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Regina v. American News Company Limited

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Regina v. American News Company Limited

Case and Comment

REGINA V. AMERICAN NEWS COMPANY LIMITED—OBSCENE LITERATURE. —Few human attitudes have changed more over the years than the general view of what does or does not constitute obscenity. In 1902 George Bernard Shaw's play "Mrs. Warren's Profession" was banned from the English stage. The works of Shelley, Swinburne, Hardy and others have all at one time or another been condemned in the most unrestrained language. In the recent case of *Regina v. American News Company Limited*[1] the Ontario Court of Appeal was called upon to consider the law of obscenity and the law respecting publication and distribution of obscene literature. The accused was charged under Section 150 (1) (a) of the Criminal Code which reads:

> Every person commits an offence who 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.

The accused was convicted of the offence, his defence being that the book in question, called "Episode" by Peter W. Denzer, was not obscene. On appeal the two questions of primary concern were: firstly, what is obscenity?, and secondly, what evidence is admissible to show that the book is not obscene?

At trial, the Crown merely provided copies of the offending book for each member of the jury and the judge. When each had read his copy, the Crown closed its case. The defence asked for leave to produce expert witnesses to show (1) that the book had literary merit, (2) that the public good had been served by the acts alleged to constitute the offence—the defence established by Section 150 (3) of the Act,[2] and (3) that the book was not obscene.

The trial judge heard expert evidence on the first two counts, but refused to hear it on the third. He held that expert evidence that a book is obscene was inadmissible since this was a question for the jury to decide after having read the book. The defence presented several writers and scholars of national reputation who testified to the literary merit of the book. The jury found the book to be obscene, and the accused was convicted.

On appeal, the Court followed the well known test of obscenity propounded by Cockburn C.J. in *R. v. Hicklin*[3]: ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." The Court of Appeal refused to alter the jury's finding that the book was obscene.

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[1] [1957] O.R. 145.

[2] Section 150 (3) reads: "No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good."

[3] (1868) L.R. 3 Q.B. 360, at p. 371.

Turning to the introduction by the Defence of expert witnesses, who gave evidence as to the literary merit of the book, the Court of Appeal held that this should not have been allowed. Such evidence, the Court pointed out, is irrelevant in considering whether the material tended to corrupt, and it was quite properly ruled inadmissible. Quoting from "Obscenity and the Law",[4] Laidlaw J.A. said: "It is utterly immaterial whether they are works of art. That is a collateral question which I have not to decide. The most splendidly painted picture in the universe might be obscene."[5]

In answer to the question as to whether the public good was served by the offence, Blair Fraser, one of the expert witnesses, replied: "Of course, I always feel very strongly that a public good is achieved when a good novel is published." One wonders if this is a valid argument. There can be little doubt that opinion evidence as to the literary merit of a book is inadmissible so far as it relates to the question of the book's obscenity, but is it inadmissible in the consideration of whether or not the public good was served by its publication? (In passing, it might be well to wonder how it is possible for something which is obscene to ever be in the public interest.) A more practical question, however, is how the defence of "public good" is to be established. No definition of "public good" exists either in the Code or in the Common Law. Apparently, the procedure adopted by the defence in this case was incorrect, since Kennedy J. said at the trial: ". . . I cannot conceive how the distribution of this book in Canada, having regard to the manner in which it is written, could be considered to serve the public good in Canada".[6] Presumably, this "public good" rule is designed to shelter medical texts, marriage manuals and the like, but are we to assume that such books would be held obscene but for the fact that they serve the "public good"? Since the question of this defence is a question of law, opinion evidence is inadmissible. How else can it be shown in a court of law? Professor R. S. Mackay, in his article, *"The Hicklin Rule and Judicial Censorship"*, says:

> In the final analysis, therefore, there is either no recognized test for the defence of "public good" or if there is such a test it cannot possibly be applied to books which will be made the subject of obscenity prosecutions. In either case the practical result is that there is no defence available for publishers and distributors of books which are alleged to be obscene, assuming that the Crown exercises at least a minimum sense of discretion, except the defence based on the definition of obscenity itself.[7]

When one considers the volume of obviously pornographic trash available in every drug and cigar store, it seems strange that a book of acknowledged literary merit should be attacked. That the purveyors of obscene literature should be prosecuted is obvious and desirable, but one receives the impression that more often the books which receive the full impact of such prosecution are ones which, in all probability, were not intended to be prosecuted by the framers of the Code. If we are

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[4] Norman St. John Stevas, Obscenity and the Law (1956), at p. 105.
[5] [1957] O.R. 145 at p. 152.
[6] As quoted by Shroeder J.A. in [1957] O.R. 145 at p. 173.
[7] 36 Can. Bar. Rev. 1, at p. 10.

to extend Section 150, as interpreted in the *American News* case to its logical conclusion, we can readily see that since the quality of the material is of no importance, while the amount and degree of salaciousness therein (usually read out of context) is all important, the list of famous books, plays and poems which would be subject to prosecution is as distinguished as it is long. One cannot but wonder in the light of the *American News* case what would be the result of prosecutions against any one or all of the following: Chaucer, Boccaccio, Shakespeare, Rabelais, Swift, Fielding, Hemingway or Faulkner.

