



July 10, 2018

File# 29929

"DP" (Manager)
Coast to Coast Video Sales Ltd.,
dba Adult Super Store
c/o 1109 Royal Avenue
New Westminster, BC V3M 1K4

[Counsel for Coast to Coast Video Sales Ltd.]
Harrop, Phillips, Powell & Gray LLP
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Vancouver, BC V6B 2M8

Re: Report to Director [dated May 11, 2018]

Please find below my reasons for decision in this matter. In summary, I have found that:

- Coast to Coast Video Sales Ltd. ("Coast to Coast", or the "Respondent") has contravened section 3 (2) of the *Motion Picture Act* ("Act").
- The contraventions are sufficiently serious as to warrant licensing sanction pursuant to section 8 (3) (d) of the Act.
- The Respondent's licence is suspended for a period of 3 days.

Introduction

Consumer Protection B.C. administers the *Motion Picture Act* ("Act"), and the Motion Picture Regulation ("Regulation") and is the licensing authority for motion picture distribution and retail in British Columbia. Coast to Coast is a licensed motion picture retailer with licence #41641, operating from a location at 10740 King George Boulevard, in Surrey, British Columbia.

This decision concerns allegations that the Respondent has contravened sections 3 (2) and 3 (4) of the Act, particularized by Inspector "M" in a Report to the Director dated May 11, 2018 ("Report"). Moreover, it relates to potential for licensing action by the

director under s. 8 (3) of the Act. The director has delegated to me the responsibility of determining whether the Respondent committed the alleged contraventions. If I find it so, I am authorized to use the director's discretion to impose conditions upon, suspend, or cancel Coast to Coast's licence.

The subject matter of the Report concerns an inspection conducted on March 7, 2018 ("Inspection"). The Report also cites a previous statutory seizure of adult films from Coast to Coast in May of 2016.

Opportunity to be heard

I have before me the written reply (inclusive of two Canada Border Services Agency memoranda) provided by counsel for the Respondent, dated June 18, 2018, (the "Response"). On this basis, I am satisfied that the Respondent is in receipt of the Inspector's allegations and evidence in the Report and has exercised its opportunity to respond.

Statutory provisions

- 3** (1) If an adult film or a copy of it is intended to be distributed by an adult film distributor, the distributor must submit the adult film to the director for approval of the adult motion picture that it produces or reproduces.
- (2) An adult film distributor or adult film retailer must not distribute an adult film or a copy of it unless the adult motion picture that it produces or reproduces has been approved by the director and, if the approval is subject to conditions under section 5 (8), in accordance with those conditions.
- (3) Before an adult film distributor distributes an adult film or a copy of an adult film to an adult film retailer, the adult film distributor must attach, in a manner determined by the director, a certificate or some other evidence of approval, satisfactory to the director, to the adult film or copy stating that the adult motion picture that it produces or reproduces has been approved by the director.
- (4) An adult film distributor or adult film retailer must not distribute an adult film or a copy of it if the adult motion picture that it produces or reproduces has been approved by the director unless
- (a) that approval is evidenced by the attachment of the certificate or other evidence of approval required under subsection (3) to the adult film or copy, and

(b) the certificate or other evidence of approval has not been removed, reused or tampered with in any manner since the time of its attachment.

5 (1) On receipt of the prescribed fee, the director must ensure that every motion picture and adult motion picture submitted to the director for approval under section 2 (1) or 3 (1) is reviewed, and every motion picture is classified, in accordance with this Act and the regulations.

(3) Subject to subsection (5), the director must, before approving a motion picture submitted under section 2 (1) or 3 (1), remove or require the removal of, by erasure or otherwise, any portion of it that depicts any of the following:

(a) coercion, through the use or threat of physical force or by other means, of a person to engage in a sexual act, if the sexual act that was coerced is depicted in explicit sexual scenes;

(b) incest or necrophilia;

(c) bondage in a sexual context;

(d) persons who are or who appear to be under the age of 14 involved in sexually suggestive scenes, whether or not they appear nude or partially nude;

(e) persons who are or who appear to be under the age of 18 involved in explicit sexual scenes;

(f) explicit sexual scenes involving violence;

(g) scenes of brutality to or torture, maiming or dismemberment of persons or animals that are portrayed with such a degree of reality and explicitness that the scenes would, in the director's opinion, be intolerable to the community;

(h) sexual conduct between a human being and an animal;

(i) conduct or an activity that is prescribed in a regulation made under section 14 (2) (f)

(4) Subject to subsection (5), the director must not approve of a motion picture submitted under section 2 (1) or an adult motion picture submitted under section

3 (1) if the motion picture or the adult motion picture predominantly consists of any, or a combination of, scenes referred to in subsection (3) (a) to (i).

