SUPREME COURT OF NOVA SCOTIA

Citation: *Grabher v. Nova Scotia (Registrar of Motor Vehicles)*, 2018 NSSC 87

Date: 2018-04-11
Docket: *Halifax*, No. SH# 463399
Registry: Halifax

Between:

Lorne Wayne Grabher

Applicant

v.

Her Majesty the Queen in Right of the Province of Nova Scotia as represented by the Registrar of Motor Vehicles

Respondent

Judge: The Honourable Justice Pierre L. Muise, J

Heard: February 1, 2018, in Halifax, Nova Scotia

Counsel: Jay Cameron, for the Applicant
Alison Campbell, for the Respondent

INTRODUCTION

[1] Following a complaint, the Registrar cancelled Mr. Grabher's personalized licence plate which read "GRABHER" and which he purportedly had since in or around 1990. It did so pursuant to sections 5(c)(iv) and 8 of the *Personalized Number Plates Regulations*, NS Reg 124/2005, on grounds that it "expresses or implies a word, phrase or idea that is or may be considered offensive or not in good taste".

[2] Mr. Grabher commenced the within Application in Court seeking a declaration: that the cancellation of the Plate unjustifiably infringes his freedom of expression and equality rights under sections 2(b) and 15 of the Canadian *Charter of Rights and Freedoms*; and, that sections 5(c)(iv) and 8 of the *Personalized Number Plates Regulations* infringe his freedom of expression rights and are of no force or effect.

[3] The Registrar contests the Application. The Affidavit of Dr. Carrie Rentschler was filed to provide expert opinion evidence in support of the Registrar's case.

[4] Mr. Grabher brought this motion to strike the affidavit in its entirety.

ISSUE

[5] The issue to be determined is whether the evidence of Dr. Rentchler is admissible in whole or in part.

LAW AND ANALYSIS

LAW RELATING TO ADMISSIBILITY OF EXPERT EVIDENCE

[6] In ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, the Supreme Court of Canada restated and clarified the admissibility analysis for expert evidence.

[7] The Court confirmed the general rule that opinion evidence will be excluded even if it is relevant. An exception to such exclusion is "expert opinion evidence on matters requiring specialized knowledge".

[8] At paragraphs 17 and 18 it referred to the dangers associated with expert evidence.

[9] Then, at paragraph 19, it stated:

> "To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be

> admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28."

[10] ***White Burgess*** and other cases provided more detailed directions for various steps in the admissibility analysis. I will refer to some of those in discussing the steps to which they relate.

[11] At this point it is useful to reproduce the summary of the *White Burgess* test from paragraph 48 of ***R. v. Abbey***, 2017 ONCA 640, which states:

> "Expert evidence is admissible when:
>
> (1) It meets the threshold requirements of admissibility, which are:
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> a. The evidence must be logically relevant;
>
> b. The evidence must be necessary to assist the trier of fact;
>
> c. The evidence must not be subject to any other exclusionary rule;
>
> d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
>
> i. Impartial,
>
> ii. Independent, and
>
> iii. Unbiased.
>
> e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,
>
> and

> (2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweighs its potential risks, considering such factors as:
>
> a. Legal relevance,
>
> b. Necessity,
>
> c. Reliability, and
>
> d. Absence of bias."

[12] Paragraphs 25 and 28 of ***R v. Mohan***, [1994] 2 S.C.R. 9, read in conjunction, indicate that, when the expert evidence in question goes to an ultimate issue, the criteria of necessity and the cost-benefit analysis are more strictly applied.

[13] At paragraph 45, the Court in ***White Burgess*** re-emphasized the comments of Binnie, J. in *R. v. J.(J.L.)* that: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility."

APPLICATION TO THE CASE AT HAND

Nature and Scope of Proposed Expert Evidence

[14] "Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence": ***R. v. Abbey***, 2009 ONCA 624, paragraph 62.

[15] The Registrar is proffering Dr. Rentschler as an "expert in representations of gendered violence across media platforms" to provide opinion evidence: explaining "how language that supports gendered violence plays a contributing role in promoting violence against women"; and, that such speech is, in addition to being offensive, harmful.

[16] Her evidence is presented to provide "social and cultural context for the Court's *Charter* analysis, particularly s. 1".

[17] The report prepared by Dr. Rentschler provides opinion evidence specifically in relation to whether "GRABHER", appearing on a personalized licence plate issued by the Province of Nova Scotia, is offensive and harmful, including whether it supports gendered violence and contributes to promotion of violence against women, as well as how social and cultural context affects interpretation of the expression.

[18] I will have to determine what, if any, portion is admissible and determine the acceptable nature and scope of any of the expert evidence that may be admitted.

First Stage – Threshold Requirements

Is the Evidence Logically Relevant?

[19] As stated in ***White Burgess***, logical relevance is sufficient to satisfy the relevance criterion at the threshold stage of admissibility. The cost-benefit analysis is to be conducted at the second stage. It can result in logically relevant evidence being excluded as an aspect of legal relevance.

[20] Expert evidence is logically relevant if it relates to a fact in issue at trial and is so related to that fact in issue that it tends to prove it: ***R. v. K.(A.)***, [1999] O.J. No. 3280 (C.A.), at paragraphs 77 and 78.

[21] The Court in ***Canada (Attorney General) v. Bedford***, 2013 SCC 72, at paragraph 126, described the use of social science and expert evidence in the s. 1 analysis as follows:

> "Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both

> qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole."

[22] In an earlier case, ***Danson v. Ontario (Attorney General)***, [1990] 2 S.C.R. 1086, the Supreme Court of Canada, at paragraph 28, stated that legislative facts must be proved by admissible evidence and that admissibility is subject to "less stringent requirements".

[23] In Hogg, PW, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2016), at page 60-13, it states:

> "Legislative facts (sometimes called 'social facts') are the facts of the social sciences, concerned with the causes and effects of social and economic phenomena. ...
>
> Legislative facts obviously cannot be proved by the testimony of eyewitnesses, but they can be proved by the opinion testimony of persons expert in the relevant field of knowledge. Like other witnesses, experts are subject to cross-examination and their testimony may be contradicted by the testimony of other experts."

[24] I find the evidence of Dr. Rentschler to be logically relevant for the following reasons.

[25] If Mr. Grabher establishes that the *Regulations* infringe his *Charter* rights, the Registrar will have the burden of justifying the infringement under s. 1. As noted in ***Bedford***, the s. 1 analysis includes an assessment of the positive and negative impacts of the law and its application. Evidence of the harm caused by

offensive public expression, such as the purportedly offensive expression in the case at hand, is so related to the positive impact of a law permitting the Registrar to prohibit such expression, that it tends to prove such positive impact of the law. Therefore, it is logically relevant to that fact in issue.