One book which was the subject of much bitter prosecution when it was first published but which is now an acknowledged classic is James Joyce's "Ulysses".[8] In this case, Woolsey J. chose to draw a distinction between obscene literature *per se* and literature which, though open and frank, is of obvious literary value. In discussing the obscenity of this book Woolsey J. said:

> The meaning of the word "obscene" as legally defined by the courts is: tending to stir the sex impulses or to lead to sexually impure and lustful thoughts. Whether a particular book would tend to excite such impulses and thoughts must be tested by the Court's opinion as to its effect on a person with average sex instincts—what the French would call *L'homme moyen sensuel.*
>
> Reading "Ulysses" in its entirety, as a book must be read on such a test as this, did not tend to excite sexual impulses or lustful thoughts but its net effect was only that of a somewhat tragic and very powerful commentary on the inner lives of men and women. "Ulysses" is a sincere and serious attempt to devise a new literary method for the observation and description of mankind.
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> I am quite aware that, owing to some of its scenes, "Ulysses" is a rather strong draught to ask some sensitive though normal persons to take. But my considered opinion, after long reflection, is that whilst in many places the effect of "Ulysses" on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac.[9]

With respect, I submit that such an attitude on the part of our Courts would better serve the cause of literature without hindering due process of law.

In England, the English Society of Authors, presided over by Sir Alan Herbert, became concerned about the large number of prosecutions in respect of obscene publications. In 1955 the Society submitted a Draft Bill[10] to deal with such matters. It is not the intention to reproduce the Bill in its entirety here. It will be enough to reproduce the first three clauses to show that while the intention of the Society is to prosecute obscenity, it wishes at the same time to afford ample protection to works of art.

Clause 1 reads:

> 1. Any person who shall distribute, circulate, sell or offer for sale any obscene matter shall be guilty of an offence, provided that no person shall be convicted of an offence under this section unless it is established by the prosecution either—
>
> (a) That the accused intended to corrupt the persons to or among whom

[8] *United States v. One Book Called "Ulysses"* (1933), 5 Fed. Supp. 182; aff'd (1934), 72 Fed. 2d. 705.

[9] (1933), 5 Fed. Supp. 182 at p. 185.

[10] The Draft Bill is synopsized in J. E. Eddy, Obscene Publications: Society of Author's Draft Bill, 1955 Criminal Law Review 218, at p. 222.

the said matter was intended or was likely to be so distributed, circulated, sold or offered for sale; or

(b) That in so distributing, circulating, selling or offering for sale he was reckless as to whether the said matter would or would not have a corrupting effect upon such persons.

Clause 2 reads:

2. In deciding, for the purposes of any of the provisions of this Act, whether any matter is or is not obscene, the court shall have regard to the following considerations:

(a) The general character and dominant effect of the matter alleged to be obscene.

(b) Evidence, if any, as to the literary or artistic merit, or the medical, legal, political, religious, or scientific character or importance of the said matter; and for this purpose expert opinion shall be admissible as evidence.

(c) Evidence, if any, as to the persons to or among whom the said matter was, or was intended, or was likely to be distributed, circulated, sold or offered for sale.

(d) Evidence, if any, that the said matter has had a corrupting effect.

Clause 3 reads:

3. In deciding whether, for the purposes of any of the provisions of this Act, any matter alleged to be obscene was distributed, circulated, sold or offered for sale with the said intent or recklessness, the court shall have regard to the following considerations:

(a) The general character of the person charged and, where relevant, the nature of his business.

(b) The general character and dominant effect of the matter alleged to be obscene.

(c) Any evidence offered or called by or on behalf of the accused person as to his intention in distributing, circulating, selling or offering for sale the said matter.

It is to be noted especially that the element of intention specifically excluded by the Canadian Criminal Code is included in this Bill. It is submitted that taking into consideration the possible undesirable results of a prosecution under Section 150 and the near impossibility of a defence to the charge laid under it, an amendment thereto is in order. It is to be hoped that such an amendment is forthcoming and it is submitted that, if it is, the drafters should consider seriously the provisions of the above mentioned Draft Bill.

W. P. SOMERS *

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