Court File No. 619/90

ONTARIO COURT OF JUSTICE

B E T W E E N:	)	
	)	
GLAD DAY BOOKSHOP INC. AND JEARALD MOLDENHAUER	)	Charles Campbell and Clare Barclay for the
Appellants	)	Appellants
	)	
- and -	)	
	)	
DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE	)	Vern Brewer and Beverly Wilton for the Respondent
Respondents	)	
	)	
	)	Heard: May 12, 13, 14 & 15, 1992

HAYES J.

This is an appeal from a determination of the Deputy Minister of National Revenue for Customs and Excise pursuant to the provisions of section 67(1) and section 71 of the Customs Act R.S. 1985 c.1 (2nd supp.).

Section 114 of the Customs Tariff S.C. 1987 c.49 (the "Tariff") provides that the importation into Canada of any goods enumerated or referred to in Schedule 7 of the Tariff is prohibited. Code 9956 of Schedule 7 is comprised, in part, of books, printed paper, drawings, paintings, prints, photographs or representations of any kind that are deemed to be obscene under section 163(8) of the Criminal Code.

On October 3, 4 & 16 and November 14, 1989 customs officials

detained five shipments containing copies of nine publications imported by the Appellants, Glad Day Bookshops Inc. and Jearald Moldenhauer hereinafter referred to as "Glad Day".

On October 16th and November 1st and 20th, 1989 customs officers made determinations pursuant to section 58 of the Act that importation of the publications into Canada was prohibited because they were classified as obscene under Code 9956 of Schedule 7 of the Tariff. The Appellant on the 2nd January, 1990 requested re-determinations pursuant to section 60 of the Act.

On January 9th, 1990 a Tariff and Values Administrator made re-determinations under section 60 of the Act that the publications were obscene and prohibited importation into Canada under Tariff Code 9956. Glad Day requested further determinations under section 63 of the Act on April 4th, 1990.

On July 16th, 1990 the Deputy Minister made her decision classifying the publications as obscene under Code 9956 of the Tariff, thereby confirming that importation of the publications into Canada is prohibited.

This appeal was launched by Glad Day on October 18th, 1990 and on November 5th, 1990 the Deputy Minister filed her Notice of Appearance on this appeal.

> implementing its administrative scheme including an appeal to this court, was for the standard of proof to be on a balance of probabilities. Upon a careful review of the legislation, I am satisfied that it was not intended that the Crown should bear the burden of proving grounds for prohibiting the importation of goods beyond a reasonable doubt."

She further held that:

> "The usual civil procedure rules were not meant to apply to this type of hearing".

and she proceeded to order the Deputy Minister to provide a summary of evidence relied on to prove the importation of the goods and their classification as obscene, a list of the witnesses and a summary of their evidence, and an affidavit on production by April 21st, 1992. Glad Day was ordered to provide a summary of its argument in response and an affidavit of production by April 30th, 1992 and it was further ordered that factums be provided to the court in accordance with the Rules of Civil Procedure.

I understand from counsel that the disclosure and other items directed by Chapnik J. have been completed by the parties prior to the commencement of this hearing.

In this matter it is to be noted that the procedure by the Deputy Minister did not provide for the reception of any evidence, for submissions by counsel or for any opportunity to be heard by the Appellant apart from the Appellant's request for a decision of

the Deputy Minister pursuant to the provisions of the Act.

Therefore there is not before this Court any record of the proceedings before the Deputy Minister other than the letter indicating her determination with respect to the articles in question and the Crown has filed as exhibits on this appeal the publications in respect of which the determinations were made by the Deputy Minister.

The parties made submissions with respect to the form of the hearing. For reasons dictated, I determine that the parties should have the opportunity to call evidence. There was some discussion as to which of the parties should proceed first but it was unnecessary to decide that matter as counsel for the Respondent advised that they were not calling any evidence and relied on the Court examining the books and magazines for its determination with respect to obscenity.

BURDEN AND STANDARD OF PROOF

Counsel made extensive submissions with respect to the above matter which may be summarized as follows:

The Appellant

1. The appellant submits that it should be proved beyond a reasonable doubt even though no one is charged with any offence. It is submitted by analogy it should not be

The Customs Act does not set out any procedure for the hearing of the appeal.