[26] There was a discussion during the hearing of this motion regarding whether the *Doré/Loyola* test, emanating from the Supreme Court of Canada decisions bearing those names, and applicable to review of discretionary administrative decisions, applied in this case to the challenge to the Registrar's decision. Both parties agreed that the wording of the amended Notice of Application made it such that the *Doré/Loyola* test does not apply and the Court will be required to decide whether the decision was correct and constitutional.

[27] Mr. Grabher suggested the Application may morph back into a judicial review. However, given the history of the proceedings, which included procedural objections by the Registrar based on initial pleadings having included judicial review elements, and the resulting amendments, the Registrar takes the position it would oppose such a morphing. Therefore, I have assessed relevance based on the ultimate constitutional analysis potentially requiring a s. 1 *Oakes* test as opposed to a *Doré/Loyola* test.

[28] However, if the *Doré/Loyola* test is determined to apply, despite the matter not being dealt with as a judicial review, the expert evidence, since it goes to the positive impact of harm avoidance, would also be logically relevant to determining whether the decision-maker has appropriately balanced the rights and objectives to ensure that any limitation of Mr. Grabher's rights was proportionate.

[29] Mr. Grabher submits that the evidence in question is not logically relevant for multiple reasons. I will explain why I respectfully disagree with each of his arguments on the issue of logical relevance.

[30] He argues the portion of the Report which discusses Donald Trump's comment about grabbing women by the genitals (which now President Trump referenced using crude and derogatory vernacular) is irrelevant because the Registrar publicly stated Donald Trump had "nothing to do" with the decision to cancel the Plate. He bases that argument on the Canadian Press article in which Michael Tutton wrote that Brian Taylor, spokesperson for the Department of Transportation and Infrastructure Renewal, had stated that the rejection of the Plate was not related to that comment. He cited Mr. Taylor as having stated: "It wasn't referenced in any official correspondence I saw."

[31] Mr. Taylor provided an affidavit attaching the email correspondence between him and Mr. Tutton. That email exchange shows that the one line answer cited was in response to an email asking two questions. “Did the complainant raise Trump’s ‘Grab her’ comment in any way? Is that a factor in the government’s decision?”

[32] The answer regarding the absence of reference in official correspondence was not a confirmation that it was not raised by the complainant nor that it was not a factor in the Registrar’s decision. On the other hand, I agree with Mr. Grabher’s submission that there is no evidence that Donald Trump’s comment was raised by the complainant or considered by the Registrar. However, irrespective of whether it was a factor in the complaint or the Registrar’s decision, if it affects the public impact of the expression “GRABHER” on a Nova Scotia licence plate, it is relevant to the s. 1 analysis for the reasons I have outlined.

[33] He argues that Professor Rentschler’s opinion regarding whether the Plate is offensive is irrelevant as she has no legal training, and it is a question of law to be determined by the judge on the hearing of the constitutional issues raised. Therefore, her expert opinion is unnecessary and would only distort the fact-finding process. Although he included these arguments under the heading of logical relevance, they are arguments regarding necessity, expert qualifications and

the cost-benefit analysis. Considering logical relevance only, evidence regarding whether or not the Plate is offensive is relevant to whether or not the Registrar's decision was arbitrary, which may be a factor in determining constitutionality. Also, as submitted by the Registrar, Dr. Rentschler's reasons for characterizing the Plate as offensive provide context to the s. 1 analysis. These points argued by Mr. Grabher will have greater application in the other parts of the expert evidence admissibility analysis.

[34] He argues that "Professor Rentschler's assertions that the Plate supports, or is an example of, 'rape culture', and that the Plate supports violence against women and 'endangers women', are not supported by any empirical evidence of any kind", and, the "Report merely contains bald assertions of supposed harm, without providing proof or evidence" thus, showing she is biased. He adds that the statements in her report regarding the Plate inferring the words "by the p---y" and being connected to "aggrieved white masculinity" are irrelevant comments which reveal bias and lack of objectivity.

[35] These points are also not related to logical relevance, but, rather relate to expert qualifications, and reliability. As submitted by the Registrar, the impugned portions of the Report cite academic journals and reports of international, national and other non-governmental organizations in support. Also, they are part of

explaining the harmful impact of the expression “GRABHER” on a government issued licence plate. That makes them logically relevant to the s. 1 analysis.

[36] At pages 11 and 12, Dr. Rentschler discusses a secondary meaning to the word “p---y” uttered as part of Donald Trump’s infamous comment, being a reference to a “weak, emasculated person”. Standing by itself, that portion of her Report would not appear logically relevant. However, as part of the building blocks to fully explain the impact of “GRABHER” on a government issued licence plate, it becomes logically relevant. It provides additional social and cultural context to consider in determining that impact.

Is the Evidence Necessary to Assist the Trier of Fact?

[37] In discussing the necessity criterion, the Court in ***Mohan***, at para 21, quoted, with approval, from page 42 of ***R. v. Abbey***, [1982] 2 S.C.R. 24, as follows:

> “With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. ‘An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary’ (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.)”

[38] Then, at paragraph 22, the Court noted that the proposed expert evidence being "helpful" was not enough to satisfy the "necessity" requirement. It went on to state (with references omitted):

> "However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information 'which is likely to be outside the experience and knowledge of a judge or jury'. … [T]he evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. … [T]his Court … stated that in order for expert evidence to be admissible, '[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge'."

[39] As cited with approval at para 21 of ***White Burgess***, "the necessity requirement exists 'to ensure that the dangers associated with expert evidence are not lightly tolerated'".

[40] The following questions have been used to guide the determination of whether the evidence in question meets the requisite standard of necessity:

(a) Will the evidence enable the court to appreciate the technicalities of a matter in issue?

(b) Will it provide information which is likely to be outside the experience of the court?

(c) Is the court unlikely to form the correct judgment about a matter in issue if unassisted by the expert opinion evidence?

[See ***Lunenburg Industrial Foundry and Engineering Ltd. v. Commercial Union Assurance Co. of Canada***, 2005 NSSC 62, paragraph 15.]

[41] In her Report, Dr. Rentschler provided the following opinions on points related to how the public would perceive and interpret the expression "GRABHER" on a government issued license plate:

1. It would be very common to read "GRABHER" as "grab her". (Page 4)
2. "The meaning of 'grab her' is offensive because it supports, condones and encourages violence against women." (Page 5)
3. It is a command that targets girls and women. (Page 5)
4. The phrase "GRABHER", on a government issued license plate would commonly be considered offensive. (page 3)
5. It's presence on a government issued license plate makes it appear as a "government-endorsed speech act" which gives it more authority and legitimacy and adds to the offense. (Page 3)

[42] In relation to those points, ordinary people do not require the assistance of persons with specialized knowledge to form a correct judgement. They, more likely than not, would readily appear, to a reasonably informed person, as the obvious issues raised by Mr. Grabher's personalized licence plate. Therefore, her opinions on those specific points are not necessary.

[43] However, she does need to discuss those points as part of the process of showing how she arrived at her ultimate opinions related to the harmful impact of the expression and the effect of social and cultural context on the s. 1 analysis, as well as on interpretation of the Plate. The points are properly included for that purpose.

