

they do not qualify as law, they cannot be employed so as to justify any limitation on expression, pursuant to section 1 [the equivalent of our section 2] of the charter (at 592).

Similarly, Mr Akel submitted that the tripartite test was simply a "guideline" and therefore not "prescribed by law". Ms Goddard on the other hand argued that the words "prescribed by law" were interpreted in the *Sunday Times Case* 58 ILR 490 at 523-4 by the European Court of Human Rights to require simply that "the law must be adequately accessible" and that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct". The Crown concluded that since the criteria contained in the tripartite test "are neither vague nor [im]precise, they possess the hallmarks of uniformity and objectivity and, in that sense, accessibility and foreseeability, that the tripartite test was consequently "prescribed by law". The Tribunal sees merit in both arguments. Given that the *Sunday Times Case* concerned court-made law on contempt of court, rather than Tribunal-made guidelines on indecency, we are inclined to the view that the tripartite test may well not be "prescribed by law". On the other hand, it could be argued that the tripartite test is merely an interpretation of, and therefore based on, statutory criteria, and is consequently a test "prescribed by law". This is supported by dicta in the *Gordon & Gotch* case to the effect that the Tribunal has the legal power to make and apply such a test as long as the original statutory criteria are not lost sight of. In any event, it is not the tripartite test which must be demonstrably justified and prescribed by law in a free and democratic society; it is our classification decision which must meet the section 5 conditions. Any classification which invokes the tripartite test alone may not be a reasonable limitation "prescribed by law". It would be equivalent to the Ontario Censor Board's *Amerika* decision. It could also be challenged for ignoring the statutory criteria prescribed in section 11 of the Indecent Publications Act 1963. If however the reasoning upon which a classification is based invoked the section 11 statutory criteria, with or without invoking the tripartite test or similar guideline, there is no doubt that the decision could be characterised as a reasonable limitation prescribed by law, simply because it is based, in whole or in part, on reasonably precise statutory criteria. Further, the fact that the Indecent Publications Act contains express criteria which we must take into account when reaching a classification decision means that the statute itself is, unlike the Ontario Theatres Act, relatively immune from a finding that it is inconsistent with the Bill of Rights. Our classification is therefore "prescribed by law" because it is based on statutory criteria and the new guidelines, both of which are accessible and precise.

We conclude therefore that our classification of these issues of *Penthouse* may well violate the freedom of expression, but that the classification is a reasonable limitation prescribed by law and demonstrably justified in a free and democratic society.

GUIDELINES

As has already been indicated, the Tribunal is in agreement with counsel for *Penthouse* and *Gordon & Gotch* that these issues of *Penthouse* are not indecent *per se*. Such a finding could be based on a consideration of the definition of "indecency in section 2, the criteria contained in section 11 (1) and an application of the current tripartite test as the cumulative test it was originally intended to be. These issues do not contain in any one depiction a combination of multiple models, sexual violence and a "high degree of intimacy" to quote from decision 1053. Indeed, as stated above, it was Crown counsel's submission that the tripartite test is consistent with the Bill of Rights, and in view of its usefulness as a guide for Customs in particular, that there may be no need to depart from it. Whether or not the tripartite test continues to reflect society's standards is of course for the Tribunal to decide in the light of the evidence adduced at the hearing and authoritative publications of which the Tribunal may take official notice. It is

therefore necessary to consider first of all whether the tripartite test is consistent with current community standards.

Current community standards must be assessed in a manner consistent with the Tribunal's functions under the Act. The Tribunal is charged with the task of preventing injury to the public good. Not only therefore must the Tribunal assess what current community standards are with regard to the material in this hearing, but it must also ascertain what sorts of depictions will injure the public good and whether these depictions occur in these magazines. Evidence of community standards or tolerances, in the Crown's submission, may be ascertained from consideration of views which are authoritatively published and which are representative of groups. These publications include the Report of the Ministerial Committee of Inquiry into Pornography (the "Morris Report", which includes views expressed by the Maori Women's Welfare League), the Justice Department paper entitled "Censorship and Pornography: Proposals for Legislation" (October 1990), and the provisions concerning public morals in the Crimes Act. Evidence of differing probative value which is relevant to the sorts of depictions likely to injure the public good is found largely in the expert testimony of Drs Donnerstein and Linz, Dr Court, Dr Mullen and Inspector Kerr. This evidence has been summarised above under the heading "Viva Voce Evidence". The Tribunal has concluded that the gist of this evidence, very simply put, is that purely sexual depictions are not harmful *per se*; it is only when coercion or violence is combined with a sexual depiction that the depiction, according to some studies, could be harmful. This evidence alone of course is not enough; the Tribunal must go on to consider what sorts of depictions go beyond the borderline defined by community standards.

With respect to evidence of what sort of material offends against community standards, the Morris Report contains the most authoritative analysis of community standards to date in this country. In addition to a survey the committee itself commissioned, no fewer than 4 other studies were considered (section 3.2.1 of the report). Not surprisingly, there was little agreement on what sort of material should be regulated or "banned". Many of the surveys seemed to founder on how the questions were framed, and on the word "pornography", which meant different things to different people. The survey commissioned by the committee concluded that both "men and women stressed the need for some censorship of violence, bestiality and exploitive sex." (page 194 of the report). It was the Crown's submission (in these hearings) that the context "considered most appropriate for censorship is violence, sex and sexual violence" (page 56 of the closing submissions for the Crown). Generally, beyond agreement on the regulation of depictions of sexual violence, these surveys support the proposition that women, older people and Maori have a broader definition of pornography which tends to focus on the manner in which sexual activity is depicted (the most commonly repeated words being "exploitive", "demeaning" and "dehumanising"), and support greater regulation of it, while men have a narrower definition of pornography which tends to focus on the content of sexual activity rather than the manner in which it is depicted. Men generally do not support as much regulation of pornography as women, older people and Maori. The Morris Report was also careful to consider the views of sexual minorities who expressed concern that a rational pluralistic society must overcome misogyny and homophobia (at page 25). All of these groups of people constitute parts of "the community", of whose standards we are meant to be cognisant.

We also have had regard to the poll introduced by Miss Bartlett for the Society for the Promotion of Community Standards. While noting the results contained in the poll, the Tribunal is inclined to treat it as relatively less probative than the other evidence because its questions were confined to depictions of sexual activity in films and video recordings, and