Court File No. 92-T-1469/92

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

B E T W E E N:

GLAD DAY BOOKSHOP INC. and
JEARLD MOLDENHAUER

Appellants

- and -

DEPUTY MINISTER OF NATIONAL REVENUE for
CUSTOMS AND EXCISE

Respondent

MOTION FOR LEAVE TO APPEAL

WRITTEN SUBMISSIONS

PART I: THE FACTS

1. In October and November, 1989, Customs Canada officials seized multiple copies of nine publications that the Appellants were seeking to import into Canada. The Customs officials made the seizure on the grounds that the publications were obscene and that importation was therefore prohibited under the *Customs Tariff*, section 114 and Schedule VII (Tariff Code 9956). In July, 1990, in response to the Appellants' request for redetermination, the Deputy Minister upheld the Customs officers' classification of the goods as obscene.

2. The Appellants appealed the decision of the Deputy Minister to the Ontario Court, General Division, as provided for in sections 67, 68 and 71 of the *Customs Act*.

***Customs Act*, R.S., 1985, c. 1 (2nd Supp.), sections 67, 68 and 71**

3. The trial of the issue was heard by Mr. Justice Hayes of the Ontario Court, General Division on May 12, 13, 14, and 15, 1992. He released his Reasons for Judgment on July 14, 1992.

Affidavit of Scott Rogers dated August 31, 1992, paragraph 2

4. On an accompanying procedural issue, Mr. Justice Hayes held that the Crown had the burden of proving obscenity beyond a reasonable doubt. On the main issue, he held that the Crown had proved beyond a reasonable doubt that each of the publications in question was obscene.

> ***Glad Day Bookshop* v. *Deputy Minister of National Revenue for Customs and Excise*, unreported, released July 14, 1992 (O.C.G.D.), attached as Exhibit "A" to the Affidavit of Scott Rogers dated August 31, 1992**

5. At trial, the Appellants called three witnesses to give evidence relating to whether the publications met the community standard of tolerance and whether they created a substantial risk of harm. The Respondent Crown adduced no evidence to support their case, choosing to let the publications speak for themselves.

Affidavit of Scott Rogers dated August 31, 1992

PART II - SUMMARY OF POINTS OF ARGUMENT

It is respectfully submitted that the Court erred in holding that the Crown had proved its case beyond a reasonable doubt.

A. The Court erred by applying a subjective standard of taste, rather than a community standard of tolerance, to the publications in question.

B. The Court erred in failing to apply the "substantial risk of harm" test to the publications.

C. The Court erred in finding that certain publications containing explicit sex were "degrading and dehumanizing" by virtue of their degree of explicitness.

D. The Honourable Trial Judge erred by relying on his views of the moral rectitude of the publications in question.

E. The Court erred in failing to rule that the delay in determining the purported obscenity constituted an infringement of the Appellants' freedom of expression contrary to section 2(b) of the *Charter of Rights and Freedoms*.

F. The Court erred in placing the burden of proof on the Appellants to prove that harm would not flow from exposure to the material. By not finding, in the absence of evidence, that the Deputy Minister failed to prove that harm would flow from exposure to the materials, the burden of proof was, by inference, wrongfully placed on the Appellants.

PART III - POINTS OF ARGUMENT

ARGUMENT A: The Court erred by applying a subjective standard of taste, rather than a community standard of tolerance, to the publications in question.

6. In assessing the community standard of tolerance based on the risk of harm, the judge must not apply his own subjective standards of taste, but rather must apply his assessment of the community's standard of tolerance. According to the Supreme Court of Canada:

> What is essential to a determination of undueness by means of the community standards test is that the trier of fact formulate an opinion of what the contemporary Canadian community will tolerate. In forming this opinion, the trier of fact must assess the community consensus...
>
> I would repeat, however, that this inquiry, though involving judgments about values, must be distinguished from the application of the trier of fact's subjective opinions about the tastelessness or impropriety of certain publications. The decision must focus on an objective determination of the community's level of tolerance and whether the publication exceeds such level of tolerance, not the trier of fact's personal views regarding the impugned publication. Thus, the role of an appellate court on an appeal from a determination of the community standard is to ensure that the trier of fact's decision is based on an opinion of the community standard of tolerance, not on his or her opinion about the tastelessness or impropriety of the impugned publication. (at p. 23)

R. v. *Towne Cinema*, [1985] 1 S.C.R. p. 516

7. In assessing the contemporary community standard of tolerance, a judge should "hesitate to rely on his own taste," and should avoid applying the law by formula.