[44] Dr. Rentschler opined on how social and cultural context influences the interpretation and effect of the expression, and on the impacts of the expression. Her opinions on those points included the following:

1. Girls and women could reasonably be assumed to find the phrase potentially threatening. (Page 5)
2. The increasing recognition of sexually harassing speech and sexual violence as a serious social problem creates a context which amplifies the offense of the phrase "grab her". (Page 6)
3. "In the current context, the statement 'grab her' would be understood to condone a culture supportive of sexual violence" because, as of 2013, popular media coverage of the problem of rape culture dramatically increased. (Page 6)
4. "The speech act 'grab her' is located on a continuum of violence against women" and "verbal expressions … that that are supportive of violence against women … contribute to a climate of fear in which many girls and women live." (Page 7)

5. Dr. Rentschler highlighted that, on October 8, 2016, during the US presidential election campaign, Donald Trump's comment about women that he could "grab them by the p---y" was made public and became widely known. In her opinion, that, along with the cases and reports of sexual harassment and assault, as well as the protest marches and public debate about misogyny and sexism, which followed it, created a cultural reference point which resulted in circumstances where the statement "grab her" could easily be interpreted as meaning "grab her by the p---y". She added that, though it does not state it, it infers it. (Pages 7 to 12)

[45] Intuitively, these comments may appear to make sense. However, they are not points on which an ordinary person would be likely to form a fully correct judgement about if unassisted by someone with special knowledge. Dr. Rentschler cited multiple pieces of research and literature in support of her opinions on these points, and has engaged in significant study and experience enabling her to formulate an opinion based on special knowledge.

[46] Dr. Rentschler, at page 11, provided a further opinion in relation to the statement "grab her" on a licence plate, including that it contributed to "an environment in which hateful speech supports violence and other violations of human rights to safety and autonomy of persons". She based that opinion, in part, on the link between Donald Trump's statement about grabbing women by the

genitals and increase in hate crimes. Although the reliability of that link will be the subject of further discussion, she did cite studies in support.

[47] That is also a point in relation to which an ordinary person, unassisted by someone with special knowledge, would be unlikely to form a correct judgement about.

[48] Subject to the first five points noted above being included only as part of the explanation for the opinion regarding the issues of interpretation and impact of the expression on the Plate, the opinion evidence sought to be admitted does satisfy the necessity criterion.

[49] Those remaining points provide social fact evidence to consider in the s. 1 analysis. Therefore, they do not constitute inferences on an ultimate issue and do not attract a more strict necessity analysis.

Is the Evidence Subject to Any Other Exclusionary Rule?

[50] Mr. Grabher raises the Registrar's failure to comply with procedural expert evidence rules as potential grounds to exclude the expert evidence in the case at hand.

[51] He pointed out that the extended deadline for the filing of the Registrar's affidavits was December 15, 2017. The affidavit of Dr. Rentschler filed that day, attaching her report, was unsworn. The Report itself is unsigned. Neither the Affidavit nor the Report confirmed that Dr. Rentschler agrees to answer questions put to her by Mr. Grabher.

[52] *Civil Procedure Rule* 55.04 requires expert reports to be signed by the expert and to state that "the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert". *Rule* 39.08 requires that the affidavit contain a "jurat showing that an oath or affirmation was administered".

[53] In the case at hand, Counsel for the Registrar informed Counsel for Mr. Grabher, on December 15, 2017, that the affidavit was being filed unaffirmed because Dr. Rentschler was out of the Country. She was in Berlin, Germany working as a visiting scholar. On January 16, 2018, Dr. Rentschler affirmed the affidavit attaching her report, curriculum vitae and retainer letter. It was filed January 24, 2018.

[54] On January 19, 2018, Counsel for the Registrar informed Counsel for Mr. Grabher that the omission in Dr. Rentschler's report of a statement confirming she

would answer questions was an oversight and confirmed that if Mr. Grabher had any questions she would be willing to answer them.

[55] In the circumstances, Mr. Grabher was not prejudiced by the delay in affirming the Affidavit, nor by the omission of the statement regarding answering questions. The affirmed affidavit did not contain any changes. The confirmation of willingness to answer questions was communicated promptly and plenty of time remains for any questions to be submitted and answered. The affirming of the affidavit which confirms the Report is a sufficient substitute for the signing of the report itself.

[56] The deficiencies in complying with procedural rules were rectified and do not warrant exclusion of the expert evidence in question. Apart from the limited correspondence between counsel regarding compliance deficiencies and brief arguments made during this motion to exclude, no expenses were incurred. The limited expenses that were incurred by Mr. Grabher, can be considered in determining the issue of costs of this motion.

[57] Mr Grabher also suggests that the Report should be expunged as being an abuse of process. He, once again, references: the focus on Donald Trump and his comment; the inference of the words “by the p---y”; as well as, the link between

the Plate and “rape culture”, “aggrieved white masculinity” and, endangerment of women. Based on those references, he submits the “Report is irrelevant, scandalous and oppressive within the meaning of Rule 88”.

[58] Subject to the exceptions I have noted, I have found the Report to be logically relevant and necessary to assess the impact of the Plate considering the existing social and cultural context. I disagree that it is scandalous and oppressive. I disagree with the assertion that it is “akin to a celebrity gossip tabloid”. Dr. Rentschler has cited ample academic writings and reports of international, national and other nongovernmental organizations in support of her opinion on the various points raised in her report. Her opinion may ultimately be rejected even if admitted into evidence. However, there is nothing in the Report or in the evidence on this motion which justifies a finding that the report is an abuse of process.

[59] It has not been suggested that any other exclusionary rule applies, and none come to mind.

Is Dr. Rentschler Properly Qualified to Provide the Opinion Evidence in Question?

Special Knowledge and Experience

[60] To be properly qualified, an expert must have special knowledge and experience in the area in question that at least goes beyond that of the trier of fact.

[61] The relevant field of expertise, in the case at hand, is that of an "expert in representations of gendered violence across media platforms".

[62] Dr. Rentschler's Report and C.V. demonstrate she has acquired special knowledge and experience in that field that is well beyond that of an ordinary trier fact.

[63] She has: a bachelor of arts with a major in Humanities and a focus on Women's and Gender Studies; a masters degree in Speech Communication; and, a doctorate degree in Communications Research. She has held visiting scholar positions at the Centre for Advanced Study in the Behavioural Sciences and the Department of Communication at Stanford University and the Centre for Transdisciplinary Gender Studies at Humboldt University. Between 2011 and 2015, she was the Director of the Institute for Gender, Sexuality and Feminist Studies at McGill University. She has been a professor at McGill University for 13 years. Before that, she was a Visiting Assistant Professor of Women's Studies at the University of Pittsburgh. She is currently a tenured Associate Professor in the Department of Art History and Communication Studies at McGill University and

the William Dawson Scholar of Feminist Media Studies. She is a lead researcher on the Social Science and Humanities Research Council of Canada (SSHRC) Partnership Grant “IMPACTS: Collaborations to End Rape Culture on University Campuses”. She is also a research member of the SSHRC Partnership Development grant “Bridging with STEAMM” which “develops feminist collaborative educational tools to address gender violence through technological learning”.

