In the Supreme Court of Canada* (SCC File No. 33461*)
(On Appeal From the Alberta Court of Appeal)

Chohan v. Cadsky, Ohlhauser, Capital Health Authority, Gardener & Baker

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APPLICATION FOR LEAVE TO APPEAL

(Memorandum of Argument)

PART I - STATEMENT OF FACTS

A. Overview:

1. This is a defamation case, but no ordinary defamation case. It raises an issue which has not previously been addressed by this Honourable Court.

2. The Applicant/Plaintiff says that he worked in a place where racism and systemic discrimination were prevalent, that he was defamed when he expressed concerns and complained, and that the judgments below have wrongfully allowed wrongdoers to escape by holding they were protected by qualified privilege.

3. The Applicant says that insofar as the Respondent/Defendant Dr. Cadsky is concerned the trial judge and the Court of Appeal of Alberta made palpable and overriding errors in holding that he was protected by the defence of qualified privilege. The Applicant says that these findings are not entitled to deference and that the case against Cadsky was plainly established.

4. The case against the other Respondents/Defendants was different and more challenging. The Applicant says that each of them – powerful members of the medical community – wrongfully labeled him as mentally ill, not because they had any honest reasons to believe that he was, but rather to silence and discredit him, in his complaint of racist and defamatory conduct.

5. The Applicant says that in these circumstances the courts below erred in holding that each of these Respondents was protected by the special defence of qualified privilege. This

submission was plainly stated in paragraphs 102-109 of the Applicant's factum and was vigourously argued before the Court of Appeal of Alberta but entirely overlooked in the judgment of that court delivered October 16, 2009.

6. The Applicant further submits that properly understood this case demonstrates the ways of modern racism and the insidious nature of systemic discrimination and that considered in the context of Canada's modern multicultural society this is an issue of public importance and provides this Honourable Court an opportunity to give needed guidance.

B. Background - Facts:

7. The Applicant ("Dr. Chohan"), a proud and devout Sikh, was raised and educated in Canada. He has practiced as a forensic psychiatrist at Alberta Hospital Edmonton (AHE) since 1997. He also practices at the Royal Alexandra Hospital (RAH) in Edmonton and is an assistant clinical professor at the University of Alberta in Edmonton. He is a respected and capable psychiatrist. He deservedly enjoys a good reputation within the Sikh community of Edmonton and beyond. He is also known as a very determined man with strong convictions about right and wrong.

Reasons for Judgment, Court of Appeal of Alberta, para. 2 [Tab 4C]
Reasons for Judgment, Court of Queen's Bench, para. 238 [Tab 4A]

8. The workplace environment at AHE was troubled. One of the persons central to the troubles was Dr. Chohan's supervisor, Dr. Cadsky. In 2001, he was summarily demoted as a disciplinary measure for having defamed another psychiatrist by characterizing him as a "greedy money-grubbing Jew." Dr. Cadsky commenced court action following his demotion and in late 2002 he went on stress and medical leave.

Reasons for Judgment, Court of Appeal of Alberta, para. 3, 9, 17 [Tab 4C]
Reasons for Judgment, Court of Queen's Bench, para. 4, 23, 25 [Tab 4A]

9. AHE had been overseen by the Alberta Mental Health Board but a political reorganization saw that responsibility transferred to the Capital Health Authority effective April 1, 2003. Concurrent with the transfer, Dr. Cadsky was reinstated effective March 31, 2003 and his court action was discontinued.

Reasons for Judgment, Court of Appeal of Alberta, para. 3, 4, 14 [Tab 4C]

10. Dr. Chohan (and other AHE psychiatrists) had gone on record to protest the lack of due process when Dr. Cadsky was summarily demoted in 2001 but it was was well known that he did not favour Dr. Cadsky again being placed in a supervisory role in 2003.

Reasons for Judgment, Court of Appeal of Alberta, para. 15, 19 [Tab 4C]

11. On February 4, 2003 two junior AHE psychiatrists visited Dr. Cadsky at his home. In part the visit was social but they wished to discuss certain administrative changes that were being suggested and they also asked Dr. Cadsky who might be appointed to replace the clinical director whose retirement was anticipated. It was on this occasion that Dr. Cadsky admittedly characterized Dr. Chohan as a "paranoid Sikh," a description which was and was meant to be taken seriously and which Dr. Chohan says was defamatory. When he testified, Dr. Cadsky acknowledged having said that it wouldn't take much to cause Dr. Chohan to depart his position.

Reasons for Judgment, Court of Appeal of Alberta, para. 9, 10, 16, 95, 100 [Tab 4C]
Reasons for Judgment, Court of Queen's Bench, para. 35, 36, 43, 249 [Tab 4A]

12. Dr. Rai, formerly a Sikh himself, was one of the two persons who heard Dr. Cadsky slander Dr. Chohan. He understood the comment for what it was but he was reluctant to "rock the boat" fearing that to do so might prejudice his status in Canada and at work. For these reasons Dr. Rai was initially silent. However, when it became known that Dr. Cadsky was to be reinstated, Dr. Rai told Dr. Chohan what he had heard: he did ask however that Dr. Chohan not disclose his knowledge of the slander.

