COURT OF APPEAL FOR ONTARIO

Robins, Doherty and Austin JJ.A.

B E T W E E N:	)	C11978
HER MAJESTY THE QUEEN	)	*David Butt* for the appellant
Appellant	)	
- and -	)	*Robert J. Upsdell* for the respondent Allan Peter Hawkins
ALLAN PETER HAWKINS	)	
Respondent	)	
A N D B E T W E E N:	)	C12199
HER MAJESTY THE QUEEN	)	*Alan D. Gold and Greg Lafontaine* for the appellant Randy Jorgensen
Respondent	)	
- and -	)	*David Butt* for the respondent
RANDY JORGENSEN	)	
Appellant	)	
A N D B E T W E E N:	)	C14430
HER MAJESTY THE QUEEN	)	*David Butt* for the appellant
Appellant	)	
- and -	)	*Konstantine P. Tatulis* for the respondents Roman Ronish and George Ronish
ROMAN RONISH and GEORGE RONISH	)	
Respondents	)	

A N D B E T W E E N

HER MAJESTY THE QUEEN

Respondent

- and -

RANDY JORGENSEN and 913719 ONTARIO LIMITED

Appellants

C13260

Alan D. Gold and Greg Lafontaine
for the appellants
Randy Jorgensen and
913719 Ontario Limited

David Butt
for the respondent

A N D B E T W E E N

HER MAJESTY THE QUEEN

Respondent

- and -

ROBERT SMEENK and CRYSTAL PALACE INC.

Appellants

C7376

Christopher A.W. Bentley
for the appellants
Robert Smeenk and
Crystal Palace Inc.

David Butt
for the respondent

Heard: May 17 and 18, 1993

ROBINS J.A.:

The issue in these five appeals, which were heard together, is whether the videotape films in question are obscene within the meaning of s.163(8) of the *Criminal Code*, R.S.C., 1985, c. C-46, which provides that:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any

expression, they were held to constitute a reasonable limit demonstrably justifiable in a free and democratic society within the meaning of s.1 of the *Charter*.

In delivering the majority judgment, Sopinka J. reviewed the legislative history of the criminalization of obscenity before deciding the constitutional issue. He noted that the statutory definition contained in s.163(8) provides the exclusive test of obscenity with respect to publications and objects which exploit sex as a dominant characteristic. The common law test, the *Hicklin* test, which had as its focus whether the impugned material would result in the corruption of morals, is no longer relevant or applicable.

For something to be obscene within the statutory definition, it must have as a dominant characteristic the "undue exploitation of sex". To determine whether particular material unduly exploits sex the courts have over the years formulated a number of tests, namely, the "community standard of tolerance" test, the "degradation and dehumanization" test, and the "internal necessities" or "artistic defence" test. After reviewing these tests, Sopinka J. concluded that the jurisprudence interpreting s.163(8) failed "to specify the relationship of the tests one to another" and left the legislation "open to attack on the ground of vagueness and uncertainty". In order to fill the "lacuna" in the

qualify as the undue exploitation of sex unless it employs children in its production".

In the present appeals, the videotapes in issue are all of an explicit sexual nature. However, with very few exceptions, none contains scenes of violence. The central issue, as these appeals were presented, is whether the portrayal of sexual activity of the kind depicted in these films constitutes "treatment that is degrading or dehumanizing". Do films of this genre fall into the second or the third of the *Butler* categories? If they fall into the second category, has a "substantial risk of harm" been proven or can such a risk be assumed? Put another way, in light of the Supreme Court of Canada's interpretation of s. 163(8) in *Butler* (to which I shall return later) are videotape films of this type criminally obscene?

Before considering those questions, I turn to the facts and decisions in each of the five appeals before the court.

