

CITATION: R. v. Whatcott, 2020 ONSC 5427
COURT FILE NO.: CR-19-70000064-0000
DATE: 20200910

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
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HER MAJESTY THE QUEEN) *Scott Patterson and Rebecca De Filippis, for*
) *the Crown*
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– and –)
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)
WILLIAM WHATCOTT) *Lindsay Daviau and John Rosen, for Mr.*
) *Whatcott*
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)
) **HEARD:** January 14, 2020

R.F. GOLDSTEIN J.

ADDENDUM TO REASONS FOR JUDGMENT DATED MARCH 16, 2020

[1] On March 16, 2020, I issued reasons for judgment on a Crown application to introduce evidence at the trial of Mr. Whatcott: *R. v. Whatcott*, 2020 ONSC 1599. In the course of those reasons I held that certain evidence going to Mr. Whatcott’s motive was not admissible. I ultimately held that the probative value of the proposed evidence was outweighed by its prejudicial effect.

[2] Among the proposed motive evidence were flyers distributed by Mr. Whatcott in 2000 and 2001 in Saskatchewan. In my reasons I indicated that the parties would negotiate over those flyers (which I will refer to as the Saskatchewan flyers, to distinguish them from the flyers that are the subject matter of the charge in this case). The parties have indicated that in fact I was in error, and that the Crown wishes to introduce the Saskatchewan flyers as evidence of motive. The defence resists.

[3] In paragraphs 10-12 of my original reasons I stated:

In 2000 and 2001 Mr. Whatcott distributed four flyers in Saskatchewan. The flyers were entitled "Keep Homosexuality out of Saskatoon's Public Schools" and "Sodomites in our Public Schools". The flyers were distributed on behalf of an organization called the "Christian Truth Activists". Some people who received the flyers complained to the Saskatchewan Human Rights Commission.

The Human Rights Commission found that Mr. Whatcott had breached s. 14(1)(b) of the Saskatchewan Human Rights Code (which I will refer to as the SHR Code, to distinguish it from the Criminal Code. That section of the SHR Code prohibited any person to publish or display any representation that "exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground." One of the prohibited grounds in the SHR Code was sexual orientation. The Saskatchewan Human Rights Tribunal held that the flyers violated s. 14(1)(b) of the SHR Code. Mr. Whatcott was prohibited from distributing further fliers and fined.

The case eventually made its way to the Supreme Court of Canada. There were two issues before the Court. First, whether s. 14(1)(b) of the SHR Code was constitutional; and second, whether the four flyers violated s. 14(1)(b) of the SHR Code. The Court held that s. 14(1)(b) limited protections under s. 2(a)(freedom of religion) and s. 2(b)(freedom of expression) of the Canadian Charter of Rights and Freedoms but that the limits were justified under s. 1 of the Charter. Accordingly, s. 14(1)(b) of the SHR Code was constitutional. The Court also held that two of the flyers did not violate the SHR Code: *Saskatchewan Human Rights Commission v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467 (Application Record, Appendix C).

[4] The Crown proposes to introduce the Saskatchewan flyers as evidence of Mr. Whatcott's animus towards gay people. Mr. Whatcott's animus is evidence of his motive, which is in turn relevant to the essential element of intent.

[5] There were four Saskatchewan flyers. Rothstein J. for the Court described two of them at paras. 182-183:

The Tribunal isolated certain passages from each of the flyers. In regard to Flyer D, it found that the combined references in six phrases "clearly exposes or tends to expose [homosexuals] to hatred, ridicules, belittles or otherwise affronts their dignity on the basis of their sexual orientation" (para. 51):

... children ... learning how wonderful it is for two men to sodomize each other; Now the homosexuals want to share their filth and propaganda with Saskatchewan's children; degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience; ex-Sodomites and other types of sex addicts who have been able to break free of their sexual bondage and develop wholesome and healthy relationships; sodomites and lesbians who want to remain in

their lifestyle and proselytize vulnerable young people that civil law should discriminate against them;
 Our children will pay the price in disease, death, abuse ... if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong.

The Tribunal made an identical finding with respect to the following passages from Flyer E (para. 50):

Sodomites are 430 times more likely to acquire Aids and 3 times more likely to sexually abuse children!;
 Born Gay? No Way! Homosexual sex is about risky and addictive behaviour!;
 If Saskatchewan's sodomites have their way, your school board will be celebrating buggery too!;
 Don't kid your selves; homosexuality is going to be taught to your children and it won't be the media stereotypes of two monogamous men holding hands;
 The Bible is clear that homosexuality is an abomination;
 Sodom and Gomorrah was given over completely to homosexual perversion and as a result destroyed by God's wrath;
 Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children.

[6] Rothstein J. agreed with the Tribunal that these two Saskatchewan flyers exposed gay people to hatred. He then described the other two at para. 195:

Flyers F and G are identical, and are comprised mainly of a reprint of a page of the classified advertisements from a publication called *Perceptions*. Printed by hand in bold print at the top of the page are the words "Saskatchewan's largest gay magazine allows ads for men seeking boys". Although there were conflicting views expressed on whether the references in the ads in question to "any age"; "boys/men"; or "[y]our age ... is not so relevant" were in fact a reference to men seeking children (as Mr. Whatcott meant to imply by his additional biblical reference), the true purpose and meaning of the personal ads are, for our purposes, irrelevant. Mr. Whatcott also added the handwritten words: "If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea' Jesus Christ" and "[t]he ads with men advertising as bottoms are men who want to get sodomized. This shouldn't be legal in Saskatchewan!".

[7] The Saskatchewan flyers themselves are attached to the Supreme Court's decision as appendices.

[8] In my view, the Saskatchewan flyers should not be admitted notwithstanding the Supreme Court's finding that two of them express hatred. I agree with the Crown that those two flyers are capable of showing that Mr. Whatcott has an animus towards gay people, unlike most of the other

material the Crown sought to introduce. In that sense, they are also more probative than the other material. I find, however, that the prejudicial effect of the Saskatchewan flyers, like the rest of the proposed motive evidence, outweighs the probative value. I say that for the same reasons that I set out in my original reasons: see my original reasons at paras. 43-46.

[9] The Crown's application to introduce the Saskatchewan flyers is dismissed.


R. F. Goldstein J.

Released: September 10, 2020

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