DATE: 20050707
DOCKET: C39287

COURT OF APPEAL FOR ONTARIO

ROSENBERG, SIMMONS and LANG JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	Jennifer Woollcombe
	)	for the respondent
(Respondent)	)	
	)	
- and -	)	
	)	
DONALD SMITH	)	Brian H. Greenspan and
	)	Peter Copeland
	)	for the appellant
(Appellant)	)	
	)	
	)	Heard: February 8, 2005

On appeal from the convictions entered by Justice Helen M. Pierce of the Superior Court of Justice, sitting with a jury, on November 27, 2002 and from the sentence imposed by Justice Pierce on November 28, 2002.

LANG J.A.:

[1] Following his trial before Pierce J., sitting with a jury, the appellant was convicted of two counts of making obscene material, one count of possessing obscene material for distribution, and two counts of distributing obscene material through Internet websites. The trial judge imposed a $100,000 fine and a period of probation, which included a term prohibiting the appellant from accessing the Internet or residing in any place where Internet access was provided. In addition, the appellant was required to irrevocably assign his interest in his websites to the Crown. The appellant appeals both his convictions and sentence.

Facts

[2] Two types of material formed the basis for the charges: audiovisual material and written stories. The materials depicted acts of violence perpetrated on women, mostly by men.

[3] The written stories were contributed by users of the pay website and were accessible on the "Members Contributions" section of that site. The stories were also found on the appellant's personal computer. The appellant took the position at trial that he had not distributed the stories and that they were not obscene.

[4] The audiovisual materials were on the appellant's websites and on his personal computer. While the materials did not depict sexual acts such as intercourse or fellatio, they did include the following depictions:

1. A nude woman sitting on the ground with an arrow protruding from her lower abdomen and her hand over her vagina;

2. A nude woman prone facedown with an arrow protruding from her rectum;

3. Two nude women: the first with her arms tied and arrows protruding from her abdomen and between her breasts while the second woman held a knife towards the first woman's vagina;

4. Two nude women on a bench, apparently dead, one with an arrow protruding from her abdomen and the other with an arrow through her breast. The women's legs are spread and their genitalia exposed;

5. A nude woman leaning back with an arrow in her lower abdomen with her legs spread and genitalia exposed;

6. A woman, apparently dead, with knife wounds between her breasts and in her abdomen; and

7. Two topless women holding swords, one of whom appears to have been stabbed through the lower abdomen.

[5] The audiovisual material employed a unique special effects technique using an air compressor and editing software to simulate the women's flesh rippling as a bullet or other object appears to pierce their skin. The audiovisual materials were relatively brief and had little plot or dialogue.

[6] The appellant admitted that he made, edited, and uploaded the audiovisual and still images to both his free website and his pay website. The free site contained a preliminary warning that the site contained "Nudity and Fantasy Violence," as well as a secondary warning describing the content as nudity, fantasy violence, and adult entertainment. One link on the website, entitled "About the Doc" - "Doc" or "Doc Don," referred to the appellant. That link took the website viewer to a page that contained a statement from the appellant that read in part: "I must begin by saying that I hate real violence" followed by an explanation about the difference between real violence and fantasy violence. All the women depicted in the materials were actors, including the appellant's wife, who also acted as a "guinea pig" for the special effects.

[7] The free website also contained links, meta-tags, and banners, the admissibility of which is at issue on this appeal. When potential viewers entered certain words into a search engine, they were led to the appellant's free website by the meta-tags embedded in that site. The appellant's meta-tags included the following keywords: snuff films, naked women, nude women, mature women, slut wives, bikini babes, porn, adult models, sexy, tits, big tits, fetish, fantasy, gunshot wounds, belly fetish, shooting fetish, role playing, horror films, dead women, necro fantasy, necro fetish, and bullets and babes.

[8] A banner on the left side of the free site allowed viewers to go to "link" pages that displayed links to other websites. The "Killer Links" page brought up banner ad links to other websites. The banner ads displayed images of sexual activity and led to websites apparently related to shock, violence, and horror. The "Hardcore Links" page brought up a series of links under the heading of "Dr. Don's XXX Hardcore Links" and contained advertisements that linked viewers to websites relating to hardcore sex.

