EQUALITY ISSUES AND PORNOGRAPHY
IN CANADA: R. v. BUTLER

The issue of pornography has generated a large number of sharply divergent views. Serious divisions have emerged within feminism over the wisdom of censoring material degrading to women and the extent to which pornography affects the social position of women. These disagreements may reflect deeper questions: about the reasons for gender discrimination and about the strategy of using law to improve the political, economic and social position of women.

There is no doubt that the recent Canadian decision of, R v. Butler,1 upholding the obscenity provisions of the criminal law, has put a new gloss on the pornography debate. The traditional liberal approach to pornography has characterised it as one of freedom.2 It considers harm in terms of causation, thus freedom can only be justifiably restricted where there is clear empirical evidence of harm. The Supreme Court's analysis of the issue has modified the liberal approach and given new life to the concept of harm by focussing on the risk of anti-social behaviour and, in particular, the threat to the integrity and safety of women. This judgement, in broadening the concept of harm in pornography cases, will go some way to satisfy many, though not all, feminist critics of the liberal legal system; but in leaving the concept of harm quite open, it may have unexpected results.

The challenge to the obscenity laws in Canada arose from the seizure of the entire inventory of a pornography store in Winnipeg. The appellant was charged with some 250 violations of the obscenity provisions of the criminal code. Most of the seized material was visual in which women were depicted as being raped or abused for sex by men; as children or as subordinates; as bound and hand-cuffed. Ultimately, the Supreme Court of Canada was asked to address the constitutional question of whether section 163(8) of the Criminal Code contravenes the Canadian Charter guarantee to freedom of expression.3 Mr. Justice Sopinka, writing for the majority, considered that

3 Section 2(b) of the Canadian Charter of Rights and Freedoms.
even though the criminal code violated section 2(b) of the Charter, it could still be saved as a reasonable limit on such freedoms in a free and democratic society.\textsuperscript{4}

The Court in \textit{Butler} considered the definitional portion of the criminal obscenity provisions of the Canadian Criminal Code and clarified the various doctrinal tests which determine whether material is obscene. Section 163(8) of the Criminal 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.” This formulation replaced the common law test for obscenity as articulated in \textit{R v. Hicklin}, namely the tendency of the materials to deprave and corrupt. The statutory inquiry shifted the focus from the “corruption of morals” to whether the impugned material constituted an “undue exploitation of sex.” According to Sopinka J., the jurisprudence applies three tests to determine whether material is “undue”: the “community standard of tolerance” test; the “degradation or dehumanization” test; and the “internal necessities” or “artistic defence” test. The most important of these is the community standard of tolerance test which “is concerned not with what Canadians would not tolerate being exposed to themselves, but what they would not tolerate \textit{other} Canadians being exposed to.”\textsuperscript{5} It represents an evolving test indicating the levels of tolerance of the community as a whole, rather than taste. The degradation or dehumanization test has been developed most recently and acknowledges feminist arguments that such “materials place women (and sometimes men) in postitions of subordination, servile submission or humiliation.”\textsuperscript{6} Such material is obscene not because it offends against morals but rather because it is contrary to the “equality and dignity of all human beings” and is perceived as a social harm, in particular, to women.\textsuperscript{7}

Sopinka J. acknowledged that no concise standard had emerged to differentiate among these tests nor were there any guidelines to

\textsuperscript{4} Section 1 of the \textit{Canadian Charter of Rights and Freedoms}.
\textsuperscript{5} Butler, \textit{supra} n.1, at 19.
\textsuperscript{6} \textit{Ibid.}, at 20.
\textsuperscript{7} Sopinka J. acknowledged that there was no exact proof of harm but relied on a substantial body of material which suggests that such representations harm women and, as a consequence, society as a whole. See \textit{supra} n.1, at 21.