Reasons for Judgment, Court of Appeal of Alberta, para. 16 [Tab 4C]

13. Dr. Chohan was shocked and devastated when Dr. Rai told him of Dr. Cadsky's wrongful comment – a racially charged slander similar to Dr. Cadsky's characterization of Dr. Hashman. Dr. Cadsky had always been nice to his face while talking behind his back. He understood why other colleagues had become distant from him. He testified:

> "Being of Sikh faith is very, very important to me. It's who I am. And also a physician is what I am. So in this one statement he has attacked everything about me, and it was devastating."

Reasons for Judgment, Court of Appeal of Alberta, para. 45 [Tab 4C]
Reasons for Judgment, Court of Queen's Bench, para. 52 [Tab 4A]
In Transcript only, A.B. Vol. 2, at 22:6-9, [Tab 6A]

14. Dr. Chohan understood the need to respect Dr. Rai's concerns and did not reveal his knowledge of the slander. He did not conceal the fact he took exception to the actions of the "old guard" psychiatrists who had lobbied for Dr. Cadsky's reinstatement. After the comment, his belief that the workplace environment at AHE was toxic was made very apparent.

Reasons for Judgment, Court of Appeal of Alberta, para. 21 [Tab 4C]

15. The Respondent Dr. Gardener, a medical doctor, was the Vice-President for Medical Affairs at Capital Health: it was his responsibility to restore and maintain a healthy workplace environment but this was not happening in the spring of 2003. Dr. Gardener was very well aware that the Applicant was expressing his frustrations over what he perceived as continuing workplace issues of racism, intimidation, and harassment. Dr. Gardener told the Respondent, Dr. Baker (the chair of psychiatry at the University of Alberta), about this situation sometime in April or May 2003.

Reasons for Judgment, Court of Appeal of Alberta, para. 4, 19, 20, 129 [Tab 4C]

16. On June 12, 2003 Dr. Baker (who is not a medical doctor) talked with Dr. Cadsky. The following day, he called Dr. Chohan and arranged to meet with him on June 25, 2003. Dr. Chohan submits that this was no mere coincidence. Dr. Chohan says that he then told Dr. Baker about Dr. Cadsky's defamatory comments and the following events. Dr. Baker testified to the effect that although Dr. Chohan did not tell him about Dr. Cadsky's slander, he was "angry and upset." On July 3, 2003, Dr. Baker called Dr. Block, the chief of psychiatry and Dr. Chohan's direct supervisor at the RAH and raised concerns about Dr. Chohan's mental health. There was a conflict in the evidence as to whether he used the word "paranoid." Dr. Baker denied using the word paranoid in his discussion with Dr. Block.

Reasons for Judgment, Court of Appeal of Alberta, para. 113 [Tab 4C]
Reasons for Judgment, Court of Queen's Bench, para. 75, 78, 80 [Tab 4A]

17. The Respondent Dr. Ohlhauser first became involved when Dr. King, a friend of Dr. Chohan, suggested that he seek his help and "fatherly advice." Dr. Ohlhauser is a former Registrar of the College of Physicians and Surgeons, Chair of Health Reform Implementation (2002-2004) and the Mental Health Plan for the Province of Alberta, and a man considered to have expertise as a consultant in medical conflict resolution matters.

Reasons for Judgment, Court of Appeal of Alberta, para. 7, 34, 118,119 [Tab 4C]
Reasons for Judgment, Court of Queen's Bench, para. 100 [Tab 4A]

18. On June 27, 2003, after having talked with Dr. King, but before meeting with the Applicant, Dr. Ohlhauser left a message with Dr. Hibbard's secretary at RAH: saying something to the effect "We have a 'sick doc' here," referring to the Applicant.

Reasons for Judgment, Court of Appeal of Alberta, para. 37 [Tab 4C]

19. Later the same day, Dr. Chohan met Dr. Ohlhauser and told him about Dr. Cadsky's "paranoid Sikh" comment. Dr. Ohlhauser felt Dr. Chohan would not let this go and was "ruminating." He told Dr. Chohan he should just move on and warned him about the effect that not letting go could have on his career, family and reputation.

Reasons for Judgment, Court of Appeal of Alberta, para. 37.
Reasons for Judgment, Court of Queen's Bench, para. 88.

20. After meeting with Dr. Chohan, Dr. Ohlhauser left a second message on Dr. Hibbard's voice mail referring to Dr. Chohan as paranoid. For Dr. Hibbard, the word "paranoid" meant dangerous and out of touch with reality. Dr. Ohlhauser testified he phoned Dr. Gardener the week of June 30th about Dr. Chohan and relayed concerns of mental illness, saying "he may be ill, maybe some mental illness." Dr. Ohlhauser is not a practicing physician.

Reasons for Judgment, Court of Appeal of Alberta, para. 38, 44, 46 [Tab 4C]

21. Dr. Baker met with Dr. Ohlhauser and discussed Dr. Chohan with him before he met with Dr. Chohan. Dr. Baker also spoke with Dr. Ohlhauser after he met with Dr. Chohan, and prior to calling Dr. Block, to confirm with Dr. Ohlhauser that Dr. Chohan was not moving away from issues of discrimination.

Reasons for Judgment, Court of Appeal of Alberta, para. 43 [Tab 4C]

22. Dr. Gardener claimed that when he received the telephone calls from Dr. Ohlhauser and Dr. Baker, he considered that the concerns originated with "credible sources" and "needed to be validated". That is why he called Dr. Block on July 3, 2003, and told him that Dr. Chohan might be paranoid and in need of assessment. Dr. Block assured Dr. Gardener that he had no concerns about Dr. Chohan's mental health.

Reasons for Judgment, Court of Appeal of Alberta, para. 47 [Tab 4C]

23. The workplace troubles at AHE remained unresolved and in the late summer of 2003 Dr. Gardener decided to retain Dr. Ohlhauser to resolve the troubles and assist in future planning. Dr. Chohan considered that this appointment was inappropriate. The troubles were not resolved.

Reasons for Judgment, Court of Appeal of Alberta, para. 48, 50 [Tab 4C]

24. Dr. Rai wrote a letter to Dr. Gardener on March 29, 2004 and then recounted Dr. Cadsky's racist slander of Dr. Chohan. At trial Dr. Gardener said he had not known of it previously. He responded to Dr. Rai's letter by terminating Dr. Ohlhauser's retainer and establishing an irregular review committee. Dr. Chohan declined to meet with the committee.

Reasons for Judgment, Court of Appeal of Alberta, para. 62, 65, 66, 69 [Tab 4C]

25. In July 2004 the Applicant sought apologies from the Respondents for having defamed him. No apologies were forthcoming and the Applicant's statement of claim was filed September 24, 2004.

Reasons for Judgment, Court of Queen's Bench, para. 182, 206 [Tab 4A]

26. Dr. Gardener's review committee produced a report which considered many situations and the actions of a number of persons. Some disciplinary recommendations were made, but not acted upon by Dr. Gardener. Dr. Gardener insisted that the Applicant meet with him to discuss this report. He then wrote to the Applicant on December 10, 2004. This letter - (not an informal note or an e-mail) – on Capital Health stationary read:

> "Dear Dr. Chohan:
>
> I am writing to thank you for meeting with me on Friday, December 3rd. I appreciate how difficult this has been.
>
> As I indicated at our meeting, I continue to have concerns that the circumstances of the past couple of years have affected your health. I encourage you to make sure you are adequately supported by either a family physician or a colleague in the mental health field.
>
> Sincerely,
> (signature)
> K. Gardener, MD"

27. This letter remains in the Applicant's personnel file.

Gardener letter to Chohan of December 10, 2004, A.B. Vol. 10, at E485 [Tab 6B]
Reasons for Judgment, Court of Appeal of Alberta, para. 139, 140, 147 [Tab 4C]
Reasons for Judgment, Court of Queen's Bench, para. 218 [Tab 4A]

28. Following a lengthy trial, Lefsrud J. delivered a 56 page decision on July 27, 2007. The Applicant submits that this decision was wholly unsatisfactory: it is extremely confusing to read and, with all possible respect, the Applicant submits that the trial judge failed to fairly assess the material facts or consider the law.

29. This case was argued in the Court of Appeal of Alberta on January 8, 2009 and that court's reasons for judgment were delivered October 16, 2009.

PART II – STATEMENT OF ISSUES:

30. This case raises an issue of national and public importance which requires the guidance of this Honourable Court:

Issue 1: Did the Court of Appeal of Alberta err in characterizing the occasions upon which Dr. Gardener (Capital Health), Dr. Baker and Dr. Ohlhauser made comments defaming the Applicant as privileged?

Properly understood, on any of these occasions, were any of the Respondents fairly discharging some public or private duty or, under the guise of professing to be concerned about the Applicant's mental health, wanting a way in which to silence or discredit him?

Issue 2: As a matter of law, did the Court of Appeal of Alberta err in holding that the occasions upon which the Respondent Dr. Cadsky defamed the Applicant, including characterizing him as a "paranoid Sikh," were ones of qualified privilege?

PART III – STATEMENT OF ARGUMENT:

A. Introduction:

31. When counsel for the Applicant began his submissions before the Court of Appeal of Alberta he said, in part:

> The facts of this case, properly understood and appreciated, were an affront to the values of modern multicultural Canadian society and seriously wronged the Appellant. To come to this conclusion, you will need to examine and understand racism in its modern context. You will need to, quite likely, step out of your own experience – and that's not

> easy to do. You will need to rise above our human tendency to use our own cultural spectacles and inclination to see what we want to see or are unable to see. You will have to put yourselves in the shoes of the appellant to, as Madame Justice McLachin has referred to as, an "Enlargement of the Mind" or human experience. It is not something most of us are accustomed to doing. It will be difficult and skeptics will say you cannot truly put yourself in the place of a person of colour - a man like Dr. Chohan – with brown skin and who wears the articles of his faith – distinct from the predominant culture. And, yet the imperatives of justice and the jurisprudence of this land requires that you do just that.
>
> The appellant submits this case is about the use of defamation as a tool to mask and suppress a complaint of racism and to further perpetuate defamation. Mental illness labeling was used to discredit and disparage legitimate complaints of racism, threats and defamatory statements. We contend that Dr. Cadsky uttered a racist and defamatory statement when he called Dr. Chohan a "paranoid Sikh" and that this was accompanied by an expressed intention to force or precipitate Dr. Chohan's departure or resignation from AHE (Alberta Hospital Edmonton) – and, that such statements were also made before and after February 4, 2003. I submit that you ought not to have difficulty finding Dr. Cadsky is a bigot and racist – and that his statements were defamatory. More importantly, we contend that conduct of the other Respondents was more egregious and reprehensible because they defamed Dr. Chohan by wrongfully labeling him mentally ill or paranoid when he appealed to them for help. They occupied positions of authority and power. Properly understood their conduct was an abuse of power and trust. The statements attributed to them were more harmful and damaging to the reputation of Dr. Chohan because they carried more weight and inflicted on-going damage – right to this day – given whom they emanated from and the small world of forensic psychiatry and medicine. That they did so, I submit, in the face of a complaint that included racism and discrimination is all the more repugnant.

