PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. R.S.H., 2013 NSPC 129

Date: November 29, 2013
Docket: 2397944
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

R. S. H.

Trial Decision

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Frank P. Hoskins

Oral Decision: November 29, 2013

Charge: Section 175(1)(b) of the *Criminal Code*.

Counsel: Robert Kennedy, for the Crown
F. Alex Embree, for R. H.

By The Court: (Orally)
Introduction

[1] This case arises out of circumstances where the defendant, Mr. H., attended a public park for the purposes of engaging in sexual acts with an anonymous male partner. The park was known to Mr. H. as a place to meet anonymous men for the purposes of engaging in sexual activity. While in the park he observed the complainant, Mr. F., sitting alone in a vehicle in the parking lot, facing the boardwalk. Mr. H. walked over to the boardwalk and approached the vehicle. He stopped in front of Mr. F.'s vehicle and made eye contact with Mr. F.. Mr. H. felt that Mr. F. was interested because Mr. F. maintained eye contact with him, and continued to watch him as he groped, and touched his penis which he exposed to Mr. F. for a sexual purpose.

[2] Consequently, Mr. H. was charged with that, "on or about December 4, 2011, at or near Dartmouth, Nova Scotia, he openly exposed an indecent exhibition to wit: his penis in a public place to wit: Spectacle Lake located at 201 Brownlow Avenue, Dartmouth, Nova Scotia, contrary to s. 175(1)(b) of the *Criminal Code*".

[3] The Defence contends that the evidence presented in the case does not support the charge, as Mr. H. should have been charged with s. 173(1)(a) of the *Code*, rather than with s. 175(1)(b). The Defence further contends, that even if Mr.

H. was charged with s. 173(1)(a), he would have been entitled to an acquittal because either he had an honest but mistaken belief, reasonably held, that Mr. F. was interested in his progressive sexual cues, or in the alternative, Mr. F. was indeed interested in the initial overtures, although he declined to take things further with Mr. H..

[4] The Crown submits that masturbation and exposure of genital organs in a public place, particularly a location adjacent to a children's playground, in view of others, and in view of a commercial parking lot, exceeds the standard for which the general Canadian population would tolerate. The Crown asserts that the crux of the matter rests on a determination of whether Mr. H.'s actions caused a disturbance.

[5] Thus, the principal issue in this case is whether Mr. H.'s actions constitute an offence as described in s. 175(1)(b) of the *Code*, which requires an interpretation of the phrase, "openly exposes or exhibits an indecent exhibition", with emphasis being placed on the term - *exhibition*.

Summary of the Evidence

[6] The evidence presented in this case is not convoluted or complex in any way, nor is there any real dispute as to what Mr. H. did on the date and time in question.

[7] During the afternoon of Sunday, December 4, 2011, the complainant, Mr. F., parked his vehicle in the parking lot of Spectacle Lake Park, a public park which consists of a playground area and walking paths. Mr. F. parked his vehicle to use his cell phone. While sitting in his vehicle, smoking a cigarette and waiting for another phone call, he observed Mr. H. walking back and forth on the boardwalk, which was approximately ten feet in front of him: his vehicle was parked facing the boardwalk. After walking back and forth a few times, and after having groped his genitals, Mr. H. stopped, and faced Mr. F., and exposed his penis to Mr. F.. Mr. H. stood facing Mr. F. with his penis exposed for approximately five minutes before another vehicle entered the parking lot. Other than that vehicle, which pulled into the parking lot for a few minutes, Mr. F. did not notice anyone else in the park area. Mr. F. watched Mr. H. while he sat on the park bench and stroked his penis. Mr. F. estimated that he observed Mr. H., while he was on and off the phone for approximately ten to twelve minutes, while Mr. H. was on the boardwalk until he was on the park bench.

[8] Mr. F. stressed that what he observed did not bother him and that he was not at the park for any other purpose than to use the phone. Mr. F. immediately called the police because he felt Mr. H. had committed an indecent exposure in an area where children play, which he viewed as inappropriate. Although, Mr. F. was convicted, himself, on April 11, 2011, for having committed an indecent act, contrary to s. 173(1)(a) of the *Code*, on the Halifax Commons, by exposing his penis, Mr. F. emphatically stated that he was only at the park, December 4, to use his cell phone. He was aware that Spectacle Park was a well-known area for gay men to engage in sexual activity. Mr. F. denied that he stared at Mr. H. while Mr. H. exposed his penis, and added that he had never attended Spectacle Lake Park to cruise because he is not gay.

