

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HIS MAJESTY THE KING

Appellant

- and -

LESLIE BORY

Respondent

**INTERVENER'S FACTUM
(THE ALLIANCE OF CANADIANS COMBATting ANTISEMITISM)**

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PART I: STATEMENT OF THE CASE AND OVERVIEW

1. The appellant, His Majesty the King, appeals against the acquittal of the respondent, Leslie Bory, on a charge of public incitement of hatred, contrary to s. 319(1) of the *Criminal Code*.
2. Pursuant to s. 319(1) of the *Criminal Code*, a person who, by communicating statements in any public place, incites hatred against an identifiable group, where such incitement is likely to lead to a breach of the peace, is guilty of an offence. Public place is defined in s. 319(7) as any place to which the public has access as of right or by invitation, express or implied.

3. The Crown submits that the trial judge erred in law in directing a verdict of acquittal on the basis that the respondent did not communicate statements in a “public place,” because he did so online, and not at a physical location where the public can meet and be incited.
4. The respondent, Mr. Bory, contends that the “immediate” causal relationship between statements of incitement and a likely breach of the peace compels the conclusion that incitement can only take place at a physical location. This is said to distinguish public incitement from wilful promotion of hatred.
5. The Alliance of Canadians Combatting Antisemitism (ALCCA), pursuant to leave granted on July 23, 2026 (Tab A) intervenes as a friend of the Court solely in relation to whether the offence requires proof that an accused communicated statements at a physical location or meeting place for the public.
6. The intervener submits that the trial judge erred in law. Public incitement of hatred can take place by communicating statements through electronic media accessible to the public. In addition to the submissions already made by the Crown, ALCCA relies upon:
 - (a) the decision of the Supreme Court of Canada in *R. v. Marakah*, which analyzes the “place” where electronic communications such as text messages occur, strongly supporting, if not compelling, the conclusion that public place includes an electronic space accessible to the public;
 - (b) The broad definitions of “communicating” and “statements,” extending beyond statements communicated at a physical place attended by the public, as well as the absurd consequences flowing from a contrary interpretation; and
 - (c) The absence of statutory language compelling proof of “immediate danger” or “an immediate causal relationship” between the incitement and a likely breach of the peace.

PART II: SUMMARY OF THE FACTS

7. It was undisputed, for the purposes of the directed verdict of acquittal, that the respondent incited hatred against Jews through statements communicated on Bitchute, a video sharing platform fully accessible by the public without a subscription or login.
8. ALCCA will not address the Crown's alternative argument that the prosecution did lead evidence that the accused communicated statements in a physical location.

PART III: ISSUES AND THE LAW

The Marakah decision strongly supports or compels the conclusion that incitement of hatred communicated through online platforms accessible to the public takes place in a public place.

9. In *Marakah*, the Supreme Court of Canada decided that text messages that have been sent and received may, in some cases, be protected under s. 8 of the Charter.¹ In considering whether the sender has a reasonable expectation of privacy in text messages retained by the recipient, the court's analysis was guided by four lines of inquiry, two being "what was the subject matter of the search?" and "whether the claimant's subjective expectation of privacy (if established) was objectively reasonable?"
10. In relation to the first line of inquiry, McLachlin C.J., speaking for the court's majority, stated:

[15] The subject matter of a search must be defined functionally, not in terms of physical acts, physical space, or modalities of transmission. As Doherty J.A. stated in *R. v. Ward*, [2012 ONCA 660](#), 112 O.R. (3d) 321, at para. 65, a court identifying the subject matter of a search must not do so "narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action" The court's task, as Doherty J.A. put it in *Ward*, is to determine "what the police were really after" (para. 67).

[16] One option can be eliminated at the outset. The subject matter of the search at issue was not Mr. Winchester's iPhone, from which the text messages in this case were recovered.

¹ [R. v. Marakah](#), 2017 SCC 59.

Neither the iPhone itself nor its contents generally is what the police were really after. The subject matter must, therefore, be defined more precisely.

[17] Correctly characterized, the subject matter of the search was Mr. Marakah’s “electronic conversation” with Mr. Winchester: see *R. v. TELUS Communications Co.*, [2013 SCC 16](#), [2013] 2 S.C.R. 3, at para. [5](#), per Abella J. To describe text messages as part of an electronic conversation is to take a holistic view of the subject matter of the search. This properly avoids a mechanical approach that defines the subject matter in terms of physical acts, spaces, or modalities of transmission: see Spencer, at paras. [26 and 31](#). It also reflects the technological reality of text messaging.²

11. In relation to the fourth line of inquiry, McLachlin C.J. indicated that the place of search may be helpful in determining whether a person has a reasonable expectation of privacy for the purposes of s. 8:

[26] Place may inform whether it is reasonable to expect a verbal conversation to remain private; depending on the circumstances, a conversation in a crowded restaurant may not attract the protection of s. 8, while the same conversation behind closed doors may.

