CANADA / JUDGMENT

Germain v. The Queen

[1985] 2 SCR 241

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Germain v. The Queen

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Date

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Report

[1985] 2 SCR 241

Case number

17573

Judges

Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Chouinard, Julien; Lamer, Antonio; Wilson, Bertha; Le Dain, Gerald Eric; La Forest, Gérard V.

On appeal from

Quebec

Subjects

Criminal law

Notes

SCC Case Information: 17573

Decision Content

Germain v. The Queen, [1985] 2 S.C.R. 241

Richard Germain Appellant;

and

Her Majesty The Queen Respondent.

File No.: 17573.

1985: March 7; 1985: October 10.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

on appeal from the court of appeal for quebec

Criminal law -- Obscenity -- Possession of obscene articles for purpose of sale -- Whether articles publications -- Words “For Adults Only” not relevant in determining whether publication obscene -- Test of obscenity -- Criminal Code, s. 159(2) (a), (8) .

Appellant was found guilty under s. 159(2) (a) of the Criminal Code of having in his possession for the purpose of sale various obscene articles. Appellant operated a shop specializing in the sale of erotic articles. The name of the shop, "National Sexe Boutique", was written on a sign above the windows of the establishment and on the door the words "For Adults Only" were written. In July 1977 the police seized forty-five articles at his shop, all concerned with satisfying the sexual desires of men or women. These articles were displayed where they could be seen by the public entering the store. Relying on the definition of obscenity in s. 159(8) of the Criminal Code , the Municipal Court judge ruled seventeen of the articles seized obscene and found appellant guilty. The articles ruled obscene were in the same category as those in Dechow v. The Queen, [1978] 1 S.C.R. 951. In that case, the articles were accompanied by a printed description in language the dominant characteristic of which was the undue exploitation of sex. In the case at bar only one of the articles was accompanied by such a description. The conviction was upheld by the Superior Court and the Court of Appeal.

Held: The appeal should be dismissed.

Per Beetz, Estey, McIntyre, Chouinard, Le Dain and La Forest JJ.: The articles ruled obscene by the Municipal Court judge were publications within the meaning of s. 159(8) of the Criminal Code . The word "publication", defined by this Court in Dechow, means an article the character of which is made public. In the case at bar the sign outside, "National Sexe Boutique", above the windows of the shop, and the laying out of the articles inside the shop, displayed to the view of visitors, suffices to make public the character of the material offered for sale. It is not necessary for the articles to have been accompanied by a printed description.

The lower courts did not err by failing to take into account the context in which the articles were displayed, in determining the parameter of Canadian community tolerance. The words "For Adults Only" over the shop door are not a factor in determining whether a publication is obscene. This Court has already held in Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, that the audience viewing a film or other publication is not relevant in determining whether the film or publication is obscene.

Finally, the Municipal Court judge and the Court of Appeal did not confuse tolerance and morality in their assessment of the parameter of Canadian community tolerance.

Per Dickson C.J. and Lamer, Le Dain and La Forest JJ.: In determining whether the articles in the possession of appellant for the purpose of sale were obscene, it is not necessary first to consider whether the articles were publications. Section 159(8) of the Criminal Code provides a definition of obscenity with regard to publications. This definition must be applied whether or not the articles in question are publications.

Per Dickson C.J. and Lamer J.: A majority of this Court decided in Towne Cinema Theatres Ltd. that the target audience is not relevant in determining whether an item is obscene and we respect that decision.

Per Wilson J.: I agree with Chouinard and La Forest JJ. that the appeal should be dismissed.

Cases Cited

Dechow v. The Queen, [1978] 1 S.C.R. 951; Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, applied; R. v. Sudbury News Service Ltd. (1978), 39 C.C.C. (2d) 1; R. v. Hicklin (1868), L.R. 3 Q.B. 360; Brodie v. The Queen, [1962] S.C.R. 681, referred to.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 159(1), (2)(a), (8), 165(b).

Authors Cited

Canada, Law Reform Commission, Working Paper No. 10, Limits of Criminal Law--Obscenity: A Test Case, Ottawa, Information Canada, 1975.

APPEAL from a judgment of the Quebec Court of Appeal1, affirming a judgment of the Superior Court2 which dismissed an appeal from a judgment of the Municipal Court of Montréal3, finding the accused guilty of committing the offence specified in s. 159(2) (a) of the Criminal Code . Appeal dismissed.

1 C.A. Mtl., No. 500-10-000178-804, January 10, 1983.

2 C.S. Mtl., No. 500-36-000256-795, April 1, 1980.

3 C.M. Mtl. No. 17-14633, September 6, 1979.

Jean-Claude Hébert, for the appellant.

Patrick Long and Germain Tremblay, for the respondent.

The following are the reasons delivered by

1. The Chief Justice and Lamer J.--We have had the advantage of reading the reasons for judgment of Chouinard J. and the separate concurring reasons of La Forest J.

2. On the issue of the proper test of obscenity to apply to the facts of this appeal, Chouinard and La Forest JJ. reach the same result, but for different reasons. We prefer the route taken by La Forest J. which builds on the judgment of Laskin C.J. in Dechow v. The Queen, [1978] 1 S.C.R. 951.

3. On the issue of whether the target audience is relevant in determining whether an item is obscene, a majority of this Court decided in the recent case of Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, that it is not and we respect that decision.

4. On all other matters, we agree with the reasons and conclusions of Chouinard J.

English version of the judgment of Beetz, Estey, McIntyre, Chouinard, Le Dain and La Forest JJ. delivered by

5. Chouinard J.--Appellant was found guilty by Primeau J. of the Municipal Court of Montréal, sitting as a magistrate under Part XXIV of the Criminal Code , of having unlawfully, knowingly and without lawful justification or excuse had in his possession for the purpose of sale various obscene articles, and of thereby committing the offence specified in s. 159(2) (a) and s. 165 (b) of the Criminal Code .

6. An initial appeal from this conviction was dismissed by Lagacé J. of the Superior Court. A second appeal, to the Court of Appeal with its leave, was unanimously dismissed by Montgomery, Bernier and Monet JJ.A.

7. Under section 159(2)(a) of the Code:

159. ...

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

8. Reference should also be made to subs. (8) of the same section:

(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.

9.

The Municipal Court judge stated the following:

[TRANSLATION] On July 7, 1977 two police officers, armed with a search warrant, went to the store operated by the accused at 723, Mont-Royal St. East, in Montreal, and seized forty-five assorted articles. All were concerned with satisfying the sexual desires of men or women.

These articles were displayed where they could be seen by the public entering the store. The latter had three windows: two facing on Mont-Royal Street and one on Resther Street. There was a door opening on Mont-Royal Street. Above the two windows of Mont-Royal Street, the name of the shop was written on a sign: "National Sexe Boutique". On the door the words "For Adults Only" were written.

10. Seventeen of the seized articles were ruled obscene by the Municipal Court judge, who listed them.

11. These articles were in the same category as those at issue in Dechow v. The Queen, [1978] 1 S.C.R. 951. They were there described in general terms as sex stimulators.

12. In Dechow a majority of the Court held that these articles were publications within the meaning of s. 159 of the Criminal Code and that, in accordance with the definition of obscenity given by subs. (8) of that section, they were obscene.

13. Ritchie J. wrote for the majority, at p. 966: "The issue in my view must therefore turn on the meaning to be given to the word `publication'"; and he concluded as indicated above.

14. First, appellant sought to make a distinction between that case and the one at bar, otherwise it would be fatal to his argument on the question of whether publications were involved.

15. As Lagacé J. of the Superior Court correctly observed, there are only two differences between the two cases. The first is that, unlike in Dechow, in the case at bar "For Adults Only" was written on the door. The phrase "For Adults Only" will be discussed in examining the second and principal argument of appellant. The second difference is that in Dechow all the articles were accompanied by "framed printed descriptions of the articles phrased in language the dominant characteristic of which was the undue exploitation of sex", whereas in the case at bar only one of the seventeen articles ruled obscene was accompanied by a description.

