

"Reviewing those findings it is my judgment that there is nothing in the *Greystone Calendar 1983* that is injurious to the public good and nothing that would cause a discernible injury to the public good. I accordingly acquit the goods which are the subject of this information."

The Comptroller of Customs appealed against that decision and in the light of the conflict between the decisions of the Court of Appeal and the full Court of the High Court the learned High Court Judge before whom the appeal was originally presented referred the matter for decision to the Court of Appeal.

In a 3 to 2 majority decision the Court of Appeal upheld the District Court Judge's decision that the documents were not indecent and in the course of their decisions some of the learned appellate judges gave consideration to the interpretation of the word "indecent" with particular reference to the statutory interpretation of that word as contained in section 2 of the Indecent Publications Act 1963 which is as follows:

"'Indecent' includes the describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good."

The majority of the Tribunal accepts that it is bound by that decision of the Court of Appeal and that they are unable to distinguish those publications which fall for its determination as to their classification in this decision in such a way as to avoid the very clear directions given by the majority in the Court of Appeal decision to both the Courts and to this Tribunal. As chairman of the Tribunal and clearly (as I know it will be accepted) without any criticism of the Court of Appeal decision I have to note that it is to be regretted that such a relatively unimportant document as a calendar depicting nude males should in the end result be the vehicle which provides for this Tribunal in all its future deliberations those important features of interpretation with which it must now work. I say that because there are clear indications in some of the learned appellate judges' decisions that all of the arguments which might have been presented were not perhaps as fully canvassed before the Court of Appeal as might have been thought necessary in a case where that Court's decision was going to have such important consequences for this Tribunal and for the future of censorship in general.

From time to time over its history the Tribunal has had occasion to say, in effect, that the publishers, importers and distributors of magazines depicting nude females have been pushing the line of acceptability with ever increasing force. The Tribunal has over many years established its own criteria within the clear prescriptions (as they have been interpreted) as set by Parliament in the Indecent Publications Act of 1963. In particular we would refer to that which has been given the rather exalted title of the Tripartite Test. That test has been set out in many of the Tribunal's decisions and it is sufficient for our purposes in this decision if we refer to one of those. Decision No. 1054 of the 17th day of March 1983, a decision dealing with certain issues of *Penthouse*, United States magazine. In that decision the Tribunal said:

"In summary, the Tribunal indicated that issues were likely to be classified as indecent if, in addition to their normal content, they contained pictorial scenes including the following:

1. Scenarios involving more than 2 models, and in which sex and violence and intimacy and/or deviant aspects of sex are depicted among the models;
2. Multiple model scenes which depict lesbian acts;
3. Heterosexual scenarios in which there are a high degree of intimacy (e.g. fellatio or cunnilingus or intercourse) depicted in the couple's actions."

Over the history of the Tribunal various decisions have referred to the Tribunal's concern at the increasing explicitness in the portrayal of the single female nude model and in particular the depiction of the genitalia. When the publications *Knave* and *Fiesta* were first circulated amongst the members of the Tribunal I found that I was faced with a concern that the so-called Tripartite Test had been formulated at a time when the explicitness in the depiction of the genitalia of the single female model in publications under review was substantially less objectionable as being indecent than it is today. There are many examples of such objectionable depiction of genitalia in the magazines *Knave* and *Fiesta*.

At the public hearing in respect of these publications the Tribunal, as has been mentioned, heard evidence from the English publisher. The Tribunal had previously been advised that Mr Geoffrey Robertson (the English barrister whose book *Obscenity* is earlier referred to in this decision) would be presenting the case on behalf of Galaxy Publications Ltd., the publisher of those 2 magazines. In the light of what was clearly a very important case for the Tribunal's determination we had anticipated that the Comptroller of Customs who had referred those magazines to the Tribunal for classification at the importers request would have been represented by senior counsel and that there might well have been evidence called by the Comptroller in respect of these particular publications. The Comptroller was in fact represented by one of his officers who as

the Tribunal understands it is not a legally qualified person nor one professing to have any special literary expertise. That officer presented the Comptroller's case to the Tribunal in a written submission which we set out in full as in so doing it highlights that feature which in the end altered the majority decision to one of a limited classification rather than a classification of indecent.