1) *R. v. Allan Peter Hawkins*

In this case the Crown appeals the respondent's acquittal by Misener J. of the Ontario Court (General Division) on April 10, 1992, on charges of unlawfully distributing obscene material contrary to s.163(1)(a) of the Code, unlawfully exposing obscene material to the public without justification or excuse contrary to

> What I describe this movie as, what it's all about, is most explicit cunnilingus, fellatio, masturbation, heterosexual sex in a variety of different ways, with overtones of lesbianism in the two women, one man scene - scenes. As an aside, I note that it's also a study in the unbelievable stamina of some males apparently. It's not about male domination. It's not about violence or anything approaching male domination or violence and, if anything, the female is the dominant character. And the final scene is again, one of explicit but explicit - explicit - what I put down is "explicit pure lesbianism" or homosexuality if that's what you want to call it.

The respondent called Robert Payne, then Chair of the OFRB, as an expert witness, as, indeed, did the accused in all but one of these appeals. Mr. Payne testified generally with respect to the composition of the Board and its power to classify, prohibit and regulate the exhibition and distribution of films and videos made available for commercial purposes in Ontario. The Board is composed of a rotating group of private citizens of various ages, cultural, religious and social backgrounds who presumably reflect the diversity of the population of the province. It operates under the *Theatres Act* R.S.O. 1990, c. T-6, and has developed guidelines pursuant to which it classifies films and videos according to four categories: family, parental guidance, adult accompaniment and restricted. The Board may demand changes, including cuts, to films and videos containing unacceptable scenes, and may ban a film completely.

> It would be quite wrong for me to say that there is even a hint of humiliation or degradation of one of the sexes and it would be just as wrong for me to say that collectively they are dehumanized or demeaned or that there is any tendency to do so. There is absolutely no message at all in this film. There is no advocacy of any kind. The film is simply a constant display of human sexual activity in most of its known forms, and the only intent of the producer is to completely satisfy the prurient interest and no other interest from the very beginning of the film to the very end of the film.

Applying the interpretation adopted by the Supreme Court of Canada in *R. v. Butler*, the learned judge concluded that because the film, and by admission the other nine films, although sexually explicit, was not degrading or dehumanizing and did not, as he also found, carry a risk of harm to the "peace, order and well-being of society", it was not obscene within the meaning of s.163(8). The respondent was accordingly acquitted on all charges.

2) *R. v. Randy Jorgensen*

The appellant in this appeal, which I shall refer to as "*Jorgensen-Hamilton*", appeals his conviction by Mitchell Prov. Div. J. at Hamilton on May 27, 1992, on three counts of selling obscene materials and three counts of possession of obscene materials for the purpose of sale contrary to s.163(2)(a) of the Code. An appeal against sentence was not pursued and is accordingly dismissed.

> The characteristic that the court would have to say that is most prominent through them all, is that they were straight, physical sex. The participants were impersonal. There was no mutual affection shown. In fact, there was almost no interaction between any of the participants other than physical. Any words that were spoken could not be said to be in the development of any human or personal relationship. There was certainly no loving interaction for that to be a consideration ...

The trial judge accepted Misener J.'s interpretation of the *Butler* decision and the law as it was applied in *Hawkins*. However, contrary to the conclusion in *Hawkins*, the trial judge held that the films were degrading and dehumanizing and, as such, fell within the second *Butler* category. Although he found no violence in the depiction of the explicit sex in the films and no indication that the acts were other than between consenting adults, the films, in his view, were degrading or dehumanizing principally because "they were totally devoid of anything other than the purely physical act and that the physical act was an automatic response, an automatic acceptance amongst interchanging adults". The effect of the films, he concluded, was such that "their total effect would be that the risk of harm is substantial and would be so perceived by the majority of the members of the contemporary community society and the Canadian community standard test".

The films were accordingly found to be obscene and the appellant was convicted on all counts. The appellant's reliance on

> The story lines are entirely transparent, intended only to provide a pretext for numerous types of sexual activities. These involve several different male and female participants, with a few lesbian scenes. ... There is obviously no romantic involvement between the participants. Their contact is only sexual.

Robert Payne, then Chair of the OFRB, again testified to the same effect as he had in the cases outlined above. He expressed the opinion that none of the films approved by the OFRB could create a substantial risk of harm to society, and that everything approved by the OFRB would fall within the guidelines of contemporary Canadian community standards of tolerance. He made it clear that the job of the OFRB is not to judge what is obscene but to approve films on the basis of contemporary community standards of tolerance. Under the OFRB guidelines, approval would not be given to video films containing explicit sex with violence, bondage, bestiality, necrophilia, crime, use of children, or anything considered degrading or humiliating.

The Crown called expert psychiatric evidence on the general effects and potential harm of exposure to this kind of pornography. The trial judge, however, concluded that this evidence, which consisted mainly of a summary of the results of studies and academic research in this area, taken at its highest, did not provide "clear proof of social harm being caused by the

majority of the members of the contemporary community and the Canadian community standard test".

Provincial Judge Cole preferred the reasoning in *Hawkins* and concluded, on the basis of *Butler*, that proof of social harm must be established in cases involving depictions of non-violent explicit sex. Since he found himself uncertain as to whether the tapes fell within the second or third *Butler* category, he proceeded on the assumption that they fell into the second category, and held that, on the evidence before him, he had "no proof, let alone legally sufficient proof" of social harm being caused by the exposure of these films. Accordingly, he dismissed the charges against both defendants.

4) *R. v. Randy Jorgensen and 913719 Ontario Limited*

In this case, which I shall refer to as "*Jorgensen-Scarborough*", the appellants appeal their convictions by Newton Prov. Div. J. on August 20, 1992, on three counts of a twenty-four count information of selling obscene material without lawful justification or excuse contrary to s.163(2)(a) of the Code. An appeal against the sentences imposed at trial was not pursued and will accordingly be dismissed.

The appellant 913719 Ontario Ltd., of which the appellant Jorgensen is the sole officer, owns and operates a store in

> vehicle to expose the explicit sexual scenes of every conceivable variety which followed. Male and female genitalia were graphically, prominently and repeatedly depicted. The tasteless vignettes portrayed had little, if any, nexus to one another. The minimal dialogue which existed was pedestrian, crude and vulgar.

She accepted that although OFRB approval is indicative of the community standards of tolerance, such approval "while lawful and clearly relevant to the issue of community standards of tolerance, does not amount to a 'lawful justification or excuse'". It is the function of the court to determine if material is obscene. With respect to the *mens rea* requirement of the offence, she held that there only need be evidence that the appellants knew the content of the videotape in a general sense. She was satisfied that the appellants "had knowledge that the dominant characteristic of the material was the exploitation of sex".

Three of the videos were found to be obscene because they depicted the portrayal of sex coupled with violence and thus constituted an undue exploitation of sex within s.163(8). Factually, the film "Bung Ho Babes" contains a scene in which a prison warden orders three women to disrobe and orders one of the women to spank another woman. The woman complies causing reddening of the buttocks area. Various sexual acts follow in close proximity and in the presence of the warden. The trial judge stated that while she appreciated that "this is play acting, there is a clear

similar acts of violence. Her Honour was not satisfied that the depiction of sex in these videos, as explicit and as varied as she found it to be, was degrading or dehumanizing. Nor was she satisfied that these videos resulted in a substantial risk of societal harm in the sense contemplated by *Butler*. Accordingly, the charges relating to these videos were dismissed. The Crown has not appealed those acquittals.

5) *R. v. Robert Smeenk and Crystal Palace Inc.*

The appellants appeal from the judgment of Killeen D. C.J. dated February 24, 1989, dismissing their appeal from their conviction by Guthrie Prov. Div. J. on October 6, 1988, on charges of exposing obscene pictures to public view and permitting obscene entertainment, contrary to the present ss. 163(2)(a) and 167 of the Code.

The decisions at trial and in the summary conviction appeal court were rendered before the judgment of the Supreme Court of Canada in *Butler*. The appeal to this court was adjourned to await the *Butler* decision since the same *Charter* argument had been raised in this case. That issue now having been determined, the appellants pursue their appeal on the basis that the trial judge and the summary conviction appeal court judge, in light of *Butler*, applied an incorrect test of obscenity to the facts of this case.

in any of these videos it is only to facilitate the depiction of various sexual acts. The acts include male/female masturbation, oral, anal, vaginal intercourse, the use of vibrators, scenes of group sex and any combination of the above". He held that, although one of the videos was not obscene, the rest were because of their explicit nature. He went on to note that in holding that the videos were obscene, he did not rely on any depiction of crime, horror or violence but based his conclusion on the "undue exploitation of sex and the definition as enunciated by the Supreme Court of Canada" in *R v. Towne Cinema Ltd.*, (1985), 18 C.C.C.(3d) 193. His focus was on the fact that the videos contained explicit sexual activity and "nothing ... of any artistic merit".

On appeal, Killeen D.C.J. upheld the conviction. In his view the films "can only be described as disgusting and degrading of human beings". "[T]he materials portrayed here", he said, "are of such a degrading nature and absent even a scintilla of social value, that they must be considered as clearly falling beyond the pale, beyond the line where the national standard of tolerance will permit such materials to be shown to other Canadians".

DISCUSSION

Apart from the violence and coercion found in *Jorgensen - Scarborough* and the violence, necrophilia and vampirism in *Smeenk*,

dehumanizing and whether a substantial risk of harm is created by such material, saying at p.150:

> Some segments of society would consider that all three categories of pornography cause harm to society because they tend to undermine its moral fibre. Others would contend that none of the categories cause harm. Furthermore there is a range of opinion as to what is degrading or dehumanizing: see *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (1985) (the Fraser Report), vol.1, at p. 51. *Because this is not a matter that is susceptible of proof in the traditional way and because we do not wish to leave it to the individual tastes of judges, we must have a norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole.* [Emphasis added.]

To decide if the exploitation of sex is undue, the courts are told to determine "as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure". The definition of criminal obscenity is limited so as to capture only material that creates a substantial risk of harm. Harm is a component of the offence. In this context, harm means (p. 150) that "it predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse". Antisocial conduct is defined (p.151) as "conduct which society formally recognizes as incompatible with its proper functioning". "The stronger the inference of a risk of harm the

abuse or the portrayal of people as having animal characteristics, that can render material degrading or dehumanizing. This kind of material, the Crown argues, differs from "explicit erotica" where positive and affectionate human sexual interaction between consenting individuals participating on a basis of equality is portrayed.

In the Crown's submission, once sexually explicit material is found to be degrading or dehumanizing, the substantial risk of harm to society required by *Butler* can be inferred or assumed. By reducing sexual activity to the "merely physical dimension" these films cause "attitudinal harm" in the sense that, among other things, they encourage unrealistic and damaging expectations, "contribute to a process of moral desensitization", and reinforce the view that a primary value of human life is sensual stimulation to the detriment of the values of individual dignity and responsibility.

The Crown's position, in sum, is that videotape films containing explicit non-violent sex between consenting adults as effectively their complete substance are by definition degrading or dehumanizing and fall into the second *Butler* category. That being so, the argument concludes, it can be inferred that films of this genre create a substantial risk of societal harm. No further evidence is needed to prove the harm. The films therefore unduly

depicting explicit sexual activity between consenting adults without violence, bestiality, necrophilia and the like clearly cannot be determinative of the criminal law of obscenity, or preclude a court from ruling otherwise, it is plainly relevant to the question of community standards of tolerance, and supportive of the trial judge's conclusion. In commenting on this type of evidence, Wilson J. observed in *Towne Cinema Theatres, supra*, at p.222:

> Since the business of these boards [film review boards] is to assess films on an ongoing basis for the very purpose of determining their acceptability for viewing by the community as a whole or a segment of the community depending upon classification, they must be regarded as tribunals with expertise at least on the community standard within their own province. It is hard to think that a judge, or even a jury, sitting in or drawn from a local area, would be better informed as to what was acceptable to Canadians across the country.

