** Unedited **

Indexed as:
Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) (Ont. Ct. (Gen. Div.))

Between
Glad Day Bookshop Inc. and Jearld Modenhauer, Appellants, and Deputy Minister of National Revenue for Customs and Excise, Respondent

6 Admin. L.R. (2d) 256
[1992] O.J. No. 712
DRS 93-02789
Action No. 619/90

Ontario Court of Justice - General Division
Toronto, Ontario
Chapnik J.
Heard: March 24, 1992
Judgment: April 8, 1992

(17 pp.)

Practice -- Appeal from decision under Customs Act -- Deputy Minister finding material obscene and prohibiting importation -- Books and magazines -- Standard of proof applicable.

This was a motion for an order declaring that the appeal be governed by procedural rules applicable to criminal proceedings and a cross-motion for an order for directions pursuant to Rule 1.05. The applicant appealed a decision of the Deputy Minister who found material to have been correctly classified as obscene and confirmed that importation into Canada was prohibited. The Customs Act was unclear as to what constituted the applicable rules and the standard of proof in such cases.

HELD: The motion and cross-motion were allowed in part and a regime for discovery was directed. No penal consequences flowed from the offence. To require proof of obscenity beyond a reasonable doubt where no charge was laid would have placed undue hardship upon the Crown. The intention of the

legislature was for the standard of proof to be on a balance of probabilities. The hearing was technically not a "proceeding" as defined in the Rules which were not meant to apply to this type of hearing.

STATUTES, REGULATIONS AND RULES CITED:
Canadian Charter of Rights and Freedoms, 1982, s. 2(b).
Criminal Code, R.S.C. 1985, c. C-46, s. 163(8).
Customs Act, R.S.C. 1985, c. C-52.6, ss. 58(1), 60, 63, 67(1), 68(1), 71, 102, 152.
Ontario Rules of Civil Procedure, Rules 1.03, 1.03(22), 1.05.

Charles Campbell, for the Appellants/Applicants.
Debra M. McAllister and Rhea M.J. Hoare, for the Respondent.

CHAPNIK J.:--

OVERVIEW

In late 1989, Canada customs officials seized multiple copies of three books and six magazines that the appellants were seeking to import into Canada. The goods were destined for Glad Day Bookshop Inc., a book store selling reading material primarily of interest to gay people. In general terms, according to the appellant, the prohibited goods contain descriptive material including pictures depicting sexual intercourse between males. The seizure was made on the grounds that the material was obscene and importation was, therefore, prohibited under the Customs Tariff.

At the request of the appellants, the Deputy Minister of National Revenue for Customs and Excise ("the Deputy Minister") reconsidered the classification of the material as obscene and found it to have been correctly so classified. The appellants have appealed the Deputy Minster's determination to this court as provided for in the Customs Act S.C. 1986, Cl. The case is scheduled to be heard in May, 1992.

The appellants bring this motion for an order declaring the appeal to be governed by procedural rules applicable to criminal proceedings. The respondents, by cross-motion, request an order for directions pursuant to Rule 1.05 of the Rules of Civil Procedure and requiring the hearing to proceed

in accordance with the rules applicable to civil proceedings.

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 has never been judicially determined.

STATUTORY SCHEME

The Minister of National Revenue ("the Minister") has responsibility for the administration of the Customs Act ("the Act") and Customs Tariff ("the Tariff"). The Deputy Minister who is responsible to the Minister, has final authority for the decision of customs officers exercising their powers under the Act in seizing obscene material imported into Canada. The administrative decisions are open to review by the judiciary as provided for in s. 71 of the Act.

Taking a closer look at the statutory scheme, it is noted that the Tariff sets out an elaborate series of guidelines regarding numerous imports from various countries. Pursuant to section 114 of the Tariff, the importation into Canada of any goods enumerated or referred to in Schedule VII of the Tariff, is prohibited. The particular code which applies to the subject goods is Code 9956 of Schedule VII comprised, in part, of books, printed paper, drawings, painting, prints,

photographs or representations of any kind that are deemed to be obscene under s. 163(8) of the Criminal Code. That section reads, as follows:

> S. 163(8) 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 Act sets out the following mechanisms and procedures for the determination of prohibited material under Section 114 of the Tariff:

a) S. 58(1) provides, in part, that an officer may determine the tariff classification of imported goods within 30 days.

b) By s. 60, the importer may, within 90 days after the officer's determination, request a re-determination of the tariff classification.

c) Pursuant to s. 63, any person may, within 90 days notice of the re-determination, request a further re-determination by the Deputy Minister.

d) The decision of the Deputy Minister may be appealed to the Ontario Court (General Division) by filing a notice of appeal within 90 days (ss. 67(1) and 71 of the Act).

e) Pursuant to s. 68(1), the decision of the court may, with leave, be appealed to the Federal Court on any question of law.