[9] Constables Bergman and Wilson, of the Halifax Regional Police, were dispatched to Spectacle Lake Park to investigate a complaint of an indecent act committed in the park. Upon arrival they came into contact with Mr. H.. They believed Mr. H. was the actual suspect they were investigating because he matched the physical description provided, and the zipper of his pants was down, exposing his penis.

[10] Upon making these observations, Mr. H. was arrested and taken into police custody.

[11] Later in the day, Mr. H. provided a voluntary statement to the police, which was presented in court.

[12] Mr. H. testified that on Sunday, December 4, 2011, he was on his way to church when he decided to attend Spectacle Lake Park instead. He stressed that he felt an urge to attend Spectacle Lake Park for the purposes of engaging in sexual acts with an anonymous male partner, rather than attend church. Spectacle Lake Park was known to Mr. H. as a place to meet anonymous men for the purposes of engaging in sexual activity. Mr. H. explained that Spectacle Lake Park was a well-known area in the gay community as a cruising spot, where gay men could cruise for a willing sexual partner. He further explained that generally cruising involved a series of progressive cues shared between two interested parties that culminated in the men having consensual sex. Mr. H. stated that the first cue was sustained eye contact, followed by a wink of the eye or a nod of the head. After receiving a positive response, such as a wink or nodding of the head, one person would grope himself, and then expose his genital organs. After that, if there was still a positive response, the men would go into the woods and engage in sexual activity. Mr. H. further explained that these cues are meant to show an interest and willingness to engage in sex. Often, men will explicitly indicate that they have no interest by either saying so, or ignoring the cues. When the men are interested, however, they

usually attentively watch each other to ensure that the progressive cues are indeed an invitation to engage in sexual activity.

[13] On December 4, Mr. H. was cruising in the park when he observed Mr. F. sitting in a vehicle, in the parking lot, facing the boardwalk. Mr. H. walked over to the boardwalk and approached Mr. F.'s vehicle. He stopped in front of Mr. F.'s vehicle and made eye contact with Mr. F.. Mr. H. felt that Mr. F. was interested because he maintained eye contact with him, and continued to watch as Mr. H. groped his genital area. Having assumed that Mr. F. was interested, Mr. H. exposed his penis as Mr. F. continued to watch him. After a few minutes of standing in front of Mr. F. with his penis exposed, Mr. H. noticed another vehicle enter the parking lot. Upon noticing the vehicle, Mr. H. put his penis in his pants and walked off the boardwalk and sat on a bench, for a few minutes, until the vehicle exited the parking lot. After the vehicle was gone, Mr. H. resumed his position on the boardwalk where he, again, exposed his penis to Mr. F. for the purposes of engaging him in sex. After giving Mr. F. a nod with his head, Mr. H. walked down into a pathway, hoping that Mr. F. would follow him. After waiting a few minutes for Mr. F. to join him, Mr. H. became nervous and decided to leave the park as he was concerned that he may either get hurt or arrested by the police.

[14] Mr. H. came into contact with the police officers as he was leaving the park. When the police officers arrested Mr. H. his zipper was down, but he believed his penis was not exposed because he had put his penis back in his pants.

[15] Mr. H. explained that he had cruised in the Park on prior occasions and would avoid the playground area when people were around.

Burden of Proof

[16] The burden is upon the Crown to prove the allegation beyond a reasonable doubt. This legal or persuasive burden never shifts to the defendant; it remains with the Crown throughout the trial. As stated in *R. v. Starr*, [2000] S.C.J.No. 40, this burden of proof lies much closer to absolute certainty than to a balance of probabilities. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada held that it is not sufficient to conclude that an accused person is - probably or likely guilty for a conviction to be registered.

[17] Although, there are no significant factual disputes in the present case, I am mindful in resolving any conflict between the evidence of the central Crown witness and the evidence of the accused, I must consider the special instruction contained in the decision of the Supreme Court of Canada in *R. v. W.(D)*, [1991] S.C. J. No. 26, wherein Cory, J.A. formulated a concise and uniform set of

instructions which posed three questions for consideration of the accused's evidence.

[18] The ultimate issue, as noted by Binnie, J.A., in *R. v. Sheppard*, [2002] S.C.J. No. 30 is not credibility but reasonable doubt.