[64] In her work, she examines “how social movements and advocates use media to respond to violence and seek to prevent it”. Most of her research focuses on “how gendered violence appears in public and across media platforms, as well as activist responses to it”. She has researched, among other things: “the use of media and communication networks in feminist antiviolence organizations”; and, “the role bystander intervention plays in responding to gendered social violence online and off-line”.

[65] She has published books and many articles in peer-reviewed journals. She has been an invited lecturer or keynote speaker in multiple conferences.

[66] Therefore, she is clearly qualified to provide opinion evidence in the proposed field of expertise.

Whether Legal Conclusions Provided

[67] Mr. Grabher characterized the following as being conclusions of Dr. Rentschler's that are "legal" conclusions, and thus outside her field of expertise:

> 1. "That the Plate 'would commonly be considered offensive', and is an 'offensive public speech act' that 'condones violence against women."
> 2. "That a personalized licence plate, such as the Plate, is 'government expression'."
> 3. "That the Plate, and all personalized licence plates, are the same as any other government issued signage - it is the expression of the government."
> 4. "That the government's authority increases the strength of communications on personalized licence plates."
> 5. "That the Plate connects the government with those who verbally abuse women."
> 6. "That a transcribed portion of a 2005 video proves that Donald Trump is guilty of sexual assault, and 'gets away with it' due to being a celebrity."

[68] I disagree with some of Mr. Grabher's characterizations. I also disagree that these conclusions are legal conclusions. I will explain why.

[69] I do agree with his comment that, whether the Plate is offensive is one of the issues that will likely need to be determined in this application. That is because the applicable *Regulations* give the Registrar discretion to revoke a personalized licence plate that contains an expression that is, or may be considered to be, offensive. However, Dr. Rentschler was not asked to interpret the meaning of the

word “offensive” in the *Regulations*. She merely provided her view that the Plate was offensive and her reasons for holding that view, including its impact. The judge hearing the application will have to determine what the legislature intended the word “offensive” in s. 5(c)(iv) of the *Regulations* to mean and include. Dr. Rentschler’s definition of the word will only be relevant and necessary to assessing the degree of harm that may be caused by the Plate, in the course of the s. 1 analysis.

[70] Similarly, Dr. Rentschler’s view that the expression on the Plate “condones violence against women” provides, along with other factors, the basis for her opinion regarding the harm caused by the expression.

[71] Such evidence of harm is, as already discussed, evidence of social or legislative facts, not a legal conclusion.

[72] Simply isolating Dr. Rentschler’s comment regarding the Plate being “government expression” misrepresents her statement by omission. Her statement was that it “is not only a personal expression, it is also a governmental one”. Plus, her statement must be read in conjunction with the remainder of her discussion surrounding the fact that the Nova Scotia Government must approve, and may reject, proposed personalized licence plates, and that it is a “shared speech act”,

rather than the self-expression of the owner. In the context of her additional statements, I interpret her comment regarding the Plate being government expression as simply stating that the expression on a personalized licence plate, though selected by the owner, if issued, is an expression condoned by the government.

[73] In the same way, Mr. Grabher has mischaracterized Dr. Rentschler's statement at page 6 of the Report as being that "the Plate connects the government with those who verbally abuse women". Her statement was that: "The province's speech act also connects it and the car's owner to others who express harassing speech acts against women."

[74] Similarly, Dr. Rentschler did not state that "personalized license plates are the same as any other government issued signage". Her comment, again as part of the constellation of comments that I've already discussed, was that an expression on a personalized licence plate "occurs within the same purview of other government regulated signage". She noted that it is the government which provides the "painted metal license plate" which the owner affixes to his vehicle. I took her to be stating that, in that way, along with the requirement for the government to approve the expression, government issued personalized licence plates occur "within the same purview as other government regulated signage".

[75] At page 6 of the Report, Dr. Rentschler explains that: “Some speakers’ words carry more weight because of the power they represent in their social position.” She highlights that the expression “grab her” being on a government approved licence plate “amplifies and legitimates” the expression.

[76] The question of whether Mr. Grabher is advancing a positive or negative right to freedom of expression, may depend upon an assessment of whether he is, in effect, asking the government to provide him a platform for his expression. If he is advancing that the Registrar has a constitutional obligation to provide him a personalized licence plate as a platform for him to express his family name, arguably, he is advancing a positive right to freedom of expression, as opposed to a negative right which would only render an attempt to interfere with his freedom of expression using his own means an infringement. Dr. Rentschler’s opinion regarding joint expression may coincidently have been arrived at using the same or similar factors as those relevant to that assessment. However, she included her view of the joint expression merely to support her opinion that the lending of government condonation increases the strength, legitimacy and thus impact of the expression. It was not an opinion on the legal question relating to the type of right advanced by Mr. Grabher.

[77] I also disagree with Mr. Grabher's assertion that Dr. Rentschler went so far as to state that "the transcribed portion of the 2005 video proves that Donald Trump is guilty of sexual assault". She characterized Donald Trump's comments in the videotaped recording as being that "he gropes and otherwise physically assaults women and gets away with it due to his celebrity, wealth, and power". She also states, at page 9, that: "There are direct links between Trump's statement about grabbing women by their genitals and kissing them without their consent and reports of his commission of violence and sexual harassment against women." She may, by pointing out those links, be implying that his statement is an admission of sexual assault. However, she does not provide any opinion regarding his guilt.

[78] She merely highlights the implications of Mr. Trump's statement, and their link to reports of violence and sexual harassment, as part of the social and cultural context in which the expression "GRABHER" on a government issued licence plate would be read and interpreted. That that is not a legal conclusion.

[79] Therefore, the impugned conclusions are not legal conclusions. They are within Dr. Rentschler's field of expertise.

Ability and Willingness to Fulfill Duties

[80] At paragraph 46, the Court in ***White Burgess*** noted that to be a properly qualified expert, the witness must also be able and willing to fulfil their duties to the court. That includes being fair, objective, and non-partisan.

[81] At paragraph 32, the Court stated:

> "Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her."

[82] At paragraph 48, the Court directed that, once the expert has attested to recognizing and accepting their duty to the court, "the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty".

[83] At paragraph 49, the Court added: "I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence."

[84] Dr. Rentschler has sworn under oath that she:

a) is "providing an objective opinion for the assistance of the court";

b) is prepared to "apply independent judgement when assisting the court";

c) has included everything in her report that she believes is relevant to her opinion and has drawn attention to anything that could reasonably lead to a different conclusion; and,

d) will notify each party of any change in her opinion or of any material fact that could reasonably affect her opinion.