On March 24th, 1992 Glad Day brought a motion before the General Division of the Ontario Court for an order declaring this appeal to be governed by the procedural rules applicable to criminal proceedings. The Deputy Minister brought a cross motion which was heard on the same day for directions requiring that the hearing proceed in accordance with the rules applicable to civil proceedings.

The application came on for hearing before Madam Justice Chapnik and her reasons were released on April 8th, 1992. Chapnik J. observes in her reasons "Accordingly the issue to be decided involves a characterization of the type of proceeding herein as well as the consequences which flow from that determination. Both parties conceded that the Statute is unclear as to what constitutes the applicable rules and the standard of proof in such cases. It appears that this particular matter had never been judicially determined."

In respect of the standard of proof she stated:

> "To require proof of obscenity beyond a reasonable doubt in such circumstances where no charges have been laid, would --- place undue hardship upon the Crown -- in all the circumstances, I would suggest that the intention of the legislature in developing and

Minister. It is therefore submitted that their using the test of obscenity from the Criminal Code the criminal standard of proof should apply.

The Respondent's submissions with respect to the standard of proof may be summarized as follows:

1. It is not a criminal proceeding.
2. It is a process to determine the status of goods sought to be imported and the liberty of the subject is not at issue.
3. The goods are not seized in Canada but detained for the determination of the customs authorities and if found to be within the prohibited schedule they are returned to the sender.
4. The test of reasonable doubt is restricted to questions of safeguarding the liberty of a person and if that is not the case the standard should be on a balance of probabilities.
5. Any submissions with respect to the principle of the delay in the proceedings relating to section 11(b) of the Canadian Charter of Rights and Freedoms is not applicable as "no one is charged".
6. The definition of obscenity from the Criminal Code which is imported into the provisions of the Customs Act is in response to the judgment in Re. Luscher v. Deputy Minister, Revenue Canada, Customs and Excise (1985) 15 C.R.R.R. 167 (F.C.A.) which held that the prohibition of "immoral" and "indecent"

different because the effect of the decision is to deprive the citizen of the use and enjoyment of the material in question.

2. The Appellant would have greater protection if the material had been seized under the provisions of the Criminal Code section 164(4) for in those circumstances the judicial officer proceeding in what in effect is an in rem proceeding would apply the standard of proof beyond a reasonable doubt as the determination of the Deputy Minister to prohibit the entry of the material into Canada has in effect the same result that is the depriving of the citizen of the materials sought to be imported.

3. It is submitted that the system of prohibition under the Customs Act is prima facie a violation of the freedom of expression under section 2(b) of the Charter and that the burden is on the Crown to establish on a balance of probabilities that it is justified under section 1 of the Canadian Charter of Rights and Freedoms because it is submitted that section 2(b) has been upheld as criminal law and therefore there is no justification for a different standard of proof under the Customs Act than under procedures under the Criminal Code because the forfeiture of material is the same result.

4. The Customs Act imports the definition of obscenity from sec. 163(8) of the Criminal Code for the purpose of the determinations by the Customs Inspector and by the Deputy

materials was so vague as to be an unreasonable limit of section 2(b) Charter of Rights and to such extent was of no force or effect.

7. Counsel for the Respondent submits that because the definition for control of goods in the country i.e. section 163(8) of the Criminal Code has been upheld therefore the importing of that section into the regulation is similarly justification for inspection in Canada at the border for the purposes of classification. Counsel refers to R. v. Simmons (1988) 55 D.L.R. 4th 673 (S.C.C.). This case dealt with the search of the person of an individual entering Canada and Chief Justice Dickson at p. 697 stated:

> "It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function."

8. In assessing the standard of proof consideration should be given to the fact that the mandate for border control is consistent with the provisions of the Act and the classification of the material is not a seizure. In addition, there are two internal administrative appeal procedures and then the appeal to the court system.

I have reviewed the structure and provisions of the Customs

Act and it sets up a regulatory scheme to control what substances or materials can be imported into Canada. In addition, it creates under section 160 and 161 summary conviction and indictable offenses for the breach of certain specified sections of the Act. It would seem to be a quasi criminal statute with certain administrative procedures relating to the entry into Canada of goods or materials.

