R. *v.* Butler, [1992] 1 S.C.R. 452

Donald Victor Butler *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of British Columbia,
the Attorney General for Alberta,
Canadian Civil Liberties Association,
Manitoba Association for Rights and Liberties,
British Columbia Civil Liberties Association,
Women's Legal Education and Action Fund and
G.A.P. (Group Against Pornography) Inc. *Interveners*

Indexed as: R. *v.* Butler

File No.: 22191.

1991: June 6; 1992: February 27.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

on appeal from the court of appeal for manitoba

Constitutional law -- Freedom of expression -- Obscenity -- Obscene materials -- Whether definition of obscenity in Criminal Code infringes s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Criminal Code, R.S.C., 1985, c. C-46, s. 163(8).

Criminal law -- Obscenity -- Obscene materials -- Whether definition of obscenity in Criminal Code infringes freedom of expression guaranteed in s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- Criminal Code, R.S.C., 1985, c. C-46, s. 163(8).

The accused owned a shop selling and renting "hard core" videotapes and magazines as well as sexual paraphernalia. He was charged with various counts of selling obscene material, possessing obscene material for the purpose of distribution or sale, and exposing obscene material to public view, contrary to s. 159 (now s. 163) of the *Criminal Code*. Section 163(8) of the *Code* provides that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of . . . crime, horror, cruelty and violence, shall be deemed to be obscene". The trial judge concluded that the obscene material was protected by the guarantee of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and that *prima facie* only those materials which contained scenes involving violence or cruelty intermingled with sexual activity or depicted lack of consent to sexual contact or otherwise could be said to dehumanize men or women in a sexual context were legitimately proscribed under s. 1. He convicted the accused on eight counts relating to eight films and entered acquittals on the remaining charges. The Crown appealed the acquittals. The Court of Appeal, in a

majority decision, allowed the appeal and entered convictions with respect to all the counts. The majority concluded that the materials in question fell outside the protection of the *Charter* since they constituted purely physical activity and involved the undue exploitation of sex and the degradation of human sexuality.

Held: The appeal should be allowed and a new trial directed on all charges. Section 163 of the *Criminal Code* infringes s. 2(*b*) of the *Charter* but can be justified under s. 1 of the *Charter*.

Per Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Stevenson and Iacobucci JJ.: While the constitutional questions as stated concern s. 163 in its entirety, this appeal should be confined to an examination of the constitutional validity of the definition of obscenity in s. 163(8). Section 163(8) provides an exhaustive test of obscenity with respect to publications and objects which exploit sex as a dominant characteristic. In order for a work or material to qualify as "obscene", the exploitation of sex must not only be its dominant characteristic, but such exploitation must be "undue". The courts have attempted to formulate workable tests to determine when the exploitation of sex is "undue". The most important of these is the "community standard of tolerance" test. This test is concerned not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to. There has been a growing recognition in recent cases that material which may be said to exploit sex in a "degrading or dehumanizing" manner will necessarily fail the community standards test, not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly women. In the appreciation of whether

material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. The last step in the analysis of whether the exploitation of sex is undue is the "internal necessities" test or artistic defence. Even material which by itself offends community standards will not be considered "undue" if it is required for the serious treatment of a theme. Thus far the jurisprudence has failed to specify the relationship of these tests to each other.

The courts must 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. Harm in this context means that it predisposes persons to act in an anti-social manner, in other words, a manner which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm, the lesser the likelihood of tolerance. The portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production. If material is not obscene under this framework, it does not become so by reason of the person to whom it is or may be shown or by reason of the place or manner in which it is shown.

The need to apply the "internal necessities" test arises only if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex. The portrayal of sex must then be viewed in context to determine whether undue exploitation of sex is the main object of the work or

whether the portrayal of sex is essential to a wider artistic, literary or other similar purpose. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Any doubt in this regard must be resolved in favour of freedom of expression.

Section 163 of the *Code* seeks to prohibit certain types of expressive activity and thereby infringes s. 2(*b*) of the *Charter*. Activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed.

The infringement is justifiable under s. 1 of the *Charter*. Section 163(8), as interpreted in prior judgments and supplemented by these reasons, prescribes an intelligible standard. The overriding objective of s. 163 is not moral disapprobation but the avoidance of harm to society, and this is a sufficiently pressing and substantial concern to warrant a restriction on freedom of expression. One does not have to resort to the "shifting purpose" doctrine in order to identify the objective as the avoidance of harm to society. There is a sufficiently rational link between the criminal sanction, which demonstrates our community's disapproval of the dissemination of materials which potentially victimize women and restricts the negative influence which such materials have on changes in attitudes and behaviour, and the objective. While a direct link between obscenity and harm to society may be difficult to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs. Section 163 of the *Code* minimally impairs freedom of expression. It does not proscribe sexually explicit

erotica without violence that is not degrading or dehumanizing, but is designed to catch material that creates a risk of harm to society. Materials which have scientific, artistic or literary merit are not caught by the provision. Since the attempt to provide exhaustive instances of obscenity has been shown to be destined to fail, the only practical alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive. The standard of "undue exploitation" is thus appropriate. Further, it is only the public distribution and exhibition of obscene materials which is in issue here. Given the gravity of the harm, and the threat to the values at stake, there is no alternative equal to the measure chosen by Parliament. Serious social problems such as violence against women require multi-pronged approaches by government; education and legislation are not alternatives but complements in addressing such problems. Finally, the effects of the law do not so severely trench on the protected right that the legislative objective is outweighed by the infringement.

Per L'Heureux-Dubé and Gonthier JJ.: Sopinka J.'s reasons were generally agreed with, subject to the following comments. The subject matter of s. 163 of the *Code*, obscene materials, comprises the dual elements of representation and content, and it is the combination of the two that attracts criminal liability. Obscenity is not limited to the acts prohibited in the *Code*: Parliament ascribed a broader content to it because it involves a representation. Obscenity leads to many ills. Obscene materials convey a distorted image of human sexuality, by making public and open elements of human nature that are usually hidden behind a veil of modesty and privacy. These materials are often evidence of the commission of

reprehensible actions in their making, and can induce attitudinal changes which may lead to abuse and harm.

Parliament through s. 163 prohibits, and does not regulate, the circulation of obscene materials. In determining whether they are obscene, the impugned materials must therefore be presumed available to the Canadian public at large, since restrictions on availability are the result of regulatory measures which fall outside the purview of these provisions.

Explicit sex with violence will generally constitute undue exploitation of sex, and explicit sex that is degrading or dehumanizing will be undue if it creates a substantial risk of harm, as outlined by Sopinka J. Explicit sex that is neither violent nor degrading or dehumanizing may also come within the definition of obscene in s. 163(8). While the content of this category of materials is generally perceived as unlikely to cause harm, there are exceptions, such as child pornography. As well, it is quite conceivable that the representation may cause harm, even if its content as such is not seen as harmful. While the actual audience to which the materials are presented is not relevant, the manner of representation can greatly contribute to the deformation of sexuality, through the loss of its humanity, and make it socially harmful. The likelihood of harm, and the tolerance of the community, may vary according to the medium of representation, even if the content stays the same. The overall type or use of the representation may also be relevant. The assessment of the risk of harm here depends on the tolerance of the community. If the community cannot tolerate the risk of harm, then the materials, even though they may offer a

non-violent, non-degrading, non-dehumanizing content, will constitute undue exploitation of sex and fall within the definition of obscenity.

Section 163 of the *Code* is aimed at preventing harm to society, a moral objective that is valid under s. 1 of the *Charter*. The avoidance of harm to society is but one instance of a fundamental conception of morality. In order to warrant an override of *Charter* rights the moral claims must be grounded; they must involve concrete problems such as life, harm and well-being, and not merely differences of opinion or taste. A consensus must also exist among the population on these claims. The avoidance of harm caused to society through attitudinal changes certainly qualifies as a fundamental conception of morality. It is well grounded, since the harm takes the form of violations of the principles of human equality and dignity.

Cases Cited

By Sopinka J.

Considered: *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494; **referred to:** *Dechow v. The Queen*, [1978] 1 S.C.R. 951; *Germain v. The Queen*, [1985] 2 S.C.R. 241; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Hicklin* (1868), L.R. 3 Q.B. 360; *R. v. Fringe Product Inc.* (1990), 53 C.C.C. (3d) 422; *Brodie v. The Queen*, [1962] S.C.R. 681; *R. v. Close*, [1948] V.L.R. 445; *R. v. Goldberg*, [1971] 3 O.R. 323; *R. v. Kiverago* (1973), 11 C.C.C. (2d) 463; *R. v. Cameron* (1966), 58 D.L.R. (2d) 486; *R. v. Duthie Books Ltd.* (1966), 58 D.L.R. (2d) 274; *R. v. Ariadne Developments Ltd.* (1974), 19 C.C.C. (2d) 49; *R. v.*

Sudbury News Service Ltd. (1978), 18 O.R. (2d) 428; *R. v. Prairie Schooner News Ltd.* (1970), 75 W.W.R. 585; *R. v. Great West News Ltd.*, [1970] 4 C.C.C. 307; *R. v. Dominion News & Gifts (1962) Ltd.*, [1963] 2 C.C.C. 103; *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53; *R. v. Ramsingh* (1984), 14 C.C.C. (3d) 230; *R. v. Wagner* (1985), 43 C.R. (3d) 318; *R. v. Odeon Morton Theatres Ltd.* (1974), 16 C.C.C. (2d) 185; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Red Hot Video Ltd.* (1985), 45 C.R. (3d) 36; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1972); *R. v. Rioux*, [1969] S.C.R. 599, [1970] 3 C.C.C. 149.

By Gonthier J.

Considered: *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494; **referred to:** *R. v. Wagner* (1985), 43 C.R. (3d) 318; *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53; *R. v. Ramsingh* (1984), 14 C.C.C. (3d) 230; *R. v. Sudbury News Service Ltd.* (1978), 18 O.R. (2d) 428; *Hawkshaw v. The Queen*, [1986] 1 S.C.R. 668; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Handyside Case*, judgment of 7 December 1976, Series A No. 24; *Case of Müller and others*, judgment of 24 May 1988, Series A No. 133; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

Statutes and Regulations Cited

Act to amend the Criminal Code, S.C. 1949 (2nd Sess.), c. 13, s. 1.

Act to amend the Criminal Code, S.C. 1959, c. 41, s. 11.

Agreement for the Suppression of the Circulation of Obscene Publications, May 4, 1910, as amended by the Protocol of May 4, 1949, Can. T.S. 1951 No. 34.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 28.

Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, September 12, 1923, as amended by the Protocol of November 12, 1947, Can. T.S. 1951, No. 33.

Criminal Code, R.S.C. 1970, c. C-34, ss. 159(1)(*a*), (2)(*a*).

Criminal Code, R.S.C., 1985, c. C-46, ss. 151, 153, 155, 159, 160, 182, 163(1)(*a*), (2)(*a*), (8), 167, 168, 173, 175, 271, 272, 273.

Criminal Code, S.C. 1953-54, c. 51, s. 150.

Criminal Code, 1892, S.C. 1892, c. 29, s. 179.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, art. 10.

Authors Cited

Australia. Parliament of the Commonwealth of Australia. *Report of the Joint Select Committee on Video Material*, vol. 1. Canberra: Australian Government Publishing Service, 1988.

Beckton, Clare. "Freedom of Expression (s. 2(*b*))". In *The Canadian Charter of Rights and Freedoms: Commentary*. Edited by Walter S. Tarnopolsky and Gérald-A. Beaudoin. Toronto: Carswell, 1982.

Canada. House of Commons. Standing Committee on Justice and Legal Affairs. *Report on Pornography*. Issue No. 18 (March 22, 1978).

Canada. Special Committee on Pornography and Prostitution. *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol. 1. Ottawa: Supply and Services, 1985.

Downs, Donald Alexander. *The New Politics of Pornography*. Chicago: University of Chicago Press, 1989.

Dworkin, Ronald. *Taking Rights Seriously*. London: Duckworth, 1977.

Dyzenhaus, David. "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367.

Gardbaum, Stephen A. "Why the Liberal State Can Promote Moral Ideals After All" (1991), 104 *Harv. L. Rev.* 1350.

