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ONTARIO COURT OF JUSTICE

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HIS MAJESTY THE KING

v.

SAMER AKILA

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PROCEEDINGS ON CHARTER APPLICATION

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BEFORE THE HONOURABLE JUSTICE G. ORSINI (VIA ZOOM)

on February 12, 2025, at LONDON, ONTARIO

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APPEARANCES:

V. Mazza / K. Benzakein / A. Pashuk

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Counsel for the accused

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ONTARIO COURT OF JUSTICE

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**Legend:**

[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) - Indicates preceding word has been spelled phonetically.

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WEDNESDAY, FEBRUARY 12, 2025

5 THE COURT: All right, so we'll proceed then with the Akila matter. Good morning, counsel. I see we have Professor Swaine also. Good morning, Professor. So, Madam Clerk, do you have the USB there?

COURT CLERK: I do.

THE COURT: All right, excellent. So, Mr. Lewin, ready to call your next witness then?

10 P. LEWIN: I am. Thank you, Your Honour. Professor Swaine can be sworn or affirmed.

THE COURT: Professor, do you prefer to be sworn or affirmed?

PROFESSOR SWAINE: Affirmed, please.

THE COURT: Yes, thank you.

15 COURT CLERK: Thank you. And I was not here the first day, was there an order excluding witnesses? I just have a whole bunch of people here, and I'm not sure....

THE COURT: There is. And can I just see the list? I don't know the list of witnesses.

20 COURT CLERK: It's just on Zoom here.

THE COURT: All right. I don't get access to that. I can't see it on my screen.

25 COURT CLERK: Okay. So, I have Mr. Floyd, I have Paul Lewin, I have Lucas Swaine, I have Amber Pashuk, I have Kerry Benzakein, a student, a student and the accused.

30 THE COURT: All right. That's fine. There is an order excluding witnesses, and counsel are aware of that. So, if you see any of your witnesses, obviously let us know, but I don't expect that'll be an issue.

COURT CLERK: Thank you.

**LUCAS SWAINE: AFFIRMED**

THE COURT: Yes, Mr. Lewin.

P. LEWIN: Thank you, Your Honour.

**EXAMINATION IN-CHIEF BY P. LEWIN:**

5 Q. Good morning, Professor Swaine. I'll start by asking you where are you right now?

A. I am at my home address, that is 252....

10 THE COURT: We don't need the address. We don't need your address. That's fine.

A. Okay. I'm in Haverhill, New Hampshire.

P. LEWIN: Q. Thank you. And are you alone where you are?

A. I am.

15 Q. All right. And I believe you would like to have a pen and paper with you, is that correct?

A. That is correct.

P. LEWIN: Your Honour, is that agreeable?

20 THE COURT: I don't have any issue with that. Doesn't sound like counsel does either. Is it Ms. Pashuk that's dealing with the issue today or is it Ms. Benzakein or Mr. Mazza?

K. BENZAKEIN: It will be me, Your Honour. And I have no issue with the request.

25 THE COURT: All right, thank you.

P. LEWIN: Q. And in terms of documents with you, you have your affidavit?

A. I do.

30 Q. And you have a number of studies and books that are referenced in the affidavit, is that correct?

A. Yes, they're here in the room with me. They're handy enough, I suppose.

Q. Okay. And there's four books that you weren't able to track down for today, but I don't believe that's an issue with my friend, but you have everything but those four books, is that correct?

A. That is correct.

Q. All right. So, now this affidavit you swore it on April 26, 2024, is that correct?

A. Yes.

P. LEWIN: Okay. Your Honour, if that could be made the next exhibit?

THE COURT: Yes, that would be exhibit twelve.

We'll just indicate it's the affidavit of Professor Lucas Swaine.

**EXHIBIT NUMBER 12:** Affidavit of Professor Lucas Swaine - produced and marked.

P. LEWIN: Q. Thank you. And Professor Swaine, it's my understanding that - so the special rapporteur's interim report is attached at Exhibit D as in dog, to your affidavit. One of the pages is blank. I believe it is page 306 in the application record, so I'm gonna ask - and Professor Swaine, the report is dated October 5, 2021, is that correct?

A. Yes, it is.

Q. Okay.

THE COURT: Mr. Lewin, before you go any further, I think you were going to send that in again with the page attached, has that been done?

P. LEWIN: It has.

THE COURT: All right, it may have gone to - we have a new clerk today.

P. LEWIN: Oh no.

THE COURT: Yes. So I should - perhaps, Madam Clerk, can you....

COURT CLERK: I'm going to put my email address on my tile. One moment please.

THE COURT: All right. Just so we can attach that as the exhibit rather than the one that we have now.

COURT CLERK: Thank you.

THE COURT: So, if you can just have that sent over, that would be appreciated. And once we get it, that will become the exhibit, and I'll include that on the USB drive that we have for the matter. Thank you.

P. LEWIN: Thank you, Your Honour. That may happen on the break, if that's okay.

THE COURT: That's fine.

P. LEWIN: Thank you.

Q. And Professor Swaine, before I get into it, I'm just going to remind you of the scope of your qualification. So, you are qualified as an expert in thought, the history of thought, freedom of thought, the history of freedom of thought, liberties and freedoms. This may include an opinion on these concepts as understood by philosophers and contained within international conventions. You are not permitted to opine on the proper interpretation of freedom of thought as contained in s. 2(b) of the Canadian Charter. You understand that?

A. I do understand that.

Q. Okay. All right, I'll begin by taking you to paragraphs 12 to 17 of your affidavit, and in those paragraphs, you define thought, and I won't take you through the definition, it's set out there, but I will ask you how is this definition viewed by other academics?

A. Okay, I think that the definition is not especially controversial. Um, I would not say that it is widely and thoroughly accepted by all academics, there's very little that would be, but I would describe it as relatively uncontroversial.

Q. Now I'll take you to paragraph 15 of your affidavit, I will read the third line down to the end of the paragraph and then I'm gonna ask you a couple of questions about that. So, beginning with:

5                   What is more, thought is, by its nature,  
different from speech or conduct because one  
can have thoughts that one neither expresses  
to others nor puts into any form of conduct.  
A person might engage in imagination or  
10 reflection, for example, or form a desire  
or think about a topic without ever mentioning  
or revealing their mental activity to anyone.  
Similarly, one might have different kinds of  
emotions or sentiments on a topic but keep  
to oneself, never disclosing them in speech  
nor manifesting the feelings in conduct.

15                   You have said that mental activity is thought. If  
the mental activity does not lead to a belief or opinion, to what  
extent does that change whether mental activity is thought?

20                   A. I don't think it would change it at all. The  
idea here is that there is a lot that goes on in a person's mind  
that is rightly counted as mental activity. And of course, some  
of those familiar forms of mental activity lead people to beliefs  
or lead them to form opinions, but they don't all do that. Um,  
sometimes one can ruminate on a topic, let's say, without ever  
forming an opinion about the matter one's ruminating over, nor  
25 with forming a belief about something to do in the world outside.  
So, mental activity is broader than belief and opinion, I would say.

30                   Q. And if the mental activity does not result in  
expressive conduct, to what extent does that change whether  
mental activity is thought?

A. It doesn't change it at all is, I think, one of  
the points that I provide here in paragraph 15. So, for example,  
construing or conceiving of thought as mental activity and as

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mere mental activity, that is, just the activity of that form, allows one to distinguish between thought and then subsequently speech or conduct behaviour of some kind. Those I would say, respectively speech and conduct, are different from thought. They may of course imply the presence of thought, they may depend upon thought but they are not thought per se. Thought per se is different because one can have thought and just keep it to oneself, that's part of its nature whereas speech or conduct are by their nature respectively, things that occur in the outside world. One speaks and acts in the outside world that way. Conduct similarly involves activity in the outside world, so to speak.

15  
Q. I will read you three types of freedom of thought violations and if you could please tell me if these are the only ways a state can violate freedom of thought: State intrusion into thoughts; state manipulation of thoughts; state punishment of thoughts?

K. BENZAKEIN: Your Honour, I have an objection. I wonder if the witness could be excused.

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THE COURT: All right, we'll just put you into a breakout room briefly, Professor Swaine, so don't go too far. Thank you.

COURT CLERK: Thank you. He's in the waiting room.

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K. BENZAKEIN: Thank you, Your Honour. I just - I wonder if we could have a little more precision on that question. My friend said he was going to identify three types of freedom of thought and ask the witness whether those are the only types of intrusions or violations of freedom of thought. And the witness has been qualified in a manner as to give us a historical perspective, an academic perspective. It seems to me that this question is

5 asking for a legal opinion, is this the only way  
that freedom of thought can be violated, as opposed  
to asking the witness is this the only way in which,  
you know, legal scholars, philosophers and so on,  
have identified as manners in which freedom of  
thought can be interrupted or violated. Because  
that's the scope in which this witness was qualified  
as an expert to give this court perspective on the  
10 historical examination of freedom of thought, the  
philosophical perspectives but not the legal  
perspective. Hopefully I'm making that clear now.  
So, I just think....

THE COURT: All right, so....

K. BENZAKEIN: ...I don't think it's - yes, sorry.

15 THE COURT: So, we ask the witness conceptually how  
state action can impact freedom of thought. You're  
saying that that's not an opinion he can give?

20 K. BENZAKEIN: My understanding of the court's  
qualification of this witness is to provide us with  
sort of an overview or perspective on freedom of  
thought as it's been understood by scholars, by  
philosophers, by the international community, not  
to tell us whether and how certain actions interfere  
with freedom of thought, because that, in my  
25 submission, is the question for this court whether  
certain actions taken by the state in this case  
violate freedom of thought. I think that this  
witness's expertise is to give us like a, you know,  
30 ten-thousand-foot overview of the present understanding  
of the scholarship of freedom of thought, not his  
opinion about what constitutes freedom of thought.

THE COURT: So, can he talk about what philosophers historically have thought constitutes state intrusion into freedom of thought?

5 K. BENZAKEIN: Yes, I think so. I think it's really just a question of a small tweak of my friend's question...

THE COURT: All right.