16. Appellant's argument was that it was because of this description accompanying the articles that the Court classified them as publications.

17. This argument may be based on various passages from the reasons of Ritchie J., in particular the following, at p. 968:

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) ....

18. In the opinion of the Superior Court judge, affirmed by the Court of Appeal, this is not the meaning that should be given to the case. The judge wrote:

[TRANSLATION] Contrary to the defence arguments, we consider that Dechow does not make it a prerequisite that the articles at issue should be accompanied by a description written in language the dominant characteristic of which is the exploitation of sex. Depending on the circumstances, it may suffice for the articles offered for sale to the public to have such a characteristic.

19. In so finding the Superior Court judge relied on the following passage from the reasons of Ritchie J., at pp. 966-67, saying that it [TRANSLATION] "should suffice to refute this defence argument and restore to that case its true meaning":

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 sentence 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, [1966] 1 C.C.C. 110, aff'd [1967] S.C.R. 38, at p. 121, where the statutory definition was held to apply to moving pictures, and in the case of R. v. Cameron, [1966] 4 C.C.C. 273, appeal quashed [1967] S.C.R. v., 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.

20. I share the view of the Superior Court and the Court of Appeal on this point, and in my opinion one may further rely on the following passage, at p. 967, which comes immediately after the passage cited above:

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 .

21. I conclude from this passage that in the view of the Court "publication" extends to an article the character of which is made public. In Dechow the accused made this character public in three ways: (i) by informing the public, by two large signs on each side of the entrance to his store, that it was dealing in erotic material; (ii) by displaying the articles in question in glass cases plainly visible to the public who entered his store; (iii) by accompanying the articles by framed printed descriptions the dominant characteristic of which was the undue exploitation of sex. Though all three of these methods of publication were present in Dechow, nothing in that case requires that they should be so. In the case at bar, there were two: the sign outside, about which the Municipal Court judge wrote: [TRANSLATION] "The sign ‘National Sexe Boutique’ surrounded by about 100 flashing lights is likely to attract attention"; and the laying out of the articles inside "displayed to the view of the public entering the store". This in my opinion suffices to make public the character of the material offered for sale; and if it were necessary to decide the point, I would be prepared to find that the mere fact of displaying to the view of visitors would be sufficient.

22. This first argument by appellant is without foundation.

23. Appellant's second argument, and the one on which discussion principally centred in this Court, is that the Court of Appeal failed to take into account the context in which the articles were displayed, inside a store on the door of which the words "For Adults Only" were written. This argument was made with respect to the Court of Appeal, the judgment of which is on appeal, but it could equally well be made with respect to the Superior Court and

the Municipal Court judge, who also did not mention the point. Counsel for the appellant said in his submission:

[TRANSLATION] The judgment of the Court of Appeal is also wrong in law in that the three judges completely failed to take into consideration the display context guideline as a factor in determining the parameter of Canadian community tolerance.

24. Appellant relied on precedent in this regard, in particular the judgment of the Ontario Court of Appeal in R. v. Sudbury News Service Ltd. (1978), 39 C.C.C. (2d) 1. Howland C.J.O. wrote for the Court, at p. 8:

The next question which arises is the extent to which the manner and circumstances of distribution are relevant in determining whether or not a publication is obscene. There are some publications which are so blatantly indecent that they would not be tolerable by the Canadian community under any circumstances. Some pictures are offensive to the majority of people to the point that the Canadian community would not tolerate them on a billboard, or on the cover of a magazine, or on a television screen where persons of all ages and sensibilities would be exposed to them, but would be prepared to tolerate them being viewed by persons who wished to view them. Some pictures would not be acceptable by Canadian community standards in a children's bedtime story-book or primer but would be in a magazine for general distribution. The Canadian community might be prepared to tolerate the exhibition of a motion picture to an adult audience, but would consider the exhibition of the same motion picture to a general audience, which included children, to be an undue exploitation of sex. Similarly, the general distribution of certain magazines to a neighbourhood store accessible to all ages would not be tolerable, whereas the distribution of such magazines to "adult" bookstores to which children under a certain age were not admitted might not be objectionable. The packaging and pricing of a publication may also be relevant in considering whether Canadian community standards have been exceeded. The distribution of magazines in plastic covers marked "adult" in some respects might act as an attraction rather than a deterrent unless the price was high enough to place it beyond the reach of most children.