[19] With respect to the demeanour of witnesses, I am cognizant of the cautious approach that I should take in considering demeanour evidence of witnesses, as there are a multitude of variables that could explain or contribute to a witness's demeanor while testifying. Saunders, J.A. comments in *R. v. D.D.S.*, [2006] N.S.J.No. 103, at paras. 77 to 79, is apposite.

Findings of Fact

[20] Having considered the totality of the evidence, I find that on December 4, 2011, Mr. H. attended a public park, Spectacle Lake Park, for the purposes of engaging in a sexual act with an anonymous male partner. Spectacle Lake Park consists of walking trails, a children playground, and a public parking lot. There is no doubt that the park is a public place as defined by s. 150 of the *Code*.

[21] Spectacle Lake Park was known to Mr. H. as a place to meet anonymous men for the purposes of engaging in sexual activity. Prior to that date, Mr. H. had

attended the park on numerous occasions where he met men and engaged in sexual acts with them.

[22] On December 4, Mr. H. was walking along the boardwalk when he observed Mr. F. sitting in his vehicle talking on a cell phone. While facing Mr. F., Mr. H. groped his genital area with the intent of luring the complainant into a sexual encounter, as he believed that the complainant had showed an interest in him.

[23] After Mr. H. groped his genital area, he unzipped his pants and exposed his penis to Mr. F.. While doing this, he observed another motor another vehicle enter the parking lot. Concerned about being seen, he put his penis in his pants and sat on a park bench, for a few minutes until the vehicle exited the parking lot. After the vehicle exited the parking lot, Mr. H. resumed his position on the boardwalk, where he again, exposed his penis to Mr. F. for a sexual purpose.

[24] After he acknowledged Mr. F., by nodding his head, he walked down a pathway hoping that Mr. F. was going to join him for a sexual encounter. Mr. F. never joined him. He waited for a few minutes, became disappointed, and then decided to leave the park. In the meantime, Mr. F. reported the incident to the police. While Mr. H. was walking out of the park to take the bus home, the police arrived and placed him under arrest.

[25] While I do not accept all aspects of Mr. H.'s evidence, I do accept his evidence that he honestly believed that Mr. F. was interested in engaging in sexual activity with him. As previously mentioned, I accept Mr. H.'s evidence that he attended the park to meet anonymous men for the purpose of engaging in sexual activity.

[26] I accept Mr. H.'s evidence that there was never any intention on his part to perform a sexual act in the presence of any person other than the driver of the car (Mr. F.).

[27] I accept Mr. H.'s evidence that he attended the park for the specific purpose of engaging in a sexual act with an anonymous male partner. I accept his evidence that he honestly believed that Mr. F. was interested in him, when he communicated to Mr. F., by staring at him, groping himself and by exposing his penis to Mr. F.. I accept Mr. H.'s evidence that he was only attempting to communicate with Mr. F. in a sexually provocative manner in an effort to engage in consensual sexual activity with a willing participate, and that there was never any intention on his part to perform a sexual act in the presence of any other person other than Mr. F.. I accept Mr. H.'s evidence that he made efforts to be discreet, and that he tried to ensure that no one else besides Mr. F. could observe him while he groped and exposed his penis on the boardwalk. This is consistent with the evidence that Mr.

H. immediately stopped exposing his penis, while on the boardwalk, when he observed another vehicle had entered the parking lot. Mr. H.'s actions of sitting down on a park bench, until the vehicle had exited the parking lot, is consistent with his assertion that he only resumed sexually exposing his penis to Mr. F. when he was assured that Mr. F. was the only person present in the park: he maintains that he honestly believed that Mr. F. was a willing participate and was interested in engaging in consensual sexual activity with him.

[28] While I find beyond a reasonable doubt that Mr. H. was touching and exposing his penis, I have a doubt as to whether or not he was engaged in masturbation. Regardless, I do find that the actions that he engaged in were indecent.

[29] To be clear, and without deciding the issue of whether or not Mr. H.'s actions would constitute an indecent act as described in s.173(1)(a), suffice it to say that given the sexual context of his actions, Mr. H.'s actions of groping, touching and exposing his penis in a public place for a sexual purpose exceeds the community standard of tolerance. I find that in these circumstances, the sexual context of the Mr. H.'s behaviour, the place (a public park, adjacent to a playground) and time of day, created a real risk of harm which would occur from

his behaviour, as it is a place well attended by members of the community, including young children.