[9] There is also an issue on this appeal about the degree of control the appellant exercised over the content of the websites. Before the trial, Mr. Luneau, the Internet host of the free website, gave a statement to the police suggesting that the appellant was a webmaster, proficient at maintaining the websites. At trial, Mr. Luneau denied that statement and instead, testified that he did not know the degree of control the appellant exercised over the content of the websites.

Criminal Code

[10] The appellant was charged under s. 163 of the *Criminal Code*, which reads:

> 163. (1) Everyone 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;
>
> …
>
> (5) For the purposes of this section, the motives of an accused are irrelevant.
>
> …
>
> (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.

The Expert Evidence

[11] The Crown called expert evidence about the harm caused by the impugned materials. Dr. Peter Collins, a psychiatrist, described various forms of sexual deviance, including sexual sadism, necrophilia, and piquerism. Piquerists are aroused by the portrayal of people being stabbed with sharp objects. Dr. Collins testified that individuals with such fetishes would be erotically aroused even by material devoid of sexual activity, as long as it portrayed the infliction of pain and suffering. He testified that exposure to the material in question could pose a risk of affecting attitudes so that such activities were seen as acceptable or fun.

[12] Dr. Neil Malamuth, a psychologist, testified about a study he had conducted. That study indicated that one third of men are sexually aroused by sexual violence and ten percent are aroused by depictions of non-sexual acts of violence committed by men on women.

[13] Dr. Malamuth described the material in this case as fusing sexuality and violence; portraying the misogynistic dominant male silencing women through violence; disengaging moral restraint by placing blame on the victim; and normalizing the assailant's behaviour by portraying the assailant in a positive manner. While the fact that men were aroused by such material did not mean they would commit acts of violence, Dr. Malamuth testified that exposure to these materials could lead to desensitization; greater acceptance of and tolerance for violence against women; decreased empathy; increased risk of sexual aggression; and greater acceptance of myths about violence against women, such as the belief that women actually enjoy being raped, controlled or

dominated in violent ways. Dr. Malamuth gave the opinion that such material posed a risk of negatively affecting behaviour and attitudes towards women.

[14] In support of their opinions, Dr. Malamuth and Dr. Collins pointed to certain features of the impugned materials including the use of “sexy” women; the positioning of the women in submissive positions; the posing of the bodies after the killings; the location of the points of penetration on the women’s bodies; the combination of nudity and dominance over the women’s lives and bodies; some of the surrounding dialogue; and the slow-motion panning of the camera over the women’s bodies.

[15] In response, the defence called evidence about materials with sexual content combined with extreme violence that were available in the community. The defence also called Dr. Barry Grant, an expert in film studies, who distinguished between sexploitation films that showed nudity, but not sexual acts, and pornographic films that showed sexual acts. He also talked about the merger of these two genres. In addition, Dr. Grant addressed the appellant’s skin-rippling technique saying that aficionados of horror and exploitation films would appreciate this new special effect. Finally, Dr. Grant opined that the special effect gave the works artistic merit.

[16] The defence also called an expert on literature who testified as to the artistic merit of the written stories.

Issues

[17] The appellant argues that the trial judge erred:

1. in her instructions to the jury regarding explicit sex;
2. in her instructions to the jury regarding artistic merit;
3. by admitting evidence of the meta-tags and links;
4. by admitting Mr. Luneau’s prior inconsistent statement; and
5. in sentencing the appellant by:
    (a) imposing a $100,000 fine;
    (b) requiring a permanent assignment of the website; and
    (c) prohibiting the appellant from having Internet access or living in a home with Internet access.

Analysis

1. The jury charge on explicit sex

[18] The appellant challenges the trial judge's jury charge on the meaning of explicit sex. The word "explicit" is not used in s. 163(8) to modify "sex." However, *R. v. Butler* (1992), 70 C.C.C. (3d) 129 (S.C.C.), the leading case on adult obscenity and one I will discuss in more detail later, held that for a publication to unduly exploit sex, the sex must be explicit. Accordingly, "explicit sex" is now an integral part of the s. 163(8) prohibition against the undue exploitation of sex. In the course of a careful and otherwise largely unchallenged charge, the trial judge said this about "explicit sex":

> Any publication, the dominant characteristic of which is the undue exploitation of sex and violence is deemed to be obscene under the Criminal Code. The motives of the accused are irrelevant. Our law defines explicit sexual activity as being acts falling at the extreme end of the spectrum of sexual activity, such as acts involving nudity or intimate sexual activity represented in a graphic and unambiguous fashion. Violence includes actual physical violence and threats of physical violence. Explicit sex, together with violence, will almost always constitute the undue exploitation of sex.

