

CANADA / JUDGMENT

Dechow v. R.

[1978] 1 SCR 951

COURT

Supreme Court of Canada

DECIDED

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Dechow v. R.

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1977-06-24

Report

[1978] 1 SCR 951

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Dechow v. R., [1978] 1 S.C.R. 951

Date: 1977-06-24

Dick Orlf Dechow (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1977: April 27; 1977: June 24.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Obscenity—Distribution of obscene material—Whether certain articles publications—Test of obscenity—Whether statutory test exclusive—Criminal Code, ss. 8, 159(1), 159(8), 163, 164.

The appellant operated a “sex shop” where he exhibited for sale to the public certain items known as “sex devices” or “sex stimulators”. The store had two large signs on either side of its entrance reading “Erotique Ltd.” and there were two window displays of books and assorted paraphernalia. Inside the store, a number of items were displayed in glass cases with a framed description under each one in addition to the price. The appellant was charged under s. 159(1)(a) of the Criminal Code that he had in his possession “for the purpose of distribution obscene material consisting of written matter, books, models, preparations, tape recordings and other devices, equipment and paraphernalia.” The appellant was found guilty at trial and his conviction was upheld in the Court of Appeal.

Held: The appeal should be dismissed.

Per: Laskin C.J. and Judson, Spence and Dickson JJ.: An associated description of an article of commerce does not transform that article into a publication where it would not be one standing alone. The articles in question are not publications. A dilemma has arisen because of the existence of two definitions of obscenity, one found in s. 159(8) and the other existing at common law (*R. v. Hicklin* (1868), L.R. 3 Q.B. 360). This dilemma is that articles not “publications” within s. 159(8) could only with difficulty be dealt with under the test in that provision and consideration of them as “publications” would be a distortion of the meaning of that word.

Section 159(8) lays down the exhaustive test of obscenity in respect of a publication which has sex as a theme or characteristic. The theory of the Criminal Code is that substantive criminal law is found in the Code itself and it would be strange for Parliament to give a prescription for obscenity and get be taken to have preserved the larger common law definition. The test in s. 159(8) should be applied in all other provisions of the Code where the obscenity revolves around sex considerations and the Hicklin test should not be applied when the test prescribed in s. 159(8) is not met. The Hicklin rule cannot be maintained consistently with the prescription of s. 159(8) because it goes much beyond that prescription.

The judicial approach should be to give a consistent meaning to the same word used by Parliament where that word is a designation of an offence which is of generic character or distributive by reason of the specification of different situations in which it may be committed.

Per: Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.: Section 159(8) refers only to publications and not to any other form of expression. The issue here therefore turns on the meaning to be given to the word “publication”. This meaning is not to be derived from the verb “to publish” but from the noun itself which may be defined as “that which is published”.

The appellant made the character of his wares publicly known. This he did by making it publicly known by the two large signs at the entrance of his shop that it dealt in erotic material and by displaying the articles in glass cases plainly visible to the visiting public, such articles being accompanied by descriptions phrased in language the dominant characteristic of which was the undue exploitation of sex. The articles in question were therefore publications within the meaning of s. 159(8). It was established in *Brodie v. The Queen*, [1962] S.C.R. 681, that in relation to a “publication” the statutory provisions regarding obscenity are exclusive.

Brodie v. The Queen, [1962] S.C.R. 681, followed; *R. v. Cameron*, [1966] 4 C.C.C. 273; *R. v. Fraser*, [1966] 1 C.C.C. 110; *R. v. Hicklin* (1868), L.R. 3 Q.B. 360; *R. v. Carty* (1972), 6 C.C.C. (2d) 248; *R. v. Lambert* (1965), 47 C.R. 12; *R. v. Small* (1973), 12 C.C.C. (2d) 145; *R. v. Goldberg and Reitman* (1971), 4 C.C.C. (2d) 187; *R. v. Times Square Cinema* (1971), 4 C.C.C. (2d) 229; *R. v. O'Reilly*, [1970] 3 O.R. 429; *R. v. Campbell* (1974), 17 C.C.C. (2d) 130; *Daylight Theatre Co. Ltd. v. The Queen* (1973), 24 C.R.N.S. 368; *Gaysek v. The Queen*, [1971] S.C.R. 888, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment of Scott Co. Ct. J.[2] on trial de novo upholding convictions on charges involving unlawful possession for distribution of obscene materials. Appeal dismissed.