K. BENZAKEIN: ...to ensure that we're on the same track.

10 THE COURT: All right. So perhaps, unless you have some strong objection, Mr. Lewin, can you just couch it in terms of historical views as to how state intrusion impacts freedom of thought um, through manipulation of thought, punishments of thoughts and so on? It's a bit of a semantical exercise, I think. I understand what the Crown is saying but we're not so much asking him his own personal views, but um, I suppose it's his opinion, but it's his opinion in a historical, I suppose, context of you know what political philosophers or philosophers generally have thought about states can impact freedom of thought through their action or inaction.

15 P. LEWIN: Well, I do have a strong objection, Your Honour, 'cause it's not how he was qualified. And how he was qualified - I'm reading verbatim, is he is an expert on "thought, the history of thought, freedom of thought, the history of freedom of thought, liberties and freedoms" full stop, period. Now there's a further sentence that says, "This may include an opinion on these concepts as understood by philosophers and contained within international conventions". And then there's the statement at the  
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end that he can't talk about the law under Canadian law, so there's no - the question for the court remains with the court, there's no issue of him overstating it, but how he was qualified he can give his personal opinion about what he thinks, how to define thought, how to define freedom of thought. I mean, that's how he was qualified. So I think my friend's misstating how he was qualified, and he is absolutely permitted to say what his opinion of thought and freedom of thought is.

THE COURT: What he thinks about it.

P. LEWIN: Yes.

THE COURT: All right. Ms. Benzakein, do you have anything further to add to that?

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K. BENZAKEIN: Only to say that if my interpretation varies from my friend's I think it's a bit much to say I'm misstating it...

THE COURT: No.

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K. BENZAKEIN: ...but I have nothing else to say. Thank you.

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THE COURT: All right. No, I agree with that. My ruling in terms of what his opinion is, given that he's an opinion witness, he's giving us his opinion and not simply reflecting factually what other opinions have been, that's in effect what brings him before the court as an expert witness, is that he's not simply recounting what others have said as a matter of history, but he is opining on the concepts that others have opined upon. So, to that extent my qualification of him was based on him providing us with his opinion of thought bearing in mind his knowledge of the subject matter in question. So,

I'm going to permit the question as phrased, Mr. Lewin, given that he is an opinion witness.

P. LEWIN: Thank you, Your Honour. And I didn't mean to...

THE COURT: No, no.

P. LEWIN: ...cast aspersions on my friend, by the way about....

THE COURT: No, I appreciate that. Thank you very much. All right. So, let's bring the witness back.

... PROFESSOR SWAINE RETURNS

THE COURT: All right, so continue then, Mr. Lewin. You can re-pose the question as you've asked it.

P. LEWIN: Thank you, Your Honour.

Q. Professor Swaine, I'm gonna read you three types of freedom of thought violations and if you could please tell me if these are the only ways a state can violate freedom of thought: state intrusion into thoughts; state manipulation of thoughts; and state punishment of thoughts?

A. Very good. I do not think that that exhausts the entire set of categories in which the state could violate someone's freedom of thought. I'd note actually that the way in which you put it, Mr. Lewin, the first category was intrusion, I would call that investigation of thought, just to be clear. It seems to me that there are clear ways in which to violate freedom of thought in investigating perhaps too zealously someone's thinking.

You say second, manipulating thought. That's close to, I think, how I would describe it, which would be modification of someone's thought. Manipulation implies perhaps a maleficent intention on the part of the manipulating party, perhaps to their end, but more broadly just the modification of someone's

thoughts could tip it, meet certain criteria I think qualifies a freedom of thought violation. Punishment for thought, I would agree entirely is the way to describe that category.

5 But the other category which exhausts the ways in which to violate freedom of thought would be preventing thought, which is to say to stop someone from thinking something. And there, there are some interesting ways in which I think government could do so, that other governments have done so, that give a sense of how preventing thought can be a freedom of thought  
10 violations. So, for example, one perhaps more well-known example is that of the one-time communist leader in Italy, Antonio Gramsci, who was arrested by Mussolini's fascists and thrown in prison and then he was put on trial. And at the trial the prosecutor, whose name I believe was Michael Isno (ph) but in any case, this was  
15 in 1928 if I recall correctly, said to the court 'We must for 20 years stop this brain from thinking', which is an interesting way in which to think of how, or to see how government could, certainly other governments have, I'd reckon, tried to stop  
20 thought by throwing someone into a very, you know, a prison filled with deprivations and thereby violating their freedom of thought. That's one way in which I think the state could infringe freedom of thought in this prevention category.

25 The other way would be to block access to something that might be very important for thought. So, for example, if the state were to, um, were to proscribe some particular book in philosophy or some such, and said 'No one may read this book, it's not allowed', well that's a - on its face it seems like a plausibly certainly a candidate for a freedom of thought violation.  
30 But then of course one would need to look at some other factors in order to determine whether it were, for example, what the state's purposes would be in proscribing access to such a book.

Other familiar considerations would be whether there might be less invasive means than saying, 'You may not read this philosophy book' in order to accomplish the state's ends, what the state's motivations for doing so might be, and so forth.

5 So, in any case, yes, I do think that there is a category beyond the three that you mentioned, Mr. Lewin. That would be prevention of thought, and it is - I think it's a category in which one can clearly see potential or actual freedom of thought violations on the part of government.

10 THE COURT: So, censorship, for example, would fall under one or both of those latter categories?

A. Yes, Your Honour, I think so. And it's not to say that all censorship would do that...

THE COURT: Right.

15 A. ...but it's that some censorship, if it, you know, were for impermissible reasons or some such could count as an infringement of freedom of thought.

20 THE COURT: Well, it may be an infringement, but it may be a justifiable one depending on the purpose for which it's enacted, I suppose.

A. Indeed. That's a very fair way to put it.

THE COURT: All right.

25 P. LEWIN: Q. Professor Swaine, I'm gonna ask you to go to paragraph 22 of your affidavit, and you appear to set out a definition of freedom of thought. I'm gonna read the first two sentences:

30 Freedom of thought may be properly construed as the ability to engage in mental activity without interference by others. By interference in this context, I mean hindering, obstructing, impeding, breaching or sanctioning mental activity.

Where would hindering, obstructing or impeding mental activity fit under these potential violations that you discussed?

5 A. Those are, I think, examples or descriptive terms that capture the idea of preventing thought in some way. A hindrance to thought is to that extent a prevention of thought, similarly for an obstruction that's thrown in its way or impeding it. I realize that these are very close terms that are near synonyms, but they do have, I think, slightly different meaning in each case. But to your question, those would count as prevention of thought.

10 Q. At paragraph 29 of your affidavit you begin by saying:

The idea of freedom of thought is special. It captures a sense of being able to engage in mental activity without legal penalization for one's thoughts and without undue incursion into one's mental life.

15 Q. Could undue incursion into one's mental life include the hindering, obstructing and impeding mental activity that you spoke of?

A. Yes, it certainly could.

20 Q. At paragraph 13 of your affidavit...

A. I'm sorry, did you say paragraph 13?

Q. Yes, please.

A. Okay.

25 Q. ...you include feeling in your definition of "What is thought?" And also at paragraph 13, you define feeling as "emotion or sentiment". How would you define a sentiment?

30 A. All right, this is a very difficult question, but I think a sentiment is a form of feeling that is a bit different from an emotion proper. And emotions, on the understanding that I would provide, and which is supported by other views of what include emotion, other theories of emotion I suppose, emotions normally include intentional aspects of thought, which is to say

5 that they are about something in the world. For example, if one is angry, one is angry at a situation. Normally, one is angry at somebody in particular but perhaps not always and so on. Um, emotions also have affective elements which are familiar to all of us, they feel differently from mere um, thinking or belief. So, that's a familiar enough feeling, to feel or to be angry is different from just thinking through, you know, a more rational question, strictly rational.

10 And then sentiments I would say are the rest of feeling that do not have necessarily these intentional elements, so they can include feelings of being hungry, let's say, or being uneasy, and so on. This is meant by distinguishing between emotion and sentiment to try to cover all of what we normally understand as feeling, without leaving anything else. And the idea here, again, is to try to capture, as at least I would say is appropriate, all of one's mental activity under the concept of thought, which I would argue and do argue is appropriate for consideration of freedom of thought.

20 Q. Thank you. And I'm just gonna go back for a little bit of a clarification. If I wrote this down correctly, you said sentiments are the rest of feeling that do not have intentional elements, did I get that right?

25 A. Yes, I think that is a fair way to describe it. So, sentiments, as I describe them in 13, or give examples of them in paragraph 13, include unease, feeling unwell, feeling pleasure or pain and so on. Those are not especially intentional, they are more what has sometimes been called surges of affect or more just properly, affective. They're not necessarily about the world or the world as we see it. Um, good. Yeah, that'd be my answer to that question. It's a good question. Thank you.

30 Q. And why would you say that feeling, as you've defined it, should be included as thought?

5 A. I would say there are a few reasons for including feeling in thought - under thought. One is that the other parts of thought, such as our beliefs and reasoning and so on, often include feeling, so it's difficult to divide and to parse off feeling from other parts of thought and thinking.

10 Second, feelings, emotions and sentiments, are held in the mind as it were in one's mental space, and like other forms of thought, you know, beliefs one might have, or ideas one might have, they too can be expressed to other people, but they don't have to be expressed to other people, they're possibly kept just to the person who has them, which makes them very much like the more rational or belief-based thoughts that we have that are not really clearly identical to feelings.

15 And then third, there isn't anything else apart from thinking and feeling so described, that has those qualities. So, when you include feeling with thinking under the rubric of thought, there isn't anything apart from those categories that have the qualities of being able to be thought by the person in question and potentially kept just to the person in question. That's the entirety of the category, it seems to me. And this  
20 further militates in favour of including feeling with thinking under the category of thought.

25 Q. Thank you. I'm gonna give you a hypothetical and I'm gonna ask you to comment on it. If a government were to subject someone to psychological experimentation and by so doing, they left the person unable to have normal emotional reactions to stimuli, would you consider that a freedom of thought violation?

THE COURT: Could you just repeat that again?

30 P. LEWIN: Q. If a government were to subject someone to psychological experimentation and by so doing, they left the person unable to have normal emotional reactions to stimuli, would you consider that a freedom of thought violation?