If the materials do not conform to the standard for admission the citizen is denied possession of them and in this case the items would be returned.

The procedure of classification of the articles is in effect an in rem procedure and, of course, does not affect the liberty of the person but may result in the books or magazines in this case being returned to the sender.

This could result in a breach of section 2(b) rights of the appellant and the return of the books and magazines is in effect analogous to a forfeiture.

If the books and magazines were in the country it is possible that they could be seized by the police under section 164(4) of the Criminal Code. Although the owner of the publications seized must show cause why it should not be forfeited the onus remains on the

prosecution to prove obscenity beyond a reasonable doubt. This again is not a procedure which affects the liberty of the subject but it could result in a breach of the section 2(b) rights of the appellants.

It would not seem consistent if the standard of proof under the Customs Act was a preponderance of evidence and under section 164 proof beyond a reasonable doubt when the results, that is, forfeiture and/or return of the items are essentially the same. In addition, there is in each case the possibility of a breach of the section 2(b) rights of the person who is the recipient of the property.

A prohibition whose first object is books, is prima facie contrary to section 2(b) of the Canadian Charter of Rights and Freedoms and the Crown bears the burden of justifying such a limitation under section 1 of the Charter. See: Re. Luscher (1985) 15 C.R.R. 167 (F.C.A.).

I have considered the Reasons for Judgment of Madam Justice Chapnik with respect to the standard of proof and I must respectfully disagree with her conclusion, that proof is by a preponderance of evidence. When the result of the prohibition from importing under the Customs Act is the same as forfeiture under the provisions of the Criminal Code and there could conceivably be

different results, different standards of proof would not be a consistent application of the law in respect of the same item especially in each case where the decision maker is applying the same definition of obscenity that is the provisions of section 163(8) of the Criminal Code.

Therefore it is my opinion that the burden is on the Deputy Minister to satisfy himself by proof beyond a reasonable doubt that the material is obscene within the meaning of section 163(8) of the Criminal Code.

Nature of publication prohibited

The publications are in the form of what might be termed magazines and publications containing short stories.

The pictures and short stories generally relate to explicit sexual activities between males. The text of the material describes in intimate detail the explicit sexual practices reactions and feelings of the participants with excessive, lewd and disgusting detail.

The material, the evidence and the submissions as they relate to the law concerning obscenity have been generally directed by counsel to the relationship and sexual practices between males who have been referred to as the "gay community".

Evidence on the Appeal

The Appellant tendered evidence on the appeal some of which may be summarized as follows:

1. Robert Payne, advised he had been Chairman of the Ontario Film Reform Review Board for approximately three years and a member for two years prior to being appointed Chairman. Part of the mandate of the Board is reflect community standards. The membership of the Board reflects racial, cultural, male and female members from various parts of the Province of Ontario.

   The Board has communication and conferences with similar Boards across the country and they compare their standards.

They also endeavour to be knowledgable about the activities and governing principles of boards outside Canada. The Board has regulations concerning the standards to be applied by the Board and under those regulations they have internal guidelines.

Explicit sex and scenes of penetration either heterosexual or gay is not a concern to the board as long as it does not involve violence or minors and is not degrading.

In cross-examination the Chairman expressed the opinion that explicit sex is not degrading or dehumanizing nor does it cause harm.

It is his opinion that the Supreme Court of Canada has not defined "degrading" and he does not agree with the statement of Madam Justice Wilson in Towne Cinema Theatres Limited v. The Queen [1985] 1 S.C.R. 494 at p.524 where she states:

> "The most that can be said I think is that the public has concluded that exposure to material which degrades human dimensions of life to a sub human or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way".

The Chairman stated that the Board decides matters on a case by case basis.

There has been placed before the Court parts of the legislation and regulations relating to the activities of the Ontario Film Review Board and the guidelines provided to the Board.

Section 14 is entitled "Board Criteria for Refusal to Approve" and in subsection 2 there is provided a list of the guidelines.

2. Kyle Rae is a city councillor for Ward 6 and a director of the community centre for the lesbian and gay community.

He states his political constituency encompasses the largest gay community in Canada.

He further indicated that he lobbied to get sexual orientation in the Human Rights Code.