E.W. Trasewick, for the appellant.

David H. Doherty, for the respondent.

The judgment of Laskin C.J. and Judson, Spence and Dickson JJ. was delivered by

THE CHIEF JUSTICE—The appellant was convicted on a charge, laid under s. 159(1)(a) of the Criminal Code that, within a specified period of time, he “unlawfully did have in his possession, for the purpose of distribution, obscene materials consisting of written matter, pictures, models, preparations, tape recordings and other devices, equipment and paraphernalia”. The information containing this charge also included three other counts, being another one under s. 159(1)(a) and two under s. 159(2)(a), but these were withdrawn. The conviction was upheld after a trial de novo before Judge D.H. Scott, and leave to appeal to the Ontario Court of Appeal was given by that Court on the question “[whether] the test of obscenity laid down in s. 159(8) of the Criminal Code [applies] to the articles which were the subject matter of the charge in this case”. The contention before that Court was that s. 159(8) was confined to printed material only. Gale C.J.O., speaking for the Court in giving leave in the light of that contention, observed that “no Court of Appeal in Canada has held that articles and devices such as the ones in question here are embraced by section 159(8).”

Having given leave, the Ontario Court of Appeal, in the words of Gale C.J.O. disposed of the appeal as follows:

Turning to the merits of the appeal on that point, we have no difficulty whatever in coming to the conclusion that the subsection does extend to objects such as these. In *Regina v. Cameron*, [1966] 4 C.C.C. 273, a judgment of our Court, and in *Regina v. Fraser*, [1966] 1 C.C.C. 110, a decision of the Court of Appeal of British Columbia, it was held that section 159(8) of the Code applies to paintings, pictures and motion picture films. It appears to us that to conclude that this subsection does not extend to articles such as these would be quite illogical. In other words, it would be nonsensical to hold that while pictures of the articles would be included in the terms of section 159(8) of the Code, the subjects of the pictures themselves would not come within that subsection.

Leave to come to this Court was given on the following question of law:

Did the Court of Appeal err in holding that s. 159(8) of the Criminal Code applied to the articles found by the trial judge to be obscene and that consequently the trial judge did not err in holding that s. 159(8) provided the sole test of obscenity in respect to those articles?

The articles alleged to be obscene in this case, and so found by Judge Scott on the trial *de novo*, may comprehensively be called sex devices or sex stimulators. They embraced a wide range, as indicated by the fact that more than seventy were filed as exhibits. Some had been displayed in the accused's shop window where they were accompanied by a framed written description of their character and use. Catalogues showing these items and containing identical descriptions in respect of the items in the shop window were among the exhibits at the trial *de novo*. It does not appear, however, that the catalogues themselves were the subject of the charge on which the accused was convicted. Judge Scott divided the articles into two groups and found those in one group obscene and those in the second group not obscene. What is important in this case is not an examination and assessment of the articles put by the trial judge into the one group or the other, but rather whether he and the Court of Appeal erred in applying to those articles the test of obscenity found in s. 159(8) of the Criminal Code. In approaching this question, I put to one side (because there was no issue raised on these points) the question of possession and the fact that distribution of the articles was contemplated by the accused; nor was there any claim in this Court of the defence of public good, within s. 159(3)(4). It will be sufficient to reproduce s. 159(1) and (8) to provide a basis for considering the legal question posed by this Court and dealt with by the Ontario Court of Appeal. These provisions are as follows:

159. (1) Every one commits an offence who

- (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or
- (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.

- (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.

In his reasons for conviction, the trial judge concluded, after canvassing various cases including the judgment of this Court in *Brodie v. The Queen*[3], that s. 159(8) provided an exhaustive test of obscenity, displacing the common law test of *R. v. Hicklin*[4]. The authorities that he cited made it evident, however, that the test of obscenity under s. 159(8) had theretofore been applied, following the reasons of Judson J. in the *Brodie* case, only to undue exploitation of sex and, moreover, that the statutory test had theretofore depended on showing that this exploitation was a dominant characteristic of a “publication”, a word not defined in s. 159.