5 A. My answer is yes, I would consider that a freedom of thought violation. Now, in fairness, I do think one would probably need to fill out the hypothetical a little bit more because it's at least logically possible that there might be an admissible and defensible reason for government subjecting a person to such experimentation. I'm not sure what it would be but that's at least in the realm of logical possibility. But it seems to me that experimenting on a person and stopping them from having normal emotions is a good example of a kind of freedom of thought violation. In fact, it would violate probably the modification category by changing someone's otherwise normal emotional reactions and make them - damaging them in some sense. So, damaging someone's mental capabilities would count as an intolerable modification of their thought and be a freedom of thought violation.

10 Also, we don't know whether in this hypothetical the reason for the experimentation would be based on some sort of punishment dealt out to the person. I assume that it wouldn't be, but if it were, that would be another way in which to violate the person's freedom of thought if it were meted out as a punishment.

15 And third, in preventing people from having normal emotional reactions the state could to that extent quite clearly violate people's freedom of thought. And in order to fill out the example, the hypothetical a little bit, again, it might be familiar to the court but I do think it's worth mentioning here that there have been cases in which either governments or agents acting on behalf of governments, agencies and actors acting on behalf of government, have engaged in such behaviour, the MKUltra experimentation from the 1950s is an example. I would adduce the Chinese government's so-called re-education of Muslim Uyghurs as an example of applying different forms of so-called, again, re-education that have, according to various accounts, damaged

the subject's normal emotional responses to stimuli and so forth. So, the hypothetical is interesting, and in my view, it's prescient and also it has some just not only historical precedent but, you know, contemporary importance as well.

5 Q. With respect to a government action, what does it take for a change or modification to a person's feelings or other thoughts in order for it to count as an infringement of freedom of thought?

10 A. I think that this is again a good question, a complicated question, or at least one that has a slightly complicated answer, and I'll do my best to reply to it, of course. I think what is important here is to keep in view as a baseline, that because our thoughts, and here again we're thinking of - I'm thinking anyhow, of thought broadly construed, including one's thinking, one's feelings, emotions, sentiments and all this, those change if not continuously at least continually all the way through the day. So, changes in thoughts are always occurring. They occur in conversation with people, they occur with our normal interactions with government. You know, reading a street sign and changing your view of when you're allowed to park in a certain area might count as a change in thought. It would be intolerable to allow any such changes to count as a freedom of thought violation. That would lower the bar, I think, so much to make the standard unworkable. However, the fact that not all changes would be violative of freedom of thought, that doesn't mean that some changes can't violate freedom of thought, some changes I think can indeed. And to your question in particular, I would say that it should probably count as sufficient for a freedom of thought violation if the change in question is quite profound, so it seriously affects, let's say someone's mental - someone's mental life, or perhaps damages their capabilities and so forth.

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5 And then also, if it were involuntary. I think the voluntariness element is important too. The reason for including that is because we wouldn't want to say that if someone decided, you know, fully informed consent to go to have mental therapy and then have their ideas and beliefs changed, their feelings changed, that the therapist would have violated their freedom of thought. So, it's not just that something serious has to happen in terms of the change, it would also have to be involuntary. I'm not sure whether there are both necessary and sufficient conditions that one can adduce coherently in this category of freedom of thought violations that are modifications of people's thought, but that doesn't mean that there aren't clear cases in which there are such violations.

10 And I would just add that I think that this structure of thinking and argumentation applies to other rights and freedoms as well, where for some of them in some cases it's not clear exactly whether there are necessary and sufficient conditions for saying that such and such is a violation of that freedom, such and such is not, but that just seems to be the way things are.

15 Q. Would you apply the same standard if a government were punishing people for thought?

20 A. Very good. I do not think that the same standard would apply for punishing people for thought. And as a clarifying remark here to your question, I don't think that this is thereby an admission of weakness of the theory or the approach here, is rather a strength of it that it acknowledges that in different categories a freedom of thought violation, the level at which government might act it can take - excuse me, let me rephrase. In different categories of freedom of thought violation, government might only need to do a little bit in one category to violate freedom of thought but might need to do a lot in another category. I say this because when it comes to punishing people for thought,

5 you might reckon, I think it's very plausible that any punishment that is handed down by a government merely for what someone is thinking or feeling. You can keep in mind here that on the view I'm providing here, these are thoughts that are not expressed to other people, they're not acted upon, it's not conduct, it's merely thought, for a government to punish a person at all merely for what they're thinking is intolerable. So that's different from the manipulation or change to thought category where one would have to get over a much higher bar in order to have a violation. In the punishment category, any punishment, at least 10 arguably, is a violation of freedom of thought. I think that this suggestion fits also with what various scholars of human rights reckon when it comes to the absolute nature of freedom of thought that they like to discuss and describe. One of the ways in which freedom of thought is construed as being [indiscernible - audio glitch] is that there must be no punishment for mere 15 thought, and that this is something that the world has come to agree upon.

20 Q. Are you able to say the test for a prevention of thought violations?

THE COURT: Sorry, what was that question again?

P. LEWIN: Q. Are you able to say the test for prevention of thought violations?

25 A. Okay, here as well I think that preventing thought has to be thought through carefully as a category because as with changing people's thoughts, there are things that people can do in daily life that at least arguably stop them from thinking something. And again, it would be intolerable to imagine freedom of thought or to propose that there are freedom of thought 30 violations happening at every turn in normal daily society. So, for example, if you imagine that someone near to you is daydreaming about something and you ask them an anodyne question and happen to

5 stop them from what they were thinking, it would not be reasonable to say that you had violated their freedom of thought even though I think fairly that might be described as stopping someone from thinking something, especially if they forgot what they were thinking about and could no longer return to it.

10 So, merely stopping someone from thinking something isn't going to be enough. There too I think the standard has to be considerably higher and also one would need to think about if it's government as the agent that is preventing thought, what the purposes of such prevention might be, whether are less invasive means by which to act to pursue said purposes without stopping thought, and of course what government's motivations might be for engaging the activity in the first place.

15 Q. Now, I'll take you - court's brief indulgence?

THE COURT: Sure.

... PAUSE

20 Q. All right, so I'll take you to the special rapporteur's report and I'll begin by taking you to page 296 on the application record.

A. Did you say two hundred and ninety-six?

Q. Yes, please. Top righthand corner.

A. This is under Part D?

25 Q. Ah, yes. And the first line states, "Beyond absolute protection relatively little is clear about the rights for elemental attributes". And here of course they're talking about freedom of thought. What's your view of that statement?

THE COURT: Sorry, what paragraph is that?

P. LEWIN: That is paragraph 25.

THE COURT: Oh, I see, at 296. Yes, okay. Go ahead.

30 P. LEWIN: Q. Professor Swaine, what's your view of that sentence?

A. That's the first sentence in paragraph 25?

Q. Yes.

5 A. Well, I think the statement is correct in part, frankly. I think it is correct in the sense that the special rapporteur rightly describes how the core elements of freedom of thought, or in this case described as the right to freedom of thought, are not well understood in human rights law, in jurisprudence, and philosophical and thought in political theory. So, that part I think is correct. And when he says - he refers to the rights of core elements or attributes, there one can include under such attributes some of the matters we were discussing earlier, for example, exactly what kind of categories there are in which there could be a freedom of thought violation, what would need to be done in each of those categories in order to get to the level of a freedom of thought violation and so on.

15 Where I think the special rapporteur is perhaps not entirely correct, is in saying that - or suggesting that absolute protection is in fact a clear attribute of the right to freedom of thought. And by that, I mean freedom of thought does indeed enjoy a kind of absolute quality according to human rights jurisprudence and international law. It is like the right not to be tortured in that respect, claim to be an absolute right and so forth, and that it requires absolute protection. However, the mere fact that people say as much does not obviously establish the fact, and in my view, the statement has to be qualified in order to be reasonable and sensible. So, for example, it's at least plausible and I think it's actually quite reasonable to suppose that the right not to be punished just for the thoughts that one has is something that is absolutely to be protected. To say that it's absolutely to be protected of course invites some further questions. For example, would that right ever be reasonably overridden by other considerations? Might the right be derogated or might it be qualified in some other respect

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You might think that as with the right not to be tortured, there are just no examples where you would reasonably override somebody's right not to be punished for their mere thoughts.

5 So, in that category of freedom of thought violation, i.e. the punishment category, it is fair to say I think, that absolute protection is a viable prospect. However, in the other categories and in other elements pertaining to thought and freedom of thought, absolute protection is probably not sensible. So, for example, sometimes human rights attorneys will say that  
10 the absolute protection of one's right to freedom of thought includes the right not to disclose what one's thinking if one wishes not to disclose it. That's an absolute protection. You may keep your thoughts to yourself effectively. And that again sounds perhaps believable, but I think it's unsound. And it's unsound  
15 because as is familiar to the court doubtless, there are many cases in the ordinary course of constitutional democratic politics in which people are called upon to disclose their thought to governing bodies. For example, if one is called as a witness in court, one might be required under penalty of law for non-compliance  
20 and so forth, to provide information. And that information can be of various different kinds. It might be many things that government might reasonably ask about. And so that's why I say that I think that the first sentence in paragraph 25 of the special rapporteur's report is to be agreed with in part but  
25 not entirely.

30 Q. The next sentence states - and I won't read all of it, but "the special rapporteur maps four possible attributes of the right, based on international human rights jurisprudence and commentary" and it sets out the four possible attributes. How are these four possible attributes treated amongst those who study these matters?

5 A. I think that the special rapporteur has fairly described the attributes. May I ask, Mr. Lewin, for clarification on what you mean by how these are viewed? Do you mean is this an exhaustive set of concerns or do people basically agree with each other on each of these points?

Q. Both of those questions.

10 A. Well, A to D so described in paragraph 25 are definitely topics under discussion for scholars and interested parties with respect to freedom of thought. As to whether people agree, I mean, I would - I suppose there's broad agreement in the points as stated but it's artificially easy to agree with them. Take point C, for example, "There is to be no impermissible alteration of one's thoughts." That's fine to say but of course the question of what counts as a permissible alteration of one's thoughts is really the issue. So, people don't agree on that part, but they would agree on the easier point that the impermissible alteration is not permissible.

15 Part D, which is the fostering and enabling environment for freedom of thought is also discussed somewhat. That is more in the realm though of a so-called positive right or positive duties of states and societies to make freedom of thought flourish and, you know, what countries can do to help with education and the rights of children and so forth.

20 Q. And are these exhaustive?

25 A. Well, the special rapporteur has not mentioned prevention, so it's not exhaustive. And frankly, prevention really merits consideration because when one thinks about freedoms generally, and basic rights and so on with respect to freedoms, usually the question of what might prevent someone from engaging the activity is one of the central things and one of the first things that gets talked about. So, for example, when one thinks  
30 about freedom of speech, one of the first and central questions

will concern what sort of factors or limits government might throw up in the way people speaking, making it more difficult for them to speak. So, when one is thinking about key freedoms, prevention really needs to be included as well.

5 Q. I will take you to paragraph 47 of the special rapporteur's report.

A. May I ask what page that's on?

10 Q. Yes, page 301. So, I'll read the first sentence. "As mental health has many implications for an individual's inner mind, state obligations, negative or positive, to ensure the highest attainable standard of mental health could affect freedom of thought in various ways." Are you able to say what is meant by the words "mental health has many implications for an individual's inner mind"?

15 A. This is a difficult question to answer because the special rapporteur does not exactly elaborate on what he seems to have meant by it. I take it though, to be fairly obvious, that the special rapporteur means that mental health related issues, as he says, have implications for an individual's inner mind, so they bear upon what happens in the inner mind and presumably the thought is that mental health has or can have both a positive sense, so good mental health and then also it may be problems with mental health, so both of those sort of broad elements of mental health, both being mentally healthy and having mental health concerns, those have implications for a person's inner mind and thereby for their thought. I think that's what he means by that particular sentence.

25 Q. Has the issue of the use of psychedelic drugs been considered by the special rapporteur?

30 A. Well, if it has, um, you know, I don't know of it. I don't - I think - it's possible that it has been a little bit but not in - not in detail. That's not been a central focus.

5 Um, really the central qualities of freedom of thought um, and the  
basic aspects of what the right includes by its nature, and what  
the freedom of thought is by its nature, that has been much more  
the focus. And so, for the topic you mentioned, that is what you  
might call a kind of downstream consideration. Freedom of thought,  
as the court will know, is less well discussed by quite some  
metaphorical distance, compared to its cognates such as freedom  
of speech or freedom of religion which we have a quite established  
discourse of rights and established, I suppose, jurisprudence and  
10 so on. And so, the issue that you mentioned, Mr. Lewin, is um,  
is not one that has been well discussed.

Q. I will take you to - I think there is one reference  
in the special rapporteur's report to what is brief, that's on  
page 306, paragraph 66.

15 A. Yes, and unfortunately that's the one page that  
turned out to be blank, but that is....

THE COURT: All right, can I stop you there because  
I'm going to need that page. Have you sent that in  
yet?

20 P. LEWIN: I haven't. My assistant isn't in, she's  
working from home.

THE COURT: All right. Can we take the morning  
recess now then? I'd like to have that page before  
me because I'm cutting and pasting into my notes  
25 here, just to follow along. Let's take 20 minutes  
now and we'll return hopefully once that comes in.  
All right?

P. LEWIN: Thank you.

30 THE COURT: Thank you.

U P O N R E S U M I N G :

**LUCAS SWAINE: PREVIOUSLY AFFIRMED**

5 THE COURT: All right, so we'll return to the Akila matter then.

P. LEWIN: Thank you, Your Honour. I think the clerk did get my email, I'm not sure if you've got....

THE COURT: Yes, I do have it now with all of the pages in it, so we'll continue then.

10 P. LEWIN: All right, very good. And I guess I should make that the next exhibit.

**EXAMINATION IN-CHIEF BY P. LEWIN CONTINUES:**

15 Q. Professor Swaine, you are familiar with the special rapporteur's report?

A. I am.

P. LEWIN: Okay. And that is the same one that we're putting forward. It is dated October 5, 2021, that's the one that's attached as an exhibit to your affidavit is the same one that we're now making an exhibit in court. Your Honour, if that could be the next exhibit?

20 THE COURT: All right, we'll call that - sorry, what is the next exhibit, Madam Clerk? I think we're up to...

25 COURT CLERK: Number 13, please.

THE COURT: ...13, special rapporteur's report

**EXHIBIT NUMBER 13:** Special rapporteur's report - produced and marked.

P. LEWIN: Thank you.

30 Q. And I will take everybody to - so, in the report, unfortunately we don't have the numbering from the application record, but in the bottom righthand corner you will see 19 of 28.

And at paragraph 66, Professor Swaine, I'm going to read this into the record and then I'm gonna ask you a question about that. So, paragraph 66 states:

5                   Some stakeholders interpret freedom of thought as creating state obligations to respect their cognitive liberty, namely the right to control and alter one's thoughts and thought processes, including the choice to consume psychoactive substances. They contend that arbitrary prohibitions on safe access to  
10                   mind-altering drugs is a de facto prohibition or even state censorship on certain thoughts.

Professor Swaine, to your knowledge, does the special rapporteur have a position on this?

15                   A. To my knowledge, he does not. Um, this is the only place in the entire report that mentions the issue - or the issues raised in paragraph 66, which is to say there aren't other parts of the - there aren't other parts of this particular document that address the matters, and so this is all that one has. And I don't think he expresses any particular opinion, he  
20                   just notes that there are some stakeholders who have made some assertions in these respects with regard to cognitive liberty and so forth.

                  Q. Okay. Would it be fair to describe [indiscernible - someone sneezes] consideration?

25                   A. I'm sorry, could you repeat that please?

                  Q. Oh, would it be fair to describe his position as under consideration on this issue?

                  A. Yes, I think that's a very fair way to describe it.

30                   Q. Do academics who study freedom of thought have a consensus on this?

                  A. This being the matters presented in paragraph 66?

                  Q. Yes.

A. I think it's quite clear that academics do not have a consensus on this matter.

Q. And could we similarly say the matter's under consideration with respect to academics?

A. Yes, I think that's very fair to say.

Q. So, I'm gonna change gears a little bit and these will be my last couple of questions. Is freedom of thought the same as freedom of religion?

A. Freedom of thought is not the same as freedom of religion, it's its own discrete freedom, I think. There are some ways in which one can quite clearly see the differences between those two respective freedoms. For example, with respect to freedom of thought, there seem to be many aspects of mental activity that can be salient for freedom of thought, and which could be adversely affected in one of the categories of freedom of thought violations that I described, but which have little to no connection to religiosity. And so, for example, someone's political beliefs might be affected - adversely affected, intruded upon as you put it, investigated, modified. One can be punished for one's political thoughts, have one's political thinking or emotions prevented, but that might have nothing to do with religion per se, either for the subject or just in general. So, this is to say that there's a lot of what ought to count as thought and thereby would be covered under freedom of thought, that is not related to religion.

On the other side, freedom of religion, I would say, again I think not especially controversially, involves more than mere thought. So, if there's a certain conception of religion or religiosity that has been, frankly, I think, rightly criticized for being overly thought or faith based, however, constitutional democracies seem correctly to recognize that freedom of religion also involves religious practice, practices of worship and so forth,

um, some associative practices, speech and whatnot, and all of those I think the court appreciates are, at least in my view, different from thought per se. And so, there is overlap between thought and religion and there might be some overlap in terms of freedom of thought and freedom of religion in terms of practicalities, but the freedoms are different, one from another.

Q. If you were to describe freedom of thought and freedom of religion as if it were a Venn diagram, how would you describe it?

A. Well, it would be a fairly easy Venn diagram with only two circles and the circles would overlap. And so, on one side, one circle there would be the freedom of thought circle, and the other side the freedom of religion circle. Some religion would just be in the part of the freedom of religion circle that does not overlap with freedom of thought part and some thought would be on its own side, but there is some overlap between the two spheres.

Q. And how would you describe the overlap?

A. Just to be clear, is the question overlap between thought and religion or freedom of thought and freedom of religion?

Q. Um, well, good question. Um, I would say - let's say thought and religion rather than freedom of thought and freedom of religion.

A. And you're asking what the overlap would be between the two?

Q. Yes.

A. The overlap would naturally fall with respect to thought or mental activity that has a very close relationship to religion. And there I would say that it would be thought that is either derived from something like a religious doctrine and so one could call it religious thought in that sense. Or perhaps - this isn't a disjunctive, it might be an additional, alternation, and/or, um, thought that is affirmative of religion in some way, about

5 religion and affirmative of some religious element. And to be clear here, when I mention religion having given, you know, conceptualization of thought as mental activity, by religion I mean here, and I think not especially controversially, the belief in supernatural powers or otherworldly powers, accompanied by a practice of worship in their respect. So, religion would have both these belief-based element, or a mental activity-based element, and then a practical element. But in any case, in terms of the overlap between thought and religion, some thought does indeed seem to be intrinsically or inherently religious but not all of it is.

10 P. LEWIN: Thank you, Professor Swaine, those are all my questions. The Crown Attorney will have some questions for you.

THE COURT: Ms. Pashuk.

15 K. BENZAKEIN: Me today, Your Honour.

THE COURT: Oh, sorry, Ms. Benzakein. I apologize.

K. BENZAKEIN: Not at all.

**CROSS-EXAMINATION BY K. BENZAKEIN:**

20 K. BENZAKEIN: All right, good morning still, Professor. My name is Kerry Benzakein, I'm one of the prosecutors on this case. I will have some questions for you, and I hope you will forgive the sort of simplistic nature of some of them while we try to work our way through these complex, philosophical arguments and information.

25 Q. So, I'd like to start, if I may, by trying to summarize your conception of freedom of thought - of thought first, leaving the freedom aside, as I understood it from your affidavit and some of your scholarship that I reviewed. Okay, so first, your definition of thought includes all mental activity including thinking and feeling, is that right?

30

A. Yes, it is.

Q. Okay. And importantly, it's to be distinguished from speech and conduct, right?

A. Yes.

5 Q. Okay. So, when the inner process of thinking crosses the threshold into speech or conduct, your view is that now we're in the realm of other rights, not freedom of thought, something else, have I got that right?

