
CANADA / JUDGMENT

R. v. Fawcett

2008 BCSC 215

COURT

Supreme Court of British Columbia

DECIDED

4 February 2008

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2008 BCCA 215 R. v. Noble

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Noble,

2008 BCSC 215

Date: 20080204

Docket: 26508-2

Registry: Fort St. John

Regina

v.

Keith Francis William Noble

Before: The Honourable Mr. Justice Parrett

Oral Reasons for Judgment

February 4, 2008

Counsel for Crown:

M. Fulmer

Appearing on his own behalf:

K.F.W. Noble

Place of Trial/Hearing:

Prince George, B.C.

[1] THE COURT: The accused is charged on a single count indictment that:

Keith Francis William NOBLE, between the 1st day of January, 2003, and the 26th day of October, 2005, at or near Fort St. John in the Province of British Columbia did by communicating statements other than in private conversation, wilfully promote hatred against identifiable groups, namely, Jews, Blacks, homosexual or gay persons, non-whites and persons of mixed race or ethnic origin, contrary to Section 319(2) of the Criminal Code.

- [2] During the course of this trial, which occupied all or part of some nine days, a total of 11 witnesses were called by the Crown. The accused neither called evidence nor testified himself, and save for certain very limited exceptions, met every request for his participation on any basis with the repeated refrain that "I am not participating in this proceeding."
- [3] The Crown's evidence against the accused, in general terms, comes from three specific sources:
- (a) the search of the apartment occupied by the accused in Fort St. John and the materials seized during the course of that search;
 - (b) materials retrieved from the hard drive of the computer located in the apartment and used to access the Internet; and
 - (c) materials retrieved from or downloaded from various websites on the Internet which the Crown submits came from the accused.
- [4] After receiving a complaint concerning activity and postings on an Internet website, members of the RCMP began an investigation which led to their obtaining and executing a search warrant on an apartment occupied by the accused at Apartment #203, 10303 - 96th Avenue, in Fort St. John, British Columbia. Upon entry, a police officer attached to the identification section took a series of photographs of the interior of the apartment, together with photographs of the building in which the apartment was located. A booklet containing some 64 of these photographs was entered at Exhibit 3.
- [5] At the time the police executed the search warrant, they found a single individual, the accused Keith Francis William Noble, in the apartment.
- [6] Within the apartment, the police located a whole series of items, including a resumé in the name of Bill Noble, a Telus bill in the same name in respect of residential telephone services for 250-787-1405, and an application for registration of a copyright of a work "Exterminance." The form records the author and owner as Bill Noble.
- [7] The evidence of Crystal Harmon of Sterling Management Services identified the rental agreement documents for the apartment in the accused's name and identified him as the sole occupant. Within the accused's apartment, the police located and seized a computer which was connected to the Internet. On its hard drive, they located a series of files, images, and electronic documents, many of which appeared on and formed a part of the Internet website www.exterminance.org. It is this website and messages and postings on other

websites that the Crown submits originated from the accused and this computer in the apartment in Fort St. John.

- [8] The presence of software capable of creating and maintaining the website on the hard drive of the computer seized provides, the Crown submits, further strong evidence linking the accused directly to the Exterminance website.
- [9] Within the apartment, the police found copies of other documents which were also located in electronic form on the computer and on the Exterminance website.
- [10] The indictment in this case contains a single count charging the accused with an offence under s. 319(2) of the Criminal Code. This section of our Criminal Code provides that:

Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group 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.

- [11] The gravamen of this offence is wilfully promoting hatred against any identifiable group by communicating statements other than in private conversation.
- [12] There are some unusual features of the offence created by this section of the Criminal Code. Firstly, there is the exception created for private conversation. Secondly, an "identifiable group" is defined in s. 318(4) as "any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation." Thirdly, "public place" is defined as "any place to which the public have access as of right or by invitation, express or implied."

- [13] Two other definitions are of note with respect to this offence. Both are found in s. 319(7):

"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.

