

discriminate against more than one of the categories encompassed in section 19 (1), racism and bigotry towards the handicapped being 2 examples.

THE BILL OF RIGHTS

Throughout the hearing, a great deal of discussion took place on the impact of the Bill of Rights. Not all counsel were agreed on all points. The Crown submitted that generally, the Bill of Rights affects the Tribunal's decisions in 2 ways:

1. It imposes certain principles of interpretation upon the Indecent Publications Act, and
2. It "provides wider parameters for gauging community standards and assessing the public good." (Closing Submissions for the Crown, page 53).

The second submission is based upon the reference in section 5 of the Bill of Rights to the needs of a free and democratic society. In general, the principles of interpretation are that the freedom of expression is to be construed broadly. Any limitation of it made by the Tribunal applying the definition of indecency in section 2 of the Act, the criteria in section 11 and any other Tribunal-made guideline such as the tripartite test, must be a narrow one which meets the 3 conditions imposed by section 5. The conditions are that the limitation must be reasonable, prescribed by law, and demonstrably justified in a free and democratic society.

The first matter for our determination is whether the Bill of Rights applies to decisions of the Indecent Publications Tribunal. The Bill of Rights applies to acts done by "the legislative, executive or judicial branches of the government of New Zealand" (section 3 (a)) and to acts done by "any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law" (section 3 (b)). Decisions of this tribunal to classify and censor can easily be called "acts done" by a body in the performance of a public function. The tribunal exercises powers and has duties imposed "pursuant to law" by the statute which creates it. There is consequently little doubt that the Bill of Rights applies to decisions of the Indecent Publications Tribunal. Moreover there is little doubt that the Bill of Rights applies to our decision as to the proposed classification of these magazines, even though they were seized before the Bill of Rights came into force. This is because the Tribunal determines the indecency or otherwise of material at the date of hearing, rather than at the date of seizure (*Robson v. Hicks Smith and Vary Ltd.* [1965] NZLR 111, 1125). and section 3 of the Bill of Rights applies to "acts done" by the Tribunal, one of which is our decision on the classification of these magazines, obviously taken after the coming into force of the Bill of Rights.

Section 6 of the Bill of Rights provides that:

"Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

The implication of this is that if there are provisions of the Indecent Publications Act which are capable of more than one meaning, the Tribunal must give those provisions a meaning which is consistent with the freedom of expression. The Tribunal must therefore construe the freedom of expression in section 14 along with section 5 which permits limitations of the freedom. This requires first of all an assessment of whether the freedom of expression would be violated by our decision to classify these issues of *Penthouse* R18. If, and only if, the freedom of expression has been violated, the next step will be to examine whether the violation is saved by section 5, which states that:

"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The second stage of the assessment requires a threefold examination:

- Is the freedom of expression subject to a "reasonable limitation?"
- Is the limitation "prescribed by law?"
- Can the limitation be "demonstrably justified in a free and democratic society?"

Does the proposed decision to classify these issues of *Penthouse* R18 violate the freedom of expression? Section 14 defines the freedom of expression in the following terms:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

This follows very closely the wording of article 19 (2) of the International Covenant on Civil and Political Rights, ("the covenant") which provides that:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The international covenant can of course be used to interpret the Bill of Rights because the Bill of Rights is said in its preamble to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". Section 2 (b) of the Canadian Charter of Rights and Freedoms ("the Canadian charter") states it more simply:

"Everyone has the following fundamental freedoms: ...

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;"

The freedom of expression as stated in the Bill of Rights and the covenant includes the right to receive information in any form. The subject matter of the Indecent Publications Act is "information", "opinion" and "expression" all of which are covered by the freedom of expression in section 14. The Ontario High Court said in *re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983) 41 OR (2d) 583 at 590 that "[i]t is clear to us that all forms of expression, whether they be oral, written, pictorial, sculpture, music, dance or film, are equally protected by the charter." Books, magazines, and sound recordings as defined in the Indecent Publications Act seem to be protected by section 14 of the Bill of Rights.

This does not mean that sexually explicit material cannot bear a classification of conditional, or even unconditional, indecency. The Crown referred us, *inter alia*, to the case of *R v Butler* (1990) 50 CCC (3d) 97 (Manitoba Court of Queen's Bench) to provide us with a useful summary of Canadian case law on whether the freedom of expression covers what is referred to in Canada as "obscene publication". Until 1989, there were some *obiter dicta* in the Ontario Court of Appeal where it was tentatively concluded that the freedom of expression did not protect sexually explicit material (page 119 of *Butler*). In 1989, the Supreme Court of Canada in a commercial expression (rather than obscene expression) case, set out guidelines as to the correct interpretation of the scope of the freedom of expression: *Irwin Toy Ltd v. Attorney-General for Quebec* (1989) 58 D1R (4th) 577; [1989] 1 SCR 927. The *Butler* Court adopted this test and held it was applicable to obscene expression as well. The Supreme Court of Canada stated (at 613-4 DLR) that:

"Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct."

Applying this test in *Butler*, the Manitoba Court of Queen's Bench decided that sexually explicit magazines convey a