A. Yes, indeed.

10 Q. So, maybe a one-line way to describe it is that thought is the processes of the mind that remain unexpressed, fair?

A. Yes, I think that's quite fair.

15 Q. Okay. And as you described in some of your scholarship and in your affidavit, you favour a very wide definition, right?

A. I do.

20 Q. And that wide definition, you called it this morning, you said it was - it was uncontroversial but maybe not widely accepted, is that fair?

25 A. Yes. And in saying that what I mean is, or what I meant was that um, in discussing the basic realm of thought with a variety of different academics, the idea of conceiving of thought as mental activity, and mental activity per se seems to generate a lot of agreement and not a lot of friction.

Q. Okay. But for instance, you give the example of Martha Nussbaum who would omit certain aspects of your definition, right?

A. Yes.

30 Q. And presumably, there are others in your field who would parse it in a different way from how you have, right?

A. Yes, indeed.

Q. Okay. As I'm sure in every field. But the core, the mental processes, that's largely - that's largely uncontroversial in the field, is that fair?

5 A. That, I think, is correct. Yes, I think it's quite fair. Again, here in order to be able to answer the question definitively or better, one would probably have to survey the field or some such, and so I want to be careful in not overstating agreement and in sort of inaccurately calibrating how much agreement. I think there's a fair amount of agreement but, you know, again, I don't know for sure how much agreement there is.

10 Q. And we do appreciate the completeness of that answer. Is it fair to say that that disagreement is on the edges of, you know, of the definition?

A. I think so.

15 Q. Okay. So, having laid the groundwork there, I'm going to suggest to you - and I think this is uncontroversial, but that freedom of thought is a concept in development, is that - is that fair?

20 A. This is very interesting. I mean, I would put it a little differently. I would say that freedom of thought is a freedom whose understanding is in development. I'm not sure that the concept is in development as much as the understanding of it. However, given your very fair points about how we understand thought and so forth, yes, I agree with what you're suggesting.

25 THE COURT: So, would we agree that, I mean, most scholars agree that freedom of thought has to do with what has been referred to as the *forum internum* but what's included in it is something that we're coming to grips with or expanding our understanding of.

30 A. Yes, Your Honour, I think that's a very good way to describe it.

K. BENZAKEIN: Q. And you've pointed out that this - the concept of freedom of thought and discussions of freedom of thought have, I think you say, received scant attention in the literature, right?

5 A. Yes. And certainly, compared to other key rights and freedoms, it's actually interesting that it's received so little. What accounts for that is a different question, but the fact is that it hasn't received either its due, nor the amount that other rights and freedoms have received.

10 Q. And you've been, as far as I could tell from your CV, you've been writing and delivering lectures about freedom of thought since at least 2012, right?

A. Yes.

15 Q. And I have that pinpointed to a talk at the University of Colorado, that's sort of the beginning of your public discussions about freedom of thought?

20 A. I suppose so. It had been on my mind a bit beforehand, partly because of the first book I wrote which was about liberty of conscience, which is of course a close cognate of freedom of thought. But in any case, yes, I think that was the first talk I gave on the topic itself.

25 Q. And when you gave that talk, you know, you were sort of forging into a field where very little had been said up to that date, right?

A. Yes, I think that's fair to say.

Q. Okay. And you've been writing a book length treatment of freedom of thought, right?

A. Yes.

30 Q. And not to - I hope this isn't upsetting, but you've been working on it since 2012, you're still working on it, right?

A. That's not upsetting, thank you. I did do a book on autonomy in there, so I was doing some other things as well.

THE COURT: When you do you expect that book to be coming out, on your freedom of thought?

A. The hope is within maybe a calendar year or year and a half.

THE COURT: All right.

A. I have a manuscript review on it for early March and then it's a matter of securing publication and going through all the revisions and so forth.

THE COURT: Sure. All right.

K. BENZAKEIN: Q. And really, the rejoinder that I was going to offer was that there's quite a lot of complexity to it, right?

A. Yes.

Q. And in part, I'm gonna suggest that's because of the lack of prior treatment of the subject matter?

A. Yes.

Q. So, you and your colleagues engaged in discussions about freedom of thought, you're forging new ground?

A. That, I think, is very fair to say.

Q. And we'll get a little bit more in detail about this in a moment, but I'm gonna suggest that the special rapporteur on freedom of thought felt the same way, right?

A. Yes. And I think that's supported by the various comments in the special rapporteur's document about how understanding of freedom of thought is really needed and advancements must be made and so forth. He mentions that more than once in the document.

Q. Yes. And just before we get to your views about freedom of thought, I just want - I'm gonna ask you if you agree with this, but just to point out that most of the philosophical

treatment of freedom of thought and the other sort of liberal discussions about freedoms, they largely come, if not exclusively come, from the western philosophical traditions, right?

A. Yes.

5 Q. So largely, maybe almost exclusively, in modern times from English-speaking largely white men, would you agree?

A. Um....

THE COURT: Hobbes, Locke, so on. Is that what you're referring to?

10 K. BENZAKEIN: Yes, yes.

A. Yes, that's true. I mean, there's Wilhelm Von Humboldt in Germany but he was at least not English-speaking. And then more contemporaneously, you know, things have changed quite a bit. For example, the special rapporteur doesn't meet that description nor does Martha Nussbaum, but yes, largely speaking it comes from the western canon.

15 Q. And it's not a criticism, but just probably a reflection of, you know, collaborative scholarship in general, right? People - like attracts like, English speakers talk to English speakers, right?

20 A. I suppose so, sure. Yes.

Q. And this gap in the diversity has been laterally recognized and attempts are being made to fill that gap, right?

25 A. Do you mean gaps in terms of efforts to be more inclusive with philosophical thinking in general, or with respect to freedom of thought in particular?

Q. That's helpful. I'll rephrase. So, you're a member of the Freedom of Thought Network, right?

A. Yes.

30 Q. And in the last two years the Freedom of Thought Network has made a real effort to reach out to thinkers and writers from other geographical areas, would you agree?

A. Yes.

Q. For instance, inviting speakers from the eastern part of Asia, right?

A. Yes.

Q And trying to incorporate speakers and writers from the African continent, right?

A. Yes.

Q. And so, I'm going to suggest that these latter efforts reflect an attempt to introduce more diversity of thought into the philosophy of freedom of thought?

A. Certainly, I think that's fair.

Q. And that is likely, I'll suggest, to introduce nuances into our understanding of thought and freedom of thought, would you agree?

A. Yes, I agree with that and not just in principle but in fact um, some of the other work that I've done has been on, for what this is worth...

Q. Yes.

A. ...on liberalism and Islam and matters to do with whether, for example, Islamic understandings can help to improve or even transform western liberal views of rights and freedoms and so forth. So, this is just to say that not only do I agree with the description that you're providing, but I agree also that it's important to do these things.

Q. Thank you. All right, we'll veer now into talking a little bit more about your conception and definition of freedom of thought, okay? So, first of all, I just want to ask you about this caveat, when you describe freedom of thought, you're not pulling from a particular legal tradition, right?

A. That is correct.

Q. You're coming at this from a more academic or more philosophical perspective, right?

A. Yes.

Q. And in addition, you're seeing it through a historical lens?

A. Yes.

5 Q. Okay. So, in your formulation of thought, we've already gone over this, thought is all mental activity, right?

A. Yes.

10 Q. And your articulation of freedom of thought is the ability to engage in mental activity without external interference, right?

A. Yes. I'm not sure that that is exactly - I mean, that might be exactly what I say in the affidavit, I'd just like to make sure that that conforms entirely to what I propose. Do you know which paragraph in the affidavit that might be?

15 Q. Yes. So, at paragraph 22 of the affidavit you say, "the interference must be placed or imposed by other parties". And then at the *voir dire*, you described it a little differently. You said "without external interference".

A. Yes.

20 Q. I'm happy for you to put what - to correct me or to provide me with the nuance you want this court to have.

A. Thank you. I think that that is basically correct. What I would add there is that the external interference would need to be imposed by another party. So, for example, not simply 25 by some kind of natural event or some such.

Q. I'm laughing because it says in my notes, "the interference must be imposed by other parties and not, for instance, because it's raining", right?

A. Yes.

30 Q. So, today it's gonna snow here and my thoughts are that I'm cold and I wish I was inside, on your understanding, that's not an interference with freedom of thought, right?

A. That is correct.

Q. Okay. But it is an example of thoughts that I'm having that you would include in the rubric of mental activity, is that right?

A. Yes, it is.

Q. Okay. And further to this, feelings, and we heard now today sentiments, are included in your articulation of thought, right?

A. Yes.

Q. And again, this is my understanding of your testimony from the *voir dire*, the reason that you include feelings in your definition of thought is because while you experience them as a mental process, they might not be manifest in speech or expression, right?

A. Yes.

Q. So, that's a further example of your description of thought, which has at end of the threshold of action or expression, right?

A. Yes. And the idea is that when - even though one's thoughts are important and help to give a sense of what one's speech is, or what one's actions are and how we properly describe those actions, that thought itself is not speech or action. As soon as one begins to speak or engages in conduct, then we have different activities that go by, correctly I think, different names.

Q. And acquire a distinct protection?

A. Yes, insofar as they would merit protection, they would be under these different kinds of freedoms as we understand them. So, for example, familiarly, um, if one were speaking, expressing thoughts in spoken terms, then that would be the province of freedom of speech where we would discuss whether the speech in question merited protection in that respect,

or if it were behaviour, then you know, one would be in the realm of discussing such matters as freedom of movement or perhaps of association and so forth.

5 Q. So, there was one thing I didn't understand and I'm hoping you can help me out. Is it necessary in your formulation of thought that the thought be capable of expression, or is that irrelevant?

A. That's a very good question. I think we....

10 THE COURT: Are you asking whether thought has to be capable of expression in order to be thought?

K. BENZAKEIN: Yes, to fall within the professor's definition of thought.

15 A. I think the answer is no, and I'll give you a few reasons why one might think so. First, is because it depends a little bit on what means by "capable" or "capability". You can imagine a person who might not be capable of speech or communication because of, let's say, some sort of physical impediment or ailment or some such, and so they might not be capable, let's say, of speech in a standard sense, but they might have a lot of different thoughts which they would be able to state aloud were they not to have the impediment. So, in that sense, capability itself or the lack thereof, wouldn't bear upon whether the mental activity qualifies as thought.