- [14] As a result of the drafting of the indictment in this case, the Crown has further particularized the offence by expansively defining the identifiable groups by adding the following language: "namely, Jews, Blacks, homosexual or gay persons, non-whites and persons of mixed race or ethnic origin."
- [15] The Supreme Court of Canada considered the exclusion of private conversation from s. 319(2) in *R. v. Keegstra*, [1990] 3 S.C.R. 697. In giving the majority decision, Dickson C.J.C. at page 772 to 773 wrote that:

In assessing the constitutionality of s. 319(2) . . . an immediate observation is that statements made "in private conversation" are not included in the criminalized expression . . . Indeed, that the legislation excludes private conversation, rather than including communications made in a

public forum, suggests that the expression of hatred in a place accessible to the public is not sufficient to activate the legislation . . . Moreover, it is reasonable to infer a subjective mens rea requirement regarding the type of conversation covered by s. 319(2), an inference supported by the definition of "private communication" contained in s. 183 of the Criminal Code. Consequently, a conversation or communication intended to be private does not satisfy the requirements of the provision if through accident or negligence an individual's expression of hatred for an identifiable group is made public.

[16] In *R. v. Elms* (2006), 217 C.C.C. (3d) 217, the Ontario Court of Appeal further considered this exclusion. In this case, the accused was charged under s. 319(2) on the basis of the content of CDs he was offering for sale. The defence advanced the argument that the offer for sale had been made at a private party which brought it within the exclusion.

[17] Juriansz J.A., speaking for the court at paragraphs 12 to 13 wrote that:

The issue, however, is not whether the statement is communicated in a setting that is private, but rather whether it is made "other than in private conversation." The evidence was that the bar had been rented for a private function and the general public was not admitted. The affair . . . seems to have been promoted within the skinhead subculture. There was no suggestion in the evidence of any personal selection of those who entered. The evidence was that the premises had not been rented to the appellant and he had no control over who might enter.

I am satisfied that the Superior Court judge was correct in not regarding his finding that the setting was a private party as relevant to the analysis.

[18] In *R. v. Ahenakew*, 2006 SKQB 272, Chief Justice Laing had before him an appeal of a conviction under s. 319(2) for wilfully promoting hatred against people of the Jewish faith. At paragraph 15 of his reasons, he observed that:

The Crown has the burden of proving beyond a reasonable doubt that the statements made by the appellant were not made in a private conversation. The question of whether statements are made in a private conversation is a question of mixed fact and law. Interpretation of "private conversation" in s. 319(2) is a matter of law. Whether the evidence falls within that interpretation is a matter of fact.

[19] Section 183 of the Criminal Code defines a private communication as being one that is made under circumstances "in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it."

[20] The authorities that have considered the application of s. 319(2) since the Supreme Court of Canada's decision in *Keegstra* have maintained the level of concern that saw the difficult balance struck between the Supreme Court's conclusions about the pernicious nature of hate promotion and their obvious concern about undue restriction on freedom of expression.

[21] In finding that s. 319(2) was a reasonable limitation on the right of free speech guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada noted that the use of the word wilfully in conversation with promoting hatred imposed a difficult burden on the Crown which would only be satisfied in the circumstances where an accused subjectively desired the promotion of hatred or foresaw such a consequence as certain or substantially certain to result from the act done.

[22] At page 776 to 777 of Keegstra, Chief Justice Dickson also highlighted the meaning to be taken from the use of the word promotes in s. 319(2) when he wrote:

Given the purpose of the provision to criminalize the spreading of hatred in society, I find that the word "promotes" indicates active support or instigation. Indeed the French version of the offence uses the verb "foment", which in English means to foment or stir up. In "promotes" we thus have a word that indicates more than simple encouragement or advancement. The hate-monger must intend or foresee as substantially certain a direct and active stimulation of hatred against an identifiable group.

[23] The concepts must be considered and applied not only to the words used by the accused but also to the circumstances and context in which they were spoken.

[24] This concept was confirmed in the recent decision of the Saskatchewan Court of Appeal in *R. v. Ahenakew*, 2008 SKCA 4, delivered on January 14, 2008, at paragraph 21. In that passage, the Saskatchewan Court of Appeal considered and applied a decision of the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at para. 106, where they observed that:

As is the case with the crime of incitement to genocide, the crime of incitement to hatred requires the trier of fact to consider the speech objectively but with regard for the circumstances in which the speech was given, the manner and tone used, and the persons to whom the message was addressed.

[25] While these decisions considered speeches in the more traditional context of teachings in a classroom (Keegstra) and a speech at a conference followed by an interview by a reporter (Ahenakew), the decision in *Elms* touched on the distribution of CDs at what was argued to be a private meeting. The present case moves into what may be at the same time a more difficult and more important area.