Central Issue

[30] As stated, the principal issue is whether Mr. H.'s actions constitute an offence as described in s. 175(1)(b) of the *Code*, which requires an interpretation of the phrase, "openly exposes or exhibits an indecent exhibition".

Principles of Statutory Interpretation

[31] The process of statutory interpretation requires that a provision in a statute be read contextually, in a manner that reflects the grammatical and ordinary meaning of the words used, that accords with the scheme and object of the statute, and that reflects the intention of the legislature (*R. v. Clark*, [2005]1 S.C.R. 6, at paragraph 43). The aim of the interpretative exercise is to discern the meaning of the statutory provision, not to define the individual words or phrases used in the provision.

[32] Recently, in *R. v. Carvery*, 2012 NSCA 107, Beveridge, J.A., writing for the majority of the court, applied the general principles of statutory interpretation to

the phrase, "if the circumstances justify it" in s. 719 of the *Code*. In doing so, he provided a framework of analysis in paras 35 to 39 which is instructive. He wrote:

> [35] Most rules and principles of statutory interpretation are judge made. For federal enactments the *Interpretation Act*, R.S.C. 1985, c. I-21, provides some general guidance. It provides:
>
> > 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> [36] It also directs "shall" is to be construed as imperative and "may" as permissive (s. 11); the preamble of an act is to be read as part of the enactment intended to assist in explaining its purpose and object (s. 13); and marginal notes, references to former enactments and other divisions in an enactment form no part of it, but are for convenience only (s. 14).
>
> [37] The Supreme Court of Canada has given clear direction that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J.A., for the court in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 wrote:
>
> > 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
> >
> > > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of*

Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

[38] The same approach holds true for federal enactments, including tax and penal statutes. In *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42, Justice Iacobucci, writing again for the court, quoted Driedger's principle of modern interpretation and said:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.
>
> 27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "*Statute Interpretation in a Nutshell*" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their

> surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[39] Importantly, Justice Iacobucci clarified the role of other principles of interpretation. He said:

> 28 Other principles of interpretation - such as the strict construction of penal statutes and the "*Charter* values" presumption - only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, at p. 115, per Dickson J. (as he then was); *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; *R. v. Hasselwander*, [1993] 2 S.C.R. 398, at p. 413; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "*Charter* values" principle later in these reasons.)

Application of the Principles

[33] As previously stated, to find criminal liability under s. 175(1)(b), Mr. H.'s actions must fall within the definition of the phrase "openly exposes or exhibits an indecent exhibition" suitable in law to the context of the section and the offence thereby enacted.

[34] In addressing this issue, I am mindful, of Beveridge J.A.'s comments in *Carvery, supra,* wherein he stated, that while the various directions involved in the

so-called modern approach are closely related and interdependent, the ultimate objective is to determine the intent of Parliament. I am also aware that any attempt to distort the plain meaning of simple words can create uncertainty and confusion in the application of the law. If a word or phrase imports an overly broad interpretation, caution must be exercised in applying it so as not to over reach its purpose. Moreover, the use of broad and general terms in legislation may be justified as legislators cannot be expected to identify every variation of the factual situations they envisage.

Interpretation of the language of s. 175(1)(b)

[35] The ordinary and natural meaning of the words, "openly exposes or exhibits an indecent exhibition" suggests that the "or" is disjunctive, and that the object is an *indecent exhibition*. The operative word in this phrase is *exhibition*, which is described in *The Concise Oxford Dictionary* (9th ed.) as "a display (esp. public) of works of art, industrial products, etc.; the act or an instance of exhibiting; the state of being exhibited". The word exhibition has a number of meanings, depending on the context. It would appear, from a literal reading of the phrase that the subsection casts a wide net which could include the actions of a person exposing his or her genital organs in a public place. The task, however, is to define the meaning of the term or phrase which best accords with the intention of Parliament.

[36] In answering the central issue, I am mindful that s. 173 of the *Code* creates two offences, compendiously described as *indecent act* and *sexual exposure*, which are set out later in these reasons.

The Origins of Sections 173 and 175 of the Criminal Code

[37] Sections 173 (indecent act) and 175 (indecent exhibition) have existed in the *Criminal Code* since its inception in 1892. Thus, it would appear that it was Parliament's intent to create two separate and distinct offences to presumably address related, but different, criminal behaviour.