With due respect, the Applicant submits that the trial judge and the Court of Appeal failed to grasp the heart of the Applicant's case: there is no mention of these submissions in the judgments below.

32. Individuals in positions of authority and power at the highest levels of the psychiatric and medical establishment in Edmonton used their power and influence to label the Applicant as mentally ill rather than deal with his justified complaint of racism and discrimination. This was an abuse of psychiatry as a tool to suppress and discredit the individual.

33. It was only after exhausting all internal avenues that Dr. Chohan initiated legal action. In a letter dated April 12, 2004 addressed to Neil Wilkinson (Chair of the Board of Capital Health) and copied to Sheila Weatherill (President and CEO) and other persons also, Dr. Chohan wrote:

> Ms. Weatherill's response to my concerns have only been to refer me back to Dr. Gardener and Rose Dempsey, despite my making it very clear to her that Dr. Gardener (and Dr. Dempsey) have not dealt with the issues for nearly **12 months** now. Not only have they not dealt with them, there is evidence to indicate that there is an effort to suppress them. Ms. Weatherill's insistence on referring me back to individuals who have not followed her directive and dealt with these issues, and, in fact, have attacked my character as a result of my having raised these issues, is the greatest form of discouragement, intimidation at the highest levels.
>
> As the governing body of the Capital Health, respected individuals of our society, individuals who are responsible for entrusting these individuals with positions of authority, I look to you as the final link in the chain of responsibility…
>
> To create an environment in which individuals of different racial and religious backgrounds can work in harmony without being harassed. To uphold the principles on which this country is based.

Both Ms. Weatherill and Mr. Wilkinson referred the Applicant back to the Respondent, Dr. Gardener.

> **Letter from Chohan of April 12, 2004, A.B. Vol. 9, at E345 [Tab 6C]**
> **Wilkinson reply of April 19, 2004, at A.B. Vol. 9, at E366 [Tab 6D]**

B. Mental Illness-Labeling:

34. That psychiatric terms and mental illness labeling can be and sometimes are misused as tools for suppressing dissent and to discredit those with genuine concerns is well known. Alexander Solzhenitsyn described this:

> Psychiatrists who break their Hippocratic oath and are able to describe concern for social problems as mental illness, who can declare a man insane for being too passionate or for his being calm, for the brightness of his talents or for his lack of them.[1]

35. Dr. Metelitsa, who came to Canada from Russia and was educated in the Soviet system, testified that this was a tactic well known to him:

> …I knew that people who suffered tremendously because of this and I knew it was terrible, terrible method of fighting and dealing with your enemies, especially when it was done by people who had authority over you or over those people because immediately after labeling them as mentally ill they were losing all the human rights to defend themselves because they were mentally ill and this was a terrible method of using psychiatry in political purpose…

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[1] M. Field (1977), "Psychiatry and the Polity: The Soviet Case and Some General Implications," 285(1) Annals of the New York Academy of Sciences 687, at 691. [Authorities Tab 7M]

In Transcript only, A.B. Vol. 4, at 489:14-22 [Tab 6E]

C. Qualified Privilege:

36. The Applicant submits that the Respondents: Dr. Gardener (Capital Health), Dr. Baker and Dr. Ohlhauser were not protected by qualified privilege because, despite superficial appearances, they were all working with common purposes to silence Dr. Chohan. While not alleging a formal or actual conspiracy, the Applicant submits the Respondents had a common interest and feared that Dr. Chohan was raining on their parade and ambitious plans by raising concerns of racism and discrimination. Properly understood, on none of those occasions were any of the Respondents fairly discharging some public or private duty but rather, under the guise of professing to be concerned about the Applicant's mental health, wanting a way in which to silence or discredit him.

37. The Court of Appeal of Alberta appears to have compartmentalized and examined the role and evidence of each Respondent "separately and in isolation"[2] and did not look at it broadly; on the whole of the evidence. The Respondents, Dr. Gardener and Dr. Baker, had discussions – they were aware of the interpersonal issues, the plans for health care delivery and the new forensic psychiatry program – in 2003; Dr. Baker had spoken with Dr. Cadsky and Dr. Ohlhauser when Dr. Chohan brought his concerns to them. Dr. Gardener was aware of Dr. Cadsky's "Dr. Hashman incident." There was a great deal of interaction between the Respondents at the relevant time: this was not mere coincidence.

38. Drs. Gardener, Ohlhauser and Baker are each powerful figures with considerable prestige, influence and responsibilities in the public domain of health care. They were personally invested in outcomes arising from a major reorganization in the delivery of health care services in Alberta. There was a great deal of emphasis on creating a "nationally recognized" and prestigious academic Psychiatric Program for the University of Alberta in mental health.

