

# *Rex v. J. B. Smith* (Calgary, 1902): Queer Carnal Acts and Heterosexual Settler Colonialism in Canada's Prairie Empire

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At about 9:00 PM on 31 October 1901, sixteen-year-old Walter Joseph McHugh confessed to his father that he had had sex (multiple times) with another Calgary man, a bachelor in his mid-40s named James Bruce Smith.<sup>1</sup>

Smith was a lawyer. He was among those men who founded the Calgary Bar Association in 1890 and are remembered today for their “pursuit of cordial intercourse.”<sup>2</sup> Smith also provided legal guidance to the civic government as the solicitor for the City of Calgary. A man on the make in the rugged white male homo-social culture of the prairies, Smith also spent much time in Regina arguing before the same court that tried him for “gross indecency” in February 1902.

In Calgary, Smith's law office on Stephen Avenue was home. There, in one of its three back rooms, he and Walter talked about sex, read pornography, and masturbated together. We know they were sexually and physically intimate—“we took hold of one another's genital organs and played with them several times”—because of Walter's testimony in the legal casefile *Rex v. J. B. Smith* (1902).<sup>3</sup> As an artifact and archive,

*Rex v. Smith* documents the threat queerness posed to male settlers, their bodies, and the state's efforts to reproduce heterosexual settler-colonialism in early Calgary.

Twenty-two documents filed in the Provincial Archives of Alberta at Edmonton archive the intimate details of four sexual encounters between two white settler men over three years from October 1899 to October 1901. *Rex v. Smith* is among a subset of court proceedings that detail settler-colonial anxieties about queer carnal acts on these mythologized and manly prairies.<sup>4</sup> Such unnatural acts were among the many crimes registered by the expanding settler state through the Supreme Court of the North West Territories. These artifacts of the flexing of colonial power detail acts of bestiality, sodomy, and gross indecency, as well as cases of violent rape, sexual assault, and seduction.<sup>5</sup> The very existence of such cases

calls into question the “popular and frontier-inspired” depiction of prairie Canada as the Last Best West. These documents of carnal excess, reveal the rich contours of a queer colonial underworld.<sup>6</sup> Here I ask what *Rex v. Smith* can teach us about the queer and contested history of settler and sexual rule in Canada's prairie west?<sup>7</sup>

According to one of Walter's four “Witness Depositions,” the two met in 1898 or 1899 on Calgary's cricket pitch where James umpired the matches, and Walter fielded. They spoke “several times,” and eventually, James offered the younger Walter a job. He testified that, “One day, he told me he would like to have me work in his office.” Soon Walter was sweeping the shop after school and lighting the fire in the mornings. Such forms of paid labour were part of urban working-class boy culture in Toronto and Montreal and were not far removed from

## Warrant to Apprehend.

Canada:  
North-West Territories. }

To all or any of the Peace Officers in the said Territories:

WHEREAS *J. B. Smith* a Barrister of  
of *Calgary*  
has this day been charged upon oath before the undersigned, a Justice of the Peace in and  
for the said Territories, for that he, on *or about the 20th day of*  
*October, A.D. 1901, and on many occasions previous to*  
at *that date.*  
*Calgary.*  
State shortly did *commit acts of gross indecency with*  
the offence *another male person to wit: Walter*  
charged. *Joseph McHugh contrary to the provisions*  
*of the Criminal Code 1892, in such*  
*cases made & provided.*

THESE ARE THEREFORE TO COMMAND YOU, in His Majesty's name forthwith  
to apprehend the said *J. B. Smith* and  
to bring him before me (or some other Justice of the Peace in and for the said Territories)  
to answer unto the said charge, and to be further dealt with according to law.  
GIVEN under my hand and seal this *21<sup>st</sup>* day of *December 1901*  
at *Calgary*, in the Territories aforesaid.

*G. Sanders* J.P.