20  
25 Now, more directly, I think, to your point, if for a standard person or any person, it were true that someone had a thought that they simply couldn't express to anybody else, would we count that as thought? That's the sort of the question, I take it. I think the answer is yes. And it's familiar that people sometimes have thoughts that they say they can't express to others in words, that they can't really articulate, it could be very difficult, almost ineffable or some such, I don't think  
30 that it makes sense to say that the ability to express a thought

is a criterion of deciding whether something is a thought in the first place.

5 Q. Thank you. But the key to defining a mental process as a thought is that it remains unexpressed. As soon as you express it we've left thought, we've moved on to some other definition, right?

A. Yes.

10 Q. Okay. All right. Would you agree that in your formulation then, really anything that affects the mind in any way would engage freedom of thought?

THE COURT: Sorry, can you repeat that again?

15 K. BENZAKEIN: Q. Yes. Would you agree that in this formulation anything that affects the mind in any way would engage freedom of thought?

A. I think it depends on what one means by "engage freedom".

20 THE COURT: I'm sorry, we've lost our connection. Are you still there, Professor? Sorry, we can't hear you if you can hear us. So, I'm just going to ask you to stop now. Can you just acknowledge that you can hear me?

COURT CLERK: Okay, I'm not sure what....

25 K. BENZAKEIN: [Audio clipped] questions I want to ask you.

THE COURT: Sorry, Ms. Benzakein, we've lost you.

K. BENZAKEIN: Oh.

30 THE COURT: We lost the feed when you were asking the question as to whether anything that affects the mind in any way engages freedom of thought, and we didn't get the answer to that. So perhaps if we could just pick up there. I'm not sure what happened, but that's the last I have.

K. BENZAKEIN: Oh, I heard the answer.

Q. Professor, could you repeat the answer?

5 A. Certainly. I think that one has to be careful because it depends on what one means by engaging the freedom of thought. As such, there's a difference between something being  
distantly relevant to or potentially relevant to the freedom  
and something actually triggering a reasonable concern about a  
freedom of thought violation.

10 Q. And then I said that's useful because I'd like to ask you a few more questions. So, for instance, when you go outside and get fresh air, the feeling of being happy about going outside to get fresh air is a thought as you define it, right?

A. Yes.

15 Q. But the fact that it's raining outside so I can't go outside, that is not a violation of my freedom of thought, right?

A. That's correct.

20 Q. And eating an excellent meal might cause me to experience sentiments of joy or satiety or pleasure, those are all thoughts, right?

A. Yes.

25 Q. But interference with those thoughts, for instance, if I don't have enough money to buy a lovely meal, would not be violations of my freedom of thought, right?

30 A. Well, here I think we have to be careful too, because interference with those thoughts, apart from the example that you've mentioned, could be a violation of one's freedom of thought. The example of for example not being able to afford it, I think is a very good example of non-interference or non-violation of one's freedom of thought, but it could be a violation if, for example, government were to say something like, you know, 'Nobody may enjoy a nice dinner anymore' and then have whatever

set of, we'll have to assume, you know, public purpose or a lack of public purpose for it, so if there were interference in someone's desire to, you know, taste good food or something, that could be an interference with freedom of thought, I suppose. But again, it would depend on - well, whether it were a violation of that freedom would depend on what the purpose for the proscription or the regulation would happen to be.

THE COURT: If we assume that an inappropriate government action rendered somebody impoverished, would that be a violation of that concept of freedom of thought, to the extent that it prevents me from enjoying a good meal?

A. Well, there's philosophical discussion of this. I think - okay, we would need to distinguish first of all, just at a philosophical level whether being made to be impoverished, let's say, would count as a freedom of thought violation as opposed to in a particular constitutional context, which might have all sorts of settled law and so forth, or principles on such matters, putting the second part aside. Um, I don't know why we would say that the purposeful impoverishment of people would violate their freedom of thought. I mean, I suppose it could and there are various bad actions or unlawful actions that can violate more than one right or freedom of a person, but to note that impoverishment would make it difficult to afford a meal and thereby to enjoy it, and by that action violate someone's freedom of thought, seems like quite a downstream consideration. There would be other more pressing concerns with the purposeful impoverishment of parties, I think.

THE COURT: What if we prevented me from owning a cell phone or access to the internet? That's more directly related to thought as opposed to how I feel.

5 A. Your Honour, can you describe exactly on your hypothetical what it would be that government would be doing such that a person would not be able to have a cell phone or access to the internet?

10 THE COURT: I'm saying if it deprived me of access to funds, impoverish me to the extent that I was unable to afford the ability to access information such as the internet or through my cell phone, stay with the internet, or buy books, be able to access those materials, that would be a more direct impact, I would think, on freedom of thought as opposed to 15 the enjoyment I might get from accessing those materials, would that be a violation of freedom of thought potentially if the government action was itself um, oppressive?

20 A. I suppose it could be. I'm a little stuck on depriving access to funds part, that's the - it would be one thing to say that you're deprived access simply to those activities. So, if the government says 'You may not have a cell phone', 'You may not have access to the internet', that 25 looks like a clearer perspective violation of freedom of thought.

THE COURT: Right.

30 A. Again, we would have to qualify this, I think, in terms of what the public purpose might be, whether the government has an adequate reason.

THE COURT: Sure.

5 THE COURT: I'm assuming really the government  
wouldn't have an adequate reason for such activities,  
but in any case depriving someone of funds so that  
they cannot purchase those services, let's say, I  
suppose it would matter the reason for depriving  
the party of those funds whether the party could  
actually acquire those funds elsewhere. So, you can  
imagine it might be one thing to say - for government  
to say 'We are not going to subsidize your purchase  
10 of philosophy books' and then a party says, 'Well,  
you know, then I can't access those books'. But it  
would seem to me that a reasonable response would be  
'You may acquire your own funds to go purchase those  
philosophy books'. You know, the fact that government  
doesn't provide the funding for the person to be able  
15 to access the activity doesn't necessarily mean that  
the person in question will thereby have no way to  
reasonably access the activity.

20 THE COURT: I'm thinking more in terms of - leaving  
aside funds, people in custody. I mean, there may  
be other reasons why their liberties are deprived  
but [indiscernible] necessarily imply a freedom of  
thought violation.

25 A. This is a very real consideration, Your Honour.  
Um, I mean, similarly, one might wonder whether  
depriving people of human conversation and the ability  
to interact with others could itself be seen as a  
freedom of thought violation. It would be a concern  
for incarcerated parties who are put in solitary  
30 confinement, let's say. One of the reasons why I  
think this is a very good question is because there  
have been examples, again, from other times and places

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but no less important, of - and stories of people who have had their mental lives really ground down and damaged by their - by their treatment in prison. I mentioned the case of Antonio Gramsci earlier this morning. One of the reasons why that's I think an interesting example is because people have sometimes used it to try to say that actually the state cannot really adversely affect your mental processes, your freedom of thought because, look at the Gramsci example, he ended up writing all of these works while in prison and, you know, his mental life went along quite well.

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However, first of all, Gramsci was allowed to have access to paper and pen and to write when he was in prison. So even though the prosecutors said they wanted to stop or must stop his brain from thinking for 20 years, they really didn't follow through on that. And second, and moreover, it's not correct, it's not right to focus on the heroic examples of the people who happen to make it through.

THE COURT: Right.

A. We have to think about all the people who didn't make it through.

THE COURT: There's many more of them, it seems to me.

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A. Yes. Yes, Your Honour. Far more of them, and some of them are described in other works. Like, for example, the Cayenne Prison on Devil's Island famously described in *Papillon* by Charrière, and by others, people have been put in this horribly tough part of the prison and then are described as still living physically but having had their mental capacities and their mental life really seriously damaged.

5 So, I do - this is to say that I agree with Your Honour that it matters for thinking about incarcerated persons, what kind of access they might have to various of the sorts of - to books and conversations and things of that nature which would matter for thought and for healthy thought.

THE COURT: Go ahead, Ms. Benzakein.

K. BENZAKEIN: Thank you, Your Honour.

10 Q. All right, Professor, I'd like to move on now to the special rapporteur, so we'll just sort of shift our focus. So, I just want to set the scene a little bit, so you contributed to the report of the special rapporteur, you were one of the people consulted, one of the stakeholders?

A. Yes.

15 Q. All right. So, I just want to set the scene a little. I wonder if you have your copy of the special rapporteur in front of you, I want to direct you to paragraph nine. And I'll just get you the page number. It's page 292 of the application record.

20 A. Yes.

25 Q. Okay. So, paragraph nine says, I just want to take it sort of bite by bite and ask you a few questions about this paragraph. So, the special rapporteur writes "To inform the present report, the special rapporteur held seven online roundtable consultations", and I'll just pause there. That was what you participated in, right, one of those online roundtable consultations?

A. Yes. I think that is - I'm just looking at the rest of the sentence.

30 Q. Yes, that's what I wondered. Do you know which type of - whether it was an online roundtable or an online bilateral meeting, do you know which it was?

A. I think it would have been the roundtable consultation because there were more than just two people present. I take a bilateral meeting to be between the special rapporteur and one other party.

5 Q. Fair enough. And I have from your affidavit that it was one virtual meeting on June 2<sup>nd</sup>, 2021, right?

A. Yes.

Q. Do you remember how long the session was?

10 A. I do not remember. I think it was - I don't remember. I think it was maybe 90 minutes or two hours, thereabouts.

Q. We're not talking about a week-long plenary session?

A. Correct, we're not talking about a long session.

15 Q. Okay. So, just moving on in that paragraph, the special rapporteur indicates that those meetings took place with key stakeholders from all five geographical regions. Does that mean the Americas, Europe, Africa and, you know, do you understand those to be the geographical regions that he's referring to?

20 A. Yes, I - I think so. I suppose these would be all five geographical - I'm trying to think of - so, if there are seven continents, um, you would think there might be six regions because Antarctica wouldn't be included, but I take this to be the sort of major regions of the globe. I'm not sure how the United Nations divvies the map, but yes, it's meant to be inclusive of all people.