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[2] *See* R v. Morin, [1988] 2 S.C.R. 345, para's 33 & 41[Authorities Tab 7C]; *Also,* R v. R.E.M., [2008] 3 S.C.R. 3, at para. 55, "The appellate court…must look at the reasons in their entire context." [Authorities Tab 7E]; *Also,* Miazga v. Kvello Estate, [2009] S.C.C. 51, para. 80, "As is often the case, a state of mind may be inferred from other facts." [Authorities Tab 7B]; *And,* R. v. Saunders, 2003 NLCA 63, para. 11, "totality of the circumstances…step back and view the painting as a whole." (Authorities Tab 7F]

39. Dr. Ohlhauser was the "Czar of Health Care." He advised the Health Minister he could "make a major impact…on mental health." Integrating mental health services into the regional health authority "was a great turning of the tide" for him. Dr. Ohlhauser stated, although Dr. Baker may have discussed some of the interpersonal problems and difficulties in forensic services, "but my interest would have been at a higher level." Dr. Gardener's "end goal was a nationally respected forensic psychiatry program." Dr. Ohlhauser signed a personal financial contract with Capital Health to "provide an action plan to actually make that vision a reality."

40. The new academic Psychiatric Program at the University was a focus of Dr. Baker. Considerable emphasis was placed on founding one of the "better" programs in Canada. He had discussions with Dr. Ohlhauser and Dr. Gardener about it. Dr. Baker felt, "most of the people…were very positive about it," but added that Dr. Chohan didn't seem to have as much "enthusiasm" for it in June 2003. Dr. Chohan had met with Dr. Baker and Dr. Ohlhauser, two days apart, in June 2003, to seek their help.

41. Dr. Gardener was at the "apex" of decision-making for medical staff structure as the Vice-President of Medical Affairs for Capital Health. He was aware of Dr. Ohlhauser's prominence, including his appointment in charge of overall mental health planning for the Province. Dr. Gardener related he had discussions with Dr. Ohlhauser and wanted to develop a program in Forensic Psychiatry "recognized nationally as a leadership program."

42. The defence of qualified privilege is rooted in public policy and is intended to serve 'the general interests of society" and "the common convenience and welfare of society." It protects only communications "fairly made" under a sense of duty, such as would be recognized by "people of ordinary intelligence and moral principles."[3]

43. If Drs. Gardener, Baker and Ohlhauser were all wanting to know for real and honest reasons whether Dr. Chohan had a mental health issue – in the public interest - the defence of qualified privilege may have applied. But, that was not what was motivating them. Each had his own interest and ambition in quieting Dr. Chohan, particularly given the specific nature and timing of his complaint - each had separate reasons and those reasons all coalesced:

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[3] Halls v. Mitchell, [1928] S.C.R. 125. p. 6. [Authorities Tab 7A]; *See also,* McConchie & Potts: Canadian Libel and Slander Actions, Irwin Law, 2004, pp. 363-371. [Authorities Tab 7J]

- Dr. Gardener had a lot riding on the need to demonstrate that he was running the show for Capital Health and was able to control the situation that the Alberta Mental Health Board had not been able to control.

- Dr. Baker was looking to get national prestige for the Province and the University of Alberta.

- Dr. Ohlhauser was the architect of the provincial reorganization and it clearly was in his interest for people to see his creation was a big improvement.

44. Dr. Chohan's concerns of racism and defamatory conduct were more than terribly inconvenient for the Respondents; they were a volatile issue. The Respondents labeled him mentally ill rather than deal with his justified complaint of racism and discrimination. This was an abuse of psychiatry as a tool to suppress and discredit the individual: it became a coverup - a denial of racism and perpetuated systemic discrimination.

45. The onus of establishing qualified privilege is on the Respondents. The proper application of the defence requires a contextual and not a superficial examination and understanding of the evidence, nor the nature of prejudice and discrimination. By any standard, no reasonable person or right-thinking person would conclude the manner in which they responded to Dr. Chohan's pleas for help to be saved by any public or overriding duty contemplated in the defence of qualified privilege: not in a modern multicultural country such as Canada.

46. Dr. Cadsky uttered a stereotypical slander of Dr. Chohan on February 4, 2003. His statement was intended to discredit, diminish and dehumanize Dr. Chohan – a person with brown skin and a person whose turban makes him look "different." Dr. Cadsky's statement cannot be trivialized and passed over: it is important to note its similarity to his slander of Dr. Hashman in 2000. It is not in the public interest to protect racist and defamatory comments of this nature.

D. Racism, social context and systemic discrimination

47. Chief Justice McLachlin spoke about stereotypes and racism in 1998 when she spoke at a judicial seminar, "Judging In A Diverse Society." She said:

> Stereotypes help us reduce a complex and confusing world to simple paradigms that we can work with and understand. They help us define our world and ourselves…
>
> They can blind us to the truth, lulling us into a state of comfortable numbness that denies the true humanity of others and pre-empts the appropriate response…
>
> Judges, like anyone else, are prone to making casual assumptions about what people did and why they did it, based on factors like age, gender, dress, race or culture. Such assumptions are often unfair. And they are particularly dangerous in the business of judging…
>
> …the consequences can be unjust and catastrophic for that individual. Moreover, the administration of justice may be brought into disrepute in the community at large.[4]