Municipality of Metropolitan Toronto. Task Force on Public Violence Against Women and Children. *Final Report*. Toronto: The Task Force, 1984.

New Zealand. Ministerial Committee of Inquiry into Pornography. *Pornography: Report of the Ministerial Committee of Inquiry into Pornography*. Wellington: The Committee, 1988.

Oxford English Dictionary, 2nd ed., vol. XIII. Oxford: Clarendon Press, 1989, "represent", "representation".

United States. Attorney General's Commission on Pornography. *Final Report*, vol. 1. Washington, D.C.: U.S. Department of Justice, 1986.

APPEAL from a judgment of the Manitoba Court of Appeal (1990), 60 C.C.C. (3d) 219, [1991] 1 W.W.R. 97, 1 C.R. (4th) 309, allowing the Crown's appeal from the accused's acquittals by Wright J. (1989), 60 Man. R. (2d) 82, 50 C.C.C. (3d) 97, [1989] 6 W.W.R. 35, 72 C.R. (3d) 18, 46 C.R.R. 124, on obscenity charges. Appeal allowed.

George A. Derwin, for the appellant.

V. E. Toews and *Robert Morrison*, for the respondent.

Bernard Laprade, for the intervener the Attorney General of Canada.

David B. Butt, for the intervener the Attorney General for Ontario.

Jacques Gauvin, for the intervener the Attorney General of Quebec.

Frank A. V. Falzon, for the intervener the Attorney General of British Columbia.

No one appeared for the intervener the Attorney General for Alberta.

Sheila Block, for the interveners the Canadian Civil Liberties Association and Manitoba Association for Rights and Liberties.

Joseph J. Arvay, Q.C., for the intervener British Columbia Civil Lberties Association.

Kathleen E. Mahoney and *Linda A. Taylor*, for the intervener Women's Legal Education and Action Fund.

David G. Newman, for the intervener G.A.P. (Group Against Pornography) Inc.

//*Sopinka J.*//

The judgment of Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Stevenson and Iacobucci was delivered by

SOPINKA J. -- This appeal calls into question the constitutionality of the obscenity provisions of the *Criminal Code*, R.S.C., 1985, c. C-46, s. 163. They are attacked on the ground that they contravene s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The case requires the Court to address one of the most difficult and controversial of contemporary issues, that of determining whether, and to what extent, Parliament may legitimately criminalize obscenity. I propose to begin with a review of the facts which gave rise to this appeal, as well of the proceedings in the lower courts.

1. Facts and Proceedings

In August 1987, the appellant, Donald Victor Butler, opened the Avenue Video Boutique located in Winnipeg, Manitoba. The shop sells and rents "hard core" videotapes and magazines as well as sexual paraphernalia. Outside the store is a sign which reads:

> "Avenue Video Boutique; a private members only adult video/visual club.
>
> Notice: if sex oriented material offends you, please do not enter.
>
> No admittance to persons under 18 years.

On August 21, 1987, the City of Winnipeg Police entered the appellant's store with a search warrant and seized all the inventory. The appellant was charged with 173 counts in the first indictment: three counts of selling obscene material contrary to s. 159(2)(*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 163(2)(*a*)), 41 counts of possessing obscene material for the purpose of distribution

contrary to s. 159(1)(*a*) (now s. 163(1)(*a*)) of the *Criminal Code*, 128 counts of possessing obscene material for the purpose of sale contrary to s. 159(2)(*a*) of the *Criminal Code* and one count of exposing obscene material to public view contrary to s. 159(2)(*a*) of the *Criminal Code*.

On October 19, 1987, the appellant reopened the store at the same location. As a result of a police operation a search warrant was executed on October 29, 1987, resulting in the arrest of an employee, Norma McCord. The appellant was arrested at a later date.

A joint indictment was laid against the appellant doing business as Avenue Video Boutique and Norma McCord. The joint indictment contains 77 counts under s. 159 (now s. 163) of the *Criminal Code*: two counts of selling obscene material contrary to s. 159(2)(*a*), 73 counts of possessing obscene material for the purpose of distribution contrary to s. 159(1)(*a*), one count of possessing obscene material for the purpose of sale contrary to s. 159(2)(*a*) and one count of exposing obscene material to public view contrary to s. 159(2)(*a*).

The trial judge convicted the appellant on eight counts relating to eight films. Convictions were entered against the co-accused McCord with respect to two counts relating to two of the films. Fines of $1,000 per offence were imposed on the appellant. Acquittals were entered on the remaining charges.

The Crown appealed the 242 acquittals with respect to the appellant and the appellant cross-appealed the convictions. The majority of the Manitoba Court

of Appeal allowed the appeal of the Crown and entered convictions for the appellant with respect to all of the counts, Twaddle and Helper JJ.A. dissenting.

Court of Queen's Bench (1989), 50 C.C.C. (3d) 97

Wright J. first considered whether the materials were obscene within the meaning of s. 163(8) of the *Criminal Code*. He noted that Canadian courts have interpreted the application of the "community standards" test to mean that as long as the trier of fact does not apply his or her subjective personal views but seeks objectively to ascertain the community standard, he or she may resolve that issue simply by drawing on his or her "experience". Wright J. expressed serious difficulties in applying the community standards test, stating that to render a factual decision on the basis of experience is contrary to the judicial role and that he regards his own views drawn from his "experience" to be unreliable. However, Wright J. was able to conclude on the basis of previous case law that the materials in question were obscene (at p. 113):

> In the context of my own inability to confidently draw on my experience, and my belief, in any event, that it is incongruous and inconsistent with basic judicial legal principles to do so, normally I would be inclined to hold that the requisite community standard of tolerance has not been proved as an essential ingredient of the Crown's case and all the charges should be dismissed.
>
> However, it is clear, from a review of the case-law binding on me that independent of the manner in which a trial judge is directed to measure obscenity, material of the kind before the court has been well established as obscene and must continue to be regarded as obscene within the *Criminal Code* definition.

Applying the Canadian decisions on obscenity since the inclusion of s. 163 in the *Criminal Code*, Wright J. found that there was no doubt that the videos and magazines in the present case fall into the category of "hard porn" and that the sexual devices are similar to the kind of sexual paraphernalia held by this Court in *Dechow v. The Queen*, [1978] 1 S.C.R. 951, and *Germain v. The Queen*, [1985] 2 S.C.R. 241, to fall under the obscenity definition. Accordingly, he found that all of the materials referred to in the various charges in the indictments are obscene according to the case law interpretation of s. 163(8).

Wright J. then concluded that the obscene material was protected by s. 2(*b*) of the *Charter*. Following the principles in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, he noted that obscene expression reflected in the material certainly conveys meaning and is entitled to protection provided the form of expression is not violent.

In conducting the s. 1 analysis, Wright J. was of the view that legislation which seeks to proscribe a fundamental freedom must have as its objective a more precise purpose than simply to control the morals of society or to encourage decency. He wrote, at p. 121:

> The aim must be directed more specifically to objectives such as equality concerns, or other Charter rights, or particular human rights; otherwise, the basic freedoms in the Charter will be subject to restrictions that arise from very personal and subjective opinions of right and wrong that will be impossible to identify . . . .
>
> Examples of more precise aims or bases for restrictions will be:
>
> (1) The protection of people from involuntary exposure to pornographic material;

> (2) the protection of the vulnerable, for example children, from either exposure or participation;
>
> (3) the prevention of the circulation of pornographic material that effectively reduces the human or equality or other Charter rights of individuals. This may arise, and often will arise, in material that mixes sex with violence or cruelty, or otherwise dehumanizes women or men.

Applying these standards, he concluded that on a *prima facie* basis, only those materials which contained scenes involving violence or cruelty intermingled with sexual activity or depicted lack of consent to sexual contact or otherwise could be said to dehumanize men or women in a sexual context were legitimately proscribed under s. 1. With respect to the material and sexual devices covered by the remaining counts he said, at pp. 124-25:

> The material covered by the remaining counts in the indictments, relating to the magazines and the videos, reflects consensual activity by adult individuals not involving force, duress or cruelty. In this context, I am unable to conclude that the depiction of the human body or any of its parts, no matter how explicitly presented, or the visual presentation of masturbation, group sex or other heterosexual or homosexual activity, including incestuous relations, *prima facie* relate to sufficiently specific concerns which are pressing and substantial in a free and democratic society to justify restricting or limiting the basic freedom permitting them to be expressed. The same reasoning applies in respect of the material before the court described as sexual toys or devices. The Crown has failed to bring forward cogent and persuasive evidence to demonstrate the specific objectives sought to be achieved, and to show that such objectives justify the limits on freedom of expression which the impugned legislation seeks to bring about.

In reaching his conclusion, Wright J. decided the definition set forth in s. 163(8) is not <u>on its face</u> in contravention of the *Charter* although it can be interpreted to cover more ground than the *Charter* provisions would permit in the context of the evidence. He stated as to the appropriate remedy (at p. 125):

> If the interpretation places the section in conflict with the Charter and the evidence required to permit the broader scope of the section to stand is lacking, then the remedy is simply to hold that the Charter provisions are paramount. It is not necessary to strike down the *Criminal Code* provision as unconstitutional.

Wright J. held that the videotapes identified in 16 of the counts contained material that has been legitimately proscribed according to the requirements of s. 1 of the *Charter*. These 16 counts related to eight films. In most cases, the appellant was charged with possession for the purpose of sale on the one hand and possession for the purpose of distribution or circulation on the other. Wright J. therefore entered eight convictions against the appellant, one with respect to each pair of charges covering similar content.

Manitoba Court of Appeal (1990), 60 C.C.C. (3d) 219

Huband J.A. (O'Sullivan and Lyon JJ.A. concurring)

Huband J.A., speaking for the majority, first noted that the approach taken by the trial judge was incorrect in that he focused the s. 1 inquiry on the individual films rather than on s. 163 of the *Criminal Code*. Counsel for both parties also agreed that the trial judge had misdirected himself in judging the materials rather than the provision.

With respect to Wright J.'s finding that all of the materials in question were obscene, Huband J.A. noted that no serious argument was made that this finding was wrong and concluded that it should not be interfered with.

Huband J.A. then considered whether s. 163 contravenes s. 2(*b*) of the *Charter*. Based on their content, he concluded that the materials in this case constitute "purely physical" activity which does not convey or attempt to convey meaning. Huband J.A. also noted that the form of expression also fell outside the protection of the *Charter*, as it consists in the undue exploitation of sex and the degradation of human sexuality. In his view, the form of the activity is not one which the *Charter* was designed or intended to protect.

With respect to the purpose and effect of s. 163, Huband J.A. stated (at pp. 230-31):

> The intent of the legislation is to bar the distribution or sale of prurient materials devoid of a redeeming meaning. As to effect, on the evidence in this case it does not appear that the obscenity provisions in the *Code* have thwarted or subverted anyone in conveying or attempting to convey a meaningful message.

Accordingly, the majority did not consider it necessary to pursue a s. 1 inquiry.

Twaddle J.A., dissenting

First, Twaddle J.A. noted that we are not concerned in the present case with the form of expression but with its content. In his view, the content of a video movie, the content of a magazine and the imagery of a sexual gadget are all within the scope of freedom of expression. Any limit on their creation, publication or

distribution must be reasonable and demonstrably justified in a free and democratic society.

Before proceeding to the s. 1 analysis, Twaddle J.A. expressed the opinion that s. 163(8) envisages two distinct offences with different objectives, and that each offence should be considered separately for constitutional validity. Twaddle J.A. was of the view that the portion of s. 163 dealing with the "undue exploitation of sex" is concerned with the maintenance of moral standards, while the concept of sex coupled with one or more of crime, horror, cruelty and violence is aimed at harm. While the avoidance of harm is universally accepted as a legitimate goal, he concluded that a law which is aimed at deciding for someone else what he may read or view is discordant with the principles integral to a free and democratic society.