25 Q. Do you recall if your session was in English exclusively or whether an interpreter was used?

30 A. That I don't recall. I don't know the answer to that. There could well have been an interpreter for those who might have needed it - needed one.

Q. Going back to this paragraph, paragraph nine, the special rapporteur reports that he received and reviewed

submissions from 35 civil society entities. Do you know what a civil society entity is?

5 A. Well, not exactly. Again, I'm looking at the entire list here because there's also, as you'll note, 14 individuals, 12 states, some multilateral organizations, some human rights and equality bodies. So, I take a civil society entity would probably be an entity that would count as a secondary association of some kind within a country that might be a party interested in freedom of thought issues. Probably a domestic association in a country that would be concerned about freedom of thought issues.

10 Q. And I don't want to get bogged down in the details, so let me put it a different way and you tell me if this assists. Was it your impression that the special rapporteur made an effort to gather people with diverse opinions in the field?

15 A. Yes, definitely.

Q. And that there was an effort to be inclusive rather than narrowing the focus?

20 A. Oh yes, I think that's - that's very fair. In fact, from what I understand, and I didn't get a, you know, a full insight into the workings of the process for how the special rapporteur worked in terms of setting up meetings and consulting and inviting parties from around the world to contribute, but I think it's very fair to say that there was a real effort to be quite inclusive.

25 Q. And the purpose of this investigation by the special rapporteur, these discussions, was to really start the process of contending with freedom of thought, right?

30 A. Yes. Or if not to start it at least to try to spur it on a bit more so that more discussion of it would take place and more attention would be - would be brought to it.

Q. Okay. So, I'm gonna suggest that this report - the special rapporteur tells us that this report is the first attempt to collate international consensus on freedom of thought, you agree with that?

A. Yes, I do agree with that.

Q. Okay. And the special rapporteur points out at paragraph 11 of the report, that the concept lacks precision, do you agree with that? And just, sorry, I'll be clear. I can point you to where it says it in the report. Do you agree that the concept lacks precision?

A. This is another good question. I think here one has to be careful because there's a difference between people's understanding of a concept being imprecise and the concept itself being by its nature imprecise. And I think in the first of those two it's fair to say that people's understanding of thought is um, imprecise and not fully conceived, I think that's fair.

Also on the second part, you know - I mean, as you know, I've tried to give an account that I would say is not especially controversial as to how one ought to conceive of thought, but there too, you know, precision is a little elusive, it's hard to be entirely precise. Although I would add to this that the same might be said for the subjects of various other key freedoms like, for example, for speech, you know, what exactly conceptually is the boundary of speech? Is it - you don't normally think it's just spoken words, it might be written, it might also be expressive action in the form of placards and so forth. Similarly, for religion, that's a famously difficult one to fully, precisely define. So, I don't think this is peculiar to thought but what you describe I think is - is an attribute of it, yes.

Q. So, I'm going to suggest, and you can tell me if you agree or disagree, that the concept of thought lacks precision in the legal sphere, you agree with me with that?

A. Um, okay, I think so. I don't - I wanna be careful because I'm - I don't know....

5 Q. I'll ask it a different - I'll ask not a different way, but I'll make my question more precise. It was not a fair question there. The special rapporteur, at paragraph 11 of his report, says that "the concept of thought lacks legal precision in the international community". Do you agree with that statement by the special rapporteur?

A. Yes.

10 Q. Okay. He also says in the same paragraph, that "the concept lacks scientific consensus in terms of what constitutes thought", would you agree with that?

A. Yes, although there too I think it's important for - I think it's important to mention that I'm not sure exactly what one would take to be scientific consensus. So, let me just pause for a second here and say, you know - okay, sometimes people draw upon or refer to scientific consensus or the lack thereof as being especially meaningful. Here I think it's fair to say that there is not scientific consensus, and I would agree that the consensus that is not present is sort of a reasonable condition given our understandings of thought, frankly, our continuing understandings of what thought is and how it works and so forth. That would be different from a claim, for example, that there is "not scientific consensus" on something like climate change where, for example, someone might adduce that as - not to say that that's being suggested here, but sometimes people say, 'Oh, there's no consensus because I found somebody who didn't agree with climate change' and so forth. Um, you know, realistically, there's a fairly reasonable consensus it seems on climate change and that climate change is real and not a hoax or some such. In this case, there isn't a thorough consensus on what thought is but it's not

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of the sort of lack of consensus that people propose when they talk about how they found a scientist who said they didn't believe in climate change.

5 Q. What the special rapporteur says in paragraph 11 is that neuroscientists know quite a bit about thought but not everything, so that's what I mean when I say lack of consensus. Would you agree with that?

A. Yes.

10 Q. And that thought as a neurocognitive process is still - there's still a lot of questions, fair?

A. Very fair.

Q. Okay. Is it fair to say, Professor, that in the end, the special rapporteur is showing a real focus and concern for the external forces that might act on people's thoughts?

15 THE COURT: Sorry, can you repeat that again, Ms. Benzakein?

K. BENZAKEIN: Q. Yes. I'll say it just a bit differently. Is it fair to say that the special rapporteur's concern is about external forces acting on people's thoughts?

20 A. I think so. I might state it a little differently in the sense that that is the main concern in terms of the weight of the - or the predominance of pressing concerns for freedom of thought, what you described seems to comprise the lion's share, especially when one thinks of, for example, people being punished  
25 for the thoughts that they're believed to have, or being excessively investigated or forced to reveal what they're thinking unduly and without adequate grounds and so on, that's the - the majority of the considerations, I think.

30 Q. At paragraph 25 of the report, I'm going to ask you to turn that up. A moment's indulgence.

A. This is at page 296 of the affidavit?

Q. That's right, of the application record. The special rapporteur identifies the attributes of freedom of thought, you've reviewed those recently?

A. Yes, and in answering one of Mr. Lewin's questions.

5 Q. Of course. Do you agree that these attributes as described by the special rapporteur represent the present consensus from the, you know, the plenary of people who participated in these conferences?

10 A. Well, as I think I described to Mr. Lewin, I think that because there are four points mentioned there, A to D under paragraph 25, point A is broadly agreed with, point B is broadly agreed with, um, so is C, and then D is a concern that is, I think frankly, a little lesser but it's still - it's still present. Um, perhaps it's a function of or a product of the special rapporteur's own admission or discussion of how freedom  
15 of thought is not fully understood and has called for better understanding, that he does not include in this list a clear category for prevention of thought, perhaps he would include it under - or would have included it under part C in that paragraph. But in any case, as I mentioned earlier in responding to Mr. Lewin,  
20 I do think that the possibility of stopping someone from thinking something and that category of concern is a reasonable freedom of thought concern that matters. And I would also say that I think that my colleagues who work on the subject would agree  
25 with it so described.

Q. But you'll also agree that the fact that it's omitted tells us something about where the special rapporteur landed with respect to its inclusion, right?

30 A. I think so. Um, you know, as I mentioned in responding to Mr. Lewin, at the very beginning of that paragraph - and I find this a little - um, I found it a tiny bit curious, you know, to say "beyond absolute protection, relatively little

is clear about the right's core elements or attributes". I find that to be a um, a strange statement, a little bit of a strange statement because um, it suggests quite clearly that that's the only thing that's really clear about freedom of thought, that it merits or is understood to have or to warrant absolute protection. Whereas, in fact, brief consideration even shows that absolute protection has to be qualified - the understanding of absolute protection has to be qualified in order to be reasonable, because otherwise point A, not being forced to reveal one's thoughts runs up against, as I mentioned earlier, the daily requirement of people divulging their thoughts to courts and so forth. So, I'm not sure exactly why the special rapporteur wrote the matter up as such but that's what we have.

Q. Well, I'm gonna suggest that that's reflective of the fact that this was the first attempt to describe freedom of thought and that there is more to come, does that seem reasonable?

A. Yes, that seems very reasonable.

Q. And that the special rapporteur likely wanted to remain within the bounds of what was robustly in agreement, fair?

A. Well, okay, I think that's fair. However, various parts of the special rapporteur's report include his accounting of what he sees some people, or some parties as saying matters for freedom of thought or for the right to freedom of thought, whether he agrees that it's central to freedom of thought. So, in some parts of the report he will say, as with paragraph 66 which was mentioned earlier, some people say the following, and he just sort of leaves it that, you know, that this is an important matter. I think in paragraph 25 however, I take what I believe to be your question here, he is meaning to suggest what he calls four possible attributes of the right based on jurisprudence and commentary. So, yes, the upshot is that this is his best reckoning with the issue at hand, and I would agree with you that both the

content of this document and the tenor of it suggest that there is more work to be done in terms of figuring out exactly what the contours of this right happen to be.

5 K. BENZAKEIN: Thank you. If I could just have a moment's indulgence, Your Honour, to go over my notes. I'm pretty sure I'm done.

... PAUSE

10 THE COURT: Ms. Benzakein, I'm thinking of taking the lunch recess in any event. I don't know whether you're going to have any questions, Mr. Lewin, but I certainly will some clarifying questions.

K. BENZAKEIN: Your Honour, I have no more questions but if we're returning in any event after lunch I'll review more thoroughly, I may have one or two more.

15 THE COURT: Let's review that. I take it you're in the same time zone as we are, Professor?

WITNESS: Yes.

20 THE COURT: It's now 10 to 1:00. We had that issue yesterday with somebody from outside the province. Let's return at 2:30 then if we could.

K. BENZAKEIN: Thank you, Your Honour.

THE COURT: All right, thank you.

WITNESS: Thank you.

25 R E C E S S

U P O N R E S U M I N G :

**LUCAS SWAINE: PREVIOUSLY AFFIRMED**

30 THE COURT: Good afternoon. All right, so Ms. Benzakein, I take it you're finished your questions?

K. BENZAKEIN: I am, thank you.

THE COURT: All right, Mr. Lewin, anything in re-examination?

P. LEWIN: No, Your Honour.

THE COURT: All right, I just have a couple of questions Professor, just to get my bearings straight on what we're talking about here because concepts are, as you can imagine, not ones we normally deal with in a criminal court.