[19] The appellant argues that the term "explicit sexual activity", as interpreted by the Supreme Court of Canada, encompasses a broader range of conduct than "explicit sex" and that it should not have been incorporated into the jury charge. In the alternative, the appellant submits that the trial judge erred in three ways. First, she erred by equating nudity with explicit sex. Second, she erred by failing to instruct the jury that, to be obscene, the depictions had to fall at the extreme end of the spectrum, had to be "unambiguously sexual", and that "the sexual aspect of the contact [had to] be clear". Third, the trial judge erred by not instructing the jury to determine first whether the materials depicted explicit sex before determining whether any such depictions were unduly exploitative.

[20] The Crown argues that material need not depict sexual acts to amount to explicit sex and that the Supreme Court of Canada has accepted that graphic or sexualized nudity can amount to explicit sex. The Crown submits that the trial judge was correct to adopt a definition of "explicit sex" that was very close to that espoused by the Supreme Court of Canada in the context of child pornography. The Crown also submits that the trial judge did not equate nudity with explicit sexual activity and that it would have been clear to the jury that material would only be caught if it fell at the extreme end of the spectrum of sexual activity and was represented in a graphic and unambiguous fashion.

[21] For this part of the charge, the trial judge relied on the Supreme Court of Canada's decisions in *R. v. Butler* an adult heterosexual obscenity case, and *R. v. Sharpe* (2001), 150 C.C.C. (3d) 321, a child pornography case.

[22] *Butler* involved a constitutional challenge to the adult obscenity provision, while *Sharpe* involved a challenge to the child pornography provision of the *Criminal Code.* In both cases, the provisions were challenged on the basis that they violated the *Charter* right to freedom of expression. The *Code* provisions were upheld in both *Sharpe* and *Butler* as reasonable limits on freedom of expression. Those limits on freedom of expression were reasonable because they protected against harm. In *Butler* the harm presented a risk to women specifically, and, more generally, to society. In *Sharpe*, the harm presented a risk to children.

[23] In *Butler*, which did not define explicit sex, the court held that only certain types of adult pornography were obscene, including pornography depicting explicit sex and violence. In *Sharpe*, the court considered the interpretation of "explicit sexual activity" as found in the *Criminal Code*'s definition of child pornography and held that depictions would only be prohibited if they fell at the extreme end of the spectrum and depicted "acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion" (para. 49).

[24] In *Butler*, Sopinka J. clarified that "[i]n 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'" (para. 42). Sopinka J. considered the meaning of "undue" and concluded that depictions would fail the community standards test, and therefore be "undue", if the materials exploited sex "in a 'degrading or dehumanizing' manner" that "is perceived by public opinion to be harmful to society, particularly to women" (paras. 47 and 50). As Sopinka J. noted, "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" (para. 49). In other words, materials that exploit sex and raise a reasoned apprehension of harm to the group being portrayed, in this case women, will constitute the "undue" exploitation of sex. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 later confirmed, "*Butler* affirmed constitutional protection for sexually explicit expression and drew the boundary only where harm exceeded the community's level of tolerance" (para. 52).

[25] In discussing what depictions would be harmful, and thus constitute the undue exploitation of sex, Sopinka J. considered three different types of adult pornography: (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 (para. 57).

[26] After noting that s. 163(8) expressly mentions sex with violence, Sopinka J. continued:

> ...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 (para. 60).

[27] Thus, adult obscenity falls within the scope of the prohibition if the pornographic material is shown to be harmful either because it combines sex and violence or because it degrades and dehumanizes people, usually women.

[28] Nine years after *Butler*, the Supreme Court of Canada applied a similar harms-based rationale to the interpretation of the child pornography provision in *Sharpe*. The child pornography provision differs from s. 163(8) in that it does not look to whether the exploitation of sex in child pornography is "undue" but instead captures all child pornography that fits within the *Code*'s definition on the basis that all such child pornography poses a reasoned risk of harm to children.

[29] In *Sharpe*, McLachlin C.J.C. interpreted the *Code's* definition of child pornography, which reads:

> s. 163 .1(1) In this section, "child pornography" means
>
> (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
>
> (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
>
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or...