> Of course, the ultimate issue was for him [the judge], but even the most knowledgeable adjudicator should hesitate to rely on his own taste, his subjective appreciation to condemn art. He does not advance the situation by invoking his right to apply the law and satisfying it by a formulary advertence to the factors which must be canvassed in order to register a conviction.

Towne Cinema, supra, p. 516 quoting *R.* v. *Cameron*, Laskin, J.A. (dissenting), cited [1966] 2 O.R. 777 (Ont C.A.)

8. A judge should have "good reason" to reject the opinion of experts on the community standard of tolerance.

Towne Cinema, supra, p. 517

9. Whether a trial judge relied on his own subjective standards of taste rather than on his assessment of the community standards of tolerance can be adduced by reading the judgment as a whole.

Towne Cinema, supra, p. 511

10. It is respectfully submitted that the decision of the Court in the trial at hand was based on the Honourable Trial Judge's subjective standard of taste and not on an assessment of the community's standard of tolerance vis-a-vis the publications in question.

a) The decision contains no assessment of the community standard of tolerance against which the publications should have been weighed.

Glad Day Bookshop, supra, at pp. 24 - 31

b) The Honourable Trial Judge gives no indication that his decision is based on any factors other than his subjective taste. His subjective view is reflected in his description of the material as containing "excessive, lewd and disgusting detail" (p.11); his frequent reference to the "excessive descriptions" of sex in the publications (pp. 24-31); and his comments that the depictions of explicit sex are void of any "real meaningful human relationship" (pp. 24-31).

Glad Day Bookshop, supra

c) The Honourable Court purported to apply the law by stating the formulary test for obscenity and then asserting that each of the publications met the elements of the formula. This does not constitute an assessment of the community's standard of tolerance or an application of that standard.

Towne Cinema, supra, p. 516

Glad Day Bookshop, supra, pp. 24 - 31

d) The decision does not articulate a "good reason" for rejecting the evidence of the Appellant's three witnesses relating to the community standard of tolerance. The need for a reasonable explanation was particularly strong given that the Crown called no evidence of community standards.

Towne Cinema, supra, pp. 511-517

Glad Day Bookshop, supra, pp. 22, 23

Affidavit of Scott Rogers dated August 31, 1992, paragraph 6

Argument B: The Court erred in failing to apply the "substantial risk of harm" test to the publications.

11. Under the Criminal Code, a publication is obscene if it has as a dominant characteristic the undue exploitation of sex. Until the recent decision of the Supreme Court of Canada in *Butler*, Canadian courts had interpreted "undue" to mean that which is "degrading and dehumanizing" and which the community would not tolerate others being exposed to.

Towne Cinema, supra

12. In *Butler*, the Supreme Court added a further requirement to the test: materials unduly exploit sex and are thereby obscene if exposure to them creates a substantial risk of harm. The arbiter of whether exposure to material creates a substantial risk of harm is the community.

R. v. *Butler*, (1992) 70 C.C.C. (3d) 150 (S.C.C.)

13. According to the Court in *Butler*, a court must assess whether the community would tolerate publications depicting explicit sex on the basis of the degree of harm that may result from exposure to the publications. The risk of harm must be substantial. As well, the immediacy of the risk of harm is directly relevant.

Butler, supra, pp. 150, 151, 160

14. The Court in *Butler* defines harm as that which "predisposes persons to act in an anti-social manner." Anti-social conduct is defined as conduct "which society formally recognizes as incompatible with its proper functioning." The Court gives as an example of anti-social conduct "the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse."

Butler, supra, pp. 150, 151

15. The Court in *Butler* applied the "substantial risk of harm" test to three categories of material, as follows:

a) explicit sex combined with violence will almost always fail the test;

b) explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial;

c) explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated by the community and will not qualify as undue unless it employs children in its production.