He has never received complaints about violence between gay men nor has he had complaints about abusive sexual behaviour between males.

He states that if there was a lack of consent in respect of violent sexual activity between men it would be degrading.

He has not done any research with respect to violence in the gay community. He agrees that there may be abusive homosexual relationships not within his knowledge.

It is his opinion that there is no violence in the sexual activity in the gay community but acknowledges there is "rough sex" such as spanking and fisting (inserting the hand in the anus).

It is further his opinion that sexual activity while a party is restrained is rough sex but in his opinion it is not degrading.

3. Barry Adams

This witness is a Professor of Sociology at the University of Windsor. He teaches theories of sexuality as it relates to the sexual behaviour in the straight and gay community.

He gave expert testimony with respect to

(1) Sexual practices in the gay community and the frequency of

In his evidence at page 59 of the transcript of his evidence line 25 he states:

Answer: "No I think it is fair to say that there are different ways of interpreting it and for many people it is not their taste, but there is a general acceptance that for people for whom it is their taste they can do it, they should have the right to do it."

At page 60 the transcript line 26 are the following questions and answers.

Question: And I'll ask you if you agree or disagree with this statement, page 25 of the judgment: (Sopinka J. in R. v. Butler).

"Among other things, degrading and dehumanizing materials place woman, and sometimes men in positions of subordination servile submission, or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted act even more degrading or dehumanizing."

Do you agree or disagree with those comments?

homosexual relationships.

(2) The nature of sexual conduct in the gay community.

(3) The nature of sexual subordination in the gay community.

(4) Issues of harm in the gay community as perceived by the gay community.

He states the majority of gay men practice oral and anal sex.

His evidence indicates there is very little research on harm, if any, in the gay community and as the result of their sexual practices a gay man could avoid violence by not staying in the relationship.

There is coercive sex in the gay community in the form of sadomasochism and bondage but if there is there is underlying consent and it is sexual theatre.

He has reviewed some of the material in this case and there is an illustration of masochism and an act of humiliation.

If someone consents to a person urinating on them or someone inflicting pain on them it is tolerable and it is not degrading or dehumanizing.

Answer: They seem reasonable to me and what I find remarkable in trying to think through that rule in terms of the material that I read, is that what seems so fundamentally different to me if rather than having the situation of, for example, having women depicted for male audiences enjoying violence, and thereby providing warrant to male aggressors to inflict that violence upon women, that on the contrary we have in this literature a situation that is consistently written from the viewpoint of the man seeking self abasement and going out of his way to find someone to help him engage in that process and, therefore, there is a clear message that it is the man who is seeking the self abasement who is in control and thereby there is no warrant to give to any unqualified exertion of force or coercion upon the subordinate party.

Question: So I gather from that you have difficulties in agreeing with Justice Sopinka's statement of principles?

Answer: I think I am agreeing with it in that to me, my understanding of it, and obviously I am not a lawyer, but my understanding of it is that there is a concern that has come out of the woman's movement that there are forms of pornography that function as a kind of hate literature which give warrant to providing, encouraging, and affirming violence against women, and this is a literature that is written by men from a male viewpoint,

impugning pleasure into woman to allow men to exert that domination and again what I found so remarkable about the text that I looked at was they were fundamentally the opposite of that kind of situation where they were not written from the viewpoint of the aggressor. The aggressor was often a kind of cardboard cut out figure in the story. They had no emotional life. All the emotional life was contained in the viewpoint of the subordinate person, and indeed, it would seem to me the only way to understand or even enjoy the story would be that the reader would have to have some sympathy with that position, but to me that separates it from the concern that was expressed in the quote that you just read.

Question: Since you have just raised the issue, Professor, isn't it correct to say that the principle enunciated by Justice Sopinka will appear to apply to all people, not just heterosexual people or to women but to all people?

Answer: Yes, I don't think that is what we are talking about here in excepting gay men, but rather that the nature of this particular form of erotica does not conform or does not fall into the problem that was identified in the quote that you just read. In other words, I think there is a consistent principle here, and we are not talking about exempting gay men because they are gay men."

Law relating to obscenity

The Supreme Court of Canada has in the decision in R. v. Butler rendered February 27th, 1992, outlined a complete analysis of this area of the law.