[27] The factor of “place” was largely developed in the context of territorial privacy interests, and digital subject matter, such as an electronic conversation, does not fit easily within the strictures set out by the jurisprudence. What is the place of an electronic text message conversation? And what light does that shed on a claimant’s reasonable expectation of privacy? Place is important only insofar as it informs the objective reasonableness of a subjective expectation of privacy.

[28] One possibility is that an electronic conversation does not occupy a particular physical place. All or part of it may be on the sender’s phone or the recipient’s, or in radio waves or a service provider’s database, or on a remote server to which both the sender and the recipient (or the recipients) have access, or some combination of these. **This interconnected web of devices and servers creates an electronic world of digital communication that, in the 21st century, is every bit as real as physical space. The millions of us who text friends, family, and acquaintances may each be viewed as having appropriated a corner of this electronic space for our own purposes. There, we seclude ourselves and convey our private messages, just as we might use a room in a home or an office to talk behind closed doors. The phrase “chat room” to describe an Internet site through which people communicate is not merely a metaphor. In a similar way, text messaging can create *private* chat rooms between individuals. Although electronic, these rooms are the place of the search.** This suggests that there would be a reasonable expectation of privacy in a text message conversation (emphasis added.)

² *R. v. Marakah*, 2017 SCC 59, at [paras. 15-17](#).

[29] Another option is to say that the place of the search is the device through which the messages are accessed or stored: see Moldaver J.'s reasons, at paras. 144-45 and 151. Again, this suggests there may be a reasonable expectation of privacy in a text message conversation. Control or regulation of access to a place is relevant to a reasonable expectation of privacy: see *Edwards*, at para. 45. I may have a high expectation of privacy in my own phone, which I completely control, a lesser expectation of privacy in my friend's phone, which I expect her to control, and no reasonable expectation of privacy at all if I expect the text message to be displayed to the public. A reasonable expectation of privacy may exist on a spectrum or in a "hierarchy" of places: *Tessling*, at para. 22.

[30] The place of the search is simply one of several factors that must be weighed to determine whether the accused had a reasonable expectation of privacy for the purposes of s. 8 of the *Charter*. Whether one views the place of an electronic conversation as a metaphorical chat room or a real physical place, it is clear that the place of the text message conversation does not exclude an expectation of privacy. At the end of the day, s. 8 "protects people, not places": *Hunter*, at p. 159. The question always comes back to what the individual, in all of the circumstances, should reasonably have expected.³

12. While *Marakah* arose in the context of s. 8 of the *Charter*, its rationale is no less applicable to how the term "public place" is interpreted for the purposes of s. 319(1) of the *Criminal Code*. Electronic conversations exist within an "electronic world of digital communication" that is "every bit as real as physical space." Such communications occur in a place, whether viewed as a "chat room" or "real physical place."
13. The court recognized that privacy expectations for electronic communications will vary, depending on public exposure. There may be no reasonable expectation of privacy at all if the sender expects the communication "to be displayed to the public. A reasonable expectation of privacy may exist on a spectrum or in a **"hierarchy of places."** (para. 29, emphasis added.)

³ *R. v. Marakah*, 2017 SCC 59, at paras. 26-30.

14. It follows, as a matter of logic and functionality that communications on online platforms displayed to or accessible to the public occur in places that are public. This also accords with the definition of “public place” earlier referred to.
15. Stated another way, once electronic communications are treated as existing in legally recognizable communicative spaces analogous to in-person communications occurring in physical meeting places, there can be no rationale for confining s. 319(1) to the latter. *Marakah* rejects formalism that would ignore the realities of modern communication.
16. "Public place" should be interpreted in a technologically neutral manner. Parliament enacted the offence to prevent public incitement of hatred likely to cause a breach of the peace. The mischief addressed by the provision is public dissemination and public impact, not the physical location of the speaker or audience.
17. A construction limiting "public place" to streets, parks, halls or a residential meeting place would allow the very same speech to escape criminal liability merely because it was delivered electronically, but to a potentially much larger audience through the internet.
18. As the Crown has pointed out, the term "public place" historically captured locations where members of the public could gather and receive messages.
19. Today:
 - video-sharing and livestream platforms such as YouTube, Twitch, and TikTok;
 - social media platforms such as X, Facebook, and Instagram;
 - online discussion forums and message boards such as Reddit; and
 - instant messaging applications and channels such as Telegram, WhatsApp, and Facebook Messenger,

may all serve the same function as a town square or in-person public meeting.