Twaddle J.A. decided that taken as an undivided proscription, s. 163 does not focus on achieving a single purpose (at pp. 246-47):

> Although there are several important purposes which it serves, the proscription is overbroad and unrefined. It disables those who wish to see sexually explicit movies from seeing those movies which, harmless in themselves, are deemed too "dirty" to be tolerated by the community . . . .
>
> If the proscription is divided into two, however, the proscription against the undue exploitation of sex coupled with one or more of crime, horror, cruelty and violence has the pressing and substantial purpose of avoiding the risk of harm and that purpose is achieved without sacrificing freedom of expression more than is necessary to achieve it.

He was of the view that Parliament was entitled to have a reasoned apprehension of harm resulting from the desensitization of individuals exposed to books or movies which portray sex with any dehumanizing feature. In this respect, he found the limit on the *Charter* freedom justified because of the importance of avoiding indifference to violence in so far as women are concerned, and the dehumanization of people. Therefore, Twaddle J.A. severed the two proscriptions and held the proscription of publications which "unduly exploit sex" alone to be invalid. Since the trial judge arrived at the same result and convicted only where the materials unduly exploit sex coupled with cruelty, violence or other dehumanizing features, Twaddle J.A. would have dismissed both the appeals of the Crown and of the accused.

Helper J.A., dissenting

Helper J.A. also found that the materials in this case are protected by s. 2(*b*) of the *Charter*. She stressed that the degree of offensiveness of the materials cannot be the criterion for determining whether or not the expression comes within the meaning of s. 2(*b*) of the *Charter*.

In determining whether the infringement of freedom of expression is justified under s. 1, Helper J.A. was of the view that it is a legitimate objective of Parliament to prevent the publication and circulation of materials depicting cruelty, dehumanization, degradation and violence. In her view, the evidence shows the circulation of such material may lead to an increase in the incidence of aggressive, harmful behaviour and further can lead to attitudinal changes that are antithetical to

the *Charter*, specifically to its s. 28. Helper J.A. rejected the trial judge's determination that morality is not a sufficient basis for imposing limitations on fundamental freedoms. In her view, morality in the broader sense, as in the present case, encompassing respect for human beings, protection of the public generally or of vulnerable individuals or groups of the public from harm is a sufficiently pressing and substantial objective warranting the intervention of Parliament.

However, Helper J.A. found that s. 163 was too vague to pass the remainder of the s. 1 test. She stated, at p. 266:

> . . . Parliament chose the terminology "undue exploitation of sex" in s. 163(8) and by so doing left the criteria for the application of the standard to the judiciary. It is not the judicial function to define the material or actions which are to be proscribed by law. Parliament has abdicated its responsibility in s. 163 of the *Code*. The present law which fails to define with precision the limit on sexual expression is too arbitrary and too vague to withstand the scrutiny of s. 1.

Helper J.A. also concluded that the legislation failed the proportionality test in that it was overreaching and did not impair freedom of expression as little as possible, as it could result in the conviction of one who deals in material containing no element of cruelty, dehumanization, violence or degradation and in the absence of any evidence of harm or risk of harm to society. Having concluded that s. 163(8) does not constitute a reasonable limit under s. 1, Helper J.A. would have allowed the appeals against conviction and entered acquittals on all charges against both accused.

2. <u>Relevant Legislation</u>

Criminal Code, R.S.C., 1985, c. C-46

163. (1) Every one commits an offence who,

(*a*) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(*b*) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(*a*) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(*b*) publicly exhibits a disgusting object or an indecent show;

(*c*) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(*d*) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, bur it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1), the fact that the accused was ignorant of the nature or presence of the

matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(*a*) the commission of crimes, real or fictitious; or

(*b*) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

3. Issues

The following constitutional questions are raised by this appeal:

1. Does s. 163 of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, violate s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If s. 163 of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, can s. 163 of the *Criminal Code* of Canada be demonstrably justified under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law?

4. Analysis

The constitutional questions, as stated, bring under scrutiny the entirety of s. 163. However, both lower courts as well as the parties have focused almost exclusively on the definition of obscenity found in s. 163(8). Other portions of the

impugned provision, such as the reverse onus provision envisaged in s. 163(3) as well as the absolute liability offence created by s. 163(6), raise substantial *Charter* issues which should be left to be dealt with in proceedings specifically directed to these issues. In my view, in the circumstances, this appeal should be confined to the examination of the constitutional validity of s. 163(8) only.

Before proceeding to consider the constitutional questions, it will be helpful to review the legislative history of the provision as well as the extensive judicial interpretation and analysis which have infused meaning into the bare words of the statute.

A. *Legislative History*

Parliament's first attempt to criminalize obscenity was in s. 179 of the *Criminal Code, 1892*, S.C. 1892, c. 29, which provided in part as follows:

> **179.** Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse --
>
> (*a*.) publicly sells, or exposes for public sale or to public view, any obscene book, or other printed or written matter, or any picture, photograph, model or other object, <u>tending to corrupt morals</u>; or
>
> (*b*.) publicly exhibits any <u>disgusting object or any indecent show</u>;
>
> (*c*.) offers to sell, advertises, publishes an advertisement of or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion. [Emphasis added.]

In 1949, Parliament repealed the successor to s. 179 and substituted it with the following provision:

> **207.** (1) Every one who is guilty of an indictable offence and liable to two years' imprisonment who
>
> (*a*) makes, prints, publishes, distributes, circulates, or has in possession for any such purpose any obscene written matter, picture, model or other thing whatsoever; or
>
> (*b*) prints, publishes, distributes, sells or has in possession for any such purpose, any crime comic.
>
> (2) Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse
>
> (*a*) sells, exposes to public view or has in possession for any such purpose any obscene written matter, picture, model or other thing whatsoever;
>
> (*b*) publicly exhibits any disgusting object or any indecent show; or
>
> (*c*) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a means of preventing conception or causing abortion or miscarriage or advertises or publishes an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

The *Criminal Code* did not provide a definition of any of the operative terms, "obscene", "indecent" or "disgusting". The notion of obscenity embodied in these provisions was based on the test formulated by Cockburn C.J. in *R. v. Hicklin* (1868), L.R. 3 Q.B. 360, at p. 371:

> . . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

The focus on the "corruption of morals" in the earlier legislation grew out of the English obscenity law which made the court the "guardian of public morals". As Charron Dist. Ct. J. stated in *R. v. Fringe Product Inc.* (1990), 53 C.C.C. (3d) 422 (Ont. Dist. Ct.), at pp. 441-42:

> When one looks at the legislative history of the obscenity provisions of the *Code*, it is clear that when the English Court of King's Bench first asserted itself in this field following the demise of the Star Chamber in 1641, it did so as the guardian of public morals: *R. v. Sidley* (1663), 1 Sid. 168, 82 E.R. 1036. The crime of publishing an obscene libel was created in 1727 in the case of *R. v. Curl* (1727), 2 Stra. 788, 93 E.R. 849, when the court accepted the argument that publishing an obscene libel tended to corrupt the morals of the King's subjects and as such was against the peace of the King and government.

The current provision, which is the subject of this appeal, entered into force in 1959 in response to the much criticized former version (*Criminal Code*, S.C. 1953-54, c. 51, s. 150). Unlike the previous statutes, subs. (8) provided a statutory definition of "obscene":

> **150.** . . .
>
> (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

As will be discussed further, the introduction of the statutory definition had the effect of replacing the *Hicklin* test with a series of rules developed by the courts. The provision must be considered in light of these tests.

B. *Judicial Interpretation of s. 163(8)*

The first case to consider the current provision was *Brodie v. The Queen*, [1962] S.C.R. 681. The majority of this Court found in that case that D. H. Lawrence's novel, *Lady Chatterley's Lover*, was not obscene within the meaning of the *Code*. The *Brodie* case lay the groundwork for the interpretation of s. 163(8) by setting out the principal tests which should govern the determination of what is obscene for the purposes of criminal prosecution. The first step was to discard the *Hicklin* test.

(a) Section 163(8) to be Exclusive Test

In examining the definition provided by subs. (8), the majority of this Court was of the view that the new provision provided a clean slate and had the effect of bringing in an "objective standard of obscenity" which rendered all the jurisprudence under the *Hicklin* definition obsolete. In the words of Judson J. (at p. 702):

> . . . I think that the new statutory definition does give the Court an opportunity to apply tests which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury. We are now concerned with a Canadian statute which is exclusive of all others.

Any doubt that s. 163(8) was intended to provide an exhaustive test of obscenity was settled in *Dechow v. The Queen, supra*. Laskin C.J. stated (at p. 962):

> I am not only satisfied to regard s. 159(8) [now s. 163(8)] as prescribing an exhaustive test of obscenity in respect of a publication which has sex as a theme or characteristic but I am also of the opinion that this Court should apply that test in respect of other provisions of the *Code*, such as ss. 163 and 164, in cases in which the allegation of obscenity revolves around sex considerations. Since the view that I take, in line with that expressed by Judson J. in the *Brodie* case, is that the *Hicklin* rule has been displaced by s. 159(8) in respect of publications, I would not bring it back under any other sections of the *Code*, such as ss. 159, 163 and 164, to provide a back-up where a sexual theme or sexual factors are the basis upon which obscenity charges are laid and the charges fail because the test prescribed by s. 159(8) has not been met.

In the *Dechow* case, the majority ascribed a liberal meaning to the term "publication", and found that the sex devices in question were "publications" as the accused had made such objects "publicly known" and had produced and issued such articles for public sale. Furthermore in *Germain v. The Queen, supra*, La Forest J., with whom a majority of the Court agreed on this point, held that the word "obscene" must be given the same meaning whether the articles are publications under s. 159(1) (now s. 163(1)) or matter covered by s. 159(2)(*a*) (now s. 163(2)(*a*)). As a consequence, it is now beyond dispute that s. 163(8) provides the exhaustive test of obscenity with respect to publications and objects which exploit sex as a dominant characteristic and that the common law test of obscenity found in the *Hicklin* decision is no longer applicable.

(b) <u>Tests of "Undue Exploitation of Sex"</u>

In order for the work or material to qualify as "obscene", the exploitation of sex must not only be its dominant characteristic, but such exploitation must be "undue". In determining when the exploitation of sex will be considered "undue", the courts have attempted to formulate workable tests. The most important of these is the "community standard of tolerance" test.

i) *"Community Standard of Tolerance" Test*

In *Brodie*, Judson J. accepted the view espoused notably by the Australian and New Zealand courts that obscenity is to be measured against "community standards". He cited, at pp. 705-6, the following passage in the judgment of Fullager J. in *R. v. Close*, [1948] V.L.R. 445, at p. 465:

> There does exist in any community at all times -- however the standard may vary from time to time -- a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that today there is any better tribunal than a jury to draw it . . . I am very far from attempting to lay down a model direction, but a judge might perhaps, in the case of a novel, say something like this: "It would not be true to say that any publication dealing with sexual relations is obscene. The relations of the sexes are, of course, legitimate matters for discussion everywhere . . . There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards. What is obscene is something which offends against those standards."

The community standards test has been the subject of extensive judicial analysis. It is the standards of the community as a whole which must be considered and not the standards of a small segment of that community such as the university community where a film was shown (*R. v. Goldberg*, [1971] 3 O.R. 323 (C.A.)) or

a city where a picture was exposed (*R. v. Kiverago* (1973), 11 C.C.C. (2d) 463 (Ont. C.A.)). The standard to be applied is a national one (*R. v. Cameron* (1966), 58 D.L.R. (2d) 486 (Ont. C.A.); *R. v. Duthie Books Ltd.* (1966), 58 D.L.R. (2d) 274 (B.C.C.A.); *R. v. Ariadne Developments Ltd.* (1974), 19 C.C.C. (2d) 49 (N.S.S.C., App. Div.), at p. 59). With respect to expert evidence, it is not necessary and is not a fact which the Crown is obliged to prove as part of its case (*R. v. Sudbury News Service Ltd.* (1978), 18 O.R. (2d) 428 (C.A.); *R. v. Prairie Schooner News Ltd.* (1970), 75 W.W.R. 585 (Man. C.A.); *R. v. Great West News Ltd.*, [1970] 4 C.C.C. 307 (Man. C.A.)). In *R. v. Dominion News & Gifts (1962) Ltd.*, [1963] 2 C.C.C. 103 (Man. C.A.), Freedman J.A. (dissenting) emphasized that the community standards test must necessarily respond to changing mores (at pp. 116-17):

> Community standards must be contemporary. Times change, and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candour that in an earlier day would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question whether [the subject materials] are obscene according to our criminal law.

