

The obscene state of censorship in Ontario

It's all a matter of taste

by Trevor Burnett

"If more people broke the obscenity law and were willing to go to jail for it, it would disappear," says London, Ontario bookseller and self-proclaimed anarchist Marc Emery.

Emery broke Canada's obscenity law last year by selling the explicit 2 Live Crew album *As Nasty As They Wanna Be*. He was charged last year and later convicted under section 163 of the Criminal Code, which defines publications as obscene if "a dominant characteristic" of their content includes "undue exploitation of sex, or of sex [along with] crime, horror, cruelty and violence."

This November Emery will appeal his 12-month probation.

In October 1990, the album was declared obscene by Project P, the anti-pornography wing of the Ontario Provincial Police. As a result, the record company WEA stopped distributing the album.

Many stores removed it from their shelves, fearing police harassment — and, according to Emery, the OPP told HMV record store President Paul Olofs that he would be charged if he did not take the album off his shelves.

Emery set out to challenge the obscenity law and the bullying tactics of the OPP. He bought 40 copies of the album in Detroit and advertised them for sale at his City Lights bookstore, where London police later charged him.

The police were serving their own agenda by banning the record when no judge had ruled it obscene, Emery says.

At the trial, Emery said judge John Menzies was totally unsympathetic and ruled the defence "inadmissible."

Osgoode Hall Law professor Alan Young, who represented Emery, thinks the law is nonsensical and unconstitutional.

According to Young and other critics, the main problem with the law's definition of obscenity is deciding what is "undue exploitation."

Another obscure tenet of the law is the "community standards of tolerance test" — which asks whether Canadians would tolerate or object to other Canadians being exposed to the material.

"Because the definition of obscenity is so ambiguous, it's unfair," Young says. "You have 2 Live Crew being charged for putting out a sexually explicit album, yet artists such as Andrew Dice Clay, Sam Kinison and some heavy metal bands have put out material just as bad or worse and they have escaped police attention."

"They search diligently to find examples of anal penetration, while they allow drugs, guns and ammunition to come into the country."

The fundamental problem, according to Young, is that publishers and store owners have no way of knowing what materials are obscene until the police have busted them.

"A bookseller can't know in advance if he or she is contravening the criminal code. It is a fundamental principle that everyone must know the law in advance so they can plan their lives accordingly."

Young also finds the community standards test absurd.

"I may know what I can tolerate but how can I say what you might tolerate, what someone in Saskatchewan might tolerate or what David Berkowitz (son of Sam) might tolerate," Young told the *Toronto Star* in June.

Copping the copies

Like Emery, Young is irked that the law allows the police to be the arbiters of "good taste."

"They will seize hundreds, even thousands, of copies of materials they consider obscene, which will remain in a police vault until the trial, whether it takes six months a year or a year and a half."

The police don't necessarily base their raids on "community" standards, Young says. They are just as likely to follow standards based on racism or homophobia.

"The fact that 2 Live Crew are harassed while the work of some white artists such as Guns N Roses is unobstructed — even celebrated — is proof of this," Young explains.

Bad day for books

John Scythes, owner of Glad Day, a gay and lesbian bookstore on Yonge Street, shares many of Young's sentiments.

Scythes' store does not get raided. Instead, many of his incoming shipments get confiscated at the Canadian border.

Jearold Moldenhauer, Glad Day's original owner, estimates that over the bookstore's 21-year existence it has lost over \$2 million due to border confiscations and related costs.

Scythes says "they search diligently to find examples of anal penetration, while they allow drugs, guns and ammunition to come into the country."

To Scythes, the customs officials and the Conservative party in general are "a bunch of fucking unsympathetic bastards."

To Jeff Moore, chair of the Canadian Commission against Customs Censorship, this is a crucial issue.

"If Marc Emery loses, his pride and principles may be hurt. If the gay and lesbian community loses, their whole access is cut off."

Moore describes what typically happens to shipments such as Glad Day's.

"They basically have three options. They can pay for the return of the material back to the shipper. They can hand the material over to customs officials where it gets destroyed. Or they can challenge the ruling and appeal."

"The customs department has its own legal and judicial branch and there is virtually no chance of getting the stuff back," Moore adds.

Moore believes the government is misdirecting its resources. "Why worry about things that people are legally entitled to do anyway?"

he asks. "You should prosecute people for crimes, not ideas."

Deceptive step

It looked like Ontario had taken a progressive step last December when the Ontario Film Review Board — which is responsible for screening and rating all films seen in Ontario — announced they would allow hardcore pornographic films to be distributed and sold in Ontario.

As a result many video stores have popped up in Ontario selling hardcore videos, both straight and gay.

But what many saw as the crumbling of the censorship walls in conservative Ontario happens to be just a facade. Why? Because Project P is still charging Ontario retailers for selling hardcore films.

According to Detective Constable Weldon Popp of the Metro Toronto branch of the OPP, the Film Review Board decision carries no weight and the OPP will continue to lay charges for material considered obscene, as defined in the criminal code.

On September 26 the *Globe and Mail* reported that 6,836 sexually explicit videotapes viewed and cleared by the Film Board, worth more than \$750,000, were seized by police at Top Shelf Entertainment in Scarborough.

But Ontario Film Review Board chair Robert Payne says the OPP were supposed to cooperate with the Board's decision.

"It reflects schizophrenia of some kind if one government agency says one thing while one says another."

"Distributors of pornographic movies asked us to come up with a more consistent rating system so that they could know what they could and could not carry," Payne says.

"The board met with distributors and members of Project P. The decision was made that films would be approved as long as they portrayed sexual activity between consenting adults, and were devoid of violence, degradation, children, bestiality or necrophilia (sex with the dead)."

Said Payne further "least among the concerns of everyone present was the explicitness of the films."

Payne says the decision was necessary due to technicalities in the Theatres Act of Ontario, which legislates the Board's actions.

"The way the Act was written gave members (of the Board) the right to reject or approve movies. Because of this, there was a lot of inconsistency in the decisions handed down."

But the old inconsistency has been replaced with a new one, where the review board obeys one law and the police obey another.

Excalibur visited several X-rated video outlets in downtown Toronto. Of the four that allowed us to interview them, two had experienced significant confrontations with the police and one, Skinflinx, had been charged.

According to Skinflinx manager Dean Manning, he was charged 5 months ago and has a court date in January.

Like many, he cannot understand all the controversy. Said Manning, "I get all my films from Montreal. It's legal over there, so why not in Ontario? The cops are just on our ass for no reason."

According to Rob, (who withheld his last name) of Triple XXX Video on Yonge Street, "the real criminals are getting too big for the police so they pick on the little guy."

Rob says he has been harassed but not charged.

"It doesn't matter who says we can have it, the police will still be making their own laws. How bad can this stuff be if three quarters of my customers are married couples?"

Moore was optimistic that eventually things would be rectified. Sooner or later the Attorney General's office will bring the OPP and the Film Board on line if for no other reason than to avoid sheer embarrassment, Moore predicts.

But Payne believes all this confusion and controversy will only be solved when either the supreme court comes out with a decision that everyone can live with, or when politicians who feel strongly enough on this issue take a stand.