(5) The director is not required to remove material under subsection (3) or refuse approval of a motion picture or adult motion picture under subsection (4) if the director considers that the theme, subject matter or plot of the motion picture or adult motion picture is artistic, historical, political, educational or scientific.

(6) If the director reviews a motion picture under subsection (1), the director must, unless the director takes action under subsection (3) or (4),

(a) approve the motion picture, and

(b) if the motion picture is intended to be exhibited in a theatre, classify the motion picture in accordance with the regulations made under section 14 (2) (c).

Uncontested Facts

- At the time of the Inspection the Respondent's store contained at least 50 adult films that had not been reviewed and approved by the director, as determined by the Inspector's scrutiny of Consumer Protection BC's database for adult films approved for distribution and retail.
- The Inspection resulted in the seizure of 798 adult film discs offered for retail by the Respondent without certificates of approval or other evidence of approval affixed.

Allegations in the Report

Allegation #1

At the time of the Inspection the Respondent violated section 3 (2) of the Act by offering for sale adult films not previously approved by the director ("unapproved").

Allegation #2

The Respondent violated section 3 (4) of the Act by retailing adult films without evidence of approval attached.

Coast to Coast's response to the Report

Extraprovincial distribution

The Inspector failed to turn his mind to whether Consumer Protection BC has jurisdiction over adult films “not intended for distribution in British Columbia”. The Inspector exceeded his jurisdiction by seizing adult films intended for distribution outside British Columbia.

Importation & CBSA controls

Further, the Inspector failed to consider that the adult films at issue may have been subject to reviewed for potential obscenity and cleared by the Canada Border Services Agency. In that case, it says, the director's authority to require approval of films previously reviewed by the CBSA “for the same depictions enumerated in s 5 (3) of the Act” is unconstitutional.

Freedom of Expression

The Respondent cites an Ontario Superior Court decision, *R. v. Glad Day Bookshops Inc.* 70 O.R. (3d) 691 [*“Glad Day”*], in support of its position that the approval scheme under the Act furthers the illegitimate purpose “of censoring motion pictures as obscene”. According to the Respondent, *Glad Day* implies that application of the Act's approval requirements is invalid.

Illegal Fees

The Respondent contends that the fees demanded by Consumer Protection BC in its administration of the Act's approval scheme, to the extent they exceed requirements of merely classifying films pursuant to section 3 of the Regulation, are “impermissibl[y] intended for the restriction of trade or some other unlawful purpose”.

Analysis

The *ultra vires* (federalism) argument

In *It's Adult Video Plus Ltd. v. British Columbia (Director of Film Classification)* 1991 CanLII 8279 (BC SC), the court considered the constitutional validity of a provincial statute apparently duplicating or overlapping with federally regulated subject matter. The court determines that if the core subject matter of a provincial enactment falls within the province's “legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*.” [Paragraph 15] Provincial legislation that closely mirrors subject matter regulation of federal law is not rendered “inoperative” unless it directly conflicts with or contradicts federal authority.

The Respondent posits that the Inspector erred in failing to consider that the adult films it offered at retail, having been imported from international suppliers, were previously subject to inspection for possible “obscenity” by the federal Canadian Border Services Agency (“CBSA”). However, the Respondent provides no evidence that the adult films in question were in fact examined by the CBSA. The CBSA Memoranda do not state that it reviews all adult films imported into Canada for obscenity, and the Respondent cites no documentary evidence that it did so in this case. (I do not find credible the submission that the seized films “were not intended for distribution in British Columbia”. The Report establishes that the films were in fact being offered for retail to British Columbia consumers.)

To the extent that the provincial authority duplicates criteria that also relate to *Criminal Code* obscenity standards or grounds for a federal agency’s interception or prohibition of importation, it does so not in the criminal law context, but simply to prevent distribution of adult films potentially harmful to or intolerable to British Columbians. I take notice of the distinction between the legitimate exercise of regulatory and preventive provincial powers on one hand, and attempts to define and penalize conduct as criminal, on the other. I do not accept that the Act is invalid due to certain similarities to the CBSA’s interception and examination scheme.