The Warrant to Apprehend James Smith on the charge that he had committed multiple acts of gross indecency with another male person (Walter McHugh) was issued on by Gilbert Sanders, Justice of the Peace, on 21 December 1901. Provincial Archives of Alberta, GR1979.0266/510, Box 5

sex and violence.<sup>8</sup> Within weeks of starting his job or “about the time the first contingent left for S. Africa,” James invited Walter to his Stephen Avenue office after hours. That appears to be the first night that they “rubbed [each other] off.” Then in February of 1900, on the weekend of Calgary’s annual curling bonspiel in which James was playing, they had sex again. And at least twice more in 1901.<sup>9</sup> It is unclear if this chronology resulted from James’ mobile prairie life or something else entirely.<sup>10</sup> Yet Walter repeatedly insisted in front of Smith, his father, and Gilbert E. Sanders, the Justice of Peace who gathered the state’s evidence, that the physical and sexual intimacy between his and James’ male bodies

1901, he visited Sanders to make a “Statement of Information” that declared he had “reason to believe and does believe” that James Smith “on or about the 20th day of October AD 1901 and on many occasions previous to that date” committed “acts of gross indecency” with “another male person”—his son—Walter Joseph McHugh.<sup>14</sup> That day Sanders issued a warrant to apprehend Smith—the second document in this casefile—so that he may “answer unto the said charge” and be “dealt with according to the law.”<sup>15</sup> Felix accused James of transgressing the 1892 *Criminal Code of Canada* with Walter. This *Code* detailed for the Dominion, its territories, and peoples the fault

was consensual.<sup>11</sup> “I am willing to do this,” Walter told the court on multiple occasions.<sup>12</sup>

Because James worked as a lawyer, he and Walter only ever acted on their illicit desires in private. Or so they told the court. The queerness of their sexual intimacy became the business of the settler state, not because someone caught them, but because Walter’s father, Felix McHugh, had gone to the authorities. In reporting James and his son, Felix demonstrated a colonial common sense that recognized his son’s sexual transgression as a queer threat to his masculine settler identity and family.<sup>13</sup> Walter’s father thus set in motion the levers of colonial ruling that created this casefile.

On Saturday, 21 December

lines of colonial difference.<sup>16</sup> It also punished those whose actions threatened to undermine the success of settler colonialism in Canada. Queer carnal acts posed a particular problem to the colonial order, as detailed in the section titled “offences against morality.” Here chapters on sodomy, buggery and the newly-created category of “gross indecency” incrementally punished acts of unnatural sex. So encompassing was the phrase “gross indecency” that when debating the *Code* in the Canadian Parliament, Minister of Justice John Thompson admitted that “it is impossible to define these cases by any form of words.”<sup>17</sup>

Canada was not alone in its efforts to shore up the straightness of the settler state and its subjects through the giving and taking of sexual liberties in these years.<sup>18</sup> This 1892 *Code* was no late-nineteenth-century invention; rather, it consolidated earlier legislation from the various British North American colonies, expanded that reach chronologically, and effectively recriminalized unnatural sex in those parts of the continent that Canada was actively colonizing. In this way, sex between men became one of a series of queer threats to heterosexual masculinity in Canada’s prairie empire.<sup>19</sup>

Of all the words spoken then recorded in *Rex v. Smith*, a mere thirty-nine—each entered into the archive through a separate “Statement of the Accused”—hint at how Smith registered this common-sense practice of sexual rule that deemed him a queer threat to the colonial order of things. Smith was most verbose when he first spoke before J. P. Sanders at a preliminary hearing held at Calgary on 23 December 1901. “I know nothing to say here,”



Justice of the Peace Gilbert E. Sanders, the man who oversaw the preliminary gathering of evidence that made its way into *Rex v. Smith*, stands tall at the North-West Mounted Police post (Fort Calgary) in 1903. Libraries and Cultural Resources Digital Collections, University of Calgary, Glenbow Digital Photo Collection, NA-2114-2

he gasped, “further than that there is not the slightest word of truth in the Criminal Charge that is brought against me.” Was Smith at such a loss for words that, as he registered the charge against him, all he could muster was that they were untrue? At a second, third, and then fourth preliminary hearing, Smith uttered even fewer words in defence of his non-queerness. To the charge that he and Walter were “grossly indecent” in October 1899 when they masturbated in his office: “The charge is untrue.” Regarding the weekend of the Calgary bonspiel in February 1900 when they did so again: “The charge is untrue.” And then again in June and October 1901: “The charge is not true.”<sup>20</sup>