The Court determined that section 163(8) of the Criminal Code provides an "objective standard of obscenity" and made reference to Brodie v. The Queen [1962] S.C.R. 681.

and

Sopinka J. at p. 20 states:

> "Any doubt that section 163(8) was intended to provide an exhaustive test of obscenity was settled in Duchow v. The Queen, supra. Laskin C.J. stated: "I am not only satisfied to regard section 159(8) [now s. 163(8)] as prescribing an exhaustive test of obscenity in respect of a publication which has sex as a theme or characteristic but I am also of the opinion that this Court should apply that test in respect of other provisions of the code such as subsection 163 and 164, in cases in which the application of obscenity revolves around sex considerations."

and further Sopinka J. at page 21(b)

> Tests of undue exploitation of sex
>
> In order for the work or material to qualify as "obscene", the exploitation of sex must not only be its dominant characteristic, but such exploitation must be "undue". In determining when the exploitation of sex will be considered "undue" the Courts have attempted to formulate workable tests. The most important of these is the "community standard of tolerance test."

The Court considered the meaning of the "community standard of tolerance" and Sopinka J. at p. 22:

> "The community standards test has been the subject of extensive judicial analysis. It is the standards of the community as a whole which must be considered and not the standards of a small segment of that community such as the university community where a film was shown (R. v. Goldberg [1971] 3 O.R. (323) C.A." -- "The standard to be applied is a national one" R. v. Cameron 1966, 58 D.L.R. (2d) (486 O.C.A.)"--"With respect to expert evidence, it is not necessary and is not a fact which the Crown is obliged to prove as a part of its case (R. v. Sudbury News Service Limited (1978), 39 C.C.C. (2d) 1 (O.C.A.)".

The Supreme Court of Canada considered the Community Standards Test in Towne Cinema Theatres Limited v. The Queen [1985] 1 S.C.R. 494 and after making reference to the judgment of Chief Justice Dickson in that case Sopinka J. concluded at p. 23:

> "Therefore, the Community Standards Test is concerned with not what the Canadians would not tolerate being exposed to themselves but what they would not tolerate other Canadians being exposed to. The minority view was that the tolerance level will vary depending on the manner, time and place in which the material is presented as well as the audience to whom it is directed. The majority opinion on this point was expressed by Wilson J. in the following passage:
>
> "It is not in my opinion open to the courts under section 159(8) of the Criminal Code to characterize a movie as obscene if shown to one constituency but not as shown to another -- in my view, a movie is either obscene under the Code based on a national community standard tolerance or it is not. If it is not, it may still be the subject of provincial regulatory control. [at p. 521].

A further test of the "undue exploitation of sex" is whether the material is degrading or dehumanizing and Sopinka J. at p.24

> "There has been a growing recognition in recent cases that material which may be said to exploit sex in a "degrading or dehumanizing manner" will necessarily fail the Community Standards Test." And Sopinka J, further at p. 25 "among other things, degrading or dehumanizing materials place woman (and

> sometimes men) in subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.
>
> This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that portrayal of a person being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to woman and therefore to society as a whole. --- it would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material. Public opinion was summed up by Wilson J. in Towne Cinema, supra as follows:
>
> "The most that can be said I think is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way. [at p. 524].
>
> In Towne Cinema Dickson C.J. considered the "degradation" or "dehumanization" test to be the principle indicator of "undueness" without specifying what role the community tolerance test plays in respect of this issue.

The Court further considered the "internal necessities test" or "artistic defense" and at p. 29 stated "even material which by itself offends community standards will not be considered "undue", if it is required for the serious treatment of a theme. For example in R. v. Odeon Martin Theatres Limited (1974), 16 C.C.C. (2d) 185".

The Court then proceeds to categorize pornography as follows and Sopinka J. at p. 30:

"Pornography can be loosely divided into three categories:

1. Explicit sex with violence.

2. Explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing and

3. Explicit sex without violence that is neither degrading or dehumanizing.

> That courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as for example, the physical or mental mistreatment of women by men or what is perhaps debatable the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standards is desirable but not essential.
>
> In making this determination with respect to the three categories of pornography referred to above the portrayal of sex coupled with violence almost always constitutes the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its productions."