[38] The term *indecency* is not defined in the *Code*. Historically, an indecent act was determined by community standards. More recently, however, for an act to be indecent it must exceed the community standard of tolerance, which requires a consideration of what harm or risk of harm will accrue from the allegedly indecent act. Therefore, for an act to be indecent it must exceed the community standard of tolerance, which requires consideration of what harm or risk of harm will accrue from the allegedly indecent act. Obviously, the greater the harm that may flow from a particular act, the less likely the community will tolerate others being exposed to it. In other words, tolerance cannot be assessed independently of harm. The circumstances surrounding the act must be taken into account when

applying the test to determine indecency. As such, the audience, place and context are essential elements in the determination of indecency (*R. v. Jacob* (1996) 112 C.C.C. (3d) 1 (Ont. C.A.)).

[39] In trying to determine the purpose and scope of these two separate offences, one has to first look through the lens of a person of the Victorian era, where the community standard of tolerance was much different from today. This becomes even more challenging when one examines the evolution of the provisions, where the words of both provisions have remained substantially the same since their inception in 1892, notwithstanding the evolution of the community standard of tolerance test.

[40] While headings are not part of a particular section, *per se*, the context within which the offences were initially placed in the *Code* in 1892 provides some general guidance in considering the types of behaviours the two provisions intended to cover. The headings help to cast light on the meaning or scope of the provisions to which they relate (Sullivan and Driedger, *Construction of Statutes*, 4th edition, Butterworths, at para. 306).

[41] In *R. v. Lohnes* (1992), 69 C.C.C. (3d) 289 (S.C.C.), headings were relied on to narrow the scope of s. 175(1)(a) of the *Code*. McLachlin J.A., at para 297, wrote:

> ... headings and preambles may be used as intrinsic aids in interpreting ambiguous statutes. Section 175(1)(a) appears under the section "Disorderly Conduct". Without elevating headings to determinative status, the heading under which s. 175(1)(a) appears to support the view that Parliament had in mind, not the emotional upset or annoyance of individuals, but disorder and agitation which interferes with the ordinary use of a place.

[42] As the learned authors of the text, *Construction of Statutes*, *supra*, at p. 307, point out:

> When provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to provisions. Conversely, the placement of provisions elsewhere, under a different heading, suggests the absence of such a relationship. The heading, suggests the absence of such a relationship.

[43] The authors also caution, at p. 308, that:

> . . . As with other descriptive components, the weight attached to a heading depends on the circumstances.... The weight attached to a heading may be undermined because the heading itself is obscure; the provisions arranged under the heading form no discernable pattern.

[44] In 1892, the offence of indecent act was in Part XIII, under the heading entitled, *Offences Against Morality*. The offence provided:

> 177. Ever one is guilty of an offence and liable, on summary conviction before two justices of peace, to a fine of fifty dollars or six months imprisonment with or without hard labour, or to both fine and imprisonment, who willfully -
>
> > (a) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to access; or
> >
> > (b) does any indecent act in any place intending thereby to insult or offend any person.
>
> is guilty of an offence punishable on summary conviction.

[45] The offence of *indecent exhibition*, in 1892, was in Part XV of the *Code*, under the heading entitled, Vagrancy.

> 207 Everyone is a loose, idle or disorderly person or vagrant who -
>
> > (c) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition
>
> is guilty of an offence punishable on summary conviction.

[46] As stated, the languages of both offences have not substantively changed since their inception in 1892. For convenience, the current sections of the *Code* are set out below in ss. 173 and 175. Section 173 states:

> 173(1) Everyone who wilfully does an indecent act in a public place in the presence of one or more persons, or in any place with intent to insult or offend any person,
>
> > (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years; or

> (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months.
>
> (2) Every person, who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of 16 years
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years and to a minimum punishment of imprisonment for a term of 90 days; or
>
> (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months and to a minimum punishment of imprisonment for a term of 30 days.

[47] The offence of openly exposes or exhibits an indecent exhibition is described in s. 175(1)(b), which provides:

> 175(1) Everyone who
>
> (b) openly exposes or exhibits an indecent exhibition in a public place is guilty of an offence punishable on summary conviction.

[48] Although ss. 173 (indecent act) and 175 (indecent exhibition) are different offences, they are related as they are broadly classified as offences against the Public Order; in that, they both present some sort of nuisance to the public in general, which can arise from sexual or quasi-sexual acts, or from acts that are annoying or dangerous to the public (*Mewett & Manning on Criminal Law* (3d) at p. 679). Indeed, presently both provisions are included in Part V of the *Code*, under the heading, *Sexual Offences, Public Morals and Disorderly Conduct*, which deals with offences relating to disorderly conduct in public places.

The Nature of the Offence created by s. 175

[49] Before examining the specific language of s. 175(1)(b), it is helpful to consider s. 175 on a more general level, and compare it to s. 173, a provision that specifically prohibits the offence of *indecent exposure of genital organs.*

[50] Although s. 175(1)(b) of the *Code* has a long legislative history, there is a paucity of reported decisions that have considered its object and scope within the context of the *Code*. Consequently, the difficulty in discerning the purpose and scope of the provision is increased, without the assistance and guidance of precedent. However, in the following three reported decisions the offence of *openly exhibiting an indecent exhibition* involved a person putting on a show or exhibition, by either arranging, providing or causing the indecent exhibition to take place in public.

[51] In the historical case of *The Queen v. Saunders and Hitchook* (1875) 1 Q.B.D. 15, which considered the common law offence of exhibiting and indecent exhibition, two men were convicted in one count of keeping a booth for the purposes of showing an indecent exhibition; in a second for showing for gain an indecent exhibition in a booth; in a third, for showing an indecent exhibition in a public place. The accused were travelling showmen, who kept a booth for the

purposes of displaying or showing an indecent exhibition. Paying customers entered the booth to watch an indecent exhibition take place.

[52] More recently, well after the enactment of the *Code*, there are two reported cases that considered the offence of openly exposing or exhibiting an indecent exhibition. Both of these cases involve bar managers or owners permitting indecent exhibitions to take place in their public establishments. The first case is that of *R. v. Tiboni* 1982 Carswell Ont. 2326, 8 W.C.B. 322 (Ont. Dis. Crt.). In that case, the respondent's acquittal was upheld. He was charged with breaching s. 171(1)(b), openly exhibiting an indecent exhibition (now s. 175(1)(b)). The respondent was in charge of a lounge where women danced in a sexually provocative manner while removing all of their clothing in front of men, and occasionally inviting and encouraging men to remove their G-string.

[53] The second case which dealt a person charged with openly exposing an indecent exhibition is *R*. v. *Bagu*, [1981] O.J.No. 3283 (Ont. Prov. Ct.) wherein the accused, a hotel manager, was charged with openly exposing an indecent exhibition, i.e. a nude dancer in a public place. The dancer had been visible through the window of the tavern to anyone standing in a specific spot across the street. In acquitting the accused, the trial judge held that although there was

sufficient evidence to establish that the dancing was an indecent exhibition, such exhibition was not "openly exposed" to the public.

[54] It is noteworthy that these three reported cases all involve incidents of a person openly exposing or exhibiting an indecent exhibition by arranging, providing, or showing an indecent exhibition in a public place, rather than a person committing an indecent act by doing something with his or her own person; such as, a man committing an indecent act by exposing his penis in public. These three cases suggest that the term "exhibition" connotes the display or showing of acts of indecency to a wider audience.

[55] The offence created by s. 175(1)(b) finds its origin in the common law of vagrancy, offences against public convenience, which proscribed behaviour in order to preserve peace and order in the community: see, for example, *An Act respecting Vagrants*, S.C. 1869, c. 28. This *Act* was incorporated into the first *Criminal Code* in 1892, as s. 207. Vagrancy was defined in s. 207 by the creation of twelve different summary conviction offences, (a) to (l), in which a person was deemed to be "a loose, idle or disorderly person or vagrant". Subsection (c) of s. 207 defined vagrant as everyone who, "openly, exposes or exhibits, in any street, road, highway, or public place, any indecent exhibition". In 1947, the *Criminal Code* created a new and distinct offence of causing a disturbance; the offence was

moved from the section of the *Code* entitled, "Vagrancy" to the nuisance offences falling under Part V labelled *Offences Against Religion, Morals and Public Convenience,* S.C. 1947, c. 55, s. 3. Upon the *Code's* revision in 1955, S.C. 1953-54, c. 51, the offence was included in Part IV, renamed *Sexual Offences, Public Morals and Disorderly Conduct,* as s. 171 under the section entitled, "Disorderly Conduct". The provision is now under Part V, as s. 175 (*R. v. Lohnes*, [1992], 1 S.C.R. 167 at para. 11).

[56] The effect of this legislative change, is that the offence of *Vagrancy*, known as a status offence, was abrogated and replaced with new offences that required criminal conduct. The moral stigma attached to being "a loose, idle or disorderly person or vagrant, was removed and replaced with offences that required actual proof of criminal conduct, which requires proof of both the *actus reus* and *mens rea* of the offence. A further impact of these legislative amendments was to enhance due process (*R. v. Dale*, [1989] 69 C.R. (3d) 74 (Ont. Dist. Crt.)).

[57] Section 160 (now s. 175(1)(b)) created four different summary conviction offences, for everyone who causes a disturbance in one of several courses of conduct described in the section, which includes subsection (b) where an accused "openly exposes or exhibits an indecent exhibition in a public place".

[58] The purpose of s. 175(1)(b) is to prohibit indecent exhibitions which exceed the community standard of tolerance test. This test is used primarily where it is unclear whether or not the conduct is indecent. It is a contemporary, national test that measures not what Canadians will tolerate for themselves but rather what they will tolerate for others (*Jacob, supra*, at 360). The inference that harm results from an act may be drawn from the act itself.

[59] An interesting aspect of s. 175(1)(b) is that the essential element of "causing a disturbance" is not required as it is under subsections (a) and (d) of s. 175(1); notwithstanding that, the provision is placed under the subheading, causing a disturbance, which deals with disorderly conduct. The plain wording of s. 175(1)(b) does not state anything about a disturbance resulting from the indecent exhibition. Presumably, the drafters of the legislation omitted that requirement because a disturbance is caused by an indecent exhibition. For all intents and purposes, an indecent exhibition committed in a public place causes a public disturbance because it exceeds the community standard of tolerance for such behaviour. Perhaps, for that reason, Parliament did not include s. 175(1)(b) and (c) in s. 175(2).

[60] It seems that the placement of s. 175(1)(b) under the section *Disorderly Conduct*, suggest that it was Parliament's intent to prevent openly exposing or

exhibiting an indecent exhibition in a public place, because it would likely cause a disturbance of the public peace, in the sense of interference with the ordinary and customary use of a place by the public.

The Nature of the Offences created by s. 173

[61] Like the offence created by s. 175(1)(b), the purpose of s. 173 is to prohibit conduct carried out in circumstances which could offend members of the public. Section 173 creates offences for doing indecent acts or sexually exposing oneself in certain circumstances.

[62] Section 173(1) creates two offences, both of which require doing of an indecent act. The offence described in s. 173(1)(a) requires the act be done in a public place. The offence described in s. 173(1)(b) refers to that the act as being committed in any place. The phrase *public place* is defined in s. 150 of the *Code*. Since the inception of the *Code* in 1892, s. 173 distinguished between using the two phrases, "public place", and "in any place". Section 173(2), which was enacted much later, was intended to make it that s. 173(2), like, s. 173(1)(b), and unlike s. 173(1)(a), was not limited to acts done in a public place or in any particular place. In fact, s. 173(2) does not speak to the location of the victim

when the offence occurs much less require that the victim be in the same place as the perpetrator (*R. v. Alicandro* 2009 ONCA 133).

[63] The purpose of s. 173(2) has been described by Doherty, J.A., in *Alicandro, supra*, at para. 45, in these terms:

> Section 173(2), like s. 172.1, was enacted to protect children against sexually exploitive conduct. That object is not advanced by an interpretation which requires that the victim be in the same physical place as the perpetrator. The harm caused by the prohibited conduct and the danger it poses to young persons flows from the conduct and the sexual purpose with which the conduct is done. Neither the harm nor the danger depends upon the victim being in close proximity to the perpetrator. Indeed, it could well be argued that the modern day "flasher" surfing the Internet for vulnerable children poses a more significant risk to children than did his old fashioned raincoat clad counterpart standing on some street corner.

[64] The offences described in s. 173(1)(a)(b), may be committed, by wilfully doing an indecent act, in a public place in the presence of one or more persons, or in any place, with the intent to insult or offend any person.

[65] Section 173 of the *Code* is the first of a set of offences under the heading *Disorderly Conduct*, which includes offences of nudity in a public place, causing a disturbance, trespassing at night, vagrancy, and a common nuisance endangering public health or safety.