I find that Consumer Protection BC is authorized by the Act to approve or disapprove, in whole or in part, adult films notwithstanding similarities between the federal CBSA and provincial examination criteria. In this case, the administration of the approval scheme does not directly conflict with, or contradict, the purposes of the CBSA. The CBSA’s remit is the regulation (i.e., prohibition) of importation into Canada of illegal materials, while British Columbia, through the Act, regulates specifically the distribution and retailing of adult films (involving complete, partial, or no further restrictions on the films’ contents). The Respondent has not referred to settled authority for the view that the provincial legislature is unauthorized to regulate by way of a “prior approval” scheme the retail distribution of adult films.

In concluding that the Respondent’s argument as to the allegedly *ultra vires* status of the Act is likely incorrect, it follows that fees charged for the director’s review and approval under section 3 are lawful. To the extent that Coast to Coast defends its avoidance of the Act’s approval scheme on the illegality of its fee component, I reject the argument.

The legal challenge in *Glad Day*

The Respondent submits that *Glad Day* calls into question the constitutional validity of the Act’s approval scheme. The submission is premised on the adjudicative facts and reasoning in *Glad Day* being equally applicable to the present case. *Glad Day* involves a

finding by the court that the relevant legislation in Ontario represented a comprehensive censorship scheme that excessively infringed freedom of expression. However, the decision is binding regarding the then-challenged Ontario statute, not the Act.

The Ontario legislation was in that case applicable to all films distributed in the province, whether for exhibition or retail. By comparison, the present case involves application of the Act's approval process for *adult* films intended for retail rental and sales (the Act does not require review and approval for all films, merely "classification"). Also, the criteria for the reviewing authorities in Ontario to potentially prohibit exhibition and distribution of films included the presence of explicit sexual content *per se*. The Act, however, does not empower the director to prohibit or censor adult films intended for distribution based on explicit sexual content, except to the degree such depictions engage the criteria in section 5 (3) of the Act. For these reasons I am not convinced that *Glad Day* governs the issues raised by the Respondent.

Challenge to the Act's validity

Considering the Respondent's submissions, I acknowledge the principle that administrative tribunals may grant relief by application of *Charter of Rights and Freedoms* principles in the context of their home statutes. As I understand it, the current jurisprudence presumes that a tribunal has jurisdiction over *Charter* issues arising in its specialized area of statutory regulation. The presumption is subject to a two-part test, namely: is the tribunal empowered to decide legal (as opposed to purely factual) questions, and, if so, is the tribunal's presumptive ability to decide *Charter* issues rebutted or "clearly withdrawn" by the legislative intent governing the statutory scheme? [*R. v. Conway*, 2010 SCC 22]

Pursuant to sections 12.1 and 12.4 of the Act, the Minister may designate Consumer Protection BC to be a director for the purposes of administering the Act. In administering the Act, Consumer Protection BC is bound by the terms and conditions of a formal agreement with government ("Agreement"), stated as follows:

S. 12.4 (3) The administrative authority must comply with the terms of the administrative agreement, and may not perform or exercise the powers, functions and duties of the director under this Act except in accordance with that agreement.

[The Agreement is online at -
<https://www.consumerprotectionbc.ca/images/content/about_us/2014_Administrative_Agreement_BPCPA.pdf>]

Among the core functions stipulated by the Agreement is *compliance with its legislative mandate to administer the Act in the public interest*. Further, Consumer Protection BC is required to assess its *effectiveness in administering the Act by measuring the degree to which licensees are found to comply with the Act* [emphasis added].

I also find relevant that the Act *mandates* the director's exercise of approval powers. For example, section 5 of the Act provides:

5 (1) On receipt of the prescribed fee, the director **must ensure that every motion picture and adult motion picture submitted to the director for approval** under section 2 (1) or 3 (1) **is reviewed**, and every motion picture is classified, in accordance with this Act and the regulations.

(3) Subject to subsection (5), **the director must, before approving** a motion picture submitted under section 2 (1) or 3 (1), **remove or require the removal** of, by erasure or otherwise, any portion of it that depicts any of the following [criteria...]

[Emphasis added]

The director is authorized under the Act to apply the approval scheme, which is central to its legislative purpose and to the terms of the Agreement. The Act permits no discretion for the director *not* to administer the approval process.

I have reviewed the Act and the Agreement according to which Consumer Protection BC administers the Act on behalf of the Minister. These documents determine the scope of the director's powers, functions and duties. I do not find any expression of legislative intent authorizing the kind of remedial action sought by the Respondent in this matter, i.e., permission for it to concede only to the "adult" classification for the films it retails, along with the purchase of decals for retail display, while dispensing with the current review process and its associated fees. I am unable within the scope of this decision to make the findings and provide the relief sought by Coast to Coast.

In the above context, I note two previous reconsideration decisions of Consumer Protection BC relating to challenges to the effect that the Act's approval requirements amount to unconstitutional censorship or an unauthorized restraint of adult film distribution. Both uphold the original decisions (a seizure and a licence suspension) while concluding that the tribunal's administration of the Act does not extend to granting a "general declaration of invalidity" concerning the Act itself. (The reconsiderations were issued June 10, 2014, and January 27, 2017.) In this decision I am also unable to reconcile the director's compliance with the terms of the authorization to administer the Act with a finding of constitutional invalidity respecting the director's "approval" function.

While I accept that ultimately the tribunal's conduct must be consistent with constitutional principles, as the decision maker of first instance I am bound by the scope of delegated authority and by the Act's statutory objectives. After reviewing the Respondent's submissions, I am not persuaded that I can provide relief in this hearing on constitutional grounds. I conclude that it is not tenable to comply with the powers and duties of the director under the Act while granting a remedy that implies a breach of the duty to administer the Act. The statutory context in this case rebuts the tribunal's presumptive ability to decide a constitutional issue in favour of the Respondent. My decision relates to whether the alleged breaches occurred and if licensing action is appropriate.

Determination

Allegation #1

The Inspector's observations summarized in Table 1, the related narrative on pages 2 and 6 of the Report, and evidence in Exhibit 10, convince me that Coast to Coast did offer for sale at least fifty unapproved adult films, contrary to section 3 (2) of the Act, as alleged by the Inspector. The Inspector's evidence is sufficiently clear and credible to support such a finding. Moreover, the Respondent does not canvass evidence to rebut the strictly factual aspects of the allegation.

Allegation #2

Section 3 (4) of the Act prohibits a distributor from distributing adult films, *if approved by the director*, without evidence of such approval attached and not removed, reused, or tampered with. In this case, the Inspector has framed the allegation to include the failure to attach evidence of approval to adult films whose status as approved or unapproved is not known or at any rate not stated. Section 3 (4) does not provide a contravention of failing to affix evidence of approval to unapproved titles (distribution or retail of unapproved adult films is a separate and distinct contravention). While the Report states that at the time of Inspection Coast to Coast was offering 798 adult films to the public without evidence of approval (which is not in dispute), I am unable to determine the extent to which the films were unapproved or alternatively were approved and offered without the requisite evidence of approval. In the absence of evidence of Coast to Coast offering approved films without appropriate decaling, I must dismiss this allegation.

Result of the licensing action

I have determined that alleged contravention #1 cited by the Report is proven, based on the evidence before me. Due to the Respondent having previously been subject to an adult film seizure in 2016 for related violations, its evidently wilful evasion of the Act, and

the substantial scope of non-compliance (nearly 800 unapproved or “undecaled” adult films) I find a licence suspension for the violation of section 3 (2) of the Act to be an appropriate regulatory response. At the same time, I am aware that the Respondent has been subject to a significant seizure of adult film inventory, an additional sanction in the same matter.

In considering an appropriate suspension, I am aware of no previous licensing sanctions against Coast to Coast under the Act. The suspension will be for a period of three days (copy of notice enclosed). In the circumstances, I consider such a period of suspension to be a reasonably serious and proportionate sanction for effecting correction and deterrence. During the suspension, the Respondent shall not rent, lease, sell, supply, or offer to do any of those things, or generally conduct business as an *adult* film retail business.

The Respondent may seek reconsideration of this decision in accordance with section 12.2 of the Act and section 12 of the Regulation. Subject to payment of a reconsideration application fee of \$242, application may be brought to the attention of:

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Robert Penkala, Manager of Enforcement
Hearings