What is or is not degrading or dehumanizing and what is or is not harmful are matters to be determined by the standards of the community as a whole. These are not matters to be determined by the tastes of individual judges. The fact that a provincial board, composed of a cross-section of citizens, and acting pursuant to a regulatory mandate, does not now consider films of this kind to be either degrading or dehumanizing and, since 1990, has approved such films for exhibition and distribution is clearly evidence of

allegation, it must be proved beyond a reasonable doubt and that proof must be found in the evidence adduced at trial.

In determining whether such a risk of harm has been proved, an important distinction should be borne in mind. It is one thing, in my opinion, to find, in considering whether a limitation on this form of expression is justified under s.1 of the *Charter*, that Parliament had a reasonable basis for concluding that harm will result from exposure to material which unduly exploits sex without demonstrating a causal link between the perceived harm and the material sought to be proscribed, and without actual proof of the harm. It is, however, quite another thing to find that the exercise of this constitutionally protected freedom creates the substantial risk of societal harm that is now an essential component of the offence when a person is on trial and subject to the full force of the law. The latter finding must be specific to the individual case and must be made in the context of the evidence adduced at trial and by the application of the accepted criminal law standard of proof to that evidence.

Contrary to the Crown's submission, I cannot accept that *Butler* compels the conclusion that once the portrayal of sexually explicit acts is found to be degrading or dehumanizing, it necessarily follows that the films are harmful and therefore obscene. In my opinion, it remains open to the court to find that

> If at the end of the case the trial judge, whether on the basis of the defence evidence or otherwise, has a reasonable doubt that the material falls below community standards, he must acquit. There is no onus on the accused to show that community standards have been met.

In my opinion, the trial judges in *Hawkins* and *Ronish* cannot be said to have erred, as the Crown contends, in failing to infer, from the content of the films themselves, that they were harmful to society. In *Hawkins*, the Crown adduced no evidence to establish the harmful effects which it argues in this appeal can flow from exposure to films of the type in issue. In *Ronish*, the evidence adduced did not prove to the satisfaction of the judge that social harm could result from exposure to the films. In both cases, the OFRB evidence was that the videos did not constitute a risk of harm to society. This evidence, particularly when unrebutted, can be taken as a significant indication of the community's perception that films of this genre are not incompatible with current standards of tolerance in this country, and, moreover, are not substantially harmful.

I think it pertinent to add that the Supreme Court of Canada, per Cory J., in a very recent post-*Butler* decision - *R. v. Tremblay*, delivered September 2, 1993 - quoted with approval (as had Wilson J. in *Towne Cinema Theatres, supra,* at p.216) the assessment of community standards of tolerance in relation to

had not been proven. His finding that the Crown had failed to establish this element of the offence was one he was entitled to make on the evidence before him, and there is no basis for this court's intervention.

The *Jorgensen-Scarborough* Appeal

It will be recalled that in the *Jorgensen-Scarborough* case the trial judge convicted the appellants on three counts of selling obscene material without lawful justification or excuse contrary to s.163(2)(a) of the Code on the ground that the films referred to in those counts, which I described earlier, contain scenes of violence and subordination or coercion. The appellants argue that these films were approved by the OFRB and involve merely explicit portrayals of sex between consenting adults. They are, the appellants contend, therefore not obscene under contemporary Canadian law, and the trial judge erred in so holding.

