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Submissions To : Board of Commissioners of Police Metropolitan Toronto

Re : Law Enforcement Policies in Obscenity Matters

From: The Canadian Civil Liberties Association

per A. Alan Borovoy
General Counsel

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Toronto November 26, 1970.

Following court on the morning of October 9th, two young men were set free after having spent nine hours in confined custody. During the evening of October 8th, the two young men were arrested on a charge relating to the possession and distribution of obscene material. Their lawyer has informed us that neither of them has a previous criminal record and that both of them were merely clerks with no financial interest or decision-making power regarding the material which was sold in the store where they were arrested.

Yet, notwithstanding these considerations, they suffered a nine hour deprivation of their freedom and they now face criminal charges. Significantly, when they were taken into custody, they were advised that there was no justice of the peace available to process their bail application. Police officials kept them in forced confinement on the basis that there was no administrative machinery through which they could secure their release until court the next morning. It is also significant that when their bail application was finally processed in court, they were released without being required to post a cash deposit.

This represents one of the recent incidents in an apparent " crackdown against the sale of pornography in this city. During the past several months, there have been several raids on Toronto bookstores in which books have been seized and persons have been arrested. Counsel for the accused has advised us that since July 9 of this year, in the wake of these raids at least fifteen sales clerks have been arrested and taken into custody. According to counsel's calculations, these fifteen people have spent a total of seventy-seven hours in forced confinement. A cash bail deposit was required to secure the pretrial release of twelve of these people; the cumulative total bail deposit was $2190.00. Moreover, according to counsel, none of the fifteen to whom we refer had previous criminal records, exercised policy-making decisions, or harboured a financial interest in the bookstores concerned. Counsel also advises us that four of these clerks during their incarceration, suffered the indignity of being handcuffed.

The Canadian Civil Liberties Association appears here to-day to register its objection to the law enforcement methods which have been described herein. In the opinion of our organization, it is completely inexcusable to arrest, to finger print, to handcuff, and to imprison for a few hours or even a few moments, persons whose sole offence was that they happened to be employees of bookstores which were selling reading matter that society might not like.

Of course, the ensuing submissions will concentrate neither upon the legal guilt of the accused persons nor upon the propriety of the obscenity laws, themselves. The legal guilt of the accused is an issue for the courts to determine; the propriety of the obscenity laws is an issue for the Dominion Parliament to determine. Notwithstanding these divisions of jurisdiction, however, some degree of overlap is inevitable. Although, the Police Commission does not decide who is guilty, it must decide whom to prosecute. Although the Police Commission cannot amend the criminal law, it can decide how vigorously or leniently it will enforce that law.

It is clear from the experiences throughout history that the attempt to legislate against what adult citizens may read carries with it enormous risks to vital civil liberties - of authors, of publishers, of distributors, of employees, and of the reading public at large. Freedom of speech, freedom of the press, freedom to read, and even works of art have been seriously jeopardized by such laws. We have never been persuaded that the benefit we derive from combatting pornography is worth the harm we sustain to these vital freedoms. According to a growing number of recent studies in the social sciences, obscene literature is more of a distasteful annoyance than a social danger. But the freedoms that suffer in the wake of anti-obscenity crackdowns , lie at the heart of democratic society.

Of course, it is for the Dominion Parliament ultimately to determine how far the general welfare is served by the assumption of these risks. And at the appropriate time, we will make representations to the Federal authorities on the general law in this area. But, in the meantime, it is for local police

authorities to determine how far their law enforcement methods are going to compound these risks. It is in this connection that the Canadian Civil Liberties Association calls upon the Metropolitan Toronto Police Commission to devise a policy of law enforcement that deliberately seeks to minimize the civil liberties risks in our obscenity laws. To whatever extent the Police Commission feels obliged to enforce these questionable laws, it ought to do so in a manner which minimizes the impositions upon the freedom of those concerned.

Unlike the situation with other criminal laws, those who may be violating our obscenity laws often have no way of determining in advance that they are doing so. A person who picks up a gun to rob a bank knows in advance that his conduct will run afoul of the criminal law. But a person who writes, publishes, distributes, or sells a particular book may not know that the book in question will ultimately be considered " obscene ". Indeed, the judges of our courts, the very sources of legal wisdom in our society, have shown substantial disagreements with each other on issues of determining obscenity.Consider the following cases.

In the 1962 case of Regina v Brodie, the trial judge, three Appeal Court Judges, and four judges of the Supreme Court of Canada held that " Lady Chatterly's Lover" was obscene. However, five judges of the Supreme Court of Canada carried the day in a declaration that the book was not obscene. Despite the acquittal, the judicial head count was 8 to 5 in favour of a conviction. In a 1963 case, Regina v Dominion News, a lower court judge and four appeal justices found the magazines in question to be obscene. One Appeal Court justice and seven Supreme Court of Canada justices held that it was not obscene. The judicial head count was five in favour of a conviction, eight against a conviction. In the 1964 case of Regina v Coles , the book " Fanny Hill " was found to be obscene by the trial judge and two Appeal Court judges. It was held not obscene by three Appeal Court Judges. Here, the judicial head count showed a 3 to 3 tie. In the 1966 case of Regina v Cameron, the trial judge and four Court of Appeal judges held that the material was obscene. One Appeal Court Judge held that it was not obscene. The judicial head count shows five to one in favourof the conviction that was ultimately registered. It is interesting

that the one dissenting judge in the case, Mr. Justice Bora Laskin, has since been appointed to the Supreme Court of Canada.

