

25166-3		
Quesnel Registry		
In the Supreme Court of British Columbia		
(BEFORE THE HONOURABLE MR. JUSTICE BUTLER AND JURY)		
Quesnel, B.C.		
November 11, 2015		
REGINA		
v.		
ROY ARTHUR TOPHAM		
PROCEEDINGS AT TRIAL		
(DAY 13)		
COPY		
Crown Counsel:		J. Johnston
Defence Counsel:		B. Johnson

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RULINGS

NIL

Quesnel, B.C.

November 11, 2015

(JURY OUT)

THE CLERK: For the record, in the Supreme Court of British Columbia, this 11th day of November, 2015. Continuing with the matter of Roy Arthur Topham, 251663.

MS. JOHNSTON: Thank you, My Lord. Jennifer Johnston for Provincial Crown.

MR. JOHNSON: Barclay Johnston for Mr. Topham.

THE COURT: Now I understand you've both received a copy of the question as well as my proposed instruction and response to it.

MR. JOHNSON: Yes.

THE COURT: Any comments on that proposed instruction?

MR. JOHNSON: My Lord, I've - I've read it over. I agree with everything except for the last sentence, which I think doesn't need to be said.

THE COURT: I think it does. It comes directly from *Buzzanga*, which - where the court said it is very rare that the defence will apply if there's been the intentional promotion of hatred. And I think that that provides the kind of instruction that they need. Now I could use the precise language in *Buzzanga* rather than "it is unlikely they're acting in good faith", but I think this captures it and does so in a direct way. MR. JOHNSON: Yeah. I don't have that case in front of me, My Lord. I just understand the - perhaps we could also state then, conversely, if someone is acting in good faith, they're not likely promoting hatred. I think there's got to be a balance on that statement.

THE COURT: Well, except that the focus on the charge is wilful promotion or, as we've said, intentional promotion of hatred. Then that's really the focus, and so I think - I think this captures it. Ms. Johnston, do you have any comments?

MS. JOHNSTON: My Lord, I was thinking what Your Lordship said. I don't have verbatim the words either, but it's rare. It might be very rare, it's not in front of me, but it's rare, it's not unlikely.

THE COURT: I think - I think the language was it's comparatively rare or something to that effect. I could grab it, I have it on my desk.

MS. JOHNSTON: I would love that because I don't remember.
THE COURT: Okay. Well, why don't -
MS. JOHNSTON: And - and I don't think it was -
THE COURT: -- why don't I do that?
MS. JOHNSTON: -- just *Buzzanga*, it was picked up in at least one other case.
THE COURT: All right.
MS. JOHNSTON: I think *Harding*, and if I'm wrong about *Harding*, then *Keegstra* itself. It's been said more than once.
THE COURT: All right. We'll just break for a moment.
THE CLERK: Order in court. Court stands down briefly.

(PROCEEDINGS ADJOURNED)
(PROCEEDINGS RECONVENED)

THE CLERK: Okay, My Lord, we're back on record.
MR. JOHNSON: My Lord, before we start, I'm sorry, I didn't bring my binder with the instruction, and I wonder if we could read that paragraph 133, if Madam Registrar could do that for us.
THE COURT: Certainly.
MR. JOHNSON: Thank you.
THE CLERK: Shall I read it?
THE COURT: Yes, why don't you let me read it? It's under the heading, "First Ingredient, Good Faith":

An individual acts in good faith when he has a sincerely held belief in his rationale for undertaking the acts he is performing. This is to be contrasted with someone who does not hold a sincere belief or someone who acts with malice. Whether or not someone is acting with good faith is, like knowledge or belief, something that we cannot know directly. Good faith is a state of mind and we cannot physically see inside other people's minds to decide whether or not they were doing something in good faith. Thus, you will have to use your common sense to decide, based on all of the evidence, whether you can infer that Mr. Topham was acting in good faith for the purpose of removing matters tending to produce feelings of hatred.

So that's the passage, and I think I want to say - the reason I'm suggesting that I start off by saying, I don't want you to focus too much on the words I used to describe the opposite of good faith, because I think that gets away from the issue. And then the other - and then I point them directly to the issue, and the statement in *Buzzanga* I was referring to is at paragraph 59 where the court says:

The exemption contained in [what was then] s. 281.2(3)(d) is, in my view, provided out of [an abundance of] caution, and where a person has "wilfully" promoted hatred, the cases in which the exemption may successfully be invoked must be comparatively rare.

And I think that juxtaposition between the wilful promotion of hatred and in good faith doing something else is why I think it's necessary to add the last sentence that I want to say.

MS. JOHNSTON: I do as well, and I think comparatively where rare and unlikely equate, very rare or rare probably doesn't, but Your Lordship is obviously accurate in the wording from the case law.
THE COURT: I thought unlikely is a fair description.
MS. JOHNSTON: Or comparatively rare, Crown agrees.
MR. JOHNSON: My Lord, I wonder if we could just caution them again at the end of that by saying that this is really a matter for your - exercising your common sense. I think it was an elegant paragraph that you put together, it - and I think that they should be reminded it's really up to them. I know - I'm not here to flatter, but I thought that was very well laid out, actually, especially directing them to their own judgment, their own common sense.
THE COURT: Or in other words, repeat the last sentence, essentially?
MR. JOHNSON: I think so. I think that would help them.
THE COURT: Why don't I just say that I reiterate - or I will repeat the last sentence in paragraph 133?
MR. JOHNSON: I think that's fair.
THE COURT: All right. Let's - well, let's first of all mark the question from the jury as the next exhibit for identification. I guess it's actually an exhibit rather than exhibit for identification.
MR. JOHNSON: I think it's an exhibit.
THE COURT: Yes.
THE CLERK: 14.
THE COURT: 14.

EXHIBIT 14: Question by the jury on a yellow piece of paper

THE COURT: All right. Let's bring in the jury.

(JURY IN)

THE COURT: Now I have a question from you and I want to provide an additional instruction to you as a response to that question. First of all, what I'm going to do is I will read the question into the record, and here's the question. It says [as read in]:

Judge's summation paragraph 133: Define malice versus good faith. Can good faith be replaced by an act that is potentially malicious? We are struggling with good faith this paragraph.

So that is the question. And here is my instruction to you in response to that.

The question you have asked relates to the first ingredient of the defence set out in s. 319(3)(d). My instruction on this ingredient does require some clarification. I do not want you to focus too much on the words I used to describe the opposite of good faith. Your focus must be on good faith. The issue you must consider when examining the first ingredient of this defence is, what were the intentions or motives of Mr. Topham when he communicated those statements which have a potential to promote hatred? Did he intend to promote hatred, or was he in good faith pointing out a matter because he wanted it removed? I should also say that if someone intends to promote hatred, it is unlikely they are acting in good faith.

I will repeat, just to remind you, the last sentence which was in paragraph 133:

When considering this issue, you will have to use your common sense to decide, based on all of the evidence, whether you can infer that Mr. Topham was acting in good faith for the purpose of removing matters tending to produce feelings of hatred.

So that is my further instruction, and with that, I'll let you return to your deliberations.

(JURY OUT)

THE COURT: Thank you.

MR. JOHNSON: Thank you, My Lord.

THE CLERK: Order in court. Court stands down awaiting the jury.

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

THE CLERK: My Lord, we're back on record.

THE COURT: Thank you. We have another question, which is really more of a request than a question, and it reads from - from the foreman:

Can we have a copy of the judge's response from court yesterday regarding paragraph 133 re first defence ingredient good faith?

Now obviously we don't have a transcript, so what I did was I listened to the - to DARS and took what I had written and supplemented it by the few extra words I added. You've received a copy of that. What I propose to do is read it out to them and hand it to them, because they seem to want to have something in their hands, so that's what we'll do.

Before they come in, we'll mark the question as the next exhibit.

THE CLERK: 15.

THE COURT: And we'll mark the - what I hand them as an exhibit for identification, because that's what we did with the rest of the instructions is mark it as an exhibit for identification. All right?

EXHIBIT 15: Question from the jury on yellow piece of paper entitled "From foreman of jury"

MARKED G FOR IDENTIFICATION: Typed-out answer to the previous question of the jury prepared by the court

MR. JOHNSON: My Lord, before they come in, I'm just wondering if we can get a sense if they're going to keep on going? Mr. Topham lives in Cottonwood. It takes about half an hour in daylight with good driving conditions. If it's snow or ice or late at night, it's probably 45 minutes.