This argument cannot succeed. As I have already stated, the Board's approval of the films may be evidence of what the contemporary community will tolerate. However, the Board's approval is not binding on a court or determinative of whether the films are criminally obscene. The trial judge properly treated this evidence as indicative of community standards of tolerance, and fully recognized that due weight must be given to it. Nonetheless, for reasons she carefully explained, she was not persuaded that it

that the OFRB approval of the films amounted to a "lawful justification or excuse" the absence of which is required by the offence charged. I do not agree with this submission. The approval of material by a body charged with considering whether the material is suitable for purposes other than the criminal law cannot constitute a lawful justification or excuse within the meaning of s.163(2)(a). Such approval may, as I have said, be relevant in determining whether the material is in fact "obscene" as that term is now defined for the purposes of s.163. It cannot, however, constitute a "lawful justification or excuse" as contemplated by the authorities. The appellant's argument, if accepted, would produce the patently untenable result of effectively placing the determination of whether material is criminally obscene in the hands of a provincial board. Reference on this point may be made to *R. v. McFall* (1975), 26 C.C.C. (2d) 181 at 201-216 (B.C.C.A.); *R. v. Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251 at 260-1 (Man. C.A.); and *R.v. Metro News Ltd.* (1986), 29 C.C.C. (3d) 35 at 68 (Ont. C.A.). It may be added that the appellants, in both *Jorgensen-Scarborough* and *Jorgensen-Hamilton*, were aware that the OFRB approval offered them no protection against prosecution or conviction.

Second, the appellants submit that the OFRB approval negates any possibility of a finding that they acted "knowingly" in selling obscene films, as required by s.163(2). In my opinion, the

degrading or dehumanizing because the interaction between the participants was said to be solely physical, devoid of mutual affection, and lacking in any human or personal relationship. The effect of this, according to the trial judge, would be such that "the risk of harm is substantial and would be so perceived by the majority of the members of the contemporary community society and the Canadian community standard test".

This view was not accepted in the other cases in appeal and, indeed, was expressly rejected in *Ronish*. Notwithstanding that the films in each of these cases depicted sexual activity without love or affection, the courts did not accept the Crown's contention that the portrayal of sex in this non-romantic context is necessarily degrading or dehumanizing, or that the risk of harm is manifest. The same conclusion was reached in two other post-*Butler* cases to which we were referred, both involving acquittals relating to films of the same genre as those in issue here, and similarly approved by the OFRB: *R. v. 934204 Ontario Limited and Jorgensen*, a decision of R.D.Clarke Prov. Div. J. dated January 19, 1993; and *R. v. Cook*, a decision of Shamai Prov. Div. J. dated August 10, 1992.

In my opinion, the record in this case contains no evidence from which it can be concluded, as the trial judge in effect held, that community standards require that sexual activity

treatment afforded the evidence of the chairman of a censor board which, as in this case, had been led by the defence for the purpose of showing that a film did not fall below contemporary community standards, said in *Towne Cinema Theatres, supra,* at pp. 211-212:

> The law is clear that a trier of fact does not have to accept testimony, whether expert or otherwise. He can reject it, in whole or in part. He cannot however, reject it without good reason. In this case it was incumbent on the trial judge to consider and assess the weight, if any, to be given to the evidence, indicative of community standards of tolerance, afforded by the approval of the film by censor boards or classification boards... .
>
> ....
>
> ...the trial judge should certainly not have rejected the evidence before him without explanation.

The *Smeenk* Appeal

The decisions of the trial judge and the summary conviction appeal court judge, as noted earlier, were both rendered prior to *Butler*. In my opinion, they each correctly applied the law applicable at the time of their decisions. The argument advanced on this appeal is that, on the *Butler* test, degrading or dehumanizing material may still be tolerated by the community where no substantial risk of societal harm is shown. Since this issue was not specifically addressed in the courts below the appellants contend that they should be acquitted or a new trial ordered.

COURT OF APPEAL FOR ONTARIO

Robins, Doherty and Austin JJ.A.

B E T W E E N: C11978

HER MAJESTY THE QUEEN

Appellant

- and -

ALLAN PETER HAWKINS

Respondent

A N D B E T W E E N: C12199

HER MAJESTY THE QUEEN

Respondent

- and -

RANDY JORGENSEN

Appellant

A N D B E T W E E N: C14430

HER MAJESTY THE QUEEN

Appellant

- and -

ROMAN RONISH and GEORGE RONISH

Respondents