The above-mentioned provisions of the Act which establish the administrative scheme whereby goods are determined to be obscene, are found in Part III of the Act entitled "Calculation of Duty". Section 152 which falls under part VI of the Act, entitled "Enforcement" provides that the burden of proof in proceedings under the Act relating to the exportation or importation of goods, lies with Her Majesty (see also R. v. Lang, [1989] 1 W.W.R. 570 (Sask. Q.B.).

CHRONOLOGY OF EVENTS

On October 3, 4, 16, 1989, and November 14, 1989, custom officials detained five shipments containing copies of nine publications imported by the applicants.

Determinations were made pursuant to s. 58 of the Act, on October 16, 1989 and November 1 and 20, 1989, classifying the goods as obscene and prohibiting their entry into Canada. On January 2, 1990, the appellants requested a re-determination pursuant to s. 60 of the Act.

On January 9, 1990, re-determinations were made by a Tariff and Values Administrator under s. 60 of the Act that the publications were obscene and importation prohibited into Canada.

Further re-determinations were requested under s. 63 of the Act on April 4, 1990. On July 16, 1990, the Deputy Minister classified the publications as obscene under Code 9956 of the Tariff, confirming that importation of the publications into Canada is prohibited.

The appellants filed a Notice of Appeal of the Deputy Minister's decision under s. 67(1) of the Act, on October 18, 1990.

The appeal is scheduled to be heard on May 12, 13 and 14, 1992. At the hearing, the appellant intends to argue inter alia that the administrative provisions of the Act contravene section 2(b) of the Canadian Charter of Rights and Freedoms, 1982, guaranteeing Canadians the right to freedom of expression and belief.

THE POSITION OF THE PARTIES

On February 3, 1992, Mr. Campbell, counsel to the appellants, sent a letter to Debra McAllister, counsel to the Deputy Minister, requesting full disclosure of the evidence she plans to present at trial. In response, Ms. McAllister took the position that she was not required to disclose evidence as in her view, the appeal was a civil one and not a criminal prosecution. As of this date, there has been no evidentiary or document disclosure and of course, no discovery of the parties.

The appellant requests an order for pre-trial disclosure by the Crown and a standard of proof at trial beyond a reasonable doubt. In support of its contention that criminal procedures apply to the appeal, the appellant raises several points.

Firstly, section 164 of the Criminal Code applies to prosecutions involving obscene material seized within the country. Subsection (4) of that section provides for the forfeiture of material which is found to be obscene under s.

163 of the Code. As noted above, the same definition section is incorporated by reference into the Act. Standard rules of criminal procedure apply to trials under s. 164. Moreover, it has been established in the case law that although s. 164 requires the owner of the material to show cause why the allegedly obscene material should not be forfeited, the burden of proof is on the Crown to prove obscenity beyond a reasonable doubt. See R. v. Benjamin News (1978), 48 C.C.C. (2d) 399 (Que. C.A.); R. v. Penthouse Magazine (1977), 37 C.C.C. (2d) 376 (Ont. Co. Ct.), (1979) 46 C.C.C. (2d) 111 (Ont. C.A.); R. v. Marshall (1982), 69 C.C.C. (2d) 197 (N.S.C.A.). This same standard, it is argued, should apply in this case.

Secondly, the sole sanction under s. 164 of the Code is the forfeiture of material found to be obscene as defined in s.

163 of the Code. Similarly, upon the finding of obscenity under s. 102 of the Act, goods are abandoned to the Crown or exported to sender. In the Penthouse Magazine case, supra, the court noted that forfeiture proceedings under s. 164 of the Criminal Code are "without doubt criminal in reality and carry a very real sanction". Thus, by analogy, the appeal proceedings under the Customs Act are more properly characterized as criminal in nature.

Thirdly, it was contended that the case law supports the above proposition. In the case of Re North American News and Deputy Minister of National Revenue for Customs and Excise (1973), 1 O.R. (2d) 200 (Ont. Co. Ct.) at 202, the court directed the Deputy Minister to address the evidence first, a typical rule of criminal procedure. As well, on appeal of a Deputy Minister's decision, Darling J. in the case of Pei-Yuan v. The Queen, [1972] 5 W.W.R. 328 (B.C.Co.Ct.), stated at p. 336:

> I should deal with burden of proof and where it lies on an appeal of this kind. I respectfully follow the learned Judge's approach to this question in Deputy Minister of National Revenue, Customs and
>
> Excise v. Capital Distributing (Canada) Ltd., Ont., Sprague Co. Ct. J., 11th February 1970 (not yet reported). Since I find that the Crown respondent has proved its case beyond a reasonable doubt that the seized material is indecent within the Sched. C