[85] Counsel for the Registrar has relayed that Dr. Rentschler is prepared to answer questions put to her by Mr. Grabher, and the omission of that point from her initial representations was an oversight.

[86] Therefore, the onus shifts to Mr. Grabher to show she is unable or unwilling to provide a "fair, objective and non-partisan" opinion.

[87] Factors which appear to support the independence and impartiality of Dr. Rentschler's opinion evidence include those which follow:

1. There is no indication that she has a close, or any, relationship with either counsel or either party.
2. Apart from the natural desire for one's opinion to be accepted, she has no personal interest in the outcome, nor in the opinion and its use.

3. Contrary to the assertions by Mr. Grabher, her opinion has stayed within the boundaries of her area of specialized knowledge.

4. She appears to have applied at least some level of intellectual rigour to the preparation of the report. I do not have any evidence regarding the level of intellectual rigour generally applied by experts in that field. However, there is no indication that the rigour applied by Dr. Rentschler was not commensurate with that generally applied.

5. She does not appear to have been under the influence of any counsel or party.

6. Her explanations for her ultimate opinion regarding the impact of the expression on the Plate are clear and coherent.

[88] On the other hand, there are some points which detract from a finding of complete independence and impartiality, and, thus negatively impact the reliability of the opinion. They include the following:

1. At Page 11 of her report, she highlights that the revocation of the licence plate on January 13, 2017, occurred eight days before the protest marches that followed the election of Donald Trump. It was unnecessary for her to highlight that to provide the social and cultural context to properly understand the message conveyed by the Plate, and its impact. Her doing so, belies some level of advocating for the Registrar's case.

2. Although she indicated that her report "draws attention to anything that could reasonably have led to a different set of conclusions, it does

not indicate any areas of controversy and does not consider alternative conclusions. That may be because she did not see anything that could reasonably have led to different conclusions; or, it may be because she has not fully considered alternative conclusions.

3. The nature of her opinion is such that it necessarily incorporates some level of subjectivity.

[89] In ***R. v. Sadiqi***, 2013 ONCA 250, the Crown expert provided an opinion "as to the relationship between culture, religion, patriarchy and violence against women in the Middle East and diasporas around the world, specifically as those issues relate to honour killings". The defence objected to the admissibility of the expert's evidence on grounds that "her background as a strong advocate for women's rights made her incapable of providing the kind of objective description of the relevant cultural context that could assist the jury". The Court of Appeal upheld the trial judge's admission of the evidence.

[90] In the case at hand, Dr. Rentschler's curriculum vitae reveals that she has engaged in research and study on issues related to feminism, victims' rights and rape culture. However, it does not indicate that she has been "a strong advocate" for any side on those issues. Therefore, there is even less reason in the case at hand to find her incapable of providing an objective opinion than there was in the ***Sadiqi*** case.

[91] Considering the Report, and the factors outlined, Dr. Rentschler is able and willing to provide the Court with "fair, objective and non-partisan" opinion evidence.

Conclusion on Whether Qualified

[92] I find that Dr. Rentschler is properly qualified as an "expert in representations of gendered violence across media platforms" capable of providing opinion evidence in relation to: the effect of social and cultural context on interpretation of expression; whether "language that supports gendered violence plays a contributing role in promoting violence against women"; and, the impact of such expression.

Is the Opinion Based on Novel or Contested Science or Science Used for a Novel Purpose, and, If So Is It Reliable for the Purpose Used?

[93] In ***Mohan***, at paragraph 28, the Court stated that "expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets the basic threshold of reliability and whether it is essential". The Court in ***Egli (Committee of) v. Egli***, 2003 BCSC 1716, at paragraphs 14 and 15, indicated a similar approach should be taken where the opinion involves "a high degree of subjectivity". Though ***Egli*** dealt with admissibility of the recorded opinion of an expert who was not available to testify,

the approach also has some application where the expert is available to testify. However, where the expert is available to testify, the level of subjectivity can more readily be tested and considered by the trier of fact in determining ultimate reliability.

[94] The nature of the report in the case at hand is such that some level of subjectivity was involved in forming some of the opinions expressed in it. However, Dr. Rentschler's significant education, research and experience in the field of expertise in question informed her analysis and opinions. In addition, she cited numerous academic writings and research materials in support of most of the components of her ultimate opinion. Therefore, her opinion does not involve the "high degree of subjectivity" that warrants the special scrutiny that would apply to a novel scientific theory or technique.

[95] In addition, Dr. Rentschler's opinion does not advance any novel scientific theory or technique so as to warrant such special scrutiny, at this threshold requirement stage.

Conclusion on Threshold Requirements Stage

[96] For these reasons, subject to adjustments to account for the points that I have noted as not requiring assistance of persons with specialized knowledge, but being

part the explanations for the ultimate opinions, the expert opinion evidence of Dr. Rentschler satisfies the threshold requirements stage.

Stage Two – Cost-Benefit Analysis

Do the Benefits of Admitting the Evidence Outweigh Its Potential Risks, Considering Its Legal Relevance, Necessity, Reliability, the Absence of Bias and Any Other Relevant Factor?

Applicable Principles and Guidelines

[97] To pass this stage, the potential benefits or helpfulness of the evidence must not be outweighed by the potential risk that the dangers associated with the evidence will materialize. Relevance, necessity, reliability and absence of bias play a role in this analysis.

[98] The Court in ***White Burgess***, at paragraph 24, stated:

> "At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks."

[99] And at paragraph 54:

> "[R]elevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the

> overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence."

[100] The Court in ***R. v. Abbey***, 2017 ONCA 640, in Footnote 4, defined legal relevance as meaning "evidence that is sufficiently probative to justify its admission".

[101] The Court in ***R. v K.(A.)*** listed the following questions as being helpful in assessing whether the probative value of expert evidence justifies its admission:

1. To what extent is the opinion founded on proven facts?
2. To what extent does the proposed expert opinion evidence support the inferences sought to be made from it?
3. To what extent is the matter that the proposed evidence tends to prove at issue in the proceedings?
4. To what extent is the evidence reliable?

[102] The expert opinion evidence of Dr. Rentschler is not scientifically based opinion evidence. Therefore, as noted in ***R. v. Abbey***, 2009 ONCA 624, at paragraph 118, though the Registrar is required to demonstrate threshold reliability, it is improper to use the *Daubert* factors in assessing its reliability. The Court in that case, at paragraph 119, suggested that the following questions may be relevant to the inquiry into whether such opinion evidence is reliable:

> " * To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
>
> * To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
>
> * What are the particular expert's qualifications within that discipline, profession or area of specialized training?
>
> * To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
>
> * To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?
>
> * To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
>
> * To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
>
> * To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
>
> * To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?"