If the best legal authorities in the community disagree so sharply with each other about what constitutes obscenity, how is the lay citizen supposed to know in advance whether the material in his possession is legally obscene? Thus, unless they were to virtually avoid material with realistic sexual content, the book sellers could be in a state of perennial peril of defying our obscenity laws .In this regard, it is quite appropriate to ask the Police Commission to adopt a more benign policy of enforcing obscenity laws.

A few years ago, the Criminal Code was amended by the addition of section 150A, a procedure for making legal determinations as to whether certain books were obscene. If they are found to be obscene, the judge may order that they be forfeited to the Crown. Under this section, the police authorities may, in effect, prosecute books rather than persons. We believe that the civil liberties of all concerned would be better protected if the Police Commission were to adopt as a matter of policy the procedure under section 150A as a pre-condition to any prosecutions against persons. Only if a book were first found to be obscene, should there be any consideration of prosecuting a person who distributes the book. Such a procedure would eliminate the unreasonable peril we impose upon persons who do not know and could not know that their book-selling is a violation of the law.

We have already noted that a large number of the people charged under this law in recent months, have suffered the penalty of arrest, and even several hours of imprisonment, We find it very difficult to conceive of the social purpose which is served by pre-trial arrests and incarcerations in these cases. None of these people has yet been found guilty of a criminal offence. Thus, in the eyes of the law, they are still innocent. In most cases, these legally innocent people have experienced several hours of degrading detention and were unable to effect their release wihtout the posting of bail money deposits. Yet recently, the Minister of Justice has introduced a bill into the Parliament of Canada which would abolish financial bail and pre-trial detention in the greatest number of cases.

According to the new bill, only in those circumstances where the accused were unlikely to show up for their trials or where they were a serious menace to society, would there be any question of pre-trial imprisonment.

In the opinion of the Canadian Civil Liberties Association, these considerations represent the most rational criteria for incarcerating legally innocent people prior to trial. No other circumstance could justify the imposition of such punishment upon people who have not been convicted of the charge against them.

From this standpoint, we would find it difficult to believe that the wide spread arrests, incarcerations, and bail deposits were a social necsssity in these obscenity cases. According to our information, at least fifteen of the accused have no previous criminal record of any kind. On what basis, then, can we believe that their immediate release would have endangered society? On what basis can we believe that the posting of bail was necessary to secure their attendance in court? Although Mr. Turner's bill has not yet become law, we respectfully submit that the law enforcement policies of the Metropolitan Police Department should be governed by its guidelines. We see no reason why these guide lines should not presently apply in all cases, let alone, in these highly questionable obscenity matters. Accordingly, we respectfully submit that, unless the special circumstances of the Turner Bill applied, all those charged in connection with our obscenity laws should receive summonses and none of them should be arrested.

As we have indicated, it is our information that a substantial number of the people recently accused of obscenity offences in this city have been merely clerks in the bookstores concerned. Whether or not they can be considered legally guilty of the offences involved, we respectfully submit that there is no justification whatever for laying criminal charges against such people. If the law enforcement authorities of this community beleive that it is necessary to crack down on the sale of obscene literature, let them go after only those who make the decisions to publish and to sell such literature. Regardless of any technicalities of legal guilt, it is a cruel social policy, indeed, that would launch criminal prosecutions against hapless sales clerks

who are making no profits and exercising no discretion. Accordingly, the Canadian Civil Liberties Association respectfully requests that the law enforcement authorities confine their anti-obscenity activities to those who make the decisions as to what to publish and what to sell.

Moreover, as a first step in instituting this policy, we respectfully request that the Police Commission review all of the cases currently under charge. To whatever extent your investigation of the facts confirms the information that has been given to us, we respectfully request that you secure the withdrawal of all the current charges that have been laid against those persons who were merely sales clerks.

In summary, to whatever extent local police authorities feel it necessary to enforce Canadian obscenity laws, the Canadian Civil Liberties Association respectfully calls upon the Metropolitan Police Commission to adopt those law enforcement methods which will impose least upon the freedoms of the citizens involved. In particular, we request that the law enforcement procedures be limited to the following guidelines:

1. Never prosecute a person before prosecuting a book under forfeiture proceedings of section 150A

2. Initiate these prosecutions by the use of summonses only unless the special exceptions of the Turner bill are applicable.

3. Confine prosecutions to those persons who exercise decision-making powers with respect to the publication and sale of the impugned material.

4. Secure the withdrawal of all charges which have been laid against those who exercised no such decision-making powers.

All of which is respectfully submitted

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