25. At page 10, he stated:

In my opinion, the manner and circumstances of distribution are relevant in determining whether the standards of tolerance by the Canadian community have been exceeded. Here the distribution was to ordinary confectionery stores who made their merchandise available to the general public. In my opinion, the Canadian community would be less tolerant in the case of such distribution than they would be in the case of distribution to stores who only made sales to persons 18 years of age and over, or who confined their sales to publications of legitimate interest to particular segments of the Canadian community, such as, for example, writers and artists. It is not necessary in this appeal to consider to what extent the Canadian community would extend greater tolerance to publications which were enclosed in a plastic dust cover and were labelled "For sale only to adults" as that was not the method of distribution in this appeal.

26. Appellant further cited Working Paper No. 10 of the Canada Law Reform Commission, titled Limits of Criminal Law--Obscenity: A Test Case (1975), which states at p. 47:

So should obscenity be against the criminal law? In our view, yes, and no. Public obscenity--like other nuisances that give offence--can rightly be the subject of the criminal law. Private obscenity--which causes little, if any, harm, and which doesn't threaten significantly--on the whole cannot. That's not to say that it can't be the subject of other types of law.

27. It also states at p. 48:

In detail, it would mean that pornography [sic] stores, pictures and so on carefully restricted to "adults only" would be allowed.

28. Since the hearing of the case at bar, however, this Court has held in Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, that the audience viewing a film or other publication is not relevant in determining whether the film or publication is obscene.

29. That case disposes of appellant's second argument. There is no distinction, in my view, between a film "For Adults Only" shown in a cinema and the articles at issue displayed and offered for sale in a store access to which is restricted to adults.

30. The third argument made by appellant is that the Court of Appeal, like the Municipal Court judge, confused tolerance and morality. This argument reads as follows:

[TRANSLATION] The majority opinion by Monet J.A. (concurred in by Montgomery J.A.) is wrong in law in its assessment of the parameter of Canadian community tolerance, in that it confuses a simple reference to the concept of morality and an assessment based essentially on the said concept of morality.

31. In Towne Cinema this Court, in deciding what constituted undue exploitation within the meaning of s. 159(8) of the Code, formulated an objective standard, that of tolerance accepted in contemporary Canadian society. In the reasons of Dickson C.J., it said at p. 508:

What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.

32. In the case at bar, appellant recognized that the Municipal Court judge had correctly stated the problem when he wrote:

[TRANSLATION] Is this exploitation undue? Is a reasonable Canadian citizen willing to tolerate the distribution and sale of such articles? Were the articles offered for sale and displayed to the view of the public entering the accused's establishment beyond the limits of tolerance of an average reasonable Canadian in 1977, taking into account the increasingly liberal atmosphere prevailing throughout the Canadian community in recent years?

33. However, appellant objected to the fact that the judge stated his finding as follows:

[TRANSLATION] . . . I consider that the following articles offered for sale by the accused are likely to offend the innate sense of morality of the average Canadian and constitute an undue exploitation of sex. They are therefore obscene.

34. This passage may seem ambiguous. However, it must be read in its context, that is with the judgment as a whole. Moreover, if there is any ambiguity it is dissipated by the Superior Court judge, who wrote in this regard, and was affirmed by the Court of Appeal:

[TRANSLATION] If we had had to write this part of the judgment we might well have said, as Hugessen J. did in the recent case of Priape Enrg. et Leblanc et Duchesne v. Le Sous-Ministre du Revenu National, [[1980] C.S. 86], after referring to the relevant case law, that:

. . . the test of undue exploitation of sex is whether the accepted standards of tolerance of the contemporary Canadian community as a whole have been exceeded.