Our Court was called upon to elaborate the community standards test in *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494. Dickson C.J. reviewed the case law and found (at pp. 508-9):

> The cases all emphasize that it is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.

> Since the standard is tolerance, I think the audience to which the allegedly obscene material is targeted must be relevant. The operative standards are those of the Canadian community as a whole, but since what matters is what other people may see, it is quite conceivable that the Canadian community would tolerate varying degrees of explicitness depending upon the audience and the circumstances. [Emphasis in original.]

Therefore, the community standards test is concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate other Canadians being exposed to. The minority view was that the tolerance level will vary depending on the manner, time and place in which the material is presented as well as the audience to whom it is directed. The majority opinion on this point was expressed by Wilson J. in the following passage, at p. 521:

> It is not, in my opinion, open to the courts under s. 159(8) of the *Criminal Code* to characterize a movie as obscene if shown to one constituency but not if shown to another . . . . In my view, a movie is either obscene under the *Code* based on a national community standard of tolerance or it is not. If it is not, it may still be the subject of provincial regulatory control.

ii) *"Degradation or Dehumanization" Test*

There has been a growing recognition in recent cases that material which may be said to exploit sex in a "degrading or dehumanizing" manner will necessarily fail the community standards test. Borins Co. Ct. J. expressed this view in *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53 (Ont. Co. Ct.), at p. 70:

> . . . films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the

> performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance.

Subsequent decisions, such as *R. v. Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man. Q.B.) and *R. v. Wagner* (1985), 43 C.R. (3d) 318 (Alta. Q.B.) held that material that "degraded" or "dehumanized" any of the participants would exceed community standards even in the absence of cruelty and violence. In *R. v. Ramsingh*, *supra*, Ferg J. described in graphic terms the type of material that qualified for this label. He states on p. 239:

> They are exploited, portrayed as desiring pleasure from pain, by being humiliated and treated only as an object of male domination sexually, or in cruel or violent bondage. Women are portrayed in these films as pining away their lives waiting for a huge male penis to come along, on the person of a so-called sex therapist, or window washer, supposedly to transport them into complete sexual ecstasy. Or even more false and degrading one is led to believe their raison d'être is to savour semen as a life elixir, or that they secretly desire to be forcefully taken by a male.

Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.

This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole. See *Wagner*, *supra*, at p. 336. See also: Attorney General's Commission on Pornography (the "Meese Commission"), *Final Report* (U.S., 1986), vol. 1, at pp. 938-1035; Metro Toronto Task Force on Public Violence Against Women and Children, *Final Report* (1984), at p. 66; *Report of the Joint Select Committee on Video Material* (Australia, 1988), at pp. 185-230; *Pornography: Report of the Ministerial Committee of Inquiry into Pornography* (New Zealand, 1988), at pp. 38-45. It would be reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material. The effect of the evidence on public opinion was summed up by Wilson J. in *Towne Cinema*, *supra*, at p. 524, as follows:

> The most that can be said, I think, is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way.

In *Towne Cinema*, Dickson C.J. considered the "degradation" or "dehumanization" test to be the principal indicator of "undueness" without specifying what role the community tolerance test plays in respect of this issue. He did observe, however, that the community might tolerate some forms of exploitation that caused harm that were nevertheless undue. The relevant passages appear at p. 505:

> There are other ways in which exploitation of sex might be "undue". Ours is not a perfect society and it is unfortunate but true that the community may tolerate publications that cause harm to members of society and therefore to society as a whole. Even if, at certain times, there is a coincidence between what is not tolerated and what is harmful to society, there is no necessary connection between these two concepts. Thus, a legal definition of "undue" must also encompass publications harmful to members of society and, therefore, to society as a whole.
>
> Sex related publications which portray persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment, may be "undue" for the purpose of s. 159(8). No one should be subject to the degradation and humiliation inherent in publications which link sex with violence, cruelty, and other forms of dehumanizing treatment. It is not likely that at a given moment in a society's history, such publications will be tolerated . . . .
>
> However, as I have noted above, there is no *necessary* coincidence between the undueness of publications which degrade people by linking violence, cruelty or other forms of dehumanizing treatment with sex, and the community standard of tolerance. Even if certain sex related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example in the sense that they portray persons in a degrading manner as objects of violence, cruelty, or other forms of dehumanizing treatment. [Emphasis in original.]

In the reasons of Wilson J. concurring in the result, the line between the mere portrayal of sex and the dehumanization of people is drawn by the "undueness" concept. The community is the arbiter as to what is harmful to it. She states, at p. 524:

> As I see it, the essential difficulty with the definition of obscenity is that "undueness" must presumably be assessed in relation to consequences. It is implicit in the definition that at some point the exploitation of sex becomes harmful to the public or at least the public believes that to be so. It is therefore necessary for the protection of the public to put limits on the degree of exploitation and, through the application of the community standard test, the public is made the arbiter of what is harmful to it and what is not. The problem is that we know so little of the consequences we are seeking to avoid. Do obscene movies spawn immoral conduct? Do they degrade women? Do they promote violence? The most that can be said, I think, is that the public has

> concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way. It must therefore be controlled when it gets out of hand, when it becomes "undue".

iii) *"Internal Necessities Test" or "Artistic Defence"*

In determining whether the exploitation of sex is "undue", Judson J. set out the test of "internal necessities" in *Brodie, supra*, at pp. 704-5:

> What I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness. That the work under attack is a serious work of fiction is to me beyond question. It has none of the characteristics that are often described in judgments dealing with obscenity -- dirt for dirt's sake, the leer of the sensualist, depravity in the mind of an author with an obsession for dirt, pornography, an appeal to a prurient interest, etc. The section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work, as the witnesses point out and common sense indicates, must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation.

As counsel for the Crown pointed out in his oral submissions, the artistic defence is the last step in the analysis of whether the exploitation of sex is undue. Even material which by itself offends community standards will not be considered "undue", if it is required for the serious treatment of a theme. For example, in *R. v. Odeon Morton Theatres Ltd.* (1974), 16 C.C.C. (2d) 185, the majority of the Manitoba Court of Appeal held that the film "Last Tango in Paris" was not obscene within the meaning of the *Code*. To determine whether a dominant characteristic of the film is the undue exploitation of sex, Freedman C.J.M. noted that the courts must

have regard to various things -- the author's artistic purpose, the manner in which he or she has portrayed and developed the story, the depiction and interplay of character and the creation of visual effect through skilful camera techniques (at p. 194). Freedman C.J.M. stated that the issue of whether the film is obscene must be determined according to contemporary community standards in Canada. Relevant to that determination were several factors: the testimony of experts, the classification of "Restricted" which made the film unavailable to persons under 18 years of age and the fact that the film had passed the scrutiny of the censor boards of several provinces.

Accordingly, the "internal necessities" test, or what has been referred to as the "artistic defence", has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme, and in considering the work as a whole, does not merely represent "dirt for dirt's sake" but has a legitimate role when measured by the internal necessities of the work itself.

(iv) *The relationship of the tests to each other*

This review of jurisprudence shows that it fails to specify the relationship of the tests one to another. Failure to do so with respect to the community standards test and the degrading or dehumanizing test, for example, raises a serious question as to the basis on which the community acts in determining whether the impugned material will be tolerated. With both these tests being applied to the same material and apparently independently, we do not know whether the community found the material to be intolerable because it was degrading or dehumanizing, because it

offended against morals or on some other basis. In some circumstances a finding that the material is tolerable can be overruled by the conclusion by the court that it causes harm and is therefore undue. Moreover, is the internal necessities test dominant so that it will redeem material that would otherwise be undue or is it just one factor? Is this test applied by the community or is it determined by the court without regard for the community? This hiatus in the jurisprudence has left the legislation open to attack on the ground of vagueness and uncertainty. That attack is made in this case. This lacuna in the interpretation of the legislation must, if possible, be filled before subjecting the legislation to *Charter* scrutiny. The necessity to do so was foreseen by Wilson J. in *Towne Cinema* when she stated, at p. 525:

> The test of the community standard is helpful to the extent that it provides a norm against which impugned material may be assessed but it does little to elucidate the underlying question as to why some exploitation of sex falls on the permitted side of the line under s. 159(8) and some on the prohibited side. No doubt this question will have to be addressed when the validity of the obscenity provisions of the *Code* is subjected to attack as an infringement on freedom of speech and the infringement is sought to be justified as reasonable.

Pornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing. Violence in this context includes both actual physical violence and threats of physical violence. Relating these three categories to the terms of s. 163(8) of the *Code*, the first, explicit sex coupled with violence, is expressly mentioned. Sex coupled with crime, horror or cruelty will sometimes involve violence. Cruelty, for instance, will usually do so. But, even in

the absence of violence, sex coupled with crime, horror or cruelty may fall within the second category. As for category (3), subject to the exception referred to below, it is not covered.

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.

The courts must 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. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standards is desirable but not essential.

In making this determination with respect to the three categories of pornography referred to above, the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.

If material is not obscene under this framework, it does not become so by reason of the person to whom it is or may be shown or exposed nor by reason of the place or manner in which it is shown. The availability of sexually explicit materials in theatres and other public places is subject to regulation by competent provincial legislation. Typically such legislation imposes restrictions on the material available to children. See *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662.

The foregoing deals with the interrelationship of the "community standards test" and "the degrading or dehumanizing" test. How does the "internal necessities" test fit into this scheme? The need to apply this test only arises if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex. The portrayal of sex must then be viewed in context to determine whether that is the dominant theme of the work as a whole. Put another way, is undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary, or other similar purpose? Since the threshold determination must be made on the basis of community standards, that is,

whether the sexually explicit aspect is undue, its impact when considered in context must be determined on the same basis. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.

C. *Does s. 163 Violate s. 2(b) of the Charter*?

The majority of the Court of Appeal in this case allowed the appeal of the Crown on the ground that s. 163 does not violate freedom of expression as guaranteed under s. 2(*b*) of the *Charter*. Huband J.A. applied the first step of the test set out in *Irwin Toy*, *supra*, as follows (at p. 230):

> In this case, it is unnecessary to proceed beyond the first step because the materials are devoid of a "meaning". That word, as it is employed in the majority reasons in the *Irwin Toy* case, leads to the realm of ideas, opinions, thoughts, beliefs, or feelings. Expression for economic purposes is included because commercial expression conveys meaning. But the majority judgment in the *Irwin Toy* case acknowledges that ". . . <u>some human activity is purely physical and does not convey or attempt to convey meaning". I think that is true of the materials in this case.</u> [Emphasis added.]

In my view, the majority of the Manitoba Court of Appeal erred in several respects in its application of the test enunciated in *Irwin Toy*. First, Huband J.A. misinterpreted the distinction between purely physical activity and activity having expressive content. The subject matter of the materials in this case is clearly "physical", but this does not mean that the materials do not convey or attempt to

convey meaning such that they are without expressive content. An example of the "purely physical" activity alluded to in *Irwin Toy* was that of parking a car which, if performed as a day-to-day task, cannot be said to have expressive content. Such purely physical activity may be distinguished from that form of activity which we are concerned with in the present appeal which, while indeed "physical", conveys ideas, opinions, or feelings. As Twaddle J.A. noted, at pp. 237-38:

> The subject matter of the material under review . . . is sexual activity. Such activity is part of the human experience . . . . The depiction of such activity has the potential of titillating some and of informing others. How can images which have such effect be meaningless? . . .
>
> In my view, the content of a video movie, the content of a magazine and the imagery of a sexual gadget are all within the freedom of expression.

Second, the majority of the Court of Appeal erred in failing to properly draw the distinction between the content of the materials and the form of expression. Huband J.A. wrote, at p. 230:

> Concerning the form of the activity, it falls within an area which has been criminalized as an offence relating to public morality -- an area identified by Lamer J. in his reasons for decision in *Reference re ss. 193 and 195.1(1)(c), supra,* as one where the form might well be unprotected by the Charter. <u>The form consists of the undue exploitation of sex, the degradation of human sexuality. In my view, the form of the activity is not one which the Charter was designed or intended to protect</u>. Thus, in terms of both content and form the activity properly falls within the regulated area of freedom of expression. [Emphasis added.]