What appears to be new in Judge Scott’s decision was the application of the test to a charge of distribution which did not involve a “publication”. I point out, however, that one of the submissions of counsel for the Crown was that the noun “publication” in s. 159(8) should be taken to embrace articles or contrivances of the kind in question here when associated with the written descriptions thereof and that in such an association they could fall within the proscription of the charge of possession for the purpose of distribution. Whether, on this view of the matter, they could also be caught on a charge of publishing or of having in possession for the purpose of publication under s. 159(1)(a) was left at large.

The factual basis for the foregoing position was not clearly reflected in Judge Scott’s reasons, although in assessing whether certain contrivances were obscene he did refer to their descriptions. The descriptions, admitted by the accused to be his or, at least, adopted by him, were in the nature of evidence of the character or use of the articles; and it is their character or use that brought them within the scope of obscenity under the trial judge’s finding. The descriptions merely identified their purpose and, in my opinion, it would be stretching the word “publication” beyond reason to find that because of an associated description an article of commerce, not being written or visual matter, became a publication when it would not be one if it stood alone. Displaying wares is not publishing them, nor can a manufactured article, having no communicative character, be termed a “publication” without a statutory enlargement of the ordinary meaning of that word.

The reasons given by the Court of Appeal in no way indicate that the Court brought the particular articles within s. 159(8) by reason of the associated descriptions. It does appear, rather, that the Court considered them to fall within s. 159(8) *per se*. I take this view by reason of the Court’s reference to *R. v. Cameron*[5], and to *R. v. Fraser*[6], dealing respectively with paintings and with books and moving pictures. I would observe, however, that the *Cameron* case did not decide that paintings were “publications” within s. 159(8). The Court there proceeded on the basis of the agreement of counsel that they should be so regarded. In the *Fraser* case, where the charge was one of possession of obscene matter (books and moving pictures) for the purpose of publication, distribution or circulation, the British Columbia Court of Appeal held that the motion pictures, which the convicting magistrate found to be obscene, were publications within what is now s. 159(8). This issue does not appear to have been raised when the *Fraser* case came to this Court

but, even if I was satisfied that the British Columbia Court could properly characterize the motion pictures as publications, it does not follow that the articles in the present case may be so characterized.

I prefer the view that the articles in question here are not “publications”. Crown counsel took the alternative position that, accepting this view, it was still proper for the trial judge and the Court of Appeal (if that is what it did) to apply the test of obscenity in s. 159(8) to the charge of possession for the purpose of distributing under s. 159(1)(a). He thus joined issue with the appellant on the central point in the latter’s case, namely, that the formulation of s. 159(8) (and especially the concluding words “shall be deemed to be obscene”) pointed to a particular definition in respect of publications, leaving the common law Hicklin rule to apply to the undefined word “obscene” in s. 159(1)(a). Counsel for the appellant also laid emphasis on the fact that s. 159(8) could not appropriately be applied to the articles in question here when regard was had to the association therein of “sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence”. I do not find this submission in itself persuasive when among the subjects associated with sex are cruelty and violence. The issue lies in the general formulation of a “publication” which “shall be deemed to be obscene”.

Counsel for the respective parties agreed that it was undesirable to have two definitions of obscenity, here two definitions where the obscenity related to exploitation of sex, but counsel for the appellant contended that the facts of this case revealed a failure of Parliament to establish a uniform test and the Courts could not come to it without legislating. They could not establish uniformity (so it was alleged) merely through interpretation, which was their only role where statutes are concerned.

It is doubtful, in my opinion, that the appellant would find any solace if his culpability was determined under the Hicklin rule. In *R. v. Carty*[7], where a charge of possession for purpose of distribution related to articles of a kind similar to those involved here, District Court Judge Kidd in Alberta held that the accused was liable to conviction under either test of obscenity. He realized the dilemma that confronted him, namely, that if the articles were not “publications” within s. 159(8) it was doubtful that the issue of obscenity could be determined under the test in that provision, and to consider them as “publications” would be a distortion of the meaning of that word. He took comfort in the reasons of McFarlane J. in *R. v. Lambert*[8], at p. 15 who noted that the Brodie case was concerned with “publications” which were deemed to be obscene if they possessed certain characteristics, and that where the charge did not relate to publications, there was no binding decision requiring the application of the test prescribed by s. 159(8). McFarlane J. also escaped the dilemma by holding that the charge, being one of mailing obscene matter under what is now s. 164, was established, whether the Hicklin test or that under s. 159(8) was applied.