One of the things that makes this case interesting is that the Crown, unlike in many other cases, is not conceding that there's been a violation of the right in this case to freedom of thought. Often, the Crown concedes the breach and then argues that the law which occasions the breach otherwise amounts to a reasonable limit in a free and democratic society, something which our rights and freedoms are circumscribed by. And in this case, because they haven't conceded the breach, there's a great deal of discussion about what freedom of thought, specifically what thought itself encompasses. And, as you can imagine, similarly, we don't have a great deal to go on in terms of decisions by our courts, and particularly our higher courts. Although there are decisions that speak to freedom of thought, they're generally in the context of other rights.

**EXAMINATION BY THE COURT**

Q. So, I want to start first of all with the interim report. Has there been a final report, to your knowledge?

## Lucas Swaine - by the Court

A. No, I don't think so. And in fact, there's now a new, or a different special rapporteur.

Q. Right.

A. So, I'm not sure exactly what the status of this is. The special rapporteurs, or rapporteurs in general can be um, can be called to address certain concerns or you know, problems in countries and so forth, but in this case on freedom of thought there hasn't been further movement.

Q. And I take it then you haven't been further consulted by the special rapporteur or their successor?

A. Excuse me, Your Honour, I think I can hear the sound of stapling in the background which makes it a little hard for me to....

Q. Sorry, I'll just repeat myself. I take it you haven't been consulted again by the special rapporteur or their successor?

A. I haven't. I was consulted by the special rapporteur's team apart from the meeting that we had, um, but not since the report's been issued.

Q. All right. Now, you've mentioned your concern with respect to that portion of the report dealing with the concept of freedom of thought as an absolute protection to the extent that in your view, it should be qualified by reasonable limits?

A. Yes, I think that's quite fair to say and as I mentioned earlier, I find it a little perplexing as to why one wouldn't think that reasonable limitations would be both appropriate and required, but this has presumably something to do with just the way that the discourse around this particular right and also the right respecting torture, as I mentioned earlier, has progressed.

## Lucas Swaine - by the Court

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Q. All right. Now, as I understand it, your views with respect to autonomy or freedom or liberty, whatever you want to call it, do not countenance an unrestricted right to do as one pleases; in other words, it's not a complete absence of coercion or restraint that you would consider to be what you refer to as ethical autonomy?

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A. Yes, that's definitely the case. Um, as Your Honour will know, there are people who approach near absolutist views with respect to different rights and freedoms. Sometimes people refer to themselves as "free speech absolutists" on the idea or the notion that, you know, there pretty much any speech should be permitted. But then of course even that view is not especially plausible, frankly, so as people have said, argued otherwise, you know, it would be intolerable to permit naval officers or members of the navy to shout the word "mutiny" on a crowded warship.

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Q. Or "fire" in a crowded theatre.

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A. Yes, when there's no fire, and so on. So, similarly, when it comes to freedom of thought, it's very believable that reasonable protections but not unlimited protection is warranted and required, as it is for the cognate rights and freedoms.

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Q. Sure. So, I suppose there's some conceptual issue as to whether we say that the freedom is violated as opposed to whether the violation is appropriate or reasonable in the circumstances. But leaving that aside, I take it - as I understand your view is that that unrestricted view of autonomy to be modulated by moral character, which is how you referred to it as.  
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## Lucas Swaine - by the Court

A. Yes. Now, that's with respect to the idea of autonomy in particular.

Q. Right.

A. Which I do think is more a broader idea than freedom of thought is.

Q. Mm-hmm.

A. Such that we would normally conceive of autonomy as being something like self-rule...

Q. Right.

A. ...an idea applicable to various bodies including human persons but also to states and provinces and so on, countries, they can have autonomy.

Q. Right.

A. But as with other - as with freedoms, one's self-rule can be used well or badly and may permissibly, I think, be limited and constrained on the argument that even a self-ruling individual let's say, might be in control of his or her faculties and in charge of his or her own life, but might also be doing horrible things to other people as part of their life plan.

Q. Right.

A. And so that is why appropriate restriction is warranted and I think necessary, under the rule of law in a lawful society.

Q. Right. So, I'm curious how much of this case is determined on the basis of a definition of thought as opposed to our concept of something much broader like freedom or autonomy because there are different concepts of what freedom is, for example. I mean, you've espoused what I think most people think of

5 as freedom today which is the absence of coercion or  
restraint. And there's some basis for that in our  
own case law to the extent that one of our previous  
Supreme Court Justices opined that freedom was  
principally the absence of coercion or restraint -  
10 principally, not necessarily exclusively. And I'm  
wondering to what extent that and perhaps your view  
of autonomy modulated by moral character, harkens back  
to an Aristotelian view of freedom as opposed to a  
Hobbes or a Locke or a John Stuart Mill view of  
15 freedom. We're talking now about value or values, so  
the concept that freedom is not just simply the right  
to do as one pleases absent restraint but involves  
self-imposed restraint to the extent that we discipline  
our base desires through training and virtue.

A. Thank you, it's a very good question, Your Honour.  
I have a couple of points to provide on this, and the  
first is that I think you're right that the modal and  
probably common understanding of what freedom is is  
20 that it's something like an absence of restraint of some  
similar sort of conception, what's sometimes called a  
"negative" view of liberty, the absence of interference.

Q. What we'd almost call a licence?

A. We could almost call it licence, indeed. So, if  
25 one were to add in more to that conception and say  
that freedom is something more than just the absence  
of interference, say for example, it might require  
positive elements or duties or other such - or some  
idea of perhaps self-fulfilment or self-realization or  
30 some such, as opposed to mere absence of interference,  
if one were to expand the idea of freedom that way,  
I'm not sure that it would affect the central issue

5 as I understand it, of the case before you. I say this advisedly because I don't really know all about that issue, but since Your Honour mentions it, I'm not sure why we would think that making a conception of freedom broader and more inclusive, let's say, of requirements would mean that it would have an effect on the issue of, let's say, prohibiting or preventing citizens from having access to something or other.

Q. Mm-hmm.

10 A. Now, it might have that effect but one would have to think about how it could have that effect. The second point I would make is that you're quite right that I, in the *Ethical Autonomy* book, argue at length and in detail for a view of personal or individual level rule over oneself, that is, 15 [indiscernible] with moral character and that thereby involves restraints on what one will think or do and so forth. And I offer that as a kind of working, if not ideal for citizenship, or working understanding of how it makes sense to have self-ruling individuals 20 in democratic societies who are nevertheless good people and law-abiding and so forth within reasonable limits. One of the things I think that's interesting about the approach is that it is a moral argument 25 effectively, or an argument at the moral level...

Q. Right.

30 A. ...in favour of such restraints, self-imposed, self-devised and so forth, which is a bit different, as Your Honour might agree, with state-side impositions on behaviour.

Q. Right.

## Lucas Swaine - by the Court

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A. I think naturally one wants to maintain a distinction between how a person should morally behave and how they ought to be in personal life, but then that's different from what the state may prevent the person from doing.

Q. Right.

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A. Because naturally there's a lot of space between things that I probably shouldn't do or say to other people and the level at which the state may prevent me from acting or speaking in the way that I wish to act or speak.

THE COURT: Right. All right.

... PAUSE

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THE COURT: All right, those are all my questions. Any questions arising out of mine, Mr. Lewin?

P. LEWIN: No, Your Honour.

THE COURT: Ms. Benzakein?

K. BENZAKEIN: No, thank you.

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THE COURT: All right. Well, thank you very much, Professor. This is probably one of the most thought-provoking cases I think the courts have to deal with. So, thank you very much, your input is greatly appreciated.

WITNESS: Thank you, Your Honour.

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THE COURT: All right, have a good day. You're free to go.

WITNESS: Thank you.

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THE COURT: So, Mr. Lewin, I take it that's all the evidence for this week. We're back on Monday with Professor Nutt?

P. LEWIN: A week Monday.

## Scheduling Discussion

THE COURT: Or sorry, a week Monday. Yes, a week Monday. And are we on track to finish then by Wednesday in all likelihood?

P. LEWIN: Yeah, very likely as Ms. Benzakein mentioned, we've had some chats about a way to lop off a whole lot of labour, so....

THE COURT: All right.

P. LEWIN: I'm not very hopeful on that but....

THE COURT: And do we have a date for submissions already?

P. LEWIN: We do, April 3<sup>rd</sup> and 4<sup>th</sup>.

THE COURT: All right. And in addition to the factum that I've received, are you going to be providing any written submissions or is it all just going to be oral submissions?

P. LEWIN: No. Well, I've been thinking about that, and I would like to provide something in writing and I'm just kind of mulling over what form for it to take. Um, I mean, I'll tell you what I was thinking, Your Honour and I'd welcome your feedback, but I was thinking of providing a written copy of my oral submissions, so it'll be easier to follow along and then there'll be a million references and they'll all be there, so does that sound like....

THE COURT: I'm quite content with that, and if you wish to supplement them on the date of oral submissions, that's fine. Ms. Benzakein, do you have a view on that?

A. PASHUK: It'll be myself making the submissions, Your Honour. We did try to provide very lengthy, as Your Honour's seen written submissions to cover off all the issues. My intention is not to read that

**244**  
**Scheduling Discussion**

factum in, as you may be happy to hear, but to respond to anything new...

THE COURT: All right.

A. PASHUK: ...that has arisen...

THE COURT: All right.

A. PASHUK: ...or answer Your Honour's questions, I think that's where the focus will be.

THE COURT: That's fine. Well, if either of you do wish to provide that, I certainly would welcome that, but obviously it's not a necessity. All right, so we will stand down then until a week this Monday, all right?

COURT CLERK: So, are we cancelling the rest of this week and....

THE COURT: Yes, we won't need tomorrow or Friday.

COURT CLERK: Thank you. And so, then we're back on the 24<sup>th</sup>?

THE COURT: Yes.

COURT CLERK: Thank you.

THE COURT: All right, thank you very much everyone, have a good day.

P. LEWIN: Thank you, Your Honour.

V. MAZZA: Thank you, Your Honour.

... PROCEEDINGS ADJOURNED TO FEBRUARY 24<sup>TH</sup>

FOR CONTINUATION

**FORM 3**  
**ELECTRONIC CERTIFICATE OF TRANSCRIPT**  
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I, DIANA RORKE certify that this document is a true and accurate transcript of the recording of

**R v. Samer AKILA**

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February 28, 2024

Date



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