The form of activity in this case is the medium through which the meaning sought to be conveyed is expressed, namely, the film, magazine, written

matter, or sexual gadget. There is nothing inherently violent in the vehicle of expression, and it accordingly does not fall outside the protected sphere of activity.

In light of our recent decision in *R. v. Keegstra*, [1990] 3 S.C.R. 697, the respondent, and most of the parties intervening in support of the respondent, do not take issue with the proposition that s. 163 of the *Criminal Code* violates s. 2(*b*) of the *Charter*. In *Keegstra*, we were unanimous in advocating a generous approach to the protection afforded by s. 2(*b*) of the *Charter*. Our Court confirmed the view expressed in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (the *"Prostitution Reference"*), that activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed. McLachlin J. wrote, at p. 828:

> As this Court has repeatedly affirmed, the content of a statement cannot deprive it of the protection accorded by s. 2(*b*), no matter how offensive it may be. The content of Mr. Keegstra's statements was offensive and demeaning in the extreme; nevertheless, on the principles affirmed by this Court, that alone would appear not to deprive them of the protection guaranteed by the *Charter*.

With respect, the majority of the Court of Appeal did not sufficiently distance itself from the content of the materials. In assessing the purpose of the legislation, the majority stated, at pp. 230-31:

> The purpose of s. 163 of the *Code* is not to interfere with the free exchange of ideas and opinions, and not to suppress the attempt to convey a message or a meaning. The intent of the legislation is to bar the distribution or sale of prurient materials devoid of a redeeming meaning.

Meaning sought to be expressed need not be "redeeming" in the eyes of the court to merit the protection of s. 2(*b*), whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure.

In this case, both the purpose and effect of s. 163 are specifically to restrict the communication of certain types of materials based on their content. In my view, there is no doubt that s. 163 seeks to prohibit certain types of expressive activity and thereby infringes s. 2(*b*) of the *Charter*.

Before turning to consider whether this infringement is justified under s. 1 of the *Charter*, I wish to address the argument advanced by the Attorney General of B.C. that in applying s. 2(*b*), a distinction should be made between films and written works. It is argued that by its very nature, the medium of the written word is such that it is, when used, inherently an attempt to convey meaning. In contrast, British Columbia argues that the medium of film can be used for a purpose "not significantly communicative". In its factum, British Columbia maintains that if the activity captured in hard core pornographic magazines and videotapes is itself not expression, the fact that they are reproduced by the technology of a camera does not magically transform them into "expression": the appellant cannot hide behind the label "film" to claim protection for the reproduction of activity the sole purpose of which is to arouse or shock.

In my view, this submission cannot be maintained. This position is not far from that taken by the majority of the Court of Appeal, that the depiction of purely physical activity does not convey meaning. First, I cannot agree with the

premise that purely physical activity, such as sexual activity, cannot be expression. Second, in creating a film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which, in some cases, may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression. The same would apply to the depiction of persons engaged in purely sexual activity.

I would conclude that the first constitutional question should be answered in the affirmative.

D. *Is s. 163 Justified Under s. 1 of the Charter*?

(a) Is s. 163 a Limit Prescribed by Law?

The appellant argues that the provision is so vague that it is impossible to apply it. Vagueness must be considered in relation to two issues in this appeal: (1) is the law so vague that it does not qualify as "a limit prescribed by law"; and (2) is it so imprecise that it is not a reasonable limit. Dealing with (1), the test is whether the law "is so obscure as to be incapable of interpretation with any degree

of precision using the ordinary tools" (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 94). Put another way, does the law provide "an intelligible standard according to which the judiciary must do its work" (*Irwin Toy*, *supra*, at p. 983; adopted in *Osborne v. Canada (Treasury Board)*, *supra*, at p. 96).

In assessing whether s. 163(8) prescribes an intelligible standard, consideration must be given to the manner in which the provision has been judicially interpreted. Accordingly, in the *Prostitution Reference*, *supra*, the majority reached the conclusion that words such as "acts of indecency" were capable of constituting a limit prescribed by law. Lamer J. (as he then was) stated, at p. 1157:

> Also, as the Ontario Court of Appeal has held in *R. v. LeBeau* (1988), 41 C.C.C. (3d) 163, at p. 173, "the void for vagueness doctrine is not to be applied to the bare words of the statutory provision but, rather, to the provision as interpreted and applied in judicial decisions".
>
> The fact that a particular legislative term is open to varying interpretations by the courts is not fatal. As Beetz J. observed in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 107, "[f]lexibility and vagueness are not synonymous". Therefore the question at hand is whether the impugned sections of the *Criminal Code* can be or have been given sensible meanings by the courts.

Standards which escape precise technical definition, such as "undue", are an inevitable part of the law. The *Criminal Code* contains other such standards. Without commenting on their constitutional validity, I note that the terms "indecent", "immoral" or "scurrilous", found in ss. 167, 168, 173 and 175, are nowhere defined in the *Code*. It is within the role of the judiciary to attempt to interpret these terms. If such interpretation yields an intelligible standard, the threshold test for the application of s. 1 is met. In my opinion, the interpretation of s. 163(8) in prior

judgments which I have reviewed, as supplemented by these reasons, provides an intelligible standard.

(b) Objective

The respondent argues that there are several pressing and substantial objectives which justify overriding the freedom to distribute obscene materials. Essentially, these objectives are the avoidance of harm resulting from antisocial attitudinal changes that exposure to obscene material causes and the public interest in maintaining a "decent society". On the other hand, the appellant argues that the objective of s. 163 is to have the state act as "moral custodian" in sexual matters and to impose subjective standards of morality.

The obscenity legislation and jurisprudence prior to the enactment of s. 163 were evidently concerned with prohibiting the "immoral influences" of obscene publications and safeguarding the morals of individuals into whose hands such works could fall. The *Hicklin* philosophy posits that explicit sexual depictions, particularly outside the sanctioned contexts of marriage and procreation, threatened the morals or the fabric of society (Clare Beckton, "Freedom of Expression (s. 2(*b*))", in Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (1982), at p. 105. In this sense, its dominant, if not exclusive, purpose was to advance a particular conception of morality. Any deviation from such morality was considered to be inherently undesirable, independently of any harm to society. As Judson J. described the test in *Brodie*, *supra*, at pp. 704-5:

> [The work under attack] has none of the characteristics that are often described in judgments dealing with obscenity -- dirt for dirt's sake, the leer of the sensualist, depravity in the mind of an author with an obsession for dirt, pornography, an appeal to a prurient interest, etc.

I agree with Twaddle J.A. of the Court of Appeal that this particular objective is no longer defensible in view of the *Charter*. To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367, at p. 370, refers to this as "legal moralism", of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.

On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society. As Dyzenhaus, *supra*, at p. 376, writes:

> Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values.

As the respondent and many of the interveners have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate.

In this regard, criminalizing the proliferation of materials which undermine another basic *Charter* right may indeed be a legitimate objective.

In my view, however, the overriding objective of s. 163 is not moral disapprobation but the avoidance of harm to society. In *Towne Cinema*, Dickson C.J. stated, at p. 507:

> It is harm to society from undue exploitation that is aimed at by the section, not simply lapses in propriety or good taste.

The harm was described in the following way in the Report on Pornography by the Standing Committee on Justice and Legal Affairs (MacGuigan Report) (1978), at p. 18:4:

> The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.

The appellant argues that to accept the objective of the provision as being related to the harm associated with obscenity would be to adopt the "shifting purpose" doctrine explicitly rejected in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. This Court concluded in that case that a finding that the *Lord's Day Act* has a secular purpose was not possible given that its religious purpose, in compelling

sabbatical observance, has been long-established and consistently maintained by the courts. The appellant relies on the words of Dickson J. (as he then was), at pp. 335-36:

> . . . the theory of a shifting purpose stands in stark contrast to fundamental notions developed in our law concerning the nature of "Parliamentary intention". Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.
>
> . . .
>
> While the effect of such legislation as the *Lord's Day Act* may be more secular today than it was in 1677 or in 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In result, therefore, the *Lord's Day Act* must be characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance.

I do not agree that to identify the objective of the impugned legislation as the prevention of harm to society, one must resort to the "shifting purpose" doctrine. First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of s. 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however this does not detract from the fact that the purpose of this legislation remains, as it was in 1959, the protection of society from harms caused

by the exposure to obscene materials. In this regard, I lend support to the analysis of Charron Dist. Ct. J. in *R. v. Fringe Product Inc.*, *supra*, at p. 443:

> Even though one can still find an emphasis on the enforcement of moral standards of decency in relation to expression in sexual matters in the jurisprudence subsequent to the enactment of s-s.(8), it is clear that, by the very words it has chosen, Parliament in 1959 moved beyond such narrow concern and expanded the scope of the legislation to include further concerns with respect to sex combined with crime, horror, cruelty and violence.
>
> It is the harm to society resulting from the undue exploitation of such matters which is aimed by the section. The "harm" conceived by Parliament in 1959 may not have been expressed in the same words as one would today. The court is not limited to a 1959 perspective in the determination of this matter. As noted in *Irwin Toy Ltd. v. Quebec (Attorney-General)*, *supra*, at p. 618:
>
>> In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place . . . However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective . . . It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances.
>
> In 1959, the harm to society caused by the undue exploitation of sex or of sex and other named matters may well have been defined more strictly in terms of public morality, *i.e.*, that such expression offended society's sense of right and wrong. It may well be that if such was the only identifiable harm today that the legislation could not be said to pertain to pressing and substantial concerns thereby warranting an infringement of the right of expression. But that is not so. The harm goes beyond public morality in this narrow sense.

A permissible shift in emphasis was built into the legislation when, as interpreted by the courts, it adopted the community standards test. Community standards as to what is harmful have changed since 1959.

This being the objective, is it pressing and substantial? Does the prevention of the harm associated with the dissemination of certain obscene materials constitute a sufficiently pressing and substantial concern to warrant a restriction on the freedom of expression? In this regard, it should be recalled that in *Keegstra, supra*, this Court unanimously accepted that the prevention of the influence of hate propaganda on society at large was a legitimate objective. Dickson C.J. wrote with respect to the changes in attitudes which exposure to hate propaganda can bring about (at pp. 747-48):

> . . . the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted . . . .
>
> The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society.

This Court has thus recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression. In my view, the harm sought to be avoided in the case of the dissemination of obscene materials is similar. In the words of Nemetz C.J.B.C. in *R. v. Red Hot Video Ltd.* (1985), 45 C.R. (3d) 36 (B.C.C.A.), there is a growing concern that the exploitation of women and children, depicted in publications and films, can, in certain circumstances, lead to "abject and servile victimization" (at pp. 43-44). As Anderson J.A. also noted in that same case, if true equality between

male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on "the individual's sense of self-worth and acceptance".

In reaching the conclusion that legislation proscribing obscenity is a valid objective which justifies some encroachment on the right to freedom of expression, I am persuaded in part that such legislation may be found in most free and democratic societies. As Nemetz C.J.B.C. aptly pointed out in *R. v. Red Hot Video*, *supra*, for centuries democratic societies have set certain limits to freedom of expression. He cited (at p. 40) the following passage of Dickson J.A. (as he then was) in *R. v. Great West News Ltd.*, *supra*, at p. 309:

> . . . all organized societies have sought in one manner or another to suppress obscenity. The right of the state to legislate to protect its moral fibre and well-being has long been recognized, with roots deep in history. It is within this frame that the Courts and Judges must work.

The advent of the *Charter* did not have the effect of dramatically depriving Parliament of a power which it has historically enjoyed. It is also noteworthy that the criminalization of obscenity was considered to be compatible with the *Canadian Bill of Rights*. As Dickson J.A. stated in *R. v. Prairie Schooner News Ltd.*, *supra*, at p. 604:

> Freedom of speech is not unfettered either in criminal law or civil law. The *Canadian Bill of Rights* was intended to protect, and does protect, basic freedoms of vital importance to all Canadians. It does not serve as

> a shield behind which obscene matter may be disseminated without concern for criminal consequences. The interdiction of the publications which are the subject of the present charges in no way trenches upon the freedom of expression which the *Canadian Bill of Rights* assures.