[26] The prosecution of the accused in this case is centred on his use of the Internet and the use of communications through the World Wide Web. Indeed, it is somewhat unclear on the evidence as to where the accused's website, www.exterminance.org, is hosted, although the evidence points to it being physically located on servers in the United States, and in particular, in Texas. Despite that physical location, the website is accessible from any Internet-capable personal computer anywhere in the world requiring, on the evidence, nothing but the computer, the Internet connection, and a readily available web browser.

- [27] This is equally true of the other main Internet websites from which the police downloaded messages and forums on which the accused participated.
- [28] Two other websites are of particular importance: stormfront.org and ypenterprise.net. The latter hosts what is described as the Yoderanium Productions forums under which the accused participated under the name "Exterminance." On Stormfront, he again participates in a series of discussion threads within the forums located on that website, again under the name Exterminance. In both of these areas, postings by the person identified as Exterminance are accompanied by an avatar or pictorial symbol which includes a picture of the accused.
- [29] Copies of the avatar along with a variety of other material were located on the hard drive of the computer found and seized during the search of the accused's apartment in Fort St. John. This accumulation of evidence, taken together with the whole of the Crown's evidence, leaves no reasonable doubt that the accused created and maintained the Exterminance website and did so from the computer in his apartment in Fort St. John.
- [30] There is also no reasonable doubt, in my view, that the accused is the person identified as Exterminance who participated in the various discussions and forums described in the evidence and in many of the exhibits entered at this trial.
- [31] The "who is" printout entered as Exhibit 62 at this trial also links the accused directly to the website, giving his name, address, and telephone number as the registrant of the website exterminance.org. Two other particulars on that exhibit are of interest:
- (a) what is described as the registered organization which is shown as Aryan Resistance Movement; and
 - (b) the registrant and admin email address which is shown as adolfhitler@shaw.ca.
- [32] I am satisfied, as I have indicated and specifically find, that on the whole of the evidence, the accused controlled and maintained the content of the Exterminance website during the period covered by the indictment and that he is the individual who made the postings attributed to Exterminance on the various websites referred to in the evidence.
- [33] On the jurisdictional issue, I am satisfied that those actions originated from the computer in the accused's apartment in Fort St. John. These websites are linked to what may be described as the white supremacist movement. A printout of the Exterminance website takes one through a tour of the website: Exhibit 66. The initial page is labelled beneath the name "Exterminance" with the legend "14/88" and the main page quickly identifies the 14 words as: "We must secure the existence of our people and a future for white children." Immediately beneath is a link to the 88 precepts, and below it the note "now recruiting skinheads in the Fort St. John area." Beneath is an extract entitled "swift justice" and a link to the full text of a novella by David Lane entitled KD Rebel.

[34] Also on the main page is a link entitled "FAQ," or "Frequently Asked Questions." Selecting this link leads to a page with a picture of the accused and a series of statements in answer to specific questions. Under the question "Who is Exterminance?" the following entry is found, in part: "Bill Noble, age 28, born in 1976 in Chilliwack." Under the question "What is exterminance.org?" is the following entry:

"exterminance.org is my political website, which I use for expressing my views, and for linking to the sites of likeminded individuals."

[35] The use of the Internet has in many respects transformed the world of communications and the word itself. People who use the Internet and those capable of utilizing websites on the Internet are aware of the reach of this new form of media. In an article published in (2000), 49 Duke L.J., 855, Lyrrisa Barnett Lidsky discussed the scope of the Internet. In the article *Silencing John Doe: Defamation and Discourse in Cyberspace*, the author wrote that:

Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again.

[36] This article was quoted by the majority of the Ontario Court of Appeal in *Barrick Gold Corp. v. Lopehandia et al* (2004), 239 D.L.R. (4th) 577 and in *Canada (Human Rights Commission) v. Winnicki*, [2006] 3 F.C.R. 446. The second of these was a motion for an interlocutory injunction before the case was heard by the Canadian Human Rights Tribunal. In its decision on the test for granting an interlocutory injunction, the court, at paragraph 32, made the following observation about Internet communications:

One must remember, however, that the hate messages considered in that case were communicated through telephone hot lines, and not by way of the Internet as in the present case. . . This new form of communication is much more easily accessible and pervasive than any previous telecommunication medium. The content of a Web site can also easily be mirrored and replicated ad infinitum, with virtually no control by the originator. This potential of the Internet for wreaking havoc has been well captured by Lyrrisa Barnett Lidsky . . .