Another instance of the same dilemma, referable to a charge under s. 163 of presenting and appearing in an obscene performance, is evident in *R. v. Small*[9], where the majority of the British Columbia Court of Appeal distinguished the act of publishing under s. 159(1)(a) and “publication” under s. 159(8), noting that the Brodie case was concerned with a book as a publication under the latter provision. The majority judgment refused to apply the test in s.

159(8) to determine whether the theatrical performance was obscene under s. 163, holding that it was not a publication. At the same time, the majority held that the Hicklin test, developed in relation to books, should not be applied to a theatrical performance. In the result, Robertson J.A., speaking for the majority, having by his reasoning (as he himself said) left himself without either a statutory or judicial definition of obscene performance, concluded that he should interpret the words “obscene performance” in s. 163 “in their natural and ordinary sense”. He then propounded a number of matters to be considered for that exercise and ordered a new trial accordingly.

Nemetz J.A. (as he then was), in a concurring judgment, concluded that performance of a play in public was a publication, enabling him to apply the test of obscenity under s. 159(8), but he joined in the order for a new trial because the trial judge rejected uncontradicted evidence of the defence on the question of community standards and made a finding unsupported by the evidence. He seemed to be apprehensive that otherwise a producer of a play based on a book would escape prosecution when the distributor of the book would be liable to conviction. I do not think that this follows, but the learned judge’s concern again points up the dilemma of which I have spoken.

The dilemma has resulted, in my opinion, in Courts pressing on the meaning of publication in s. 159(8) in order to be able to apply the test of obscenity which that provision prescribes rather than the Hicklin rule, a judge-made rule which has been extensively criticized in both judicial decisions in this country and in periodical literature: see, Mackay, *The Hicklin Rule and Judicial Censorship* (1958), 36 Can. Bar Rev. 1. Judson J. in the Brodie case considered the Hicklin definition of obscenity to be “vague, difficult and unsatisfactory to apply”: see [1962] S.C.R. 681, at p. 702. Illustrative of the cases pressing on the term “publication” in s. 159(8) are *R. v. Goldberg and Reitman*[10] (movies); *R. v. Times Square Cinema*[11] (video tape); *R. v. O’Reilly*[12], (play); *R. v. Campbell*[13] (theatrical performance); *Daylight Theatre Co. Ltd. v. The Queen*[14] (movies).

This Court should resolve the dilemma revealed by the case law and say whether s. 159(8) exhaustively defines obscenity where exploitation of sex is concerned, regardless of whether or not a “publication” is involved. I take the Brodie case as the proper starting point for the consideration of this matter because there the Court was divided on the question whether s. 159(8) established the exhaustive test of obscenity even in respect of what was clearly a publication. Thus, Fauteux J., as he then was, and Ritchie J. thought that s. 159(8) merely expanded the definition of obscenity without displacing the Hicklin rule. Three other members of the Court, Kerwin C.J.C., Taschereau J., as he then was, and Locke J., applied s. 159(8) without saying that it was exhaustive and, indeed, Taschereau J. expressly reserved his opinion on that question. Cartwright J., as he then was, also reserved his view on the exhaustiveness of s. 159(8), being content to proceed on counsel’s agreement that it was. On the other hand, Judson J., speaking for Abbott and Martland JJ. as well as for himself, was of the firm opinion that s. 159(8) laid down the exhaustive test of obscenity in respect of a publication. He said this (at p. 701):

...A writer who faces a charge of obscenity is entitled to know by what standard his work is to be judged and what defence, if any, he is called upon to make. Under the Criminal Code, as amended in 1959, there is no double standard, that is to say (1) the statutory definition intended to strike down the obvious, and (2), the Hicklin test still in the background, although unstated in the Code, for those works that are not within the statutory definition. If there is to be a double standard, it must be expressly set out in the Code and I would disapprove of *R. v. Munster* (1960), 129 C.C.C. 277, where, in sending the case back for a new trial, the Supreme Court of Nova Scotia in banco held that there was error when the magistrate directed himself exclusively according to s. 150(8) (sic) on the ground that the subsection does not purport to be a definition of what is obscene and because matter not included with its provisions may be obscene under the Hicklin test.