Butler, supra, pp. 150, 151

16. According to a recent Ontario Court decision, the decision in *Butler* imposes the following requirements on a party attempting to prove that materials are obscene:

> It now appears clear therefore, that in order to find a publication obscene, the prosecution will be obliged to adduce evidence relating to the degree of harm that is likely to flow from exposure to the material. It must show how the material is likely to predispose persons to commit anti-social conduct incompatible with the proper functioning of society and it should further show that the harm alleged would be substantial, immediate, and causal.

R. v. *Laliberte*, unreported released May 29, 1992 (O.C.G.D.), p. 33

17. It is respectfully submitted that the Trial Court in the case at hand failed to analyze whether each publication that fit within the "sex with violence" or "degrading and dehumanizing" category would, according to community standards, create a substantial risk of harm.

a) The Court erred in finding that the Crown had proved beyond a reasonable doubt that exposure to each of the publications would create a substantial, immediate risk of harm. The Crown called no evidence on what harm and the degree of harm that may flow from exposure to the publications. It therefore failed to establish that the

harm from exposure would be substantial, immediate, and causal.

Butler, supra

Laliberte, supra

Glad Day Bookshop, supra

Affidavit of Scott Rogers dated August 31, 1992, paragraph 6

b) The decision of the Trial Court contains no assessment of the severity of the risk of harm that may flow from exposure to each publication (e.g., minimal, moderate, substantial, high). It is submitted that exposure to the publications which could be categorized as "sex with violence" or "degrading and dehumanizing" would cause, at most, a minimal risk of harm.

Glad Day Bookshop, supra, pp. 24-31

c) The Honourable Trial Judge failed to assess the immediacy of the risk of harm that may result from exposure to each publication. It is submitted that any risk of harm caused by exposure to the publications in question is distant.

Glad Day Bookshop, supra, pp. 24-31

d) Except to repeat the formula enunciated in *Butler*, the Honourable Trial Judge failed to identify what harm may flow from exposure to each publication. Thus, it is impossible to ascertain whether the harm in each case falls within the definition enunciated in *Butler*: predisposition to act in a manner that society formally recognizes as incompatible with its proper functioning. It is submitted that exposure to the publications in question would not predispose persons to any

conduct that fits this definition.

Glad Day Bookshop, supra, pp. 24-31

e) The Honourable Trial Judge failed to assess the causal link between exposure to the publications in question and the harm that may result from such exposure. It gives no indication of how exposure to each of the publications may cause a substantial risk of harm. It is submitted that there is no causal link between exposure to the publications in question and a substantial and immediate risk of harm.

Glad Day Bookshop, supra, pp. 24-31

Argument C: The Court erred in finding that certain publications containing explicit sex were "degrading and dehumanizing" by virtue of their degree of explicitness.

18. The Supreme Court of Canada has given numerous definitions of "degrading and dehumanizing." In *Towne Cinema*, Mr. Justice Dickson discussed the term as follows:

> Sex-related publications which portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment may be "undue"... No one should be subject to the degradation and humiliation inherent in publications which link sex with violence, cruelty and other forms of dehumanizing treatment.
>
> *Towne Cinema*, supra, p. 505

19. The Court in *Butler* cited the example, given in *R.* v. *Ramsingh*, of the type of material that is degrading and dehumanizing:

> They are exploited, portrayed as desiring pleasure from pain, by being humiliated and treated only as an object of male domination sexually, or in cruel or violent bondage.
>
> *Butler*, supra, p. 146, quoting *R.* v. *Ramsingh*, (1984), 14 C.C.C. (3d) 230 Man R. (Q.B.)

20. The Court in *Butler* went on to offer a general summary of "degrading and dehumanizing":

> Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation.

Butler, supra, p. 146

21. The Court in *Butler* distinguished depictions of non-violent, non-degrading explicit sex from explicit sex that was degrading and dehumanizing. Explicit sex that is non-violent and is neither degrading nor dehumanizing is not obscene unless children are involved in its production. *Butler* and earlier case law indicate that depictions of sex that are explicit are not degrading and dehumanizing by virtue of their degree of explicitness; additional elements constituting "degrading and dehumanizing" must exist.