[103] The reliability question examines whether Dr. Rentschler's education, research, experiences and literature review permitted her "to develop a specialized knowledge" about "representations of gendered violence across media platforms", as well as how context affects interpretation of expression and "how language that supports gendered violence plays a contributing role in promoting violence against women", that is "sufficiently reliable to justify placing her opinion" before the trier of fact: ***Abbey* (2009)**, paragraph 117.

[104] The "cost" side of the analysis is described generally in ***Mohan***, at paragraph 18, as follows:

> "Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability."

[105] The dangers associated with the way the trier of fact may use the expert evidence were described at paragraph 19 of ***Mohan*** as follows:

> "There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves."

[106] Further and more specific articulations of the potential risks or dangers of expert evidence are those referred to at paragraphs 17 and 18 of ***White Burgess***, which include the following:

a) "that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it";

b) "that the jury 'will be unable to make an effective and critical assessment of the evidence'";

c) that the trier of fact will "simply decide on the basis of an 'act of faith' in the expert's opinion", particularly if the expert evidence in question is "resistant to effective cross-examination";

d) "the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination";

e) "the risk of admitting 'junk science'";

f) "the risk that a 'contest of experts' distracts rather than assists the trier of fact"; and,

g) "that it may lead to an inordinate expenditure of time and money".

[107] I must also remember that, as stated at paragraph 63 of ***Abbey* (2009)**:

> "A determination of the scope of the proposed expert opinion evidence and the manner in which it may be presented to the jury if admissible will be made after a *voir dire*. … Admissibility is not an all or nothing proposition. Nor is a trial judge limited to either accepting or rejecting the opinion evidence as tendered by one party or the other. The trial judge may admit part of the proffered testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame that opinion."

Mr. Grabher's Position

[108] Mr. Grabher submits that the evidence goes to the ultimate issue to be determined by the Court, which requires a strict application of the criteria of relevance and necessity. He argues that, even though Dr. Rentschler was not asked to provide a definition of the word "offensive" in the *Regulations*, she still provided an opinion regarding whether the expression on the Plate is "offensive". The fact that it is the same word brings it into the realm of a legal conclusion which goes to an ultimate issue. He further argues that, as part of the s. 1 analysis, the Report is submitted to justify prohibiting the expression on the Plate on the basis that it is offensive, which effectively loops back to the meaning of "offensive" in the *Regulations*.

[109] Mr. Grabher argues that the opinion evidence in question has numerous frailties, including the following:

1. The "myopic focus on Donald Trump demonstrates Professor Rentschler's lack of objectivity in regard to the matter at hand, and evidences a fixed obsession that renders" her opinion biased and unreliable.
2. Her view regarding whether the Plate is offensive is irrelevant.
3. There is no "evidence" supporting her conclusions, especially her conclusions that: there is a connection between the Plate and "aggrieved white masculinity"; and, that the expression on the Plate infers the addition of the words "by the p---y".
4. She fails to explore other additional words that might be inferred.
5. Unlike in ***RJR MacDonald v. Canada***, [1995] 3 S.C.R. 199, where there was evidence of a clear link between smoking and early death, in the case at hand, there is no evidence of any clear link between the expression on the Plate and rape culture or endangerment of women.
6. The Registrar is only advancing her credentials and the numerous references cited, some of which are her own writings, to support the reliability of her opinion, and she did not attach any, making it very difficult to test the reliability and assess the weight of her evidence.
7. She cites, as one of her authorities, the Southern Poverty Law Centre, based out of the Southern United States, which is not a recognized

authority in relation to whether the Plate would have a negative impact on a Nova Scotia society.

8. The trier of fact can draw any necessary inferences without her assistance.

9. She failed to follow the mandate given to her by the Registrar when the opinion was requested

[110] Mr. Grabher submits that, considering the frailties of the evidence, its probative value is insufficient to overcome the potential risks associated with it, particularly considering it goes to an ultimate issue. Thus, it should be excluded.

The Registrar's Position

[111] The Registrar disputes the assertion that the opinion evidence goes to an ultimate issue. It argues that the ultimate issue to be determined in the case at hand is the constitutionality of the applicable *Regulations* and the decision to revoke, including whether any infringement is justified under s. 1. It adds that whether the Plate is offensive is not a legal question for the Court to determine. It concedes that the Court will have to consider the definition of "offensive" in the *Regulations*; but, highlights that the opinion evidence is put forward for the s. 1 analysis.

[112] The Registrar further notes, citing ***Danson*** in support, that "legislative facts in constitutional cases are subject to less stringent admissibility requirements".

[113] The Registrar disagrees with Mr. Grabher's submissions regarding the frailties of Dr. Rentschler's evidence. In response, it submits the following:

1. Donald Trump is a very public figure in a position of great power and his statement regarding grabbing women by the genitals has been highly publicized. Dr. Rentschler cites discussions, protests and academic writings related to those comments from him, and their impact given his position. So, her focus on Donald Trump is merely to provide the social and cultural context in which the expression on the Plate would be interpreted. Irrespective of whether it was considered by the Registrar in arriving at the decision to revoke, it is relevant for that purpose.
2. Dr. Rentschler provides evidence of the impact of the Plate which is relevant to the s. 1 proportionality analysis.
3. Her conclusions are supported by other academic writings, and reports from international, national and other nongovernmental organizations, not scientific testing or empirical data.
4. The association between the expression on the Plate and President Trump's comment about grabbing women by the "p---y" is obvious, otherwise Michael Tutton, of the Canadian Press, would not have asked the Department's Media Relations Advisor whether that comment was a factor in the decision to revoke the Plate.
5. Her impressive credentials and extensive supporting citations increase the reliability of her opinion.

6. "[T]he use of social science evidence in *Charter* litigation has evolved significantly since *RJR–MacDonald* was decided. In the intervening years, … [the Supreme Court of Canada] has expressed a preference for social science evidence to be presented through an expert witness": ***Bedford***, paragraph 53.

7. Mr. Grabher can cross-examine her on the writings and reports she references in support.

8. The weight of her evidence can be assessed based upon the strength and applicability of her supporting references.

9. The Court does not have Dr. Rentschler's expertise in communication and gender studies to fully understand how the meaning and impact of communication through language is affected by the context.

10. The evidence is "required to justify the law's impact in terms of society as a whole": ***Bedford***, paragraph 126.

[114] The Registrar argues that Dr. Rentschler's credentials and supporting references, along with the need for her opinion to provide the social and cultural evidence to assess the impact of the expression on the Plate, make it such that its probative value exceeds any potential risks associated with its admission. Thus, it should be admitted.

Cost-Benefit Analysis and Conclusion

<u>Whether the Opinion Evidence Is On an Ultimate Issue and Its Effect</u>

[115] As stated at paragraph 12.143 of Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, Third Edition (Markham: LexisNexis Canada, 2009), "there is no longer a general rule barring opinion evidence on the ultimate issue".