[66] Historically, the offence of indecent act was placed under the heading of *Offences Against Morality* in the *Code*. This section was revised as part of the *Code's* revision in 1955, S.C. 1953-54, c. 51, where it took its present language or wording. The offence was included in Part IV, renamed *Sexual Offences, Public Morals and Disorderly Conduct*, as s. 169 under the section entitled, *Disorderly Conduct*. The provision is now under Part V, as s. 173.

[67] There is nothing in the language of s. 173(1) to suggest that Parliament intended to limit the scope of this section to require that an indecent act must have a sexual context. In contrast, s. 173(2), which deals with the exposure of genital organs to a person under 14 years of age, explicitly requires that the exposure be for a sexual purpose. This suggests that Parliament was cognizant to the prospect that some, but not all, indecent acts have a sexual purpose. Had Parliament intended to limit the application of s. 173(1) to acts that are in substance sexual, it would have said so (*Jacob*, *supra*). The community standard of tolerance test is relevant to acts alleged to be indecent under both subsections (1) and (2) of s. 173. Thus, in order for an act to be considered indecent under either subsection (1) or (2), the Crown is required to prove that the impugned act exceeds the community standard of tolerance test.

[68] As mentioned, s. 173(2) was enacted specifically to address the offence of sexual exposure of a person's genital organs to a person under the age of 16.

[69] While indecency, under s. 173, is not confined to sexual indecency, there are cases where the sexual exposure of a person's genital organs was considered an indecent act, including men exposing their genitals and masturbating in public places (*R.v. Miclei* (1977.), 36 C.C.C. (2d) 321 (Ont. Prov. Ct.); *R. v. McEwen*, [1980] 4 W.W.R. 85 (Sask. Prov. Ct.); *R. v. Wise* (1982),67 C.C.C. (2d) 231 (B.C. Co Ct.); *R. v. Buhay* (1986), 30 C.C.C. (3d) 30 (Man. C.A.); *R. v. Carruthers*, [2004] S. J. No. 831 (Prov. Ct.); *R. v. Burgar*, 2005 BCSC 1709).

Differences Between ss. 173(1)(a) and 175(1)(b)

[70] Historically, these two offences, ss. 173(1) and 175(1)(b) were considered to be in the nature of a nuisance at common law. In my view, neither time nor statute has changed the nature of the offences: except the recently enacted sexual exposure offence of s. 173(2), which is a more serious offence, and s. 173 is now a hybrid offence.

[71] Although the offences of indecent act and indecent exhibition are related, they are two separate offences. It seems that the former applies to the action or conduct of the actual accused; for example, the act of exposing one's genital

organs, whereas the latter seems to be relating to the display or showing of an indecent act or acts of indecency in the broader sense; such as, the display or open exhibition of an indecent act or acts, which is in and of itself an indecent exhibition. For example, a person who openly exposes or exhibits an indecent exhibition in a public place by displaying a collage of photographs that depict indecent acts. In this situation the offender does not actually participate in the act of indecency, but rather shows, displays or exhibits an indecent exhibition.

[72] It seems that under s. 175(1)(b) the accused can either commit the *actus reus* of the offence, as a principle, without actually doing the indecent act himself or herself, as long as he or she openly exposes or exhibits the indecent act or acts in a public place: openly exhibiting an indecent exhibition in a public place.

[73] Put differently, s. 173 deals with a situation where the accused actually commits an indecent act, whereas s. 175(1)(b) deals with a situation where the accused openly exposes or exhibits an indecent exhibition by arranging, providing or causing an act of indecency to be exposed or exhibited in a public place. This interpretation seems to be consistent with the scheme, language and object of the provisions, and reflects the intent of Parliament to create two separate and distinct offences. Further support for this interpretation can be found in the recently enacted sexual exposure offence of s. 173(2). In 1988, a new offence of sexual

exposure was added to s. 173. The creation of the specific offence of exposure of genital organs to a person under 16 years seems consistent with the interpretation that exposure of genital organs to persons 16 and over can constitute an offence under s. 173(1), rather than under s. 175(1)(b). It seems that the purpose of s. 175(1)(b) is to proscribe against a person openly exposing or exhibiting an indecent exhibition by arranging, providing or causing for an act of indecency to be exposed or exhibited in a public place.

Conclusion

[74] For these reasons, I find that Mr. H.'s actions do not constitute an offence as described in s. 175(1)(b) of the *Code*, and accordingly, I find him not guilty of committing the offence of s. 175(1)(b) of the *Code*.