[37] It is possible within the present state of technology and software to create levels of protection and security that restrict access to certain areas of computers and/or websites. It is not difficult to conceive of precautions being taken which restrict access and bring an individual within a level of security which would potentially allow a person to consider his communications to be private.

- [38] In the present case, no such precautions were taken and no issue of accident or negligence arises. The communications and postings in this case were wide open and accessible to anyone who had the technology and chose to look. In my view, the content and circumstances here do not bring these communications within the private conversation exception.
- [39] In *Keegstra*, the Supreme Court of Canada agreed with the interpretation of wilfully from *R. v. Buzzanga and Durocher* (1979), 101 D.L.R. (3d) 488. The word wilfully sets a high burden on the Crown, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such. The present case is wholly unlike that in *Ahenakew*, where the court found that the circumstances suggesting that the accused spoke the words in anger must be considered. Here, the evidence, in my view, unequivocally establishes that the accused over a considerable period of time pursued a course of action calculated to express and advance the theories and ideas he believes. It is, in my view, unnecessary to quote extensively from the evidence, the posting messages, and documents placed in public view by the accused. A series of representative examples is sufficient to demonstrate the nature of these communications and their purpose.

(a) A January 18, 2004, posting on stormfront.org:

Re Holocaust:

What I think . . .

The Final Solution = racial separation, the deportation of all non-Whites from Aryan land. Official historical version: Attempt to exterminate all Jews.

Jewish dead = as many as 500,000, due to typhoid fever, and starvation (Germans themselves were subsisting on as little as one slice of bread to day, sometimes; how much worse off one could expect prisoners to be!) . Official historical version: 6,000,000 dead, deliberately murdered. (if that figure were true, then Jews were having seventy-five babies an hour, twenty-four hours a day, three-hundred-sixty-five days a year, nonstop for nine years, in a population that would have dipped to well below ten million. That's the only way their population could have 'recovered' so dramatically after a loss of six million.)

Adolf Hitler: a man with a vision to purge society of its criminal elements, with a view to preserving, safeguarding, and advancing civilization; a hero like no other history has seen, he stood up and fought overwhelming odds, fell, and became the victim of the single greatest character assassination in history. Official historical version: He was insane, power-hungry, corrupt, evil, ignorant, and we're all better off without him.

I won't say 'The Holocaust never happened'. 'Holocaust' literally means 'sacrifice by fire'. Hitler sacrificed his life for his race and his foes have been trying to burn down his image ever since. That was the real Holocaust.

(b) A March 19, 2004, posting on Yoderanium Productions Forums:

One of Adolf Hitler's greatest faults is also one of the White Race's greatest faults: Compassion towards those who deserve no compassion. Had Hitler won the war, I believe he would have created the state of Israel; perhaps in its present-day Middle East location, perhaps on Madagascar or elsewhere.

The trouble is the inherent nature of the Jew: it is irredeemably a parasite. Hitler would have had Germany for Germans and Israel for Jews. The Jews knew they could not sustain an independent, autonomous Jewish state: they needed slaves to survive. So they stabbed Germany in the back, crushed it utterly, and with it crushed as much as they could any hope for a self-governed White state.

Instead of Hitler's Germany for Germans and Israel for Jews, we have a myriad of Jew-occupied White nations (JOGS - Jew Occupied Governments), such as America, Canada, Britain, Australia - and Israel, the kingpin of the world, with 80% of its Orthodox Jews on welfare (something to do with religious laws against menial jobs, perhaps?), receiving billions of dollars from America annually, plus whatever benefits it can reap from its manipulation of the other White-populated, Jew-operated nations.

By painting Adolf Hitler and Aryans as the biggest monsters on Earth, and by painting themselves and the biggest victims on Earth, the Jews have played upon the sympathies of the unwary and bought the highest seats of power in the world.

(c) A May 3rd, 2004, posting on Yoderanium Productions forums:

A rhyming dream

I woke up laughing just the other day. . .

The dream only lasted a few seconds from start to finish. I saw this guy with a great big lazy grin go swaggering onto a stage, looking like he was getting ready to sing or dance or something. He was wearing a top hat. Then he started talking in a sing-song sort of voice.

"Hat", he reached up and took hold of the brim of his hat, "why am I wearing a hat?" He tossed the hat over his shoulder, then pointed at a rope noose hanging from the ceiling. "There oughtta be a nigger up there hanging on that!"