[30] In considering the parameters of subparagraph (i)'s reference to "explicit sexual activity", McLachlin C.J.C. considered dictionary definitions of the modifier "explicit".

She determined that "'explicit' in the context of sexual acts means 'describing or representing nudity or intimate sexual activity'. . . [or] . . . 'describing or representing sexual activity in a graphic fashion'" (para. 45). Based on these definitions, McLachlin C.J.C. held that "the law catches only depictions of sexual intercourse and other non-trivial sexual acts" (para. 45).

[31] She also noted that subparagraphs (i) and (ii) of s. 163.1 "cover two types of depiction: (i) the depiction of explicit sexual activity; and (ii) the static depiction of the sexual organs or anal regions of children." She said:

> Subparagraph (ii) clearly indicates that Parliament's concern was with visual representations near the extreme end of the spectrum. While it is possible in the abstract to argue that Parliament intended a much broader sweep for subpara. (i) than for (ii), it seems more likely that Parliament was seeking to catch in subpara. (i) the activity-related counterpart to subpara. (ii).
>
> Finally, Parliament's goal of preventing harm to children related to child pornography supports a restrained interpretation of "explicit sexual activity". The evidence suggests that harm to children produced by child pornography arises from depictions of explicit sexual acts with children at the extreme end of the spectrum. The literature on harm focuses mainly on depictions of sexual activity involving nudity and portrayal of the sexual organs and anal region. It is reasonable to conclude that this sort of material was uppermost in Parliament's mind when it adopted this law.
>
> I conclude that "explicit sexual activity" refers to acts which viewed objectively fall at the extreme end of the spectrum of sexual activity -- acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion, with persons under or depicted as under 18 years of age. The law does not catch possession of visual material depicting only casual sexual contact, like touching, kissing, or hugging, since these are not depictions of nudity or intimate sexual activity. Certainly, a photo of teenagers kissing at summer camp will not be caught. At its furthest reach, the section might catch a video of a caress of an adolescent girl's naked breast, but only if the activity is graphically depicted and unmistakably sexual (paras. 47-49).

[32] Thus, the *Code* has been interpreted to capture only depictions that fall at the far end of the spectrum because only those depictions are likely to cause harm. In this way, the *Code* impinges on freedom of expression only to the extent necessary to protect against harm.

[33] Giving a restrained interpretation to what is captured by both the child pornography and by the adult obscenity provisions in the *Criminal Code* is consistent with *Charter* principles and strikes an appropriate balance between freedom of expression and equality rights. Thus, it was appropriate for the trial judge in this case to charge the jury that the *Code* captures only extreme depictions. In this case, the trial judge took the language directly from McLachlin C.J.C.'s concluding paragraph on the issue in *Sharpe* where she said that the legislation captures material that falls "at the extreme end of the spectrum" and referred to material presented "in a graphic and unambiguous fashion". Of course, what is considered extreme will be different when considering child and adult depictions. Thus, subject to the question of the correct definition of "explicit sex", the charge conveyed the correct message to the jury. It was unnecessary to add the further qualifiers requested by the appellant.

[34] I turn now to the definition of explicit sex in the jury charge. Both *Butler* and *Sharpe* considered the meaning of "explicit": *Butler* because it held that only "explicit sex" could amount to the "undue exploitation of sex" and *Sharpe* because it considered the meaning of "explicit sexual activity" in the *Criminal Code* definition of child pornography.

[35] While in *Sharpe*, McLachlin C.J.C. would have been mindful of the discussion of explicit sex in *Butler*, her analysis is based on the specific wording of the child pornography definition, and the relationship between the two subparagraphs of that definition. McLachlin C.J.C. held the types of explicit sexual activities caught under subparagraph (i) to be informed by subparagraph (ii)'s definition of the static depiction of a child's sexual organs or anal region. The subparagraph (ii) definition clearly avoided capturing innocent depictions of, for example, naked babies in the bath, and restricted the scope of the provision to those depictions that were graphic and unambiguous. Thus, McLachlin C.J.C. reasoned, the subparagraph (i) definition was only intended to capture explicit sexual activity at the extreme end of the spectrum.