> item (and all other ingredients of the offence) I decline to determine in this appeal if the burden of proof of legality might not lie on the appellant in any case that might arise. I assume for the purpose of this appeal that the burden rests on the Crown throughout as in any criminal or quasi-criminal case and that that obligation has been fully discharged by the Crown respondent. (emphasis added)

Finally, the appellant maintains that the appeal, being neither an action nor an application, is not a proceeding as defined by Rule 1.03 of the Rules of Civil Procedure. Furthermore, civil disclosure rules do not reasonably apply to this appeal whose origin was the Deputy Minister's decision to prohibit the importation of certain goods. In the circumstances, the appeal should be governed by criminal procedures and standards.

The respondent alleges that since nobody has been charged with an offence, the higher standard of proof is inappropriate. In criminal matters, that standard is required in order to overcome the presumption of innocence. Moreover, the result in criminal proceedings often deprives an individual of liberty and may have serious consequences for his or her reputation and social life. Accordingly, when an individual is charged with an offence, the Crown must bear the evidentiary burden of proof and guilt must be proved beyond a reasonable doubt. (R. v. Oakes, [1986] 1 S.C.R. 103).

The respondent likened the within process to those actions which are civil in nature. Some civil actions do in fact involve allegations of crime or use terms more commonly found in criminal law, yet do not impose the criminal standard of proof. For example, a civil action for trespass to the person has similar elements to a criminal prosecution for assault but the onus and standard of proof differs.

Furthermore, upon a review of the statutory scheme of the Act, it is clear on the face of the statute that its procedures are administrative. Moreover, they are separate and apart from the offence process initiated in Part VI of the Act. There is

no charge laid under either the Criminal Code or the Act. The object of the censure is the prohibited material rather than

the importer which alters the standard of proof. This aspect was noted in Re Winkler and Deputy Minister of National Revenue For Customs & Excise (1973), 15 C.C.C. (2d) 168 (Ont. Co. Ct.) which involved an appeal from a decision of the Deputy Minister. At p. 174, Phelan J. observed that "it is the books which are on trial, not the person".

In the case of R. v. Bureau, [1941] S.C.R. 367, the respondent's automobile and American cigarettes were seized by customs officers upon his re-entry into Canada. Although he was acquitted by a jury on a charge of unlawful importation, the Supreme Court of Canada held that this did not invalidate the seizure nor affect the right of forfeiture under the Customs Act.

The fact that the Criminal Code definition of obscenity is incorporated by reference into the Act, cannot, according to the respondent, change the nature of the proceedings.

It was agreed that in light of the decision of the Supreme Court in R. v. Shelley, [1981] 2 S.C.R. 196; [1981] 59 C.C.C.

(2d) 292, the reverse onus provisions in s. 152(3) and (4) cannot stand. Nevertheless, the respondent maintained that the legislature intended a shifting burden in cases of this kind. Precedent for this is found in cases involving wills and testamentary capacity. See, for example, Robins v. National Trust, [1927] 12 D.L.R. 97 (P.C.); or negligence in a personal injury claim (Hellenius v. Lees, [1972] S.C.R. 165). The onus shifts to the party who asserts a proposition or fact which is not self-evident. In the case at bar, the Minister would have the onus of proving importation of the goods and their classification as obscene, on a balance of probabilities, after which the burden would shift to the appellant to show why the goods should not be forfeited. This would be consistent with the Crown presenting its evidence first, as in the Re North American News case, supra.

Finally, according to the respondent, the appropriate forum to raise Charter issues, as proposed by the appellant, would be in civil proceedings where discoveries are held.

In the circumstances, the respondent contends that the appeal is civil in nature and should be governed by the Rules of Civil Procedure.

CONCLUSION

It is clear from a careful reading of the relevant statute and regulations that there is no precision in the legislation regarding this issue. The legislative scheme does not classify or characterize the nature of the appeal proceedings. The appeal is adjudicated as a trial de novo, as in a court of first instance. This is necessitated by the fact that previous determinations did not involve the giving or hearing of evidence. Yet, the resulting decision is an appellate decision either upholding or overturning the Deputy Minister's re-determination.

Moreover, to date, the case law is inconclusive as to who bears the onus of proof. Either the parties have agreed with no comment by the court (Pei-Yuan case), or the court has decided who should adduce evidence first, without definitively pronouncing on the question of who bears the onus or what constitutes the standard of proof in these types of cases. (Re North American News).