20. Indeed, they often reach vastly larger audiences and allow rapid amplification and mobilization. The risk of a resulting breach of the peace may be greater online than in many traditional physical locations. Mr. Bory's submission that immediacy compels an interpretation that confines a public place to a physical space cannot bear scrutiny. The transmission of an electronic message instantly accessible to many more people than the typical physical space may increase the likelihood of a breach of the peace exponentially.
21. A purposive interpretation therefore supports treating publicly accessible online platforms as public places because they are the contemporary equivalents of the public forums Parliament sought to regulate. *Marakah* strongly reinforces that conclusion.

The definitions of "communicating" and "statements" support, if not compel the same conclusion

22. For the purposes of s. 319(1), "communicating" includes communicating by telephone, broadcasting or other audible or visible means. "Statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations. The Crown has already cited the broad definition of public place. All these definitions are set out in s. 319(7). It is difficult, if not impossible, to reconcile the breadth of these definitions with a requirement that incitement occur only through communication at a physical meeting place.

A purposive interpretation avoids absurd results

23. A narrow physical interpretation would produce anomalous outcomes:

- A speaker addressing 50 people in a park would be in a "public place."

- The same speaker addressing 500,000 people through a public livestream would not be.

24. Canadian courts generally avoid interpretations that defeat legislative purpose when a purposive interpretation is available.

25. Such a result would frustrate Parliament's objective of preventing hatred likely to provoke public disorder. A recent unreported decision⁴ is illustrative. The accused was convicted of public incitement of hatred against the Jewish people. The agreed-upon facts included (but were not limited to) the following: the accused publicly incited hatred against Jews in a public place, namely on his social media posts, by making a series of posts, including comments, re-posts and videos of himself. The posts were on two social media accounts belonging to the accused (Facebook and Instagram). Both were publicly accessible. His Facebook account had over 1,200 friends and 1,400 followers. The accused made numerous hateful posts targeting Jews under the guise of attacking Zionists. He used the term "Zionist" as a pejorative proxy reference for Jewish people, blaming Jews for the actions of Israel. He repeatedly engaged in common antisemitic tropes including referring to Zionists and/or Jews as baby killers and pedophiles and compared Jews to subhuman disease-ridden vermin. He encouraged others to engage in the violent targeting of Jews. In one post, he told people to "take to the streets and actively target Zionist entities throughout North America before Palestine and its Semetic (sic) people are fully decimated." He warned the public that "ZIONISTS ARE LIKE RATS AND TICKS HAD BABIES THAT CARRY RABIES AND BUBONIC PLAGUE 110% ROTTED INFECTED SHIT SKUM GOYIM THAT MUST BE CLEANSED WITH FIRE."

⁴ *R. v. Amor*, Ontario Court of Justice, dated April 16, 2026.

26. Unfortunately, this does not represent an isolated instance of internet hate speech targeting Jews and other vulnerable groups accompanied by urging readers to kill or otherwise act violently against the targeted group. Publicly accessible internet sites have international, national and local reach. They can inspire violence against targeted communities. They can augment and amplify poisonous messages in ways much more pronounced than merely through in-person incitements.

Subsection 319(1) does not require immediate danger, only a causal connection between the incitement and a likely breach of the peace.

27. The above illustration is relevant to this submission as well. Subsection 319(1) imposes no requirement on the prosecution to prove that an incitement will immediately lead to a breach of the peace. On the contrary, an incitement may urge listeners to travel to a particular location to attack the targeted group or to mobilize for violent action on a specified or unspecified future day. Proof that incitement will likely lead to a breach of the peace may involve proof of imminent or immediate violence at a physical scene (explaining why police are empowered to act quickly without the Attorney General's consent) or it may involve proof of a less immediate but nonetheless real likelihood of a breach of the peace. Indeed, investigative scans of social media responses to online incitements represent one way of determining whether the incitements are likely to lead to a breach of the peace.

28. It should be noted that there is no language contained in s. 319(1) that imposes a requirement of imminence. This distinguishes it, for example, from s. 30 of the Criminal Code which empowers someone who witnesses a breach of the peace to interfere to prevent its continuance or renewal and to detain someone who commits or is about to join in or to renew the breach of the peace. See also s. 31(1) which empowers a peace officer who witnesses a

breach of the peace to arrest a party found to be committing a breach of the peace or who they reasonably believe is about to join in or renew the breach of the peace.