[36] Although, in *Sharpe*, the Supreme Court included depictions of nudity within the scope of the child pornography prohibition, in my view, it is not appropriate to incorporate nudity from the definition of explicit sexual activity in child pornography into the concept of explicit sex in adult obscenity. The prohibition on child pornography and the prohibition on adult obscenity serve different goals. In furtherance of the goal of protecting children, the *Code* criminalizes all child pornography because all child pornography harms children. In furtherance of the goal of protecting adults, usually

women, the *Code* criminalizes only adult pornography that involves the undue exploitation of sex because only the undue exploitation of sex promotes harm. The goals of these *Code* provisions are different.

[37] Thus, the *Sharpe* definition of explicit sex, which captures acts involving child nudity, cannot be taken as authority for the proposition that adult nudity, with nothing more, amounts to explicit sex for the purposes of determining whether material depicting adults is obscene. Something more than mere adult nudity is required to demonstrate a reasoned apprehension of harm.

[38] Having found that mere nudity is insufficient to amount to explicit sex within the context of adult obscenity, I turn to consider the Crown's argument that sexualized nudity is sufficient to constitute explicit sex and the appellant's argument that explicit sex requires the depiction of sexual acts.

[39] In support of its argument that sexualized nudity is enough to amount to explicit sex, the Crown relies on *R. v. Jorgensen* (1995), 102 C.C.C. (3d) 97 (S.C.C.). A video considered in *Jorgensen* portrayed a female prison warden requiring one female inmate to spank another thereby visibly reddening her exposed buttocks. The trial judge held that the video equated sex with physical punishment in the context of subordination. Sopinka J. expressed support for the trial judge's evaluation of the impugned materials.

[40] The Crown argues that *Jorgensen* stands for the principle that sexualized nudity is included within the definition of explicit sex. *Jorgensen*, however, focuses on the combination of violence and sex. Although *Jorgensen* does not refer to sexualized nudity, it does support the principle that the nature and context of the violence informs whether the depiction is sexual.

[41] Moreover, sexualized nudity is a nebulous term and therefore unhelpful. Incorporating this vague concept into the obscenity analysis would potentially capture an overly-broad range of material. Sexualized nudity, without more, cannot amount to the explicit sex for the purposes of the *Criminal Code*.

[42] In interpreting the parameters of explicit sex in the adult obscenity context, the Crown relies on traditional dictionary definitions of sex as either of two main divisions (male and female) into which humans and most other living things are divided. Other definitions refer to sexual intercourse or genital union. *R. v. Coles*, [1965] 1 O.R. 557 (C.A.) at 565 talks about the division between male and female in relation to reproduction, "and the phenomena inherent in each consequent upon that division." None of these definitions are helpful. *R. v. Adams*, [1966] 4 C.C.C. 42 (N.S. Co. Ct.) at 60 is somewhat more helpful because it refers to "the sexual appetites and the activities connected with them, especially, but not exclusively, sexual intercourse."

[43] It is interesting to note that the *Code Criminel* uses the language “choses sexuelles” in s. 163(8) of the *Code Criminel,* which provides as follows:

> Pour l’application de la présente loi, est réputée obscène toute publication dont une caractéristique dominante est l’exploitation indue des choses sexuelles, ou de choses sexuelles et de l’un ou plusieurs des sujets suivants, savoir : le crime, l’horreur, la cruauté et la violence.

[44] The meaning of “sexual” was considered in *R. v. Chase*, [1987] 2 S.C.R. 293 at para. 11:

> The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: “Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer”. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant [citations omitted].

[45] I conclude that to determine whether a sexual offence has occurred, the trier of fact must decide whether, in all of the circumstances, the offence was of a sexual nature.

[46] Similarly, in determining whether material depicts explicit sex, the trier of fact must consider the circumstances and context of the material. Even where no sexual act is depicted, material may still depict explicit sex. The trier of fact will determine whether a reasonable person who viewed the material would determine, in all the circumstances, that the material was explicitly sexual in nature. The part of the body depicted; the nature of the depiction; the context of the depiction; the accompanying dialogue, words, or gestures; and all other surrounding circumstances will be relevant to this determination.