I promptly woke up laughing my ass off. It didn't make tonnes of sense, but that's how a lot of dreams go, I guess.

[40] These are but examples of the communications placed publicly by the accused on the Internet, which I find wilfully promote hatred against identifiable groups, namely, in the case of these three examples, Jews and Blacks.

[41] I do not find it necessary to examine in detail the writings of David Lane which are so much the focus of this accused's website. Two passages from David Lane's paper *Misdirected Hate* are sufficient to make the point:

Unfortunately too many of our White Folk when first becoming aware that Our Race faces extinction as a result of miscegenation, and the denial of exclusive territorial imperatives, then turn their anger against folks of different hues, be they black, brown, or yellow. That first reaction is myopic and plays directly into the hands of the Universalist media who label their anger as hate.

. . .

The real hate I feel is to the traitors of my own Race, who embrace universalist mixing with the inevitable subsequent extinction of my White Race as happened in Carthage, Egypt, Persia, and so many places throughout history. History and Nature's Law make it absolutely clear that racial integration is racial suicide for the White Race.

- [42] The true examples of the accused's mission and efforts, however, find expression in his inclusion on his website of David Lane's novella, KD Rebel. This effort elevates his beliefs and philosophy to the level of actively promoting the theories and techniques used within this tract. It is impossible, in my view, to read this material without concluding that it is writing calculated to identify and vilify traits of certain readily identifiable groups and to deliberately and calculatedly promote hatred against them.
- [43] This is by no means the end of the evidence in this case. However, the accused had in his possession materials from Project Schoolyard. This included a number of copies of songs and CDs designed and produced for the express purpose of placing in the hands of school-age children music and recorded material that was recorded and calculated to educate them in white supremacist values and beliefs. Those materials are calculated to promote hatred against Blacks and other identifiable groups.
- [44] In addition to the above, and again without trying to be exhaustive, the evidence includes the following:
- (a) evidence that the accused was actively recruiting skinheads in the Fort St. John area and was using his website to spread the message and advance that purpose;
 - (b) his website contained links which allowed visitors to move directly to other white supremacist forums and websites;
 - (c) his website contained links which allowed visitors to access the full text of works such as Misdirected Hate and KD Rebel;
 - (d) KD Rebel, its overall theme parallels the characterization of Jews by the Nazi propaganda machine and adopts violent means of maintaining racial purity, both against inroads by the Jews and homosexuals, as well as against racial mixing;
 - (e) the 88 precepts promotes what amounts to race war, describing:
 - (i) number 27, the pure and perfect hatred one must apply to those who threaten one's people, culture, or racial exclusiveness;

- (ii) number 28 advises that a multiracial society violates every natural law for species preservation;
 - (iii) number 29 denounces the concept of equality;
 - (iv) number 32 denounces miscegenation, race-mixing;
 - (v) number 35 describes homosexuality as a crime against nature;
 - (f) in part of his forum postings, he is commenting on weekly B.C. meetings and comments on the "Jew infestation";
 - (g) the accused's possession of a recording of the Eternal Jew;
 - (h) the contents of his notebook or journal, Exhibit 51, is a collection of ideas and hate materials;
 - (i) many of the images and posters in his possession are highly revealing: the altered movie poster for Jaws, the AIDS poster attacking gays, and others;
 - (j) the 46 Panzerfaust CDs found in his apartment leads to the overwhelming inference that he had them in his possession for distribution and promotion purposes.
- [45] The accused, in a trial in which he had little to say and chose not to participate, retreated from that position on really only two occasions. His obvious discomfort and anger when Len Rudner, the national director of community relations for the Canadian Jewish Congress, led him to begin a cross-examination which highlighted and emphasized, in my view, the danger of calling as a purported expert witness those who are closely aligned with and committed to their own agenda.
- [46] In a brief cross-examination, Mr. Noble substantially damaged Mr. Rudner's credibility and the overall value of his evidence.
- [47] At the end of the case, Mr. Noble made some brief submissions, asserting that (a) his website is on an American server and outside the court's jurisdiction; (b) that much of his material presented by the Crown is simply humour and reflects American cultural music; (c) that this is an example of malicious prosecution.
- [48] In my respectful view, these submissions ignore the reality of his material and his actions. Hatred is a term which has a broader meaning than simply violence. In my view, despite the difficult burden upon the Crown, the Crown has proven each and every element of the offence charged.
- [49] I find the accused guilty as charged.

Parrett J.

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