To riff on the perceptive and evocative question asked by H. G. Cocks in his examination of the voices of the men accused of sodomy in nineteenth-century England, this was not the sodomite speaking.<sup>21</sup> What then was going on here? Was Smith suggesting that Walter was a liar? Or was there more at play? When asked on four different occasions,

Smith appears to have been at a loss for words, unable to articulate a response to a law that effectively identified him and queerness as threats. It is also probable that Smith, a lawyer, employed denial as a defence tactic. It was, after all, challenging to prove that a man had transgressed the threshold between manliness and queerness and convict him of “gross indecency.” This was especially so for white, well-networked, and respectable men like Smith.<sup>22</sup> But might Smith’s silence be a queer act of dissent? Might the act of not speaking be an example of queer resistance aimed not at Walter’s truth-telling but the criminalization and characterization of sex between men as *grossly indecent*? Was Smith challenging the increasingly dominant ideal that deemed white men *complete* when living in heterosexual, same-race, patriarchal

unions?<sup>23</sup> Perhaps. Whatever Smith’s intent, on 4 February 1902, before the Honourable Thomas H. McGuire, a judge of the Supreme Court of the North West Territories, Smith asserted he was “not guilty. [original]” Though somebody had struck Smith’s last words from the record, his archived brevity had worked. Later that day, McGuire officially proclaimed Smith “not guilty.” This time these two words remained.

*Rex v. Smith* ends here. It is an archive of an angry father and a family shamed. An artifact of a young man, Walter, who repeatedly testified to having had sex with another man and was soon after sent to Ottawa College in Ontario.<sup>24</sup> It is also the record of a bachelor, James, declared innocent of grossly indecent behaviour but who would no longer be the man among men



The McHugh Family at the start of the twentieth century. Walter is standing directly behind his father who reported him and James Smith to Justice of the Peace Sanders for gross indecency. The youngest boy in the photograph, John, would record the family’s history in the 1960s. Libraries and Cultural Resources Digital Collections, University of Calgary, Glenbow Digital Photo Collection, NA-217-6

on the cricket pitch or curling rink that he once was. Four years later, he was found dead in his room.<sup>25</sup> However, we must also remember that the actions of these men were corporeal responses to the fear of queer carnal acts at the turn of the century. When we do, we shift our attention from questions: Did they or didn't they or were they or weren't they—to the contested history of settler and sexual rule in the prairie west. In this way, students of sex and settler-colonialism can read casefiles like *Rex v. Smith* as artifacts of a queer and messy prairie past. A past that included a concerted effort by the settler state in Canada and its territories—and buttressed by the “powerful truth effects of the law”—to orient white settler manhood toward straightness.<sup>26</sup> ■