Though the trial judge chose to express himself differently, in our opinion the facts of the case fully justify the conclusion that the accepted standards of tolerance of the average Canadian have been exceeded in the way required by the test of Hugessen J. in Priape, supra: so that there is no reason to intervene, even if the proposition of law may have been badly expressed on the question of what constitutes undue exploitation of sex.

35. Appellant's third argument is also without foundation.

36. I would dismiss the appeal.

English version of the reasons delivered by

37. Wilson J.--I agree with my colleagues Chouinard and La Forest JJ. that the appeal should be dismissed.

English version of the reasons of Le Dain and La Forest JJ. delivered by

38. La Forest J.--I have had the benefit of reading the reasons for judgment of my brother Chouinard J., and I agree with him that the appeal should be dismissed. I also concur in his reasons. However, I would dispose of the first ground of appeal, concerning the meaning of the word "obscene" for the purposes of s. 159 of the Criminal Code , on a broader basis.

39. Section 159(2) (a), under which the accused was convicted, prohibits the sale or exposing to public view of obscene matter. In determining whether the articles in the possession of the accused for the purpose of sale were obscene Chouinard J., following Ritchie J. in Dechow v. The Queen, [1978] 1 S.C.R. 951, first considered whether in the circumstances those articles were publications, since in that case the definition of obscenity with regard to publications, contained in s. 159(8) , applies. As the articles were similar to those at issue in Dechow, he concluded that they were obscene publications under that subsection.

40. Although it is possible to arrive at this conclusion by this means, I think that it is preferable to dispose of the question more directly. In my view obscenity has the same meaning whether or not the articles at issue are publications. It is true that the route taken by Chouinard J. had already been indicated by Ritchie J., who wrote the majority judgment in Dechow; but in Dechow, the charge was laid under s. 159(1), which deals primarily with publication and other activities of that kind. Section 159(2) (a), on the other hand, deals with the sale of articles and their exposure to public view. These articles may undoubtedly be publications. But can it reasonably be concluded that if the articles in question in the present case were not publications, a different meaning could be given to the word "obscene" in this provision? I do not think so. I share the view expressed by the late Laskin C.J., in his concurring reasons in Dechow, that the word "obscene" must be given the same meaning whether or not the articles in question are publications, that is, the meaning which appears in s. 159(8) .

41. For many years the courts relied on the definition of obscenity formulated in R. v. Hicklin (1868), L.R. 3 Q.B. 360. More recently, however, this definition has been seriously criticized both in the courts and in academic writings. In Brodie v. The Queen, [1962] S.C.R. 681, for example, Judson J. described it as "vague, difficult and unsatisfactory to apply". It is worth noting that in the recent decision in Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, Dickson C.J., in a judgment concurred in by Lamer and Le Dain JJ., said at p. 502:

It [the rule stated in s. 159(8)] supersedes rather than supplements the much-criticized test enunciated by Cockburn C.J. in R. v. Hicklin. . . .

Although in that case the Chief Justice's observation concerned films, it nonetheless suggests that application of the old rule is questionable to say the least. In this state of flux, especially in a matter so related to public opinion as obscenity, the courts should pay particular attention to what is said by Parliament, even when it does not directly address the point at issue. This is especially true here, for if we applied the old definition to articles which are not publications, not only would we be giving a different definition to the word in the same provision, we would be applying a harsher definition in less serious circumstances, as for example in the case of a private sale by someone not a merchant.

42. It is true that the opinion of Ritchie J. in Dechow was a majority opinion. Nevertheless, he did not indicate that he disagreed with the reasons of Laskin C.J. Rather, he simply said, at p. 968, that he "[did] not find it necessary to consider what test is to be applied in determining whether or not matters other than publications are obscene". This was quite natural in the circumstances of Dechow, where the charge was based on s. 159(1) of the Code, dealing primarily with publications. That is not true in s. 159(2) (a), and the fact that a publication is involved in the case at bar is only a matter of chance.

Appeal dismissed.

Solicitor for the appellant: Jean-Claude Hébert, Montréal.

Solicitors for the respondent: Patrick Long and Germain Tremblay, Montréal.

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