29. An argument predicated on any requirement that a likely breach of the peace caused by incitement to hate must be imminent is not supported by the language or purpose of the offence.

Conclusion

30. For the purposes of s. 319(1), the essential characteristic of a public place is not based on physical geography but public accessibility. Where statements are communicated through an online platform accessible to the public, the communication occurs in a public place because it performs precisely the function historically associated with the town square: the dissemination of messages to members of the public. The intervener's submissions are designed to explain why this conclusion is supported by the Supreme Court of Canada's jurisprudence, the full range of definitions associated with the offence, an analysis of the absurd results flowing from a contrary interpretation and the absence of any immediacy requirement associated with the offence.

PART IV: ORDER REQUESTED

31. ALCCA requests that s. 319(1) be interpreted by this Honourable Court in a manner consistent with these submissions.

PART V: SEALING ORDERS, PUBLICATION BANS OR OTHER RESTRICTION ON PUBLIC ACCESS

32. ALCCA is not aware of any sealing orders, publication bans, or other restrictions on public access.

DATED at Toronto, 29th day of July 2026.



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SCHEDULE A: AUTHORITIES TO BE CITED

R. v. Marakah, 2017 SCC 59

R. v. Amor, Ontario Court of Justice, dated April 16, 2026.

SCHEDULE B: RELEVANT LEGISLATIVE PROVISIONS

Criminal Code (R.S.C., 1985, c. C-46)

Hate Propaganda

Public incitement of hatred

319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Definitions

319 (7) In this section,

communicating includes communicating by telephone, broadcasting or other audible or visible means; (*communiquer*)

identifiable group has the same meaning as in section 318; (*groupe identifiable*)

public place includes any place to which the public have access as of right or by invitation, express or implied; (*endroit public*)

statements includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations. (*déclarations*)

TAB A

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bory, 2026 ONCA 542

DATE: 20260723

DOCKET: M57276 (COA-25-CR-0439)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

His Majesty the King

Appellant

and

Leslie Bory

Respondent

Dana Achtemichuk, for the appellant

Ian McCuaig, for the respondent

Mark Sandler, for the proposed intervener, The Alliance of Canadians Combatting Antisemitism

Heard: July 20, 2026

REASONS FOR DECISION

I. OVERVIEW

[1] The Alliance of Canadians Combatting Antisemitism (“ALCCA”) seeks leave to intervene in this appeal (COA-25-CR-0439). The Crown consents to the motion. Mr. Bory opposes the motion.

[2] Mr. Bory was convicted of advocating genocide, wilful promotion of hatred, and two counts of uttering threats. He was acquitted of public incitement of hatred and careless storage of ammunition. He received a three-year global sentence, reduced to time served after credit for pre-trial custody. The Crown appeals the verdict of not guilty of public incitement of hatred and also seeks leave to appeal sentence. Mr. Bory also seeks leave to appeal sentence.

[3] The appeals are scheduled to be heard on Friday, November 20, 2026.

[4] While the intervention motion commenced with a request that counsel for Mr. Bory be removed as counsel of record, following an in-court discussion, counsel agreed to continue with the matter on the terms already set out in the record. Specifically, the Crown appeal will continue as originally envisioned and Mr. Bory's appeal will continue strictly as a sentence appeal.

[5] Following resolution of that issue, the motion for leave to intervene was heard. Counsel to Mr. Bory responded to the motion. While he was offered the opportunity to file written submissions following the hearing, and prior to a decision being made, counsel declined to do so, confident that all responding submissions had been made.

[6] These reasons address why I would grant the ALCCA leave to intervene.

II. BACKGROUND

[7] Over the course of two years, Mr. Bory posted videos online in which he used inflammatory and derogatory language. He called for his viewers to engage in acts of violence against Jews. Police found multiple firearms and over 20,000 rounds of ammunition in his residence. He was charged with advocating genocide, wilful promotion of hatred, and public incitement of hatred. He was also charged with two counts of uttering threats and careless storage of ammunition.

[8] Following a directed verdict application, Mr. Bory was acquitted of public incitement of hatred and careless storage of ammunition. He was convicted by a jury of the remaining counts. The Crown's appeal from acquittal deals only with the public incitement of hatred acquittal.