## Notes

1. Provincial Archives of Alberta, GR1979.0266/510, Box 5, *Rex v. J. B. Smith*, 1902. Thanks to Kristine Alexander, Arpad Kovacs, Karen Simonson, Signe Spence, T. J. Tallie, and Mike Wilton for their assistance and time, and to Erin Millions for encouraging me to write this.
2. Glenbow Archives, Calgary Bar Association fonds; and “History of the Calgary Bar Association: In Pursuit of Cordial Intercourse,” <http://www.calgarybarassociation.com/history> (visited 24 February 2021).
3. Deposition of a Witness (Re: June 1901). As Rachel Hope Cleves argues, when an archive gives voice to those young boys and men involved in cases of same-sex sex, especially in sexual encounters where the age difference may appear jarring to our contemporary selves, it is important that we listen to what they can teach us about the uneven history of sexual morality. See: *Unspeakable: A Life Beyond Sexual Morality*, The University of Chicago Press, Chicago, 2020.
4. Henderson, Jarett, 2011. “No Money, But Muscle and Pluck: Cultivating Trans-Imperial Manliness for the Fields of Empire, 1870–1901,” in *Making it Like a Man: Canadian Masculinities in Practice*, Wilfrid Laurier University Press, Waterloo: , pp. 17–34 and Jarett Henderson, 2018, “‘From One Part of the Empire to Another’: Promoting a Settler-Colonial Future in Canadian Immigration Handbooks in the Late-Nineteenth Century,” in *From Suffragette to Homesteader: Exploring One Woman’s Memoir on Life in England and Canada*, edited by Emily van der Meulen, Fernwood Publishing, Winnipeg, pp. 110–125.
5. Zeb Tortorici, ed., 2016. *Sexuality and the Unnatural in Colonial Latin America*, University of California Press, Berkeley; and Angela Laughton, 2016. “A Case of Seduction: Sexual Violence and the Law in Southern Alberta, 1922,” History Honours Thesis, Calgary: Mount Royal University.
6. Leslie Erickson, *Westward Bound: Sex, Violence, the Law, and the Making of a Settler Society*, Vancouver: UBC Press, 2011, p. 2–3; Kirsten McKenzie, *Imperial Underworld: An Escaped Convict and the Transformation of the British Colonial Order*, Cambridge: Cambridge University Press, 2016; and Christopher Chitty, *Sexual Hegemony: Statecraft, Sodomy, and Capital in the Rise of the World System*, Durham: Duke University Press, 2020.
7. One must acknowledge the foundational research of Terry Chapman, “An Oscar Wilde Type: ‘The Abominable Crime of Buggery’ in Western Canada, 1890–1920,” *Criminal Justice History*, 4 (1983). See also, Lyle Dick, “The Queer Frontier: Male Same-sex Experience in Western Canada’s Settlement Era,” *Journal of Canadian Studies* 48.1 (Winter 2014), pp. 15–52. Here I use queer as a term neither rooted in sex nor wholly removed from it. I draw from a comparative and international historical literature to emphasize how the act of queering can draw attention to varied technologies of power and rule that propped up racialized heteronormative projects of empire across the globe. See, Scott Lauria Morgensen, 2011. *Spaces Between Us: Queer Settler Colonialism and Indigenous Decolonization*, University of Minnesota Press, Minneapolis; Zeb Tortorici, 2018. *Sins against Nature: Sex and Archives in Colonial New Spain*, Duke University Press, Durham; and T. J. Tallie, 2019. *Queering Colonial Natal: Indigeneity and the Violence of Belonging in Southern Africa*, University of Minnesota Press, Minneapolis.
8. Steven Maynard, 1997. “‘Horrible Temptations’: Sex, Men, and Working-Class Male Youth in Urban Ontario, 1890–1935.” *The Canadian Historical Review* 78, no. 2: 191–235 and Tamara Myers, 2005. “Embodying Delinquency: Boys’ Bodies, Sexuality, and Juvenile Justice History in Early-Twentieth-Century Quebec.” *Journal of the History of Sexuality* 14, no. 4: 383–414.
9. Deposition of a Witness (Re: October 1898); Deposition of a Witness (Re: February 1900); Deposition of a Witness (Re: June 1901); Deposition of a Witness (Re: October 1901).
10. The records of other gross indecency cases from the prairies in these years that undergraduates and I transcribed in 2016 suggest similarly volatile encounters. See Jarett Henderson, *Indecent Alberta: On Trial for Gross Indecency*: <https://indecentalberta.wordpress.com>. Thanks to Jackie Jansen van Doorn and Kenney Reilly for their work creating this digital archive, and to Jeff Keshen and his Dean of Arts Faculty