[47] In this case the impugned material depicts women being assaulted with knives, arrows and other weapons. Violence alone is not obscene. That some people derive sexual gratification from the depiction of other people’s pain does not, of itself, make a depiction obscene. It is the undue exploitation of sex, or of sex and violence, that makes material obscene. In this case, the Crown argues that the depictions fall within the first category outlined in *Butler*: they combine explicit sex with violence. The Crown submits the materials are explicitly sexual for a number of reasons: the use of nude or near-nude, young, conventionally-attractive women posed in sexually suggestive

manners; the fact that the women are depicted as stabbed, shot, or pierced in particular parts of their anatomy such as their breasts, lower abdomen, and rectum; and the use of dominance, dialogue and camera action to promote a message of sexual violence. All these circumstances, including the nature of the violence depicted, will inform the question of whether the publication portrays explicit sex.

[48] Whether the impugned materials contain explicit sex and whether any such depiction is "undue" is a matter for the jury. In this case, the instructions given to the jury defined explicit sexual activity as including acts involving nudity or intimate sexual activity. This instruction created a real danger that the jury would believe that nudity alone would suffice to ground an obscenity conviction with respect to the audiovisual material. This instruction was in error. Accordingly, in my view, there must be a new trial.

[49] In most cases, it will be unnecessary to define "explicit sex" because whether a depiction portrays "explicit sex" will be apparent from a consideration of the contextual factors. Thus, on any new trial, in considering whether a dominant characteristic of the material is the undue exploitation of sex and violence, the jury should be instructed to first determine whether the material portrays explicit sex, or explicit sex and violence, a determination to be made after considering the surrounding circumstances, including the nature of the violence inflicted. The jury may be instructed that explicit sex captures portrayals at the far end of the spectrum, displayed in a graphic and unambiguous way. If they determine that the material depicts explicit sex and violence, they would then be asked to determine whether that portrayal was unduly exploitative on the application of all the factors involved in the community standards test, bearing in mind the direction in *Butler* that the portrayal of explicit sex with violence will almost always constitute the undue exploitation of sex.

[50] There is, however, no need for a retrial with respect to the written stories available on the website. "Betrayal" included the graphic depiction of the vaginal and oral rape of a police officer by her partner; "knife fucking" the victim's breasts; and anal intercourse with the dead murder victim. "The Deadly Fates" depicted violent sexual assaults committed by a white man on two young aboriginal girls, including cutting off their genitalia and feeding it to wolves. "Importance of Good Manners" similarly depicted explicit sex and violence. The expert evidence establishing their potential for harm was not successfully challenged and the Crown demonstrated that the stories did not have artistic merit. Clearly, under the *Butler* test, these stories are obscene. Thus, the conviction on count 7 of the indictment should stand.

2. The jury charge on artistic merit

[51] Since I would set aside the convictions on the audiovisual materials and order a new trial, it is unnecessary to consider at length the other challenges to the conviction. I do so briefly, however, to offer guidance for the trial judge at any retrial.

[52] The appellant challenges the charge to the jury on the artistic merit of the audiovisual materials in two respects. First, he argues that the trial judge was obliged to highlight for the jury the importance of freedom of expression. Second, he argues that the trial judge erred in her characterization of the goal of the work as a whole.

[53] On the first point, the Supreme Court of Canada held in *Butler* that in determining whether explicit sex was unduly exploitative, the court would determine whether the material was necessary for the required treatment of a theme. Thus, the artistic merit defence ensures minimal intrusion on an author's freedom of expression.

[54] With respect to freedom of expression *Butler* said:

> [a]rtistic 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 (para. 62).

[55] In this case, the trial judge was of the view that a charge on freedom of expression would divert the jury from the core issues under consideration. Instead, she charged as follows:

> If you find the materials are close to the line, then tolerance is to be preferred. Any person charged with a criminal offence is entitled to the benefit of a reasonable doubt.

[56] I see no reversible error in the trial judge's direction. However, it would have been open to the trial judge to say that, if the jury found the materials to be close to the line, in recognition of the importance of artistic freedom of expression, tolerance is to be preferred. Nonetheless, in this case, the jury would have fully appreciated the task with which they were charged. Accordingly, I would not have ordered a new trial on this point.

[57] On the second point, the appellant testified that the artistic merit of the audiovisual materials lay in the skin rippling special effect. The Crown refuted this claim by relying on the objective of the impugned material as set out by the appellant:

> I've always enjoyed watching women acting in death roles especially death roles where they are shot or stabbed or impaled in some way. It intrigues me to see a beautiful

> woman do her best to portray being shot or stabbed before the whole world on screen …

[58] In accordance with the Crown's pre-charge conference request, the trial judge charged the jury to "consider the words of Donald Smith himself, on the website; that his purpose is to show beautiful women getting killed". Although, the appellant apparently made no objection to that characterization either at the pre-charge conference or after the charge, there is a distinction between wanting to show women getting killed (reality) and enjoying watching women portraying death roles (fantasy).