48. In ***R. v. R.D.S.***[5], Justices L'Heureux-Dube and McLachlin for the majority, stated the importance of social context for judging in a diverse society:

> "It is the capacity for 'enlargement of mind' that makes autonomous, impartial judgment possible." (quoting Prof. Nedelsky) [42]
>
> …the reasonable person…endorsed by Canadian courts…approaches the question… with a complex and contextualized understanding of the issues in the case… The reasonable person is cognizant of the racial dynamics in a local community, and as a member of the Canadian community, is supportive of the principles of equality. [48]

And Cory J.,

> Canada is not an insular, homogenous society…The multicultural nature of Canadian society has been recognized in s. 27 of the Charter…Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. [95]

This jurisprudence was articulated before the Court of Appeal of Alberta. The justices failed to properly address any such considerations in their judgment. The Applicant submits that many members of visible minority groups in Canada might reasonably conclude that the Alberta courts are unable or unwilling to recognize that racism still exists in Alberta or, alternatively, that the standard for proof and acceptance of racism and systemic discrimination is so high that it is

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[4] McLachlin, B., The Judicial Vision: From Partiality to Impartiality, BCSC Education Seminar, pp. 4-5. [Authorities Tab 7N]

[5] [1997] 3 S.C.R. 484 [Authorities Tab 7D]

virtually impossible to prove. The message to complainants and victims is unmistakable: do not bother.

49. Properly understood, this case vividly demonstrates a failure of the courts to understand the importance of social context in evaluating the evidence and issues, particularly when racism and discrimination are raised. The results for Dr. Chohan and for visible minorities generally, as it bears on determinations of credibility and fact-finding so integral to the judicial function, are unsatisfactory.

50. This is a classic case of institutional and systemic discrimination, as described by Frances Henry and Carol Tator, leading experts and authors on the subject of racism in Canada. Dr. Chohan's attempts to expose the racist and defamatory remarks (which caused the Respondents described him as "ruminating", "angry and upset", or "refusing to let it go") were:

> ...impeded by the invisible but deeply embedded ideology of democratic racism. Resistance to changes in the status quo is reflected in the discourses of denial, deflection, and disparagement. This resistance manifests itself in myriad other discourses of democratic racism such as 'colour-blindness', 'blame the victim,' reverse racism, moral panic, and 'otherness.'
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> The principle assumption is that racism simply does not exist (or, that it exists elsewhere) in a democratic society…The assumption is that because Canada is a society that upholds the ideals of a liberal democracy, it cannot possibly be racist. The denial of racism is so habitual…that to even make the allegation of bias and discrimination and raise the possibility of its influence on social outcomes becomes a serious social infraction, incurring…wrath and ridicule. This discourse has become a central rhetorical strategy…It functions as an expression of resistance to forms of social change. Demands of marginalized minorities…are discredited as an "overdose of political correctness."[6]

51. Racism exists in a variety of forms in modern Canada: subconscious, ignorant, hidden, disguised or unrecognized. Whereas, overt racism is generally rare; the conduct of Dr. Cadsky comes close to the mark. The judicial statements that Dr. Cadsky and his comments were not racist are problematic. The conclusion of the Alberta courts in this case, begs us to be naïve. It fails to understand the impact and reality of racism. In so doing, it fails uphold fundamental values of equality: that all human beings are equal in dignity and rights.

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[6] Frances Henry and Carole Tator, the Discourses of Democratic Racism, found at **http://www.yorku.ca/fhenry/writings.htm** [Authorities Tab 7G]; in detail in, The Colour of Democracy: Racism in Canadian Society, Thomson Nelson, 2006, at 22-29. [Authorities Tab 7H]

52. The public and the courts need the guidance of this honourable court on the judicial duty to properly entertain and determine these types of issues where race and discrimination intersect with legal questions before the courts. Consideration of this issue is necessary and of utmost importance to those who experience racism and to all Canadians. This case raises fundamental questions about Canada – who we are and our collective future.

53. Canada is a rapidly changing and increasingly diverse society. One in five Canadians was born outside of Canada. Nearly one in five Canadians is a member of a visible minority group or community.[7] One in four Canadians say their rights have been violated, including victims of discrimination based on race and ethnicity.[8] This case raises fundamental questions about our commitment to justice: the ability and willingness of the courts to confront and address the reality of racism, involving those who may seem "different" in a multicultural country.

54. Dr. Chohan was not seeking action from the Respondents with respect to Dr. Cadsky's "paranoid Sikh" comment for any unworthy motives. As the Commission on Systemic Racism in the Ontario Criminal Justice System noted:

> Systemic racism is a complex social process. It reveals itself in specific incidents, acts and consequences, and is recognized by its impact on racialized people…Experiences of members of racialized groups provide important insights into racism and say much about the impact of systemic practices…gaining access to experience is difficult…
>
> Contrary to what some people think, racialized people are often reluctant to relate their experiences of racism. Few enjoy publicly recounting incidents in which they felt humiliated, and the impact of racism is for many among the more degrading, if only too common, experiences of their lives.[9]

55. The Applicant submits that there was no public interest or duty on any of the Respondents to make any statement about Dr. Chohan's mental state whatsoever; not for Dr. Cadsky with his history and not for the other Respondents. Dr. Ohlhauser admitted knowing of the "paranoid Sikh" comment. Dr. Chohan had brought up Dr. Cadsky's history of the anti-