The enactment of the impugned provision is also consistent with Canada's international obligations (*Agreement for the Suppression of the Circulation of Obscene Publications* and the *Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*).

Finally, it should be noted that the burgeoning pornography industry renders the concern even more pressing and substantial than when the impugned provisions were first enacted. I would therefore conclude that the objective of avoiding the harm associated with the dissemination of pornography in this case is sufficiently pressing and substantial to warrant some restriction on full exercise of the right to freedom of expression. The analysis of whether the measure is proportional to the objective must, in my view, be undertaken in light of the conclusion that the objective of the impugned section is valid only in so far as it relates to the harm to society associated with obscene materials. Indeed, the section as interpreted in previous decisions and in these reasons is fully consistent with that objective. The objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*. This, then, being the objective of s. 163, which I have found to be pressing and substantial, I must now determine whether the section is rationally connected and proportional to this objective. As outlined above, s. 163(8) criminalizes the exploitation of sex and sex and violence, when, on the basis of the community test, it is undue. The determination of when

such exploitation is undue is directly related to the immediacy of a risk of harm to society which is reasonably perceived as arising from its dissemination.

(c) Proportionality

(i) *General*

The proportionality requirement has three aspects:

(1) the existence of a rational connection between the impugned measures and the objective;

(2) minimal impairment of the right or freedom; and

(3) a proper balance between the effects of the limiting measures and the legislative objective.

In assessing whether the proportionality test is met, it is important to keep in mind the nature of expression which has been infringed. In the *Prostitution Reference*, *supra*, Dickson C.J. wrote, at p. 1136:

> When a *Charter* freedom has been infringed by state action that takes the form of criminalization, the Crown bears the heavy burden of justifying that infringement. Yet, the expressive activity, as with any infringed *Charter* right, should also be analysed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

The values which underlie the protection of freedom of expression relate to the search for truth, participation in the political process, and individual self-fulfilment. The Attorney General for Ontario argues that of these, only "individual self-fulfilment", and only in its most base aspect, that of physical arousal, is engaged by pornography. On the other hand, the civil liberties groups argue that pornography forces us to question conventional notions of sexuality and thereby launches us into an inherently political discourse. In their factum, the B.C. Civil Liberties Association adopts a passage from R. West, "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" (1987), 4 *Am. Bar Found. Res. Jo.* 681, at p. 696:

> Good pornography has value because it validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography (when it is good) celebrates both female pleasure and male rationality.

A proper application of the test should not suppress what West refers to as "good pornography". The objective of the impugned provision is not to inhibit the celebration of human sexuality. However, it cannot be ignored that the realities of the pornography industry are far from the picture which the B.C. Civil Liberties Association would have us paint. Shannon J., in *R. v. Wagner*, *supra*, described the materials more accurately when he observed, at p. 331:

> Women, particularly, are deprived of unique human character or identity and are depicted as sexual playthings, hysterically and instantly responsive to male sexual demands. They worship male genitals and their own value depends upon the quality of their genitals and breasts.

In my view, the kind of expression which is sought to be advanced does not stand on an equal footing with other kinds of expression which directly engage the "core" of the freedom of expression values.

This conclusion is further buttressed by the fact that the targeted material is expression which is motivated, in the overwhelming majority of cases, by economic profit. This Court held in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at p. 247, that an economic motive for expression means that restrictions on the expression might "be easier to justify than other infringements".

I will now turn to an examination of the three basic aspects of the proportionality test.

(ii) *Rational Connection*

The message of obscenity which degrades and dehumanizes is analogous to that of hate propaganda. As the Attorney General of Ontario has argued in its factum, obscenity wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentations.

Accordingly, the rational link between s. 163 and the objective of Parliament relates to the actual causal relationship between obscenity and the risk of harm to society at large. On this point, it is clear that the literature of the social sciences remains subject to controversy. In *Fringe Product Inc.*, *supra*, Charron Dist.

Ct. J. considered numerous written reports and works and heard six days of testimony from experts who endeavoured to describe the status of the social sciences with respect to the study of the effects of pornography. Charron Dist. Ct. J. reached the conclusion that the relationship between pornography and harm was sufficient to justify Parliament's intervention. This conclusion is not supported unanimously.

The recent conclusions of the Fraser Report, *supra*, could not postulate any causal relationship between pornography and the commission of violent crimes, the sexual abuse of children, or the disintegration of communities and society. This is in contrast to the findings of the MacGuigan Report, *supra*.

While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs. The Meese Commission Report, *supra*, concluded in respect of sexually violent material (vol. 1, at p. 326):

> . . . the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence.
>
> Although we rely for this conclusion on significant scientific empirical evidence, we feel it worthwhile to note the underlying logic of the conclusion. The evidence says simply that the images that people are exposed to bears a causal relationship to their behavior. This is hardly surprising. What would be surprising would be to find otherwise, and we have not so found. We have not, of course, found that the images people are exposed to are a greater cause of sexual violence than all or even many other possible causes the investigation of which has been beyond our mandate. Nevertheless, it would be strange indeed if graphic representations of a form of behavior, especially in a form that almost

> exclusively portrays such behavior as desirable, did not have at least some effect on patterns of behavior.

In the face of inconclusive social science evidence, the approach adopted by our Court in *Irwin Toy* is instructive. In that case, the basis for the legislation was that television advertising directed at young children is *per se* manipulative. The Court made it clear, at p. 994, that in choosing its mode of intervention, it is sufficient that Parliament had a reasonable basis:

> In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

And at p. 990:

> . . . the Court also recognized that the government was afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence.

Similarly, in *Keegstra*, *supra*, the absence of proof of a causative link between hate propaganda and hatred of an identifiable group was discounted as a determinative factor in assessing the constitutionality of the hate literature provisions of the *Criminal Code*. Dickson C.J. stated, at p. 776:

> First, to predicate the limitation of free expression upon proof of actual hatred gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups targeted by hate

> propaganda. Second, it is clearly difficult to prove a causative link between a specific statement and hatred of an identifiable group.

McLachlin J. (dissenting) expressed it as follows, at p. 857:

> To view hate propaganda as "victimless" in the absence of any proof that it moved its listeners to hatred is to discount the wrenching impact that it may have on members of the target group themselves . . . . Moreover, it is simply not possible to assess with any precision the effects that expression of a particular message will have on all those who are ultimately exposed to it.

The American approach on the necessity of a causal link between obscenity and harm to society was set out by Burger C.J. in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1972), at pp. 60-61:

> Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist.

I am in agreement with Twaddle J.A. who expressed the view that Parliament was entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations.

Accordingly, I am of the view that there is a sufficiently rational link between the criminal sanction, which demonstrates our community's disapproval of the dissemination of materials which potentially victimize women and which restricts

the negative influence which such materials have on changes in attitudes and behaviour, and the objective.

Finally, I wish to distinguish this case from *Keegstra*, in which the minority adopted the view that there was no rational connection between the criminalization of hate propaganda and its suppression. As McLachlin J. noted, prosecutions under the *Criminal Code* for racist expression have attracted extensive media coverage. The criminal process confers on the accused publicity for his or her causes and succeeds even in generating sympathy. The same cannot be said of the kinds of expression sought to be suppressed in the present case. The general availability of the subject materials and the rampant pornography industry are such that, in the words of Dickson C.J. in *Keegstra*, "pornography is not dignified by its suppression". In contrast to the hate-monger who may succeed, by the sudden media attention, in gaining an audience, the prohibition of obscene materials does nothing to promote the pornographer's cause.

(iii) *Minimal Impairment*

In determining whether less intrusive legislation may be imagined, this Court stressed in the *Prostitution Reference*, *supra*, that it is not necessary that the legislative scheme be the "perfect" scheme, but that it be appropriately tailored <u>in the context of the infringed right</u> (at p. 1138). Furthermore, in *Irwin Toy*, *supra*, Dickson C.J., Lamer and Wilson JJ. stated, at p. 999:

> While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence

> establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.

There are several factors which contribute to the finding that the provision minimally impairs the freedom which is infringed.

First, the impugned provision does not proscribe sexually explicit erotica without violence that is not degrading or dehumanizing. It is designed to catch material that creates a risk of harm to society. It might be suggested that proof of actual harm should be required. It is apparent from what I have said above that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm.

Second, materials which have scientific, artistic or literary merit are not captured by the provision. As discussed above, the court must be generous in its application of the "artistic defence". For example, in certain cases, materials such as photographs, prints, books and films which may undoubtedly be produced with some motive for economic profit, may nonetheless claim the protection of the *Charter* in so far as their defining characteristic is that of aesthetic expression, and thus represent the artist's attempt at individual fulfilment. The existence of an accompanying economic motive does not, of itself, deprive a work of significance as an example of individual artistic or self-fulfilment.

Third, in considering whether the provision minimally impairs the freedom in question, it is legitimate for the court to take into account Parliament's past abortive attempts to replace the definition with one that is more explicit. In *Irwin Toy*, our Court recognized that it is legitimate to take into account the fact that earlier laws and proposed alternatives were thought to be less effective than the legislation that is presently being challenged. The attempt to provide exhaustive instances of obscenity has been shown to be destined to fail (Bill C-54, 2nd Sess., 33rd Parl.). It seems that the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed. In my view, the standard of "undue exploitation" is therefore appropriate. The intractable nature of the problem and the impossibility of precisely defining a notion which is inherently elusive makes the possibility of a more explicit provision remote. In this light, it is appropriate to question whether, and at what cost, greater legislative precision can be demanded.

Fourth, while the discussion in this appeal has been limited to the definition portion of s. 163, I would note that the impugned section, with the possible exception of subs. 1, which is not in issue here, has been held by this Court not to extend its reach to the private use or viewing of obscene materials. *R. v. Rioux*, [1969] S.C.R. 599, [1970] 3 C.C.C. 149, unanimously upheld the finding of the Quebec Court of Appeal that s. 163(2) (then s. 150(2)) does not include the private viewing of obscene materials. Hall J. affirmed the finding of Pratte J., at pp. 151-52 C.C.C.:

> [TRANSLATION] If exposing "to public view" is mentioned in s-s. (2)(*a*), it is because the legislator intended that this, and not a private showing, should constitute a crime.
>
> I would therefore say that showing obscene pictures to a friend or projecting an obscene film in one's own home is not in itself a crime nor is it enough to establish intention of circulating them nor help to prove such an intention.

This Court also cited with approval the words of Hyde J., at p. 152 C.C.C.:

> Before I am prepared to hold that private use of written matter or pictures within an individual's residence may constitute a criminal offence, I require a much more specific text of law than we are now dealing with. It would have been very simple for Parliament to have included the word "exhibit" in this section if it had wished to cover this situation.

Accordingly, it is only the public distribution and exhibition of obscene materials which is in issue here.

Finally, I wish to address the arguments of the interveners, the Canadian Civil Liberties Association and Manitoba Association for Rights and Liberties, that the objectives of this kind of legislation may be met by alternative, less intrusive measures. First, it is submitted that reasonable time, manner and place restrictions would be preferable to outright prohibition. I am of the view that this argument should be rejected. Once it has been established that the objective is the avoidance of harm caused by the degradation which many women feel as "victims" of the message of obscenity, and of the negative impact exposure to such material has on perceptions and attitudes towards women, it is untenable to argue that these harms could be avoided by placing restrictions on access to such material. Making the

materials more difficult to obtain by increasing their cost and reducing their availability does not achieve the same objective. Once Parliament has reasonably concluded that certain acts are harmful to certain groups in society and to society in general, it would be inconsistent, if not hypocritical, to argue that such acts could be committed in more restrictive conditions. The harm sought to be avoided would remain the same in either case.

It is also submitted that there are more effective techniques to promote the objectives of Parliament. For example, if pornography is seen as encouraging violence against women, there are certain activities which discourage it -- counselling rape victims to charge their assailants, provision of shelter and assistance for battered women, campaigns for laws against discrimination on the grounds of sex, education to increase the sensitivity of law enforcement agencies and other governmental authorities. In addition, it is submitted that education is an under-used response.