Butler, supra, p. 151

22. It is respectfully submitted that the Honourable Trial Judge found that the following publications were degrading and dehumanizing solely by virtue of their degree of explicitness: Oriental Guys No. 4; Play Guy; In Touch; Advocate Man. The Trial Judge referred to the "excessive descriptions" of sex contained in these publications. It is submitted that he erred in failing to consider whether the explicit sex depicted in these publications contained any elements that would characterize them as degrading and dehumanizing, as defined in the case law.

Glad Day Bookshop, supra, pp. 24-31

23. It is submitted that these four publications comprise depictions of explicit sex that are non-violent and neither degrading nor dehumanizing as defined by case law, and thus were incorrectly found to be obscene by the Honourable Trial Judge.

Argument D: The Honourable Trial Judge erred by relying on his views of the moral rectitude of the publications in question.

24. Until the introduction in 1959 of the statutory definition of obscenity in the Criminal Code, the test of obscenity was based on the "*Hicklin*" test of whether the allegedly obscene material would "deprave and corrupt those whose minds are open to such immoral influence." The introduction in 1959 of the statutory definition of obscenity in the Criminal Code replaced this morality-based test with an objective standard of obscenity.

Butler, supra, pp. 142, 143

25. A threat to society's morals that may be perceived to result from a depiction of explicit sex outside marriage is not the type of harm referred to in *Butler*. Although the *Hicklin* philosophy attempted to address this type of "moral" threat, the *Charter of Rights and Freedoms* no longer permits this type of morality-based objective. According to the Court in *Butler*,

> The *Hicklin* philosophy posits that explicit sexual depictions, particularly outside the sanctioned contexts of marriage and procreation, threatened the morals or the fabric of society... In this sense, its dominant, if not exclusive, purpose was to advance a particular conception of morality.
>
> I agree with Twaddle J.A. of the Court of Appeal that this particular objective is no longer defensible in view of the *Charter*. To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract... The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.

Butler, supra, pp. 156, 157

26. In his findings that each of the publications were obscene, the Trial Judge frequently commented that the publications contained depictions that were void of "any real meaningful human relationship" or "any real human dimension". He described the publications as containing "excessive, lewd and disgusting detail" and repeatedly commented on the "excessive descriptions" in the publications. It is respectfully submitted that, in

finding the publications in question obscene, the Honourable Trial Judge erred by substantially relying on his views of the moral rectitude of the publications. It is submitted that he perceived that exposure to the materials would pose a threat to the morals of society -- and that this was the harm with which he was concerned. It is submitted that, under *Butler* as well as the *Charter*, this was not a valid basis for finding the publications obscene.

Glad Day Bookshop, supra, pp. 11, 24-31

Butler, supra, pp. 156, 157

ARGUMENT E: The Court erred in failing to rule that the delay in determining the purported obscenity constituted an infringement of the Appellants' freedom of expression contrary to section 2(b) of the *Charter of Rights and Freedoms*.

27. It is respectfully submitted that the delay of approximately thirty months from the first seizure of the impugned material until trial in May, 1992 is an unjustifiable infringement of freedom of expression. A small portion of this delay was the result of the Appellant's delay in filing appeals but the vast bulk of it was the normal "wait period" as the case progressed up the ladder to trial.

Charter of Rights and Freedoms, section 2(b)

28. It is respectfully submitted that the Honourable Trial Judge erred in concluding that "the 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.".

Glad Day Bookshop, supra, 31

29. A system of Customs censorship is *prima facie* a violation of the freedom of expression under section 2(b) of the *Charter*.

Re. Luscher (1985), 15 C.R.R. 167 (F.C.A.)

30. The burden of justifying this infringement of the freedom of expression lies on the Minister who must prove on a high degree of probability that the limitation on the Charter right is reasonable and demonstrably justified.

R. v. *Oakes* (1986), 65 N.R. 87 (S.C.C.)

31. To be justified under section 1 of the *Charter*, the system of detention and review by Customs officials must impair as little as possible on the right of freedom of expression.