[116] If the opinion goes to, or nearly to, the ultimate issue, though it heightens the relevance of the evidence, it exacerbates the dangers associated with expert opinion evidence. Therefore, evidence of lesser necessity and reliability, will more easily be excluded, particularly if there is sufficient evidence of bias. That is because the weight on the risk of dangers side of the scale is amplified. The effect of any distortion of the fact-finding process is likely to be more significant. Consequently, the potential helpfulness of the evidence must be greater to outweigh it.

[117] An opinion going to an ultimate issue raises a risk of the expert usurping the function of the trier of fact, because of the danger that triers of fact, particularly jurors, may simply rely on the expert opinion as a ready-made fact-finding.

[118] It is for these reasons that opinion evidence on an ultimate issue requires a strict application of the relevance and necessity criteria.

[119] I agree that the ultimate question to be determined in this application is the constitutionality of the decision and *Regulations*. Also, Dr. Rentschler's report does go beyond providing an opinion that the expression on the Plate is "offensive". It also ultimately provides opinion evidence regarding the harmful impacts of such expression.

[120] However, it is important to note that the first and third questions which Dr. Rentschler was asked to provide an opinion on were directly related to whether the expression on the Plate was "offensive". Those questions were:

> "In your opinion is the appearance of the word/phrase "GRABHER" on a government issued license plate offensive? Why or why not?"
>
> "Does the fact that Grabher is someone's surname change your opinion as to whether a license plate with the word/phrase "GRABHER" is, or is not, offensive?"

[121] The remaining question, when read in conjunction with these two questions, also incorporates the issue of whether the expression is offensive. That question was: "Has the meaning of the word/phrase "GRABHER" changed over time?"

[122] "Offensive" is the relevant word which appears in s. 5(c)(iv) of the *Regulations*. Also, that the Plate was or may be considered to be "offensive" formed part of the reasons given by the Registrar for revoking it. As conceded by the Registrar, the judge hearing Mr. Grabher's application will have to consider the definition of "offensive" in the *Regulations*. Whether the expression is "offensive"

will be of even greater importance if that judge determines that the portion of the *Regulations* permitting cancellation of a personalized license plate if it "may be considered to be" offensive is unconstitutional. Also, if the judge determines that the expression on the Plate is clearly not offensive, or that it could not be considered to be offensive, they could find that the Registrar acted arbitrarily and, thus, unconstitutionally. Therefore, a large part of Dr. Rentschler's opinion, as presented, approaches an ultimate issue.

[123] In taking this view, I am cognizant that the opinion is being submitted to provide social and cultural interpretation context, and ultimately as evidence of the harmful impact of the expression on the Plate. However, I take the view because the Report presents the opinions relating to the "offensive" nature of the Plate as being supported by the harmful impact arising from the context influenced interpretation, rather than the other way around. Had the questions put to Dr. Rentschler been more generally geared to eliciting an opinion regarding the effect of that social and cultural context on how the expression would be interpreted, and its impact, it would have been the other way around. The "offensive" nature of the Plate would simply have been presented as one of the multiple factors, constituting the elements upon which the ultimate opinion was based.

[124] The manner in which the expert opinion evidence is currently presented impacts this cost-benefit analysis stage. As argued by Mr. Grabher and as noted in ***Mohan***, it requires a stricter application of the cost-benefit analysis.

[125] At the same time, since it is evidence of legislative or social facts in a constitutional case, the admissibility requirements can be relaxed to some extent: ***Danson***, paragraph 28.

Benefits of Admitting the Opinion Evidence

[126] The portion of the opinion evidence of Dr. Rentschler that is most necessary and most legally relevant is that explaining the effect of social and cultural context on interpretation of the expression on the Plate and the impact of that expression. The Court must consider that impact in any s. 1 analysis that may be required.

[127] An ordinary person, unassisted by someone with special knowledge would be unlikely to form a correct judgment about the influence of that context and the full impact of the Plate.

[128] The Supreme Court of Canada has stated that such evidence is required in constitutional cases.

[129] The opinion evidence strongly supports an inference that the expression on the Plate has a harmful impact, including that of: condoning a culture supportive of sexual violence; and, contributing to women to living in a climate of fear. The impact of the Plate is likely to be a significant factual issue in the proceedings.

[130] Therefore, subject to reliability concerns, the opinion evidence will have significant probative value.

[131] The points which support the reliability of Dr. Rentschler's opinion include the following:

1. She has acquired a high level of special knowledge and experience relating to "representations of gendered violence across media platforms". She has engaged in extensive study and work in relation to both communication and gender issues, including gendered violence and its relation to communication across media platforms.
2. She has written multiple peer-reviewed or refereed journal articles related to those topics.
3. In forming her opinion, she has relied on academic writings regarding gendered violence, harassing and hateful speech, and the connection between them. In particular, multiple academic writings are cited in support of the link between the expression on the Plate and "aggrieved white masculinity".

4. She has clearly explained the reasoning process she used in arriving at her opinion.
5. She has stayed within the boundaries of her area of expertise.
6. The writings and reports she has used to support her opinion were prepared independently of this case and appear to have been prepared independently of the litigation process generally.

Risks of Admitting the Opinion Evidence

[132] In assessing threshold reliability, I must be cautious not to encroach upon the role of the trier of fact in assessing ultimate reliability. Consequently, factors negatively impacting reliability that can properly be assessed by the trier of fact are not as important at the threshold reliability stage: ***Abbey*** **(2009)**, paragraph 142.

[133] The points which detract from the reliability of Dr. Rentschler's opinion evidence include the following:

1. Apart from where she cites her own writings, the evidence does not establish whether the writings she relied upon have been peer reviewed.
2. The evidence does not establish whether the approach used by Dr. Rentschler in arriving at her opinion is accepted by those working in the field in which the opinion is advanced.
3. Many of the references cited in support of her opinion are news articles.

4. At page 11 of the Report, she stated: “Trump’s statement about grabbing women by their genitals has also been linked to increases in hate crimes.” In support, she cites studies and reports which purportedly refer to an increase in hate crimes “over the course of his election campaign and as a consequence of his election”. She did not explain why she linked the increase in hate crimes to the “grabbing” comment as opposed to other aspects of his campaign and agenda. This appears to be a weak point in the development of her opinion.

5. The nature of the opinion, and the writings upon which it relies, are such that they incorporate at least some level of subjectivity. That, to some extent, hampers critical examination by the trier of fact.

6. The reports of non-governmental organizations upon which she relies, such as those from the Southern United States, may not be as applicable in a social and cultural environment, such as that in Nova Scotia, which differs from that in relation to which the reports were prepared.

7. She does not discuss alternative or additional interpretations of, or words that might be inferred from, the expression on the Plate, nor indicate why they do not arise. Such failure to consider other conclusions may be indicative of some level of bias.

8. She highlighted that the Plate was revoked eight days before the protest marches that followed Donald Trump’s election. That point involves adjudicative facts and is not an element required for her to form her opinion. Consequently, it presents as an attempt to advocate

for the position that the revocation was justified. That also indicates some level of bias.

9. I agree with Mr. Grabher's view that the conclusions expressed in her opinion exceed the questions put to her by the Registrar. It went beyond opining on the meaning of the expression on the Plate and whether it is offensive, and provided an opinion that it has a harmful impact. Although the opinion regarding the harmful impact is the most helpful and probative portion of the opinion, the fact that it was provided without being requested is further evidence that Dr. Rentschler may, to some extent, be straying into the role of an advocate.

[134] Dr. Rentschler's impressive credentials, along with the difficulty and onerousness of testing the reliability and assessing the weight of her opinion, create a risk that the trier of fact will defer to her opinion on an act of faith, instead of engaging in a critical assessment of her evidence. That would lead to a distortion of the fact-finding process. However, the case at hand is not a jury trial. It is an application being heard by a judge sitting alone. Therefore, the risk of misleading the trier of fact in that way is diminished. The Court can make a decision without being distracted by the "infallible" nature of an expert opinion.

[135] I agree with Mr. Grabher that the task of testing the reliability and assessing the weight of Dr. Rentschler's opinion is made more difficult and onerous because

her opinion relies upon numerous writings and her own credentials, especially considering that the materials upon which she relied were not supplied. However, the *Civil Procedure Rules* do not require experts to provide copies of the sources cited in their reports. Counsel for the opposing side can locate those sources and use them on cross-examination to challenge the experts on their opinions. Also, Counsel for Mr. Grabher indicated that, if the evidence of Dr. Rentschler is admitted, he will obtain his own expert. That expert can assist him in properly preparing for cross-examination of Dr. Rentschler. Therefore, the basis for her opinion can still be tested.

[136] However, it will require more preparation time and more trial time to do so thoroughly. That consumption of time is a prejudicial factor to be considered.

[137] The current structure of the opinion of Dr. Rentschler as expressed in the Report will, in addition to unnecessarily consuming excessive preparation and trial time, make cross-examination unnecessarily more difficult. In its current form, the Report provides evidence of how context affects interpretation of the expression on the Plate, and the expression's impact, as a component of, or as an addition to, the requested opinions. Revising the structure of the opinion evidence to address the legislative or social fact issues for which it is being proffered would facilitate and streamline the trial process, making it fairer to Mr. Grabher.

[138] Such a revision would result in an opinion on how the expression on the Plate would be interpreted in the social and cultural context in which it would be read, and ultimately on the impact of such expression, which Dr. Rentschler opines is a harmful one. The point relating to whether the expression is "offensive" would only be discussed as part of explaining her ultimate conclusion. That would provide a more logical flow to the expression of the opinion, and, thus to the testing of the opinion. It would eliminate any unnecessary confusion that may arise from the opinion being presented in its current form, which, considering the purposes for which it is proffered, might properly be characterized as inverted.

[139] In addition, the main conclusions, as presented in the current report, relate to whether the expression on the Plate is offensive, a point on which an ordinary trier of fact does not need the assistance of an expert to make a decision.

[140] The opinion expressed in its current form would detract from the real purpose for which it is tendered, and, present a substantial risk of unnecessarily using up too much hearing time cross-examining on the bases for the points in relation to which the trier of fact does not need the assistance of an expert. Those are the first five points I noted when discussing necessity at the first threshold requirement stage. They are not necessary other than to show and explain the

development of the ultimate opinion of the impact of the expression “GRABHER” on a personalized government issued licence plate.

[141] In its current form, the opinion would be advanced for its secondary or additional conclusions as opposed to its primary conclusions.

[142] Revising the Report to provide opinions on how context influences interpretation of the expression, and ultimately on the impact of the expression, as primary conclusions, would be beneficial. It would provide evidence on the factual issue of the harmful impact of the expression, and thus the beneficial impact of the law and the decision prohibiting it. The Court would have to consider that evidence along with other evidence regarding whether such impact exists. Then it would have to weigh its finding regarding any beneficial impact against its finding, based on other evidence, of the harmful impacts of the law and decision. For instance, such “other evidence” might include evidence relating to the impact of someone not being permitted to display their surname on a personalized licence plate. As such, the primary opinion proffered would simply be one to be considered as going to a part of the s. 1 analysis, and would not approach the ultimate s. 1 justification issue.

[143] Also, the Report would be of greater benefit, and pose less of a risk of prejudice, to the trial process.

CONCLUSION

[144] Balancing the concerns in the cost-benefit analysis, the benefits of the expert opinion evidence of Dr. Rentschler, in its current form, are outweighed by its prejudicial impact on the trial process, or the risk of dangers associated with the evidence materializing.

[145] Also, the judge's discretion to "edit the language used to frame" an expert opinion, recognized in ***Abbey*** **(2009)**, includes the discretion to require the expert to edit that language, as a condition of admissibility.

[146] For the benefits of Dr. Rentschler's evidence to outweigh its potential risks, its format must be revised so that it answers the real questions for which it may be proffered, and, of course, provides reasons for the answers. Those questions are:

1. How, if at all, does social and cultural context affect the interpretation of the expression "GRABHER" on a government-issued licence plate?

2. If social and cultural context affects the interpretation of the expression “GRABHER” on a government-issued licence plate, has that context changed over time?
3. If so, how, if at all, has that change affected the manner in which the expression is interpreted?
4. What impact, if any, would the expression “GRABHER” on a government-issued licence plate have?

[147] Dr. Rentschler is qualified as an “expert in representations of gendered violence across media platforms” to provide opinion evidence in relation to: the effect of social and cultural context on interpretation of expression; “how language that supports gendered violence plays a contributing role in promoting violence against women”; and, the impact of such expression.

[148] Her revised opinion evidence must remain within the bounds of that nature and scope of opinion evidence.

[149] In ***Bruff-Murphy (Litigation guardian of) v. Gunawardena***, 2017 ONCA 502, at paragraphs 66 and 67, the Court discussed the ongoing gatekeeper function of the judge hearing a matter in which expert evidence is presented. It noted that evidence at the hearing may reveal prejudicial effects that were not apparent during the admissibility motion, and may justify exclusion.

[150] Examination of Dr. Rentschler at the hearing of the Application may reveal points such as that she is acting as an advocate and too biased to provide an objective opinion, or that her opinion is not supported by the sources she has cited. Such points could lead to exclusion of her opinion evidence during the hearing of the Application based on her not being sufficiently impartial and/or her opinion not being sufficiently reliable to make it worth presenting and considering.

[151] However, at this stage, based on the evidence before me, I conclude that, if revised as directed, it is admissible.

[152] Consequently, Mr. Grabher's motion to exclude Dr. Rentschler's opinion evidence is granted in part, but only to the extent that, to be admissible, her report must be revised to comply with the format outlined, while remaining within the boundaries of the nature and scope specified.

COSTS

[153] If the parties cannot agree on the issue of costs of this motion, I invite written submissions on the issue.

ORDER

[154] I ask Counsel for the Registrar to prepare the Order.

Muise, J.