It is noteworthy that many of the above suggested alternatives are in the form of <u>responses</u> to the harm engendered by negative attitudes against women. The role of the impugned provision is to control the dissemination of the very images that contribute to such attitudes. Moreover, it is true that there are additional measures which could alleviate the problem of violence against women. However, given the gravity of the harm, and the threat to the values at stake, I do not believe that the measure chosen by Parliament is equalled by the alternatives which have been suggested. Education, too, may offer a means of combating negative attitudes to women, just as it is currently used as a means of addressing other problems dealt

with in the *Code*. However, there is no reason to rely on education alone. It should be emphasized that this is in no way intended to deny the value of other educational and counselling measures to deal with the roots and effects of negative attitudes. Rather, it is only to stress the arbitrariness and unacceptability of the claim that such measures represent the sole legitimate means of addressing the phenomenon. Serious social problems such as violence against women require multi-pronged approaches by government. Education and legislation are not alternatives but complements in addressing such problems. There is nothing in the *Charter* which requires Parliament to choose between such complementary measures.

(iv) *Balance Between Effects of Limiting Measures and Legislative Objective*

The final question to be answered in the proportionality test is whether the effects of the law so severely trench on a protected right that the legislative objective is outweighed by the infringement. The infringement on freedom of expression is confined to a measure designed to prohibit the distribution of sexually explicit materials accompanied by violence, and those without violence that are degrading or dehumanizing. As I have already concluded, this kind of expression lies far from the core of the guarantee of freedom of expression. It appeals only to the most base aspect of individual fulfilment, and it is primarily economically motivated.

The objective of the legislation, on the other hand, is of fundamental importance in a free and democratic society. It is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to

individuals, groups such as women and children, and consequently to society as a whole, by the distribution of these materials. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other.

I therefore conclude that the restriction on freedom of expression does not outweigh the importance of the legislative objective.

5. Conclusion

I conclude that while s. 163(8) infringes s. 2(*b*) of the *Charter*, freedom of expression, it constitutes a reasonable limit and is saved by virtue of the provisions of s. 1. The trial judge convicted the appellant only with respect to materials which contained scenes involving violence or cruelty intermingled with sexual activity or depicted lack of consent to sexual contact or otherwise could be said to dehumanize men or women in a sexual context. The majority of the Court of Appeal, on the other hand, convicted the appellant on all charges.

While the trial judge concluded that the material for which the accused were acquitted was not degrading or dehumanizing, he did so in the context of s. 1 of the *Charter*. In effect, he asked himself whether, if the material was proscribed by s. 163(8), that section would still be supportable under s. 1. In this context, he considered the government objectives of s. 163(8) and measured the material which was the subject of the charges against this objective. The findings at trial were therefore made in a legal framework that is different from that outlined in these reasons. Specifically, in considering whether the materials were degrading or

dehumanizing, he did not address the issue of harm. Accordingly, it would be speculation to conclude that the same result would have been obtained if the definition of obscenity contained in these reasons had been applied. The test applied by the majority of the Court of Appeal also differed significantly from these reasons. I therefore cannot accept their conclusion that all of the materials are obscene. Accordingly, I would allow the appeal and direct a new trial on all charges. I note, however, that I am in agreement with Wright J.'s conclusion that, in the case of material found to be obscene, there should only be one conviction imposed with respect to a single tape.

I would answer the constitutional questions as follows:

1. Does s. 163 of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, violate s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If s. 163 of the *Criminal Code* of Canada, R.S.C., 1985, c. C-46, violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, can s. 163 of the *Criminal Code* of Canada be demonstrably justified under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law?

Answer: Yes.

//*Gonthier J.*//

The reasons of L'Heureux-Dubé and Gonthier JJ. were delivered by

GONTHIER J. -- I have had the benefit of the reasons of Justice Sopinka and, while I agree both with his disposition of the case and with his reasons generally, I wish to add to them with respect to the judicial interpretation of s. 163 of the *Criminal Code*, R.S.C., 1985, c. C-46, and to its constitutional validity.

The Substance of s. 163 of the *Code*

A Representation and its Content

Section 163 of the *Code* offers a peculiar structure. Its subject matter, obscene materials, comprises the dual elements of representation and content. Representation here is understood in the sense of public suggestion. A representation is a portrayal, a description meant to evoke something to the mind and senses. Furthermore, in the context of s. 163 of the *Code*, one deals with representations to the public in general, without restriction, as will be explained below. Hence the *Oxford English Dictionary* (2nd ed.) defines "to represent" as "to bring clearly and distinctly before the mind" and "representation" as "the action or fact of exhibiting in some visible image or form". The element of representation in s. 163 of the *Code* is therefore a suggestion, a depiction to the public. By "content" I mean of course the content of the representation.

It is the combination of the two, the representation and its content, that attracts criminal liability. A representation as such is not enough, of course, to create the subject matter of s. 163, but neither is an act included in the content of s. 163 of the *Code*, without an element of representation.

It is indeed important to emphasize that the *Criminal Code* is grounded on the principles of sexual freedom between consenting adults, and of criminal liability for sexual relations between adults and minors (young persons between the age of 14 and 17 being in a special position). Offences such as sexual assault (ss. 271-73), sexual interference (s. 151), sexual exploitation (s. 153) or incest between an adult and a minor (s. 155) are corollaries of these basic principles. Aside from them, few offences related to sexual practices exist: incest between adults (s. 155 of the *Code*), anal intercourse when more than two persons are present (s. 159 of the *Code*), bestiality (s. 160 of the *Code*) and necrophilia (s. 182 of the *Code*).

Yet obscenity is not limited to the acts described above. Irrespective of the construction given to s. 163(8), a surface glance at its wording makes this obvious. The acts listed in the above paragraph might perhaps be included in the phrase "sex and . . . crime, horror, cruelty and violence" found in s. 163(8) of the *Code*. They certainly do not exhaust the meaning of this phrase, and s. 163(8) comprises in addition the phrase "undue exploitation of sex", which is central to this case. Hence the content of obscenity exceeds the acts prohibited in the *Code*.

This difference in content stems from the element of representation found in s. 163 of the *Code*. Parliament ascribed a broader content to obscenity because it involves a representation. In this combination of a given content and its representation lies the particular essence of obscenity, as was mentioned above. The type of scenes vividly described in *R. v. Wagner* (1985), 43 C.R. (3d) 318 (Alta. Q.B.), *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53 (Ont. Co. Ct.) or *R. v.*

Ramsingh (1984), 14 C.C.C. (3d) 230 (Man. Q.B.), might perhaps be legal if done between consenting adults, but they become obscene when they are represented.

Without launching into a lengthy debate on the reasons why Parliament may have enacted s. 163 of the *Code* (the reasons of Sopinka J. cover this point extensively), it can be seen that the combination of representation and content that constitutes obscenity leads to many ills. Obscene materials (I will not for reasons explained later differentiate between obscenity and pornography) convey a distorted image of human sexuality, by making public and open elements of the human nature which are usually hidden behind a veil of modesty and privacy. D. A. Downs, *The New Politics of Pornography* (1989), aptly describes how these materials do not reflect the richness of human sexuality, but rather turn it into pure animality, at p. 183:

> . . . the deeper objection to sheer pornography or obscenity . . . is that it represents a retreat from the human dilemma and the responsibility of acknowledging the tensions in our nature. Sheer pornography also reduces us to the lower aspects of our natures by stripping away the modesty that arises from our encounter with our animality.

This distorted image of human sexuality often comprises violence, cruelty, infliction of pain, humiliation, among other elements of the pornographic imagery. Not only are these materials often evidence of the commission of reprehensible actions in their making, but their representation conjures the possibility of behavioural influences. In a marketplace of ideas, to use that classic metaphor, pornographic imagery is there for the taking, and it finds without any doubt many takers. Attitudinal changes in these takers, because of exposure to pornographic materials, may lead to abuse and

harm. As the Special Committee on Pornography and Prostitution concluded in its report entitled *Pornography and Prostitution in Canada* (1985) (the "Fraser Report") at p. 103:

> . . . there are magazines, films and videos produced solely for the purpose of entertainment whose depiction of women in particular, but also, in some cases, men and young people, demeans them, perpetuates lies about aspects of their humanity and denies the validity of their aspirations to be treated as full and equal citizens within the community.

These conclusions echoed those of the Standing Committee on Justice and Legal Affairs, in its *Report on Pornography* (1978).

To summarize this section, the particular combination of a representation and its content that forms the subject matter of s. 163 of the *Code* was seen by Parliament as putting forward a distorted image of human sexuality, which in turn can induce harmful behavioural changes. This must be kept in mind when interpreting s. 163 of the *Code*.

Prohibition and Regulation

Another crucial feature of s. 163 of the *Code* lies in its very presence in the *Criminal Code*. Parliament through s. 163 only prohibits, and does not regulate, the circulation of obscene materials. In *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494, this Court accordingly insisted that the audience to which a movie is shown was not relevant in deciding whether it is obscene or not, since applying different standards to different constituencies would bring s. 163(8) closer

to regulation than prohibition. Wilson J. wrote at p. 521, with the assent of the majority of this Court:

> It is not, in my opinion, open to the courts under s. 159(8) [now s. 163(8)] of the *Criminal Code* to characterize a movie as obscene if shown to one constituency but not if shown to another. I do not doubt that it is desirable to regulate the movies that can be shown to different constituencies. A movie which is not obscene within the meaning of the *Criminal Code* may still not be desirable viewing material for persons under the age of 18. Such regulation . . . is authorized in various provincial jurisdictions but it is the regulation of material which is not obscene under the *Code*.

Sopinka J. also underscores this point in his reasons.

In the interpretation of s. 163(8) of the *Code* therefore, the impugned materials must be presumed available to the Canadian public at large. Any restrictions on availability are the result of regulatory measures which fall outside the purview of these provisions of the *Criminal Code*. Obscenity here is concerned with materials for which the mere fact of availability in the public at large is sufficient to warrant criminal prohibition, irrespective of in whose hands they actually fall.

The Three-Category Classification

Section 163(8) is the key to the identification of these materials. In the course of his reasons, Sopinka J. outlines the three tests that have been judicially developed for the application of s. 163(8), that is the "community standard of tolerance", "degradation or dehumanization" and "internal necessities" tests. He then

proceeds to a progressive restatement of the law, putting in perspective the first two tests and bringing out the notion of harm as the central feature of s. 163(8) of the *Code*. Sopinka J. essentially aligns the definition of obscenity in s. 163(8) of the *Code* with the definition of pornography nowadays. He introduces a three-part categorization that has surfaced in contemporary theory, and that had been adopted in some Canadian cases throughout the 80s:

(a) Explicit sex with violence, which generally constitutes "undue exploitation of sex" within the meaning of s. 163(8) of the *Code*, on the basis of demonstrable harm;

(b) Explicit sex that is degrading or dehumanizing, which will be "undue exploitation of sex" if it creates a substantial risk of harm; the risk of harm can be assessed with reference to the tolerance of the community, under the "community standard of tolerance" test; and

(c) Explicit sex that is neither violent nor degrading or dehumanizing, which will not generally fall under s. 163(8) of the *Code*, according to Sopinka J.

I must say at the outset that I differ only with respect to the third category of materials. I am not prepared to affirm as boldly as my colleague Sopinka J. does that it escapes the application of s. 163(8).

Materials of the Third Category

The dual nature, as representation and content, of the subject matter of s. 163 comes into play here. Yet the classification proposed by my colleague Sopinka J. focuses only on content. The content of the first two categories of materials is so likely to harm that the characteristics of the representation do not really matter: if there is violence or degradation or dehumanization, as long as the element of representation is present, harm will probably ensue.

The content of the third category of materials is generally perceived as unlikely to cause harm, as Sopinka J. rightly points out. He mentions as an exception child pornography, i.e. materials in the production of which children were employed. This exception is important, since it obviously flows from the high likelihood of harm ensuing from the production and dissemination of child pornography.