Although there is a discretion in the Board Mr. Payne's evidence with respect to his views as to community standards does not seem to be entirely in accord with the guidelines provided by the legislature and in addition, he does not appear to agree with the statement of Madam Justice Wilson in Towne Cinema with respect to the dehumanizing nature of materials and the basis on which harm

can result.

There has been placed before the Court (a portion of which was shown to the Court a video tape entitled "Hard Choices" which had been approved by the Ontario Film Review Board. This film shows explicit continuing sexual activity between males engaged in oral and anal sex. It does not involve violence but in a part which was not shown to the Court, Counsel for the Appellant advises that there are scenes of anal intercourse involving three males. This, of course, is not permissible activity under the provisions of the Criminal Code.

In summary notwithstanding Mr. Payne's experience and consultation with others I am not satisfied that his evidence is entirely and necessarily representative of community standards.

I have reviewed the evidence of Professor Adam. His research and opinions are generally not based on recent original research. In addition, his views are largely restricted to the gay community and oriented around consensual activity which he indicates should be allowed. His evidence does not assist the Court with respect to the effect of the publication of descriptions of homosexuals' sexual activities as it might relate to harm. His evidence does not assist with respect to the community standard test.

It does not contain any real human relationship. In its grotesque figures and their sexual activity it is completely degrading and the community would not tolerate others being exposed to this material.

There is a strong inference of a risk of harm to be drawn from the material itself. The material is subhuman. The dominant characteristic is the undue exploitation of sex. It is clearly obscene.

3. Wolfbiorin The Viking

This is a description in comic strip format of grotesque male figures engaging in oral and anal sex with up to four participants. There is also some element of bondage with chains being attached to parts of the body.

The conduct depicted is such that society would formally recognize it as being incomparable with its proper functioning. There is a strong inference of harm from the material. The community would not tolerate others being exposed to this material. The dominant characteristic is the undue exploitation of sex. It is clearly obscene.

4. Spartan's Quest

This is a succession of grotesque drawings of three males

I shall now review the material which was before the Deputy Minister of Customs and Excise and assess it in accordance with the guidelines provided in R. v. Butler, supra.

1. Re Oriental Guys No. 4 Spring 1989.

This magazine contains explicit descriptions of consensual oral and anal sex with oriental males. The article "Adonis" contains extensive excessive descriptions of the acts and professed pleasures and the appreciation of the physical activity. There is no description of violence.

The description in the magazine of this sexual activity is degrading, I am of the opinion that this particular material does indicate a strong inference of a risk of harm that might flow from the community being exposed to this material. I am of the opinion that the community would not tolerate others being exposed to this item. The dominant characteristic is an undue exploitation of sex. It is obscene.

2. Movie Star Confidential

This is supposedly a comic strip concerning an aging movie actress. It depicts sexually explicit activity. It also depicts a messenger of the actress paying men to attend at her home and ejaculate on her in her bath tub so she could satisfy her desire to bath in semen. There are also some parts of the material relating to bondage.

engaged in various forms of sexual activity one of the men having emerged from the sea in a fishing net. It is a sexual encounter without any real meaningful human relationship. The manner in which the conduct is depicted would not be recognized as compatible with the proper functioning of society. It is degrading. There is a strong inference of harm. The community would not tolerate others being exposed to this gross material. I find it to be obscene.

5. Harry Chess

This is a comic book format with respect to a detective looking for people who have taken young men to perform various sex acts on them and left them on a beach in San Francisco.

The entire theme is sexual. There are depicted scenes of bondage, sex with pain and forced violent sexual activity. The material does not have any real human dimension. Harm is depicted and clearly harm would flow from the release of the material.

Applying the test in R. v. Butler, supra, it is obscene.

Humongous - True Gay Encounters

This a collection of short stories relating to the sexual encounters of gay men.

There are such titles as "Born Again Stud", "Two Hawaiians", "Chocolate Delight", 'You're Hung Like a Colt", Slapped Him Until He Came".

The sexual encounters described in the stories are generally between males who are not previously known to each other. The stories involve explicit oral and anal sexual activity accompanied in some cases by bondage, urination, defecation and pain. The stories all have the same theme describing the activity in excessive descriptive terms.