THE COURT: I mean normally we keep them till about nine o'clock. What I do at that time is ask if they want to keep going. I think that - you know, I'm not going to trouble them now with that. I'll talk to the people who know and we'll let you know, but I think you can anticipate it's roughly nine o'clock that we're - we're stopping.

MR. JOHNSON: Yeah. Just - I was just asking this on behalf of Mr. and Mrs. Topham. They probably have to get a hotel room otherwise.

THE COURT: No, I understand that. Bring in the jury.

(JURY IN)

THE COURT: All right. Now ladies and gentlemen of the jury, I've received your request. I'll read it out, just for the record:

Can we have a copy of the judge's response from court yesterday regarding paragraph 133 re first defence ingredient good faith?

Now I would love to provide you with a copy. We don't have those resources. What I did is I listened to the - the tape and I've prepared a copy, which I will give to you. I've passed it by counsel and they agree that it's - that it's accurate. I will read it to you and then provide copies of it to you. So here it is. And this was my response this morning to your question:

The question you have asked relates to the first ingredient of the defence set out in s. 319(3)(d). My instruction on this ingredient does require some clarification. I do not want you to focus too much on the words I used to describe the opposite of good faith. Your focus must be on good faith. The issue you must consider when examining the first ingredient of this defence is, what were the intentions or motives of Mr. Topham when he communicated those statements which have a potential to promote hatred? Did he intend to promote hatred, or was he in good faith pointing out a matter because he wanted it removed? I should also say that if someone intends to promote hatred, it is unlikely they are acting in good faith.

I will repeat, just to remind you, the last sentence which was in paragraph 133:

When considering this issue, you will have to use your common sense to decide, based on all of the evidence, whether you can infer that Mr. Topham was acting in good faith for the purpose of removing matters tending to produce feelings of hatred.

So that's the - what I said this morning. You'll get a copy of that, and you may return to your deliberations.

(JURY OUT)

THE COURT: I will let you know when we hear anything about how long they're going tonight, but I expect it'll be probably nine o'clock.

MR. JOHNSON: Okay.

MS. JOHNSTON: My Lord -

MR. JOHNSON: That'll be -

THE COURT: Which isn't much longer.

MR. JOHNSON: That'll be communicated through Madam Registrar?

THE COURT: Yes.

MR. JOHNSON: Thank you.

MS. JOHNSTON: My Lord, it's obviously too late tonight, 45 minutes would be too late to wait tonight, but the Crown has no objection if Your Lordship gives the Tophams a somewhat longer - a bit more leeway. That's fine with the Crown, if you're willing to wait for them to come in from Cottonwood tomorrow. I leave that with the court obviously.

THE COURT: Sorry, I didn't - I didn't understand that.

MS. JOHNSTON: Right now the Tophams are staying in town because they're expected to be back about 20 minutes.

THE COURT: Oh, I see.

MS. JOHNSTON: If the roads are dry and clear and the sun shines tomorrow, they could come back within a half an hour. I'm willing to wait an extra 10 minutes, if that pleases the court. I'm simply saying the Crown has no objection if we give them a somewhat longer tether so that they can wait at home rather than wait in town.

THE COURT: Oh, oh, certainly. Certainly, that's no problem at all. Well, obviously, if the jury has a verdict, we're going to wait for Mr. Topham to be here, so - and if it's a half hour to get here from - from where you live, Mr. Topham, that's fine. I heard I guess from someone today that we may have a storm coming in. I hope it doesn't involve snow, but it - I suppose it might.

MR. JOHNSON: My Lord, I gathered from Mr. Topham that last night they had a good half inch of snow in Cottonwood. The other problem is that they've got chores, they've got chickens and animals and dogs to feed and what have you, so a bit of a concern there.

THE COURT: Well, that's fine. If that's what Mr. Topham would like to do, then that's fine, and certainly an extra 10 minutes after what we've been through doesn't mean a lot. All right.

THE CLERK: Order in court. Court stands down awaiting the jury.

(PROCEEDINGS ADJOURNED TO AWAIT VERDICT)

Transcriber: B. Berekoff