The reality is that the appeal proceedings under s. 67(1)

and s. 71 of the Act are somewhat hybrid in nature. To attempt to fit them into a neat slot particularly for discovery purposes, would in my view, be a futile exercise. How can one order production and discoveries in a situation where no pleadings are exchanged? What justification is there for labelling the proceedings as criminal where no charges are laid and the presumption of innocence becomes devoid of meaning? Should there be two sets of rules in obscenity cases, attracting different legal and evidentiary burdens - one which proceeds under the Customs Act and the other under the Criminal Code?

The importance of these issues is highlighted by two recent decisions of the Supreme Court of Canada.

In R. v. Stinchcombe (1991), 130 N.R. 277 (S.C.C.), the Supreme Court of Canada outlined the duty on the Crown to disclose all material it proposes to use at trial and all evidence which may assist the accused even if the Crown does not propose to adduce it. Sopinka J. quoted the words of

McLachlin J. in R. v. M.H.C. 1991, 123 N.R. 63 (S.C.C.), that "the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not." In the result, the court recommended an extensive regime of Crown disclosure. Sopinka J. stated at p. 287:

> The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted.

In the case of R. v. Butler (February 27, 1992) unreported, (S.C.C.), the accused was convicted of several charges relating to the possession and sale of obscene material. In its decision, the Supreme Court established a new legal framework for ascertaining whether materials are obscene under the definition contained in section 163 of the Criminal Code. In allowing the appeal, Sopinka J. observed at p. 31:

> The 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. (emphasis added)

I am cognizant of the fact that my function is not to amend or create legislation but rather to interpret the existing legislation within the overall context of its spirit and intent.

The Act and its regulations sets up an administrative process to deal with prohibited material imported into Canada.

The object of censure is clearly the prohibited material rather than the importer. No penal consequences flow from the "offence". An appeal from a decision of the Ontario Court is provided with leave to the Federal Court on a question of law. As a matter of policy, the Ministry needs to be able to seize and classify prohibited material from entering the country. In

doing so, it is acting implicitly and explicitly in the public interest. To require proof of obscenity beyond a reasonable doubt in such circumstances where no charges have been laid, would, in my view, place undue hardship upon the Crown.

I quote from the judgment of the Honourable Judge Grossberg in the North American News and Deputy Minister of National Revenue decision, supra [at p. 68]:

> The Customs Act provides a code for administration of matters relating to customs and for a review. Parliament is entitled to intervene in the public interest against a trafficker who attempts to dump into Canada for crass commercial gain the publications in question.

In all of the circumstances, I would suggest that the intention of the legislature in developing and 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 the goods

beyond a reasonable doubt.

Regarding the issue of disclosure, this situation is anything but typical. There is no doubt that the appellant is entitled to know the case it will have to meet at trial. Yet, the usual rules are cumbersome and inappropriate to this type of proceeding. Mr. Campbell was quite correct in pointing out that the hearing is technically not a "proceeding" as defined in the definition section of the Rules of Civil Procedure. In para. 22 of Rule 1.03 a proceeding is defined as an "action" or "application". The latter terms include proceedings commenced by either statement of claim, counterclaim, notice of claim, crossclaim, third party claim, divorce petition, or notice of application. By means of Rule 1.02, the Rules of Civil

Procedure apply to all civil proceedings in the Court of Appeal and in the Ontario Court (General Division) subject to certain named exceptions.

It is clear, therefore, that the usual civil procedure rules were not meant to apply to this type of hearing which has not been commenced in any of the ways contemplated.

Accordingly, for the purpose of this case, I direct the following regime of discovery:

1) The respondent shall provide the following to the appellant on or before Tuesday, April 21, 1992:

a) a summary of the evidence upon which it will rely to prove the importation of the goods and their classification as obscene;

b) a list of witnesses;

c) a summary of the evidence of each witness;

d) an affidavit on production.

2) The appellant shall provide to the respondent on or before Tuesday, April 30, 1992, a summary of its argument in response to the above and an affidavit on production.

3) There shall be no discoveries unless the parties agree otherwise.

4) Factums shall be provided to the court in accordance with the Rules of Civil Procedure.

I am well aware, however, that the above outline does not solve the overall problem. I urge the legislature to reconsider the statutory provisions in light of the recent Supreme Court pronouncements. Legislation which does not clearly set out its policy, goals and procedures should be discouraged. There may be a more efficient and effective way of handling the importation of prohibited goods, in the public interest. Concurrent but different procedures for dealing with goods deemed to be obscene may well be viewed as cumbersome or

unfair. In any event, the present scheme should be clarified in terms of policy objectives and legal and evidentiary tests.

In the result, both the motion and the cross-motion are allowed, in part. The regime established above does not satisfy the claims of either party, but does provide directions, as requested.

In the circumstances, there will be no order as to costs.

CHAPNIK J.

DRS

End of document.