[9] The offence of public incitement of hatred is made out where the accused communicated, in a public place, statements that incite hatred against an identifiable group, where such incitement is likely to lead to a breach of the peace: *Criminal Code*, R.S.C. 1985; c. C-46, s. 319(1). "Public place" is defined in s. 319(7) as including "any place to which the public have access as of right or by invitation, express or implied". The trial judge directed a verdict of not guilty on this count because the statements were made online only and the requirement that the statements be communicated in a "public place" was not satisfied.

[10] The Crown argues that this was an error, and the key question for this offence is whether the public has access to the statements – which they did in this

case. The Crown submits that online spaces are the new public square and the definition of “public place” in the *Criminal Code* should be interpreted accordingly.

III. MOTION FOR INTERVENTION

i. Applicable test on a motion for leave to intervene

[11] In determining motions for leave to intervene as a friend of the court pursuant to r. 30 of the *Criminal Appeal Rules*, the court will generally consider “the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties”: *R v. Doering*, 2021 ONCA 924 at para. 10; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167.

ii. Submissions of the moving party

[12] The ALCCA seeks leave to intervene in the Crown’s appeal against acquittal only (COA-25-CR-0439). It seeks leave on its own behalf, as well as on behalf of four partner organizations whose interests it also proposes to advance in its intervention: the Centre for Israel and Jewish Affairs, the Canadian Antisemitism Education Foundation, B’nai Brith Canada, and Friends of Simon Wiesenthal Center.

[13] The ALCCA intends to make submissions on a single issue: whether s. 319(1) requires proof, as a matter of law, that the incitement of hatred took place

through the communication of statements in a physical location. They have filed a draft factum, which I have reviewed.

[14] Their proposed submissions will address the following arguments and issues:

- (1) *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, which analyzes the “place” where electronic communications such as text messages occur, strongly supports, if not compels, the conclusion that “public place” includes an electronic space accessible to the public.
- (2) The broad definitions of “communicating” and “statements” extend beyond statements communicated at a physical place attended by the public; absurd consequences flow from a contrary interpretation.
- (3) There is an absence of statutory language compelling proof of “immediate danger” or “an immediate causal relationship” between the incitement and a likely breach of the peace.

iii. Submissions of the responding party

[15] Mr. Bory contends that the ALCCA has nothing novel to add to this appeal. He characterizes their submissions as largely duplicative of the Crown’s submissions.

iv. Analysis and disposition

[16] The intervention is appropriate based on the nature of the case and the issues raised. The interpretation of “public place” for the purposes of s. 319(1) of the *Criminal Code* is an issue with wide-reaching impact, particularly as public discourse increasingly moves into the online sphere. It also does not appear that an appellate court has provided guidance on the essential elements of the offence of public incitement of hatred, so an intervener’s perspective is likely to assist this court.

[17] I am also satisfied that the ALCCA, and the groups on whose behalf it seeks leave to intervene, are well-recognized groups with expertise on these issues.

[18] In my view, this intervention turns on whether the proposed submissions are sufficiently distinct from those of the appellant Crown so as to be useful. They are.

[19] The Crown deals with the alleged “public place” error briefly, in only three paragraphs, arguing that so long as the statements are accessible by the public, the forum in which they are accessible is irrelevant. The balance of the Crown’s submissions deal with their sentence appeal and Mr. Bory’s sentence appeal, neither of which involves the “public place” interpretation issue.

[20] The ALCCA’s proposed submissions, by contrast, deal with this statutory interpretation issue in detail and suggest analytical frameworks from other contexts that the panel could rely on in considering this issue. They therefore do not seek

to expand the issues. Nor are they proposing arguments that duplicate the arguments already made by the parties; instead, they have a different perspective on the existing issue and their contributions are likely to assist the panel in approaching the issue.

[21] I am satisfied that the intervention is appropriate. I order that the ALCCA be permitted to intervene on the following terms:

- (1) The ALCCA is granted leave to intervene pursuant to r. 30(1) of the *Criminal Appeal Rules*.
- (2) The ALCCA shall take the record as it is and not supplement the record by way of its factum or otherwise.
- (3) The ALCCA shall serve and file the draft factum provided on this motion within one week of these reasons being released.
- (4) Mr. Bory may deliver a factum not exceeding 11 pages responding to the factum filed by the ALCCA by September 30.
- (5) The ALCCA shall be permitted a maximum of 20 minutes to make oral submissions at the hearing of the appeal.
- (6) Mr. Bory shall be permitted an additional 20 minutes of submissions at the hearing of the appeal to respond to the ALCCA.

- (7) The ALCCA shall not be entitled to, nor subject to, any costs on this motion or on the appeal.

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