If a result such as this is to be brought about the legislation must define the two standards of obscenity and tell the Court that the charge is proved if the work offends either standard. I note that this is the way that the New Zealand legislation is framed, *Re Lolita*, [1961] N.Z.L.R. 542 and also the Australian legislation, although not so clearly, as considered in *Wavish v. Associated Newspapers Ltd.*, [1959] V.R. 57; *MacKay v. Gordon & Gatch (Australasia) Ltd.*, [1959] V.R. 420; and *Kyte-Powell v. Heinemann Ltd.*, [1960] V.R. 425. Otherwise, why define obscenity for the purposes of the Act, if it is still permissible for the Court to take a definition of the crime formulated 100 years ago and one that has proved to be vague, difficult and unsatisfactory to apply?

In contrast, I think that the new statutory definition does give the Court an opportunity to apply tests which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury. We are now concerned with a Canadian statute which is exclusive of all others.

I agree with him that it would be incongruous to have a double standard for obscenity in respect of publications which exploit sex, especially when, in my opinion, the Hicklin rule can be said to be more comprehensive than s. 159(8), leaving this provision as a particular illustration of what is obscene under the Hicklin rule and thus as having no independent force. I would not construe this statutory provision in such a dependent sense.

The theory of the Criminal Code, reflected in s. 8 thereof is that the substantive criminal law is found in the Code itself. There are, of course, situations where words in the Code either express or require a reference back to the common law, as, for example, in the case of forgery, but where the Code has also brought within the definition of the offence acts which were not offences at common law: see *Gaysek v. The Queen*[15]. The present case is different because s. 159(8) does not lie outside the common law but reflects a definition which would be within it, if the common law test was to be applied; and I would regard it as strange, as did Judson J., for Parliament to give a prescription for obscenity and yet to be taken to have preserved a larger definition. I do not regard the phrase in s. 159(8) "shall be deemed" as detracting from what I have said. It must be taken in context with the opening phrase in s. 159(8) "for the purposes of this Act", and I read this as meaning for all the purposes of the Criminal Code. The term "Act" was used when s. 159(8) and the present s. 160 were introduced into the Criminal Code by 1959 (Can.), c. 41 which embodied a

large number of amendments and in which the Criminal Code was referred to as “the Act”. That designation in the original of s. 159(8) has remained.

I am not only satisfied to regard s. 159(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 ss. 163 and 164, in cases in which the allegation of obscenity revolves around sex considerations. Since the view that I take, in line with that expressed by Judson J. in the Brodie case, is that the Hicklin rule has been displaced by s. 159(8) in respect of publications, I would not bring it back under any other sections of the Code, such as ss. 159, 163 and 164, to provide a back-up where a sexual theme or sexual factors are the basis upon which obscenity charges are laid and the charges fail because the test prescribed by s. 159(8) has not been met.

The Hicklin rule was established in a case which dealt with a pamphlet, with a “publication”, as that word is ordinarily understood. Although it was an attack upon the Roman Catholic Church, and especially upon the confessional practice of that Church, the basic allegation was the depravity of the priesthood, a depravity having sexual aspects. In my opinion, the Hicklin test cannot be maintained consistently with the prescription of s. 159(8) because it goes much beyond that prescription. It is reasonable for a Court to apply the statutory standard, prescribed by Parliament as a definition of an offence of a generic character, when it is called upon to determine, in allied provisions of the Criminal Code, the sense in which the expression of some offence, made punishable in other circumstances, should be taken. Where no constitutional considerations are involved but only the interpretation and application of the words of Parliament, the judicial approach should be in the direction of consistency of meaning of the same word used by Parliament where that word is a designation of an offence which is a distributive one by reason of the specification of different situations in which it may be committed. So it is with obscenity in the various provisions of the Code under which it is an offence. If the issue under any of those provisions is sexual exploitation, either alone or in association with any of the subjects mentioned in s. 159(8), then I think it the proper course for this Court to apply in all such cases the standard or test that s. 159(8) prescribes for publications.

I would dismiss the appeal.

The judgment of Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ. was delivered by

RITCHIE J.—I have had the advantage of reading the reasons for judgment prepared for delivery by the Chief Justice and while I agree with him that this appeal should be dismissed, I reach this conclusion for such materially different reasons that I find it necessary to express my views separately.