In addition to this exception, it is quite conceivable that the representation may cause harm, even if its content as such may not be seen as harmful. It is helpful to quote here a passage from *R. v. Sudbury News Service Ltd.* (1978), 18 O.R. (2d) 428, at p. 435, where Howland C.J.O. wrote:

> There are some publications which are so blatantly indecent that they would not be tolerable by the Canadian community under any circumstances. Some pictures are offensive to the majority of people to the point that the Canadian community would not tolerate them on a billboard, or on the cover of a magazine, or on a television screen where persons of all ages and sensibilities would be exposed to them, but would be prepared to tolerate them being viewed by persons who wished to view them. Some pictures would not be acceptable by Canadian community standards in a children's bedtime story-book or primer but would be in a magazine for general distribution.

This passage and the surrounding sentences were also quoted in the judgment of Dickson C.J. in *Towne Cinema*, *supra*, for the proposition that the tolerance of the Canadian community will vary according to the audience of the materials. Dickson C.J. was in minority on this issue; as was mentioned above, the majority agreed with Wilson J. that the actual audience to which the materials are presented is not relevant. I accept the opinion of Wilson J., as it was concurred in by the majority.

The above passage, however, brings out another important aspect, the manner of representation. This was not at issue in *Towne Cinema*, *supra*, and neither Dickson C.J. nor Wilson J. addressed this point in his/her respective opinion. The manner of representation, of public suggestion, can greatly contribute to the deformation of sexuality, through the loss of its humanity. Even if the content is not as such objectionable (and, I would say, even more so), the manner in which the material is presented may turn it from innocuous to socially harmful. After all, it is the element of representation that gives this material its power of suggestion, and it seems quite conceivable that this power may cause harm despite the apparent neutrality of the content. A host of factors could intervene in the manner of representation to affect the characterization of the material, among which are the medium, the type or the use.

The medium provides a good example. Indeed the differences between the various media are not acknowledged often enough in opinions dealing with s. 163 of the *Code*. This Court, in *Hawkshaw v. The Queen*, [1986] 1 S.C.R. 668, has decided that the definition of obscenity in s. 163(8) of the *Code* applies throughout

the *Code*, whether the material is a publication or not, but that does not preclude s. 163(8) from taking into account the medium of representation. Statements are made regarding the law of obscenity where a movie is impugned, for instance, and it is often taken for granted that they will apply to all media.

Nevertheless it seems natural to me that the likelihood of harm, and the tolerance of the community, may vary according to the medium of representation, even if the content stays the same. Let me take, as an example, an explicit portrayal of "plain" sexual intercourse, where two individuals are making love. This falls within the third category of Sopinka J. If found in words in a book, it is unlikely to be of much concern (if found in a children's book, though, this may be different). If found depicted in a magazine or in a movie, the likelihood of harm increases but remains low. If found on a poster, it is already more troublesome. If found on a billboard sign, then I would venture that it may well be an undue exploitation of sex, because the community does not tolerate it, on the basis of its harmfulness.

The harmfulness, in the billboard sign example, would come from the immediacy of the representation, inasmuch as the sign stands all by itself (as opposed to a passage in a book, a film or a magazine). Its message is at once crude and inescapable. It distorts human sexuality by taking it out of any context whatsoever and projecting it to the public. This example goes to the extreme, of course, but it is meant to show that the element of representation may create a likelihood of harm that may lead to the application of s. 163 of the *Code*, even if the content of the representation as such is not objectionable.

As I mentioned, the medium of representation is but one variable pertaining to representation that may trigger the application of s. 163 to third-category materials. The overall type or use of the representation, be it education, art, advertising, sexual arousal or other, may also be relevant, among other factors. These factors tie in to the "internal necessities" test to some extent. This test, if it is to find a place within the interpretive framework of Sopinka J., must intervene at the representational level, to change the characterization that would ensue from a mere look at the content of the materials.

For these reasons, therefore, I would hold that materials falling within Sopinka J.'s third category (explicit sex with neither violence nor degradation or dehumanization), while generally less likely to cause harm than those of the first two categories, may nevertheless come within the definition of obscene at s. 163(8) of the *Code*, if their content (child pornography) or their representational element (the manner of representation) is found conducive of harm.

Tolerance and Harm

The assessment of the risk of harm here depends on the tolerance of the community, as is the case with the second category of materials. This brings me to outline a certain shift in the meaning of "tolerance". In *Towne Cinema*, *supra*, Dickson C.J. formulated the community standard test as follows at p. 508:

> . . . it is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it

> would be beyond the contemporary Canadian standard of tolerance to allow them to see it. [Emphasis in original.]

It is unclear from this excerpt what the basis of tolerance is. It seems that tolerance is for taste the conceptual equivalent of the reasonable person to the actual plaintiff: an abstraction, an average perhaps. Tolerance would be some form of enlightened, altruistic taste, which would factor in and sum up the tastes of the whole population.

In the mind of Dickson C.J., there exists no necessary relationship between tolerance and harm, as he mentions at p. 505:

> However, as I have noted above, there is no *necessary* coincidence between the undueness of publications which degrade people by linking violence, cruelty or other forms of dehumanizing treatment with sex, and the community standard of tolerance. Even if certain sex related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not "undue" in some other sense, for example in the sense that they portray persons in a degrading manner as objects of violence, cruelty, or other forms of dehumanizing treatment. [Emphasis in original.]

Sopinka J. uses the community standard of tolerance to gauge the risk of harm. In this context, tolerance must be related to the harm. It must mean not only tolerance of the materials, but also tolerance of the harm which they may bring about. It is a more complicated and more reflective form of tolerance than what was considered by Dickson C.J. in *Towne Cinema*, *supra*. Such a development is fully in accordance with the emphasis put by this Court on harm as the central element in the interpretation of s. 163(8).

In the context of the third category, the harm sought to be avoided is the same as in the first two categories, that is attitudinal changes. While this type of harm was clear in the case of the first category and was probable in the case of the second, it is perhaps more remote here, and will likely occur only in a limited number of cases. The main difference between the second and third categories lies in the presumed likelihood of harm: while degrading or dehumanizing materials are likely to cause harm regardless of whether the community may be ready to tolerate such harm, materials which show no violence, no degradation or dehumanization are less likely to cause harm, and the evidence with respect to the lack of tolerance of the community will be central. Still the risk of harm flowing from the content or the representational element of third-category materials is not always so slight as my colleague Sopinka J. pictures it. If the community cannot tolerate this risk of harm, then in my opinion these materials, even though they may offer a non-violent, non-degrading, non-dehumanizing content, will constitute undue exploitation of sex and will fall under the definition of obscenity at s. 163(8) of the *Code*.

The Constitutional Validity of s. 163 of the *Code*

With respect to the constitutional aspects of this case, I am in agreement with Sopinka J., and I wish only to complement his reasons on the objective of s. 163 of the *Code*.

In his reasons, Sopinka J. rules out the possibility that "public morality" can be a legitimate objective for s. 163 of the *Code* and, while admitting that

Parliament may legislate to protect "fundamental conceptions of morality", he goes on to conclude that the true objective of s. 163 is the avoidance of harm to society.

In my opinion, the distinction between the two orders of morality advanced by my colleague is correct, and the avoidance of harm to society is but one instance of a fundamental conception of morality.

First of all, I cannot conceive that the State could not legitimately act on the basis of morality. Since its earliest *Charter* pronouncements, this Court has acknowledged this possibility. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J. (as he then was) wrote for the Court at p. 337:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Morality is also listed as one of the grounds for which freedom of expression can be restricted in the *European Convention on Human Rights* at article 10:

> 1. Everyone has the right to freedom of expression . . . .
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The European Court of Human Rights has recognized the validity of prohibitions of obscene materials in English and Swiss law, respectively, on the basis that they concern morals, in the *Handyside Case*, judgment of 7 December 1976, Series A No. 24 and in the *Case of Müller and Others*, judgment of 24 May 1988, Series A No. 133.

Indeed the problem is not so much to assess whether morality is a valid objective under the *Charter* as to determine under which conditions it is a pressing and substantial objective. Not all moral claims will be sufficient to warrant an override of *Charter* rights. As R. Dworkin wrote in the chapter of *Taking Rights Seriously* (1977) entitled "Liberty and Moralism" at p. 255:

> The claim that a moral consensus exists is not itself based on a poll. It is based on an appeal to the legislator's sense of how his community reacts to some disfavored practice. But this same sense includes an awareness of the grounds on which that reaction is generally supported. If there has been a public debate involving the editorial columns, speeches of his colleagues, the testimony of interested groups, and his own correspondence, these will sharpen his awareness of what arguments and positions are in the field. He must sift these arguments and positions, suppose general principles or theories vast parts of the population could not be supposed to accept, and so on.

This task that Dworkin assigns to Parliament is also entrusted to this Court in *Charter* review. Two dimensions are important here, which allow one to distinguish between morality in the general sense and "fundamental conceptions of morality".

First of all, the moral claims must be grounded. They must involve concrete problems such as life, harm, well-being, to name a few, and not merely differences of opinion or of taste. Parliament cannot restrict *Charter* rights simply

on the basis of dislike; this is what is meant by the expression "substantial and pressing" concern.

Secondly, a consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people. In a pluralistic society like ours, many different conceptions of the good are held by various segments of the population. The guarantees of s. 2 of the *Charter* protect this pluralistic diversity. However, if the holders of these different conceptions agree that some conduct is not good, then the respect for pluralism that underlies s. 2 of the *Charter* becomes less insurmountable an objection to State action (this argument has recently been rejuvenated and reformulated in S. Gardbaum, "Why the Liberal State Can Promote Moral Ideals After All" (1991), 104 *Harv. L. Rev.* 1350). In this sense a wide consensus among holders of different conceptions of the good is necessary before the State can intervene in the name of morality. This is also comprised in the phrase "pressing and substantial".

The avoidance of harm caused to society through attitudinal changes certainly qualifies as a "fundamental conception of morality". After all, one of the chief aspirations of morality is the avoidance of harm. It is well grounded, since the harm takes the form of violations of the principles of human equality and dignity. Obscene materials debase sexuality. They lead to the humiliation of women, and sometimes to violence against them. This is more than just a matter of taste. Without entering into the examination of the rational connection, some empirical evidence even elucidates the link between these materials and actual violence. Even then, as was said by this Court in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989]

1 S.C.R. 927, in *R. v. Keegstra*, [1990] 3 S.C.R. 697, and as is reiterated by my colleague in his reasons, scientific proof is not required, and reason and common experience will often suffice.

Furthermore, taking into account that people hold different conceptions about good taste and the acceptable level of sexual explicitness, most would agree that these attitudinal changes are serious and warrant State intervention (civil liberty groups who advocated that this Court strike down s. 163 of the *Code* concede that harm can justify State intervention, but they deny that any harm flows from obscene materials; that is a different question).

I agree with Sopinka J. that s. 163 of the *Code* aims at preventing harm to society and I fully endorse his analysis, and as I tried to demonstrate I would not hesitate to affirm that the prevention of harm is a moral objective that is valid under s. 1 of the *Charter*.

I also agree with Sopinka J.'s analysis of the proportionality between the restriction effected by s. 163 of the *Code* and its objectives. I would add a remark, however, on the first factor listed by Sopinka J. under the minimal impairment branch of the proportionality test, that is the exception for materials of the third category. Contrary to Sopinka J., I consider that the third category may sometimes attract criminal liability. The requirement that the impugned materials exceed the community standard of tolerance of harm provides sufficient precision and protection for those whose activities are at stake. This is so as, on the one hand, the field of sexual exploitation is one of first apprehension, directly related to one of the primary

aspects of human personality, and well known to all, including particularly those engaged in it. On the other hand, the criterion of tolerance of harm by the community as a whole is one that, by definition, reflects the general level of tolerance throughout all sectors of the community, hence generally of all its members. It is therefore a very demanding criterion to meet as it must be by definition generally known or apprehended. It is indeed not far removed from the domain of public notoriety and, inasmuch as it falls within it, may be the subject of judicial notice not requiring specific proof.

Subject to the foregoing comments, I otherwise concur both with the reasons and the disposition of the case of my colleague Sopinka J.

Appeal allowed.

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