[59] However, despite the mischaracterization of the work's overall objective, the jury heard the correct phraseology from the website on three separation occasions during the trial, including in the Crown's submissions. The jury also had the extract available as one of the exhibits in the jury room. Since the jury would not have been misled by the mischaracterization, I would not have ordered a new trial on this ground. Nonetheless, the difference in characterization should be kept in mind at any retrial.

3. Did the trial judge err in admitting evidence of the meta-tags and links?

[60] In the *voir dire*, the defence argued that the meta-tags, banners, and links were irrelevant and that their prejudicial effect outweighed their probative value. The Crown argued that they were relevant to the context of the site and intensified the message of violence against and dehumanization of women.

[61] On the basis of *Butler*, which requires that the impugned work be considered as a whole, the trial judge ruled the evidence admissible. She held that this evidence formed part of the site, drew viewers to the site, and informed the context of the impugned material on the site. Its probative value accordingly outweighed its prejudicial effect.

[62] The trial judge did not err in admitting this evidence. The meta-tags, banners, and links on an Internet website are analogous to the dustcover and preface to a book: they inform the viewer about the content of the publication and provide context for the work.

[63] The appellant also argued that the trial judge did not adequately direct the jury as to the use of this evidence. The trial judge did not refer to the evidence in her charge to the jury. In my view, the absence of reference to this evidence would have enured to the appellant's benefit. The appellant also argues that the jury could have used this evidence improperly by relying on it as evidence of the appellant's motive. The trial judge, however, clearly told the jury that the appellant's motive was irrelevant.

[64] For the first time on this appeal, the appellant raises the issue that this evidence was relevant only to the count involving the free site as the information did not appear on the pay site or in the material on his home computer.

[65] The Crown took the position that this objection was not raised at trial. While the lack of an objection at trial is not determinative, it is indicative, at least, that defence counsel did not consider the issue to be significant. While I agree that this evidence was not relevant to the other counts on the indictment and it would have been preferable if the trial judge had separated the evidence on the different counts, it was nevertheless clear to the jury that this information related only to the free website. On any retrial, however, the evidence should be separated with respect to each count.

4. Mr. Luneau's Prior Inconsistent Statement

[66] As set out above, the Internet host, Mr. Luneau, gave allegedly different statements regarding the extent of the appellant's control over the websites' content. In a police statement given during the investigation, Mr. Luneau characterized the appellant as a webmaster. At trial, he denied that statement and disclaimed any knowledge of the level of control the appellant exercised over the website. In her charge to the jury, the trial judge did not provide the limiting instruction that prior inconsistent statements could only be used to assess the witness's credibility and not for the truth of their contents.

[67] Apparently, this issue was not raised in the pre-charge conference and there were no objections to the jury charge. The failure to raise this issue signals that the defence did not consider it significant. Further, there is a factual dispute as to the extent to which Mr. Luneau actually disclaimed his earlier statement. The trial judge was in the best position to determine the extent of any discrepancy. On any new trial, the appellant may address this concern to the trial judge.

5. Sentence

[68] I note for the purposes of the retrial that the Crown concedes that the court had no jurisdiction, as a term of probation, to order the appellant to irrevocably assign his interest in the websites to the Crown. At any future sentencing, the judge would also wish to consider the enforceability of any order denying the appellant access to the Internet and, in addition, whether any such prohibition could be structured so as to impinge as minimally as possible on those members of the appellant's family who may require Internet access for day-to-day purposes.

[69] As the only outstanding conviction lies on count 7, relating to the three stories, I would adjust the sentence. The appellant had no prior criminal record. In all the circumstances surrounding count 7, I would set a fine in the amount of $2,000.

Disposition

[70] I would allow the appeal, set aside the convictions on counts 3, 4, 5 and 6 and order a new trial on those counts. I would dismiss the appeal with respect to count 7 and vary the sentence to a $2,000 fine.

Released: July 7, 2005

Signed: "S.E. Lang J.A."
"I agree M. Rosenberg J.A."
"I agree J. M. Simmons J.A."