The Chief Justice has discussed the circumstances giving rise to this appeal at some length and I will endeavour to avoid repetition except in so far as I find it necessary in order to make my views clear.

The appellant operated a business of the type sometimes described as a “sex shop” where he exhibited for sale to the public certain items which were obviously designed for, and could in fact only be used for, unnatural sexual practices. The manner in which these items were presented to the public is described by the trial judge as follows: According to Exhibit 1 (p) the store had two large signs on either side of the entrance, in large letters reading, ‘Erotique Ltd.’. There are two window displays of various books and assorted paraphernalia. A number of photographs admitted in evidence show the interior of the store. Briefly, a quantity of articles was displayed in glass cases plainly visible to anyone attending at the premises, while under each item was a framed description of the article with its price...

The framed description to which the trial judge refers was identical in wording with those contained in a catalogue which was one of the exhibits before this Court, and in this regard the trial judge made the following finding in the concluding portion of his reasons for judgment:

In any event, having considered the articles (and more particularly their description) which I have found to be obscene, I am of the opinion that their dominant characteristic is the undue exploitation of sex and taking a general average of community thinking and feeling, they are a clear and unequivocal offence against community standards.

The Court of Appeal, in a judgment delivered by Chief Justice Gale on behalf of himself and Evans and Martin, J.J.A., limited the issue before it to one point which was expressed as follows:

The only point to which we gave consideration was the first one argued, namely, that the test of obscenity laid down in section 159(8) of the Criminal Code does not apply to the articles which were the subject matter of the charge in this case, the contention being that the subsection is confined to printed material only. We agree that there is a question of law involved in that issue and that leave ought to be granted in respect thereto.

Gale C.J., after having considered the merits of the appeal, dealt with this point succinctly in the following sentence:

Turning to the merits of the appeal on that point, we have no difficulty whatever in coming to the conclusion that the subsection does extend to objects such as these.

And having referred to the cases of *R. v. Cameron*[16] and *R. v. Fraser*[17], concluded by saying: Accordingly, we decide the point of law against the appellant.

Leave to appeal to this Court was granted on a slightly broader issue than that which was considered by the Court of Appeal. The question is stated in the reasons for judgment prepared by Chief Justice Laskin, but I think it desirable to reproduce it here:

Did the Court of Appeal err in holding that s. 159(8) of the Criminal Code applied to articles found by the learned trial judge to be obscene and that consequently the trial judge did not err in holding that s. 159(8) provided the sole test of obscenity in respect of those articles.

It will be seen that while the Court of Appeal confined itself to the question of whether or not the test of obscenity laid down in s. 159(8) was confined to printed material only, the question posed in this Court raises the issue as to whether the test so laid down is the sole test of obscenity in respect of the articles found to have been obscene.

The charge upon which the appellant was convicted was that he had in his possession “for the purpose of distribution obscene material consisting of written matter, books, models, preparations, tape recordings and other devices, equipment and paraphernalia”. This charge is clearly laid under the provisions of s. 159(1)(a) of the Criminal Code which is reproduced in the reasons for judgment of Chief Justice Laskin and need not be repeated except to point out that the offence thereby created relates to “possession for the purpose of publication, distribution or circulation”. Both the trial judge and the Court of Appeal found that the appellant had a large number of items in his possession which were obscene within the meaning of 159(8) of the Criminal Code, and I find it necessary to reproduce that subsection:

159. (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 italics are my own.] It was contended on behalf of the appellant that none of the materials of which he was found to be in possession was a “publication” so that the provisions of s. 159(8) could not apply and there being no other statutory standard of obscenity, resort must be had to the common law.

With the greatest respect for those who may hold a different view, I am of opinion that, when the plain and ordinary meaning is given to the language used in s. 159(8) it is to be construed as referring only to publications, nothing else is mentioned in that section, and it appears to me to be straining the language there used to construe it as being directed to any other form of expression. The issue in my view must therefore turn on the meaning to be given to the word “publication”. In the Shorter Oxford English Dictionary this word is defined in part as follows:

The action of publishing or that which is published.

1. The action of making publicly known; public notification or announcement; promulgation. Notification or communication to those concerned, or to a limited number regarded as representing the public...
2. The issuing, or offering to the public, of a book, map, engraving, piece of music, etc.; also the work or business of producing and issuing copies of such works...b. a work published; a book or the like printed or otherwise produced and issued for public sale...