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11. Thomas Thorner and Neil B. Watson, 1984. "Keeper of the King's Peace: Colonel G. E. Sanders and the Calgary Police Magistrate's Court, 1911–1932," *Urban History Review* 12:3: pp. 45–55; and Thomas Reynolds, 1978. "Justices of the Peace in the North-West Territories, 1870–1905," MA Thesis, University of Regina, Regina.
  12. Deposition of a Witness (Re: October 1898); Deposition of a Witness (Re: February 1900); Deposition of a Witness (Re: June 1901); and Deposition of a Witness (Re: October 1901 C).
  13. On notion of colonial common sense, see: Ann Laura Stoler, *Along the Archival Grain*, (2010). Tallie, *Queering Colonial Natal*; Morgensen, *Spaces Between Us*.
  14. Strikethrough in original. Information (October 1901).
  15. Warrant to Apprehend (December 1901).
  16. Partha Chatterjee, 1993. *The Nation and Its Fragments: Colonial and Postcolonial Histories*, Princeton: Princeton University Press; Catherine Hall, "2000. The Rule of Difference: Gender, Class and Empire in the Making of the 1832 Reform Act," in *Gendered Nations: Nationalism and Gender Order in the Long Nineteenth Century*, ed. Blom, Ida, Hagemann, Karen, and Hall, Catherine, Oxford: Berg, pp. 107–136; and Elizabeth Kolsky, 2005. "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23: 3: 631–683.
  17. Official Report of the Debates of the House of Commons of the Dominion of Canada, 55–56 Victoria, 1892, Ottawa: S. E. Dawson, 1892, John Thompson, 25 May 1892, p. 2968.
  18. Enze Han and Joseph O'Mahoney, 2018. *British Colonialism and the Criminalization of Homosexuality: Queens, Crime, and Empire*, Routledge, London; Margot Canada, 2008. *The Straight State: Sexuality and Citizenship in Twentieth-Century America*, Princeton University Press; Jessica Hinchy, 2019. *Governing Gender and Sexuality in Colonial India: The Hijra, C.1850–1900*, Cambridge University Press, Cambridge.
  19. Sarah Carter, 2008. *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada in 1915*, Athabasca University Press, Edmonton; Amanda Nettelbeck, Russell Smandych, Louis A. Knafla, Robert Foster, 2016. *Fragile Settlements: Aboriginal Peoples, Law, and Resistance in South-West Australia and Prairie Canada*, UBC Press, Vancouver; and Tallie, *Queering Colonial Natal*, 2019.
  20. 23 December 1901, Statement of the Accused (Re: October 1901); 24 January 1902, Statement of the Accused (Re: October 1898); Statement of the Accused (Re: February 1900); Statement of the Accused (Re: June 1901).
  21. H. G. Cocks, 2006. "Making the Sodomite Speak: Voices of the Accused in English Sodomy Trials, c.1800–98," *Gender & History*, 18:1 (November): pp. 87–107.
  22. Lyle Dyck, 2009. "Same-sex Intersections of the Prairie Settlement Era: The 1895 Case of Regina's 'Oscar Wilde,'" *Histoire sociale/Social history* 42:83: pp. 107–145.
  23. Adele Perry, 2008. "Poor Creatures Are We without Our Wives: White men and Homosocial Culture," in *On the Edge of Empire: Gender, Race, and the Making of British Columbia, 1849–1871*; Carter, *The Importance of Being Monogamous*; and William Benemann, 2012. *Men in Eden: William Drummond Stewart and Same-Sex Desire in the Rocky Mountain Fur Trade*, University of Nebraska Press, Lincoln.
  24. This was more than likely after the 1902 trial and quite possibly the McHugh family turning to the long-used method of self-removal or community banishment to escape the stigma of queerness. Glenbow Archives, McHugh Family Fonds, "Walter J. McHugh."
  25. Thanks to Erin Millions for this sleuthing. *The Weekly Post*, Lindsay (Ontario), Friday, 30 November 1906.
  26. Sara Ahmed, 2006. *Queer Phenomenology: Orientations, Objects, Others*, Duke University Press, Durham and Steven Maynard, 1998. "On the Case of the Case: The Emergence of the Homosexual as a Case History in Early-Twentieth-Century Ontario," in *On the Case: Explorations in Social History*, Edited by Franca Iacovetta and Wendy Mitchinson, University of Toronto Press, Toronto, footnote 3. See also, Carter, 2008. *The Importance of Being Monogamous*, and Erickson, 2011, *Westward Bound*.



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