

DISTRICT COURT OF ONTARIO

Court file no. 300/86

B E T W E E N:

THE GLAD DAY BOOKSHOP INC.

Appellant

- and -

THE DEPUTY MINISTER OF THE  
DEPARTMENT OF NATIONAL REVENUE  
(Customs and Excise)

Respondent

C.M. CAMPBELL, Esq. for the Appellant

B.R. EVERNDEN, Esq. for the Respondent

REASONS FOR JUDGMENT

HAWKINS, D.C.J.

On or about 5 March 1986, Canadian Customs officials seized and detained a book entitled "The Joy of Gay Sex" which was being imported by Glad Day Bookshop Inc. (the appellant) from a similarly-named company in Boston, Massachusetts.

That decision to detain was confirmed by the Deputy Minister of National Revenue (Customs and Excise) on 25 April 1986 and the appellant appeals from that decision. I am advised by both counsel that the appeal is by way of a trial de novo, that the burden is upon the Crown and that the issue is whether the book is obscene within the definition contained in s. 159(8) of the Criminal Code which provides as follows:

"For the purposes of this act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."

The principal concern of the customs officials is with the question of anal sex, both penile/anal and oral/anal and, to some lesser degree, the questions of bondage and domination.

The crown led no evidence by way of expert opinion on the issue of obscenity or community standards content, apparently, to let the book speak for itself.

Since the book cannot really speak for itself, I shall describe it. It, (or at least the copy furnished to me and marked as exhibit 5) is a 7-inch by 10-inch (18-centimetre by 26-centimetre) soft-cover book about 1/4-inch (1.5 centimetres) thick. The cover simply bears the title of the book, a description that it is "an intimate guide for gay men to the pleasures of a gay lifestyle" and the names of the co-authors. The back cover contains a promotional synopsis of some of the book's content and four brief extracts from reviews. It contains certain types of illustrations. They are as follows:

1. Line drawings. These are black and white drawings of men in various stages of undress engaged in various

acts. I counted forty-eight drawings showing the following activities:

(a) General fondling	12	(24.5%)
(b) Anal intercourse	12	(24.5%)
(c) Genital fondling	11	(22.4%)
(d) Fellatio	5	(10.2%)
(e) Non-sexual activity	5	(10.2%)
(f) Anal/oral activity	2	(4.0%)
(g) Kissing	1	(2.0%)

2. "Pointilist" coloured illustrations. There were eight of these specially commissioned for the work and done in the pointilist style mainly showing partially clad men in pairs close to each other, sometimes kissing, usually just in close proximity.
3. Historical Illustrations. There are thirteen coloured illustrations of Japanese, Greek and mid-eastern origin showing fellatio, genital fondling and oral intercourse.

The text of the book covers a number of non-sexual topics such as disease, fidelity, depression and affection but its central theme is homosexual sexual activity and the specific description of its various practices.

One of the book's authors, Charles Silverstein, testified for the defence. He holds a B.S. in education

(1959) from New York State University at New Paltz, and an M.A. and Ph.D. (1975) in psychology from Rutgers University. He and his co-author are both, according to him, homosexual. They did not write this book as a charitable endeavour. He is a qualified sex therapist. He describes the book as a sex manual for "debutante" homosexuals. The illustrations are intended to give the book a "sensual" quality.

Karl Siegler also testified for the defence. He holds both a B.A. (Honours) and an M.A. (First Class) in literature from Simon Fraser University. In addition to working as a consultant to the Manitoba Department of Cultural Affairs he is chief executive officer of Talon Books. Talon Books is not a sex manual publisher but a "literary house". He describes the book as a self help book, incredibly well done with a clear objective and an accomplished piece of writing in spite of its "hard direct language".

Ronald Langevin testified for the defence. He holds a B.A. from McGill in psychology and anthropology, an M.A. in psychology from the University of Toronto and a Ph.D. in psychology from O.I.S.E. He is an associate professor in the department of psychiatry at the University of Toronto. He consults with the Toronto Board of Education on questions of homosexuality. He testified that over 90% of homosexual men have experienced oral genital sex and

mutual masturbation, that over 30% of homosexual men have practised anal intercourse and that 20% do so on a regular basis. He also testified that 43% of heterosexual men have engaged in heterosexual anal sex and that 2% do so on a regular basis. In Mr. Langevin's opinion the book has educational merit, is well written, clear, simple and contains useful information. He says that 90% of the population receives no sex education from home or school and must rely on books.

Dr. Beryl Chernik testified for the defence. She holds an M.D. degree (cum laude) from the University of Western Ontario (1962) and a Ph.D. in pharmacology from the University of Western Ontario (1967). She is a well known practising sex therapist. In her opinion the book is a useful educational volume of appropriate sexual advice, its text is not generally arousing and its intention appears to be to inform.

I find that the above-mentioned witnesses were well qualified to give opinion evidence and sincere in the evidence that they gave. I reach the conclusions I do not because of their evidence but comforted by it. Much has been written (some would say too much) on the subject of obscenity and much more will no doubt be written in the future. I will not add much to that already substantial body of literature. I find that the book deals rationally

and unsensationally with the sexual practices of a substantial segment of the male population. However repugnant the concept of anal sex may be to the heterosexual observer it is, I find, the central sexual act of homosexual practice. To write about homosexual practices without dealing with anal intercourse would be equivalent to writing a history of music and omitting Mozart. The drawings in my view are a non-prurient illustration of the textual material. I find the "school-yard" language regrettable but not obscene. I hold that the book is not obscene within the meaning of s. 159(8) of the Criminal Code of Canada. Accordingly, the appeal is allowed.

DATED AT TORONTO, this 20<sup>th</sup> day of March, 1987



JUDGE BRUCE HAWKINS