We are not concerned here with the meaning derived from the verb “to publish” but rather with the noun, i.e., “publication”, and in this latter sense the given meaning is “that which is published” and this is made manifest by the example given under 2. b. in the definition, namely, “a work published; a book or the like printed or otherwise produced and issued for public sale.” This latter definition was adopted by Maclean J.A. in writing the reasons for judgment for the

majority of the Court of Appeal of British Columbia in *R. v. Fraser*[18], at p. 121, where the statutory definition was held to apply to moving pictures, and in the case of *R. v. Cameron*[19], Laskin, J.A., as he then was, in the course of his dissenting reasons for judgment wherein he found that the pictures there in question were not obscene, had occasion to observe, at p. 301, speaking of the counsel in that case, that:

They also agree that the term ‘publication’, awkward as it is to embrace paintings or drawings, should be taken as being comprehensive enough to do so. In the result, the inquiry to be made is whether in the case of each picture ‘a dominant characteristic...is the undue exploitation of sex’.

It is apparent therefore that although the conclusion that the word “publication” applied to paintings or drawings was founded on an agreement of counsel, it was nevertheless the basis upon which all judges in that case treated the problem before them.

I cannot escape the conclusion that in making it publicly known by two large signs on either side of the entrance to his store, that it was dealing in erotic material and by displaying the articles in question in glass cases plainly visible to the public who entered his store and which were accompanied in each case by framed printed descriptions of the articles phrased in language the dominant characteristic of which was the undue exploitation of sex, the appellant was making the character of his wares publicly known and they therefore fell into the category of articles that were published and that were “printed or otherwise produced and issued for public sale...”. The articles in question were, therefore, in my opinion, publications within the meaning of s. 159(8) of the Criminal Code.

In the course of the argument in this Court, reference was of course made to the case of *Brodie v. The Queen*[20], which was cited as authority for the proposition that the test established by s. 159(8) was exhaustive and that resort could not be had to the common law rule sometimes said to have been established in the much criticized case of *R. v. Hicklin*[21]. In considering the *Brodie* case, I think it is to be remembered that it was accepted on all sides in that case that the novel which was the subject of the prosecution was in fact a “publication” and I have no doubt that it was there established that in relation to a “publication” the statutory provisions regarding obscenity exclude the application of the test suggested in the *Hicklin* case or any other test.

I agree with the courts below that the articles here in question, displayed as they were in conjunction with the printed explanations of their use, were to be judged by the standard laid down in s. 159(8), and as I find this to be the sole test of obscenity in relation to “publications”, I do not find it necessary to consider what test is to be applied in determining whether or not matters other than publications are obscene.

For these reasons, as well as those delivered by Chief Justice Gale on behalf of the Court of Appeal for Ontario, I would dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: E.W. Trasewick, St. Catherines.

Solicitor for the respondent: David H. Doherty, Toronto.

- [1] (1974), 18 C.C.C. (2d) 106.
- [2] 18 C.C.C. (2d) 107.
- [3] [1962] S.C.R. 681.
- [4] (1868), L.R. 3 Q.B. 360.
- [5] [1966] 4 C.C.C. 273, appeal quashed [1967] S.C.R. v.
- [6] [1966] 1 C.C.C. 110, aff'd [1967] S.C.R. 38.
- [7] (1972), 6 C.C.C. (2d) 248.
- [8] (1965), 47 C.R. 12.
- [9] (1973), 12 C.C.C. (2d) 145.
- [10] (1971), 4 C.C.C. (2d) 187.
- [11] (1971), 4 C.C.C. (2d) 229.
- [12] [1970] 3 O.R. 429.
- [13] (1974), 17 C.C.C. (2d) 130.
- [14] (1973), 24 C.R.N.S. 368.
- [15] [1971] S.C.R. 888.
- [16] [1966] 4 C.C.C. 273, appeal quashed [1967] S.C.R. v.
- [17] [1966] 1 C.C.C. 110, aff'd [1967] S.C.R. 38.
- [18] [1966] 1 C.C.C. 110, aff'd [1967] S.C.R. 38.
- [19] [1966] 4 C.C.C. 273, appeal quashed [1967] S.C.R. v.
- [20] [1962] S.C.R. 681.
- [21] (1868), L.R. 3 Q.B. 360.

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