The manner in which they express explicit sexual activity is described is degrading to human beings. There is no real human relationship as stated in Towne Cinema, supra, by Dickson C.J. "Degradation or Dehumanization" is a principle indicator of "undueness". The descriptions are not necessary for the serious treatment of what purported to be the theme of these stories.

Humongous and True Gay Encounters is a publication which the community would not tolerate others being exposed to and there is a strong inference of harm to be drawn from the material. I find it to be obscene within the principles of R. v. Butler.

Hot Tricks - True Revelations and Strange Happenings from 18 Wheelers.

The author in his opening statement clearly indicates that the

explicit sexual activity that he is about to describe in the collection of short stories does not arise from any ongoing human relationships but are descriptions of random sexual encounters.

The stories involve explicit oral and anal sex, sex with juveniles, urination in the mouth and sex with a mentally retarded person.

This material is clearly degrading and dehumanizing. It is material of the type referred to by Wilson J. in Towne Cinema, supra.

The dominant characteristics of the material is the undue exploitation of sex. I find it to be obscene.

Sex Stop- True Revelations and Strange Happenings from 18 Wheeler

This is a collection of short stories describing explicit oral and anal sex encounters accompanied by urination taking place in washrooms and trucks with one male engaging in this activity with a number of males generally unknown to him.

The introduction to this book as in the previous book clearly indicates the base purpose of the material which has no human dimension and is degrading and dehumanizing. There is a strong inference of a risk of harm as considered in R. v. Butler, supra.

The community would not tolerate others exposed to this material as harm may flow. The dominant characteristic is the undue exploitation of sex. I find it to be obscene.

Bear Issue No. 9

It is a magazine containing letters to the editor describing explicit sexual activities including violence, urination for sexual arousal, anal penetration with a fist, ejaculation on the face.

There are stories of explicit sexual encounters of oral and anal sex and digital anal penetration. There is a description of a biker gang using one person for explicit anal intercourse and in violent impersonal and degrading circumstances with lewd descriptions of the activity and the alleged pleasures.

There is a strong inference of harm as referred to in R. v. Butler, supra. The community would not tolerate others being exposed to it and the dominant characteristic is the undue exploitation of sex. It is obscene.

Play Guy

This is a magazine type format with pictures of unclothed males including a picture of six men involved in oral sex.

There are also short stories of oral and anal sex and

urination with excessive descriptions of the activity. As in many of the articles referred to above the nature of the explicit sexual activity and its description is completely degrading.

It is clear applying the tests in R. v. Butler that the dominant characteristic is the undue exploitation of sex. I find it to be obscene.

In Tough No. 154

This is a magazine of explicit pictures of nude males and text on the cover relating to sexual experiences. There are also stories of specific sexual encounters involving oral and anal sex with excessive descriptions which are degrading. I find that the dominant characteristic is the undue exploitation of sex. I find it obscene.

Advocate Men

This is a magazine of explicit pictures of nude males and stories of explicit casual sexual encounters relating to oral and anal sex.

The description and activities are degrading and without any human dimension. The dominant characteristic is the undue exploitation of sex. I find it to be obscene.

I have reviewed all of the material considered by the Deputy

Minister, the evidence and the submissions of Counsel and for the reasons set out above the materials referred to above referenced by control numbers C.O. 1807, 1806, 1949, 2399 and 1763 seized and detained by Canada Customs are obscene by proof beyond a reasonable doubt and the appeal in respect of each item is dismissed.

I find that detention of the subject materials is not an unreasonable violation of the appellant's freedom of expression contrary to sec. 2 of the Canadian Charter of Rights and Freedoms.

Counsel did not address the question of costs if any of the appeal. Therefore the Court will receive written submissions with respect to what, if any, order should be made with respect to costs and the amount thereof. Submissions as to costs to be exchanged and filed with the Court on or before 30 days from the date of this judgment.

F. C. HAYES J.

July 14 1992

Released
July 14/92
C.F.J.

Court File NO. 619/90

ONTARIO COURT OF JUSTICE

B E T W E E N:

GLAD DAY BOOKSHOP INC. and
JEARALD MOLDENHAUER

Appellants

- and -

DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE

Respondents

REASONS FOR JUDGMENT

F. C. HAYES, J.

Released: July 14, 1992