R. v. *Oakes*, supra.

32. A person who may be denied a fundamental right under the *Charter* has the right to a judicial or quasi-judicial determination of the issue within a reasonable period of time. By analogy, under section 11(b) of the *Charter*, criminal charges must be stayed if a trial is not held within a reasonable period of time. Under section 7 of the *Charter*, a person who may be deprived of the right to liberty or security has the right to a hearing of the issue within a reasonable period of time. This right to trial within a reasonable time applies to corporations as well as persons.

R. v. *Askov* (1990), 75 O.R. (2d) 673 (S.C.C.)

Saskatchewan Human Rights Commission v. *Kodellas* (1989), 60 D.L.R. (4th) 144, (Sask.C.A.), at pp. 176-178

Freedman v. *Maryland*, 380 U.S. 51 (U.S.S.C.)

R. v. *CIP Inc.* (1991), 71 C.C.C. (3d) 129 (S.C.C.), at pp. 139-41

33. It is submitted that such a lengthy delay is not justifiable because:

(a) a judicial or quasi-judicial determination of fundamental rights must be timely; the series of determinations by Customs officials and by officials of the Department of National Revenue do not constitute a judicial or quasi-judicial determination. Limits placed on the freedom of expression cannot be left to the discretion of administrative officials, or to internal directives instructing such officials.

Freedman v. *Maryland*, supra.

(b) prior to May, 1992 the continued detention of the goods in question was based on a Guideline which is not "law" within the meaning of section 1 of the *Charter*.

Re. Ontario Film and Video Appreciation Society and Ontario Board of Censors (1983), 41 O.R. 583 (Ont H.C.), at pp. 592-93, affirmed on appeal, (1983), 45 O.R. (2d) 80 (Ont C.A.)

Committee for the Commonwealth of Canada v. *Canada* (1991), 17 D.L.R. (4th) 422 (S.C.C.), at p 401

(c) an alternative and speedy method of seizing allegedly obscene material already exists in section 164 of the *Criminal Code* which provides a less intrusive means of protecting any public interest in the interdiction of obscene material. Under section 164, allegedly obscene material can be brought before the court after police seizure on a timely basis and a determination of obscenity made. If material is determined to be obscene it can be disposed of by forfeiture without a *Criminal Code* conviction.

Criminal Code, s. 164

34. A judicial or quasi-judicial hearing would require that a person who may be deprived of a fundamental rights under the *Charter* be provided with the opportunity to present her or his case, usually by way of an oral hearing.

Re Singh and Minister of Employment and Immigration (1985), 17 D.L.R. (4th) 422 (S.C.C.), at pp. 464-465

ARGUMENT F: The Court erred in placing the burden of proof on the Appellants to prove that harm would flow from exposure to the material. By not finding, in the absence of evidence, that the Deputy Minister failed to prove how harm would flow from exposure to the material, the burden of proof was, by inference, wrongfully placed on the Appellants.

35. The Court failed to assess how harm would flow from exposure to the subject materials and the Deputy Minister declined to offer any evidence on the connection between exposure to like material and any resulting harm. In the absence of an assessment

from the Court as to the connection between exposure and harm inherent in the material and in the absence of any additional evidence from the Deputy Minister as to how harm would flow from exposure, it must be inferred that the onus was on the Appellants to prove that harm would not flow from exposure.

Affidavit of Scott Rogers dated August 31, 1992, paragraph 6

R. v. *Laliberte*, supra, p. 33

Glad Day Bookshop, supra, pp. 24 - 31

36. It is respectfully submitted that a party defending its guarantee to freedom of expression ought not be required to disprove any element of a law that is aimed at restricting that freedom.

R. v. *Oakes*, supra

37. All of which is respectfully submitted.

Dated at Toronto, this 16th day of September, 1992.

Charles Campbell
Solicitor for the Appellants

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WRITTEN SUBMISSIONS

ILER, CAMPBELL
Barristers and Solicitors
160 John Street
Toronto, Ontario
M5V 2E5

CHARLES CAMPBELL
(416) 598-0103
Solicitor for the Appellants