- "1. These magazines are sample copies and have been submitted to the Tribunal at the request of the importer.
2. In Decision 916 of April 1979 the Tribunal classified Vol. 11, No. 12 of *Fiesta* magazine as being unconditionally indecent.
3. These 6 magazines currently before the Tribunal are very similar to that magazine in many respects although in their favour they do lack the lesbian pictorial sequences and the more explicit letters from readers contained in the earlier magazine.
4. These magazines still retain the imbalance between sexual content and any redeeming serious writing that was present in *Fiesta*, Vol. 11, No. 12, however, as none of the content is blatantly offensive it is suggested that the magazines' circulation could be restricted only to the younger reader.
5. All 6 magazines have therefore been submitted under section 14 of the Indecent Publications Act 1963."

Mr Robertson was unable to attend the hearing due to illness but his brief was most ably presented to the Tribunal by Mr Justin Smith, counsel of Wellington.

In order to properly appreciate the dilemma which the Tribunal was placed in as a result of the Court of Appeal decision in the Lawrence case we deem it important to disclose how the Tribunal now functions.

There are 5 Tribunal members, 2 of whom reside in Wellington and 3 in various places in the South Island. Most of the work of the Tribunal comes from publications referred to it by the Comptroller of Customs. This can be either by way of reference to the Tribunal of publications which have been seized from travellers arriving in New Zealand or by way of commercial consignment. Our understanding is that the bulk of such literature is ultimately condemned and destroyed without ever coming to the notice of the Tribunal as there is no challenge to the Comptroller's seizure or destruction. Where the publisher and or importer or owner of the publication disputes seizure, condemnation and forfeiture the matter is accordingly referred to the Tribunal for a decision as to whether it is indecent or not or for a decision as to its classification.

Not infrequently responsible publishers or distributors have sample copies imported into New Zealand with the intention that they should be referred to this Tribunal at their request by the Comptroller of Customs and as previously indicated that is what occurred in the case of the publications *Knave* and *Fiesta*. Occasionally publications are referred to the Tribunal by the Courts and this is necessary as Parliament has given to the Tribunal the sole initial jurisdiction to determine indecency in respect of books and it is provided that the Courts in terms of section 12 of the Indecent Publications Act refer such questions to the Tribunal for decision and report.

As the Tribunal's present chairman I have regular contact with the officers of the Tribunals Division of the Department of Justice who supervise the working of the Tribunal and with them organise the distribution of the material presented for our consideration to the Tribunal members. All members receive all books and publications requiring decision well before the Tribunal meets in formal session. The members each read and consider those publications making evaluations in respect thereof which they note and record. When the Tribunal meets at its formal session as advertised in the newspapers and notified to all having an interest in the various publications for determination its members have a preliminary meeting prior to the formal hearing. The purpose of this meeting is to discuss the various items for consideration but without any attempt being made to reach any consensus in relation to that material. On most occasions the formal sitting time of the Tribunal would be less than 1 hour with the majority of the submissions made on behalf of publishers, importers or owners of material seized being in written form and in the majority of cases there are no representations whatsoever. It is rare for the Tribunal to have the assistance as it had in the case of the *Knave* and *Fiesta* publications of submissions from counsel for the importer.

Immediately following the formal hearing the Tribunal meets to determine the character of any book submitted for its classification and to classify those books in terms of section 10 of the Act which provides as follows: 10 functions of Tribunal—The functions of the Tribunal shall be—

- (a) To determine the character of any book or sound recording submitted to it for classification;
- (b) To classify books and sound recordings submitted to it as indecent or not indecent or as indecent in the hands of persons under a specified age or as indecent unless their circulation is restricted to specified persons or classes of persons or unless used for a particular purpose, as the case may be: