

Decision No. 60/90
Reference No.: IND 49/90

Before the Indecent Publications Tribunal

In the matter of the Indecent Publications Act 1963, and in the matter of an application by the Comptroller of Customs for a decision in respect of the publications contained in application No. IND 49/90. These publications are more particularly referred to by title and publisher in the categories specified in the decision which follows:

Chairperson: P. J. Cartwright.

Members: W. K. Hastings and S. C. Middleton.

Hearing at Wellington on the 11th day of September 1990.

Appearances: B. N. Cheeseman on behalf of the importer.
M. J. Wotherspoon on behalf of the Comptroller of Customs.

Decision

These publications were commercially imported through air freight, Auckland and were seized by the Collector of Customs. The importer disputed forfeiture and the publications have been referred to the Tribunal for classification prior to the commencement of condemnation proceedings pursuant to the Customs Act 1966.

There are 21 publications in this application. All of them are magazines the contents of which are largely photographs of single female models displaying various aspects of their nude or mostly nude bodies. Most of the photographs are black and white, artless and sexually explicit. There is little accompanying text. They are intended for a male heterosexual market. The Tribunal finds that the 15 magazines in category A are unconditionally indecent and that the 4 magazines in category B justify an age restriction of 18 years. Decisions on the remaining 2 magazines, *Poppin' & Milkin*, Vol. 2, No. 2 and *Pregnant Gals Special 2*, are deferred until the Tribunal has considered more fully their contents.

Category A

The Tribunal finds that the following publications are unconditionally indecent:

| Title | Publisher |
|-------------------------------------|-------------------------------|
| 100 Pages of Tits and Ass, No. 2 | Red Lion Publications. |
| Black Girl Review 28, Vol. 7, No. 4 | American Art Enterprises Inc. |
| Geisha Girls, Vol. 6, No. 4 | American Art Enterprises Inc. |
| Hefty Bottoms, Vol. 1, No. 1 | American Art Enterprises Inc. |
| Hot Legs, Vol. 4, No. 1 | American Art Enterprises Inc. |
| Pure Crystal, Vol. 1, No. 64 | Red Lion Publications. |
| Split Beavers, Vol. 6, No. 3 | American Art Enterprises Inc. |
| Sultry Black Dolls, Vol. 5, No. 3 | American Art Enterprises Inc. |
| 300 Black Beauties, No. 11 | London Enterprises Ltd. |
| 303 Super Boobs, No. 10 | London Enterprises Ltd. |
| Black Sugar, No. 15 | London Enterprises Ltd. |
| Crotch Bait, Vol. 1, No. 1 | Red Lion Publications. |
| Dirty Dames, Vol. 1, No. 1 | Red Lion Publications. |
| Hot Pink Pussy, Vol. 1, No. 1 | Red Lion Publications. |
| Miss Twin Volcanoes, Vol. 1, No. 1 | American Art Enterprises Inc. |

Mr Wotherspoon submitted that the photographs in the first 8 of these publications, and in all of the publications in category B, "place undue emphasis on the female genitalia, with many models posed in contrived positions to accentuate that part of the female anatomy". He submitted that on the basis of past decisions of this Tribunal, these magazines may attract an R18 classification. Mr Wotherspoon submitted that the next 6 publications should be considered unconditionally indecent because they contain many photographs which "place undue emphasis on the female genitalia and depict

genital manipulation with the hand". Finally, Mr Wotherspoon submitted that the last publication in this category ought to be unconditionally indecent because of its photographs of heterosexual sexual activity.

Previous issues of *Black Girl Review* (decision 47/89), *Geisha Girls* (decisions 47/89 and 26/90), *Hot Legs* (decisions 47/89 and 26/90), *Split Beavers* (decision 47/89) and *Sultry Black Dolls* (decision 26/90) were classified R18 by the Tribunal.

The Tribunal has always recognised the desirability for consistency balanced, of course, with the need to recognise changes in the community at large. The High Court in *Comptroller of Customs v. Gordon & Gotch (NZ) Ltd.* [1987] 2 NZLR 80 at 98 stated that:

"the membership of the Tribunal has a continuity but also a slow change. There is thus at any time a depth of cumulative experience, together with an inflow of fresh thought and experience. The Tribunal, therefore, is able to reflect the change in the community at large. The Tribunal in this country takes the place of the judge and jury which is the corresponding situation in other parts of the Commonwealth in indecency legislation. But it still represents the community in the exercise of its function to determine and classify the books and other documents before it. It is to apply its specialised expertise and its collective community knowledge and experience in its deliberations."

The magazines in this category, as stated by Mr Wotherspoon, contain "undue" emphasis on female genitalia. There is very little to distinguish amongst them. In many of the photographs, the models have been placed in positions by the photographer which can at best be described as awkward, in order to maximise the reader's view of the models' genital area. The models quite often are shown spreading their labia with their hands, either to simulate masturbation or to maximise again the reader's view. In many of the photographs, only models' genital areas are seen; their faces are distant or altogether hidden. There is no doubt that the magazines are tasteless and offensive. But are they unconditionally indecent? The Tribunal is well aware of the statement of the Ontario Court of Appeal in *Re Information Retailers Association of Metropolitan Toronto Inc* (1985) 52 OR (2d) 449 at 468 that "it is indeed often true that 'one man's vulgarity is another's lyric'".

The definition of "indecent" in the Act includes "describing, depicting, expressing, or otherwise dealing with matters of sex ... in a manner that is injurious to the public good". It is important to re-emphasise how the Tribunal comes to a decision on whether or not a publication is injurious to the public good. In *Gordon & Gotch*, the High Court stated that:

"Although the function is to make a determination of indecency and, in the course of that, to decide whether or not some matter is injurious to the public good, in form as if this was a decision on a matter of fact, it is rather a matter of opinion or judgment. It is the judgment of the Tribunal based upon its understanding, experience and knowledge of the common or public good. Needless to say, that is a concept whose boundaries are always changing as society itself changes (at 99)."

The High Court also decided in that case that "injury to the public good is a large, wide-ranging category of facts that simply does not lend itself to a where, how, when finding of fact" (at 91). Nevertheless, we have attempted to articulate reasons which would warrant a finding that these publications are unconditionally indecent. It is not an easy task, and as the High Court stated, it is a matter of the members of the Tribunal applying their understanding, experience and knowledge of the public good to the facts of the publications before them. This is done with a great deal of discussion of the publications themselves and after careful consideration of the statutory criteria. The main factor which makes these magazines unconditionally indecent in the opinion of the