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[7] Statistics Canada: http://www.statcan.ca/english/freepub/11-008-XIE/2008001/article/10556-en.htm

[8] Canadian Race Relations Foundation and Association for Canadian Studies, release analysis of the perception of Human Rights violations by Canadians, to mark 59th Anniversary of the Universal Declaration of Human Rights. Declaration, December 10, 2007. [Authorities Tab 7K]

[9] Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: The Commission on Systemic Racism in the Ontario Criminal Justice System, 1995, pp. 56-57.) [Authorities Tab 7O]

semitic comment in conversation with him. Dr. Gardener and Capital Health claimed not to know about Dr. Cadsky's "paranoid Sikh" comment until Dr. Rai's letter of March 29, 2004. The courts below described Dr. Gardener's letter dated December 10, 2004, as a mere "thank you" letter. It remains in Dr. Chohan's personnel file, a form of continuing defamation.

56. Reasonable and fair-thinking persons in modern Canadian society having been made aware of a complaint or possibility of racism, especially on the part of a known offender such as Dr. Cadsky, ought to and would have properly actuated a very different response from the Respondents. If, indeed, there was a duty – it was to genuinely help the Applicant. They had a complaint of racism, a particularly degrading and offensive act, and an affront to the values of Canadian society. They had a duty to proceed cautiously, fairly and not make conclusory statements without proper investigation about the Applicant's mental state. They failed to do so.

57. Dr. Chohan's reactions were not unreasonable since his complaint about Dr. Cadsky's comments were ignored, unlike the earlier complaint about the "greedy money-grubbing Jew" comment which resulted in disciplinary action. The Applicant was told to stay quiet and stop raising a fuss in order to keep his job and his good name. His principled determination was turned against him. The conduct of the Respondents shows a willful disregard and negation of the personality of the Applicant.

58. Drs. Block and Hibbard had quickly dispelled any notion that Dr. Chohan was unwell or mentally ill. The Respondents Dr. Gardener, Dr. Cadsky and Capital Health pled truth in their statement of defence. Dr. Gardener placed the letter of December 10, 2004, in Dr. Chohan's permanent personnel file.

59. Dr. Cadsky wrote a disparaging letter to the College of Physician & Surgeons concerning Dr. Chohan: he never did post this letter, but it was passed around and discussed, although not with the Applicant. He continued to tell other doctors Dr. Chohan was paranoid. Dr. Cadsky was permitted to provide self-serving opinion evidence in which he stated Dr. Chohan displayed four indicia of paranoia. A party to litigation cannot be independent, objective and unbiased, and cannot give expert evidence in support of his own case. The Respondents made no other attempts to support the false proposition Dr. Chohan was paranoid. Several witnesses, all them psychiatrists, testified and said that Dr. Chohan was never clinically paranoid.

E. The Approach of the Alberta Courts:

60. Racism and systemic discrimination underlie the conduct of the Respondents in perpetuating defamation. The courts below failed to examine and see the true dimension of the issue and its impact. In so doing, they permitted discrimination, denigration of the human personality and diminishment of reputation by mental illness labeling and the abuse of the nomenclature of psychiatry. An injustice was done to the Applicant; the implications for complainants of racism are much wider.

61. Language is power: at issue is a prevailing narrative about Canadian society. It requires the unraveling of the coded language, discourses and stereotypes that associate people of colour with deviant and dangerous "otherness." The trial judge failed to comprehend the meaning and context of the words "paranoid Sikh." He appeared to separate the words. They must be examined together. They were intended to be derogatory and convey a particular and negative connotation. They conveyed a harmful stereotype – one of a foreigner who is irrational, angry, aggressive, hostile, and extremist.

62. Sikhs, Muslims, and persons of colour are particularly vulnerable to stereotypes. Prejudice, racism and stereotypes do exist in Canada. In a 2009 National Survey, Canadians revealed the limits of our "tolerance." The authors wrote, "fewer than one in three Canadians can find it in their hearts to view Islam or Sikhism in a favourable light. Diversity? Canadians may embrace it in theory, but…" [10] And yet, beyond private and confidential polling, systemic discrimination and a denial of racism is a common manifestation. To admit it, would be an admission of failure. It would expose the myth of equality that is part of the national narrative. Avoidance can become an escape valve.

63. In the appellate judgment, the justices resorted to or used terminology such as "irritability", "angry", "troublemaker", "fixated", "unwilling to move on," "reputation for quitting positions," "dysfunctional workplace," "difficult to work with," "excessively upset," "agitated," "the appellant complains," and "overreacting to the situation," to describe the

[10] "What Canadians think of Sikhs, Jews, Christians, Muslims…A disturbing new poll shows the limits of our tolerance", Maclean's, May 4, 2009. P. 20. [Authorities Tab 7L]

Applicant. The language used by the justices of the Court of Appeal of Alberta was intended to discredit Dr. Chohan by use of the power of descriptive language. But, they failed to say why and connect it with the evidence. As well, omission can be as effective as commission. The judgment of the appeal court is highly descriptive and it is selective in what is left out and what is not. The coding of language trivializes or hides the issue of race and permits justificatory conclusions.

F. Conclusion

64. "Race is likely to be taken too seriously while racism is not taken seriously enough."[11] Opposition to racism is almost universal, but nevertheless racism has not gone away. British professors, Susan Marks and Andrew Clapham write:

> the emergence of new, more subtle forms of racism, in connection with the embrace of official anti-racism, has made charges of racism more difficult to prove than was previously the case…not only has racism not disappeared; in some respects it is actually being aggravated in contemporary conditions.[12]

65. The failure of the appellate court to properly address issues of racism and systemic discrimination, when the trial court trivialized race in its decision, helps not only to perpetuate racial discrimination, but also freezes the law from development. "At the heart of the expression of racism in the justice system is the manner in which its incumbents exercise discretion and judgment when dealing with people of colour whether they be litigants, lawyers or others."[13] The intersection between race and the interpretive process so central to decision-making in the justice system; between judicial discourse and finding of fact, goes to the core of the responsibility of justice. Several commissions have outlined the problems of aboriginal people and racism within the criminal justice system. Racism in the system of justice also applies to other racial minorities. It is hidden and the Applicant respectfully submits that too many judges also do not want to really talk about it.

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[11] Paul Gilroy, Against Race, Cambridge, Mass.: Harvard University Press, 2000, p. 41. (reproduced from Marks & Clapham, *see* footnote 12). [Authorities Tab 7I]

[12] Susan Marks and Andrew Clapham, International Human Rights Lexicon, Oxford University Press, 2005, p. 293. [Authorities Tab 7I]

[13] Henry and Tator, The Colour of Democracy, supra. 6, p. 128. [Authorities Tab 7H]

66. Professors Henry and Tator observe,

> In civil litigation, the issue [racism] is perhaps more widespread even though it has not been the subject of systematic study…At present, the attitude appears to be not to entertain submissions on race in cases other than in criminal law. Such a reserved approach helps perpetuate and fails even to acknowledge issues specific to the civil litigation approach…[14]

67. In many respects, the issue of racism and the subject of systemic discrimination involve confronting societal "blind spots" and the new forms of racism, which are more hidden and sophisticated. It is not the racism of an earlier generation; but it is still with us. The ability and willingness of the courts to seriously entertain and determine questions of racism and its systemic manifestations is vitally necessary to ensure our commitment to equality and render informed decisions in individual cases.

68. Dr. Chohan belongs to a community with a deep sense of awareness of its historical and legal exclusion, including the professions, in Canada. The judgment of the courts below, in commenting on Dr. Cadsky's personal circumstances and essentially overlooking Dr. Chohan's testimony and predicament, is indicative of an approach to the case that is and appears to be less than even-handed. Not once, did the trial judge state any reason or make any comment on why he discounted the evidence of Dr. Chohan or the supportive evidence of non-party witnesses on his behalf. The appeal court declined to address this fundamental fact; merely repeating the trial decision. Dr. Cadsky's personal tragedy does not legally absolve him from liability or accountability.

69. The Alberta Court of Appeal completely overlooked written and oral submissions on race, social context and systemic discrimination. The Applicant submits this is truly a case in which justice must not only be done, but be seen to be done.

70. Dr. Chohan was made to pay a very high price for his determination. Access to justice is a prominent legal issue. Most persons in his position would have been financially exhausted and emotionally dispirited. Dr. Chohan has challenged power and his pursuit of this case presents a unique opportunity to address the serious issues it raises on behalf of all Canadians.

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[14] Henry and Tator, ibid, pp. 130-131. [Authorities Tab 7H]

71. Elie Wiesel has written of "The Perils of Indifference"[15] – "Indifference is not a beginning, it is an end" – the breeding ground of injustice. In this case, the trial judge may have been indifferent; the Court of Appeal of Alberta went further: it ignored the Applicant's central argument.

72. The conduct of the Respondents was improperly protected by qualified privilege. It was also malicious, oppressive and high-handed. By granting leave in this case, this Honourable Court will have the opportunity to right a wrong and to give guidance that the lower courts and the people of Canada need.

PART IV – SUBMISSION ON COSTS:

73. The Applicant seeks costs in the cause.

PART V – ORDER SOUGHT:

74. The Applicant respectfully submits that this case raises issues of national public importance that warrant the consideration and guidance of this Honourable Court and that leave to appeal should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11 th day of December, 2009.

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B. W. SUNDHU
Counsel for Applicant

[15] Elie Wiesel, The Perils of Indifference, Speech at the White House, Washington D.C., April 12, 1999. [Authorities Tab 7P]

PART VI – TABLE OF AUTHORITIES:

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	Cases:	Paragraphs
A.	*Halls v. Mitchell,* [1928] S.C.R. 125, p. 6	42
B.	*Miazga v. Kvello Estate,* 2009 SCC 51	37
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F.	*R. v. Saunders,* 2003 NLCA 63	37

Texts:

G.	Henry, Frances & Tator, Carol: Publications; The Discourses of Democratic Racism, found at http://www.york.ca/fhenry/writings.htm	50
H.	Henry, Frances and Tator, Carol: The Colour of Democracy: Racism in Canadian Society, 3rd ed., Thomson Nelson, 2006	65, 66
I.	Marks, Susan and Clapham, Andrew: International Human Rights Lexicon, Oxford University Press, 2005	64
J.	McConchie, R.D. & Potts, D.A.: Canadian Libel and Slander Actions, Irwin Law, 2004	42

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