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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
CRIMINAL DIVISION

REGINA

v.

RANDY PRICE

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE R. R. LOW**

Counsel for the Crown:	M. Mahoney
Counsel for the Defendant:	K. Snowsell
Place of Hearing:	Vancouver, B.C.
Dates of Hearing:	Feb 16-March 19, 2004
Date of Judgment:	April 23, 2004

[1] Randy Price (Mr. Price) is charged with making, distributing and circulating nine obscene videos or alternatively possessing the same nine obscene videos plus two others, (The Eleven Videos) for the purpose of publication, distribution and circulation. Twenty such offences involving the Eleven Videos are alleged to have been committed during four overlapping periods of time between August 7 and November 7, 2002.

[2] Of the twenty counts against Mr. Price, Counts 1, 2, 3, 9, 11, 13, 15, 17 and 19 are alternative, respectively, to counts 4, 5, 6, 10, 12, 14, 16, 18 and 20.

[3] The Crown has proceeded by indictment. Mr. Price has elected trial in Provincial Court. The maximum sentence for each offence according to S. 169 of the **Criminal Code** is two years prison.

[4] The Eleven Videos portray bondage and discipline, dominance and submission, sadism and masochistic activities (BDSM).

[5] The evidence for the Crown consists of the contents of the Eleven Videos and various admissions.

[6] Although Mr. Price did not testify, he called a number of witnesses including two medical Doctors who were qualified to give opinions regarding, *inter alia*, human sexual practices including BDSM. The Defence also played a number of videos, compact disks (CDs), material from various web sites on the Internet, and entered various magazines and books.

[7] There are a number of technical issues raised by the Defence regarding the case called by the Crown but the overriding issue is whether the contents of the Eleven Videos are obscene as defined in S. 163(8) of the Criminal Code.

[8] There are no issues concerning the credibility of the various witnesses called, although there are questions to be resolved with regards to the weight I can give to some of their evidence.

[9] The Crown objected on the grounds of relevance to most of the evidence called by the Defence. I allowed the Defence evidence on the basis that this issue could best be determined by the weight I might attribute to the evidence.

FACTS

[10] I have found the evidence called by the parties, proves beyond a reasonable doubt the following facts.

[11] Since 1995 world wide communication has been fundamentally altered by the development of people's ability to communicate with each other through their personal computers. There is now an international network of interconnected computers called the Internet. The Internet enables people to communicate instantaneously with any number of people at any time, any where in the world using a variety of communication and information retrieval systems.

[12] All these systems provide a medium, by which people can provide or access material via text, sound, pictures and moving video images. The World Wide Web is one well known system. Material is compiled on the World Wide Web at specific locations called Websites.

[13] The only requirements to access material at Websites are:

- a) Access to a personal computer which has an operating system featuring a Web browser and an email program. It is rare for a personal computer not to have these systems;
- b) Access to an Internet Service Provider (ISP) such as Telus. These ISPs are commonly available in Canada upon payment of a fee. People access ISPs privately or through means provided by others such as employers, universities, libraries or internet cafes.
- c) Some technical knowledge in the operation of a personal computer;
- d) In some cases the ability to pay a fee to enter a Website. The fee can most often be paid by credit card or in some cases by posted personal cheque or by telephone.

[14] Unlike television or radio, access to the Internet requires a person to take a number of affirmative steps and to have a limited degree of knowledge and skill in the operation of a computer.

[15] Seventy-three percent of adult Canadians have access to the Internet. I take judicial notice of the fact that Canadians under the age of 19 also have access to the Internet but I have no evidence before me as to how widespread this access is and whether this access is legally restricted in any Canadian jurisdiction.

[16] I also take judicial notice that parents have the option to control their children's access to the Internet either by way of direction or mechanically.

[17] The Eleven Videos were made in the City of Vancouver, B.C. under the auspices of Sweet Productions Inc. (SPI). Mr. Price is the operating mind of SPI.

[18] In addition to making the Eleven Videos, SPI made them available to paying subscribers through various web sites it controls on the Internet, or similar web sites controlled by others but who have a contract with SPI to use their videos.

[19] SPI made the Eleven Videos solely for the purpose of making them available to any member of the public, through the Internet, upon payment of a fee. The ultimate purpose of SPI in collecting this fee is to make a profit.

[20] Any person with a valid credit card may obtain unlimited access to any material on any website controlled by SPI.

[21] There are at least seventy websites on the Internet which provide access to portrayals of BDSM activities, information about BDSM generally, information pertaining to BDSM activities such as parties and conferences plus where to obtain equipment and supplies for carrying out BDSM activities.

[22] These websites make available a vast amount of material which is at least similar and in many cases identical to the material portrayed in the Eleven Videos. Some of the material at these websites portrays even more extreme examples of BDSM activities than shown in the Eleven Videos.

[23] In addition, there is a vast amount of written material such as magazines, periodicals, newspapers and books plus video tapes or films which contain material which is at least similar and in many cases identical to the material portrayed in the Eleven Videos. The Canadian public has generous access to these materials through private vendors or lenders, public libraries, or cinemas.

[24] Various exhibits were entered by the Defence listing a large variety of books, videos and television programs which are commonly available in the City of Vancouver and throughout Canada. Excerpts from these materials were provided to the court. The material portrayed scenes similar in nature to those portrayed in the Eleven Videos. However, most of this material was not as graphic as that contained in the Eleven Videos.

[25] The Defence also filed a copy of the book **American Psycho** and played extracts from the movie adaptation of this book. In addition, the Defence played extracts from movies such as **Fetishes and Mistresses, Sick, I Spit On Your Grave, Henry Portrait of a Serial Killer, Rape Me, Irreversible** and a television show **Kink**. All of this material is readily available to Canadians either in book stores, libraries, movie theatres, video rental shops or on cable television.

[26] **Fetishes and Mistresses, Sick** and **Kink** can be described as documentary films discussing the BDSM culture. There is a fair amount of nudity and portrayals of scenes that are similar to the Eleven Videos. With the exception of **Sick** none of the portrayals of BDSM scenes or the degree of nudity in the documentary videos are as extreme or graphic as in the Eleven Videos. There are some very extreme scenes and graphic nudity in **Sick**. In particular the principal character at one point is graphically filmed using a hammer to drive a nail through his penis, thus affixing it to a board.

[27] **I Spit On Your Grave, Henry Portrait Of A Serial Killer, Rape Me, American Psycho and Irreversible** are all fictional films depicting extreme sexual violence to women by men. There are repeated scenes of men raping women and treating them in a savage, barbaric manner. While the violence is extremely graphic and the sexual scenes explicit, the portrayal of genitalia and other private areas of the actor's bodies is less graphic than that found in the Eleven Videos.

[28] Most larger urban centres in Canada have facilities where BDSM activities are regularly carried out. Adult members of the public may attend these facilities upon payment of a modest fee. Those who attend may engage in the BDSM activities or watch others performing these activities.

[29] Mr. MacDonald, a retired thirty year veteran of the Vancouver Police Department, now a licensed private investigator, starting October, 2003, attended a number of BDSM events in Vancouver and Victoria, B.C. on the instructions of Mr. Price's counsel. He described the behaviour of those present at these events, as exemplary. The events attended by Mr. MacDonald were patrolled by Vancouver Police officers who did not interfere with any of the BDSM activities taking place. The BDSM activities Mr. MacDonald observed at these events were similar to some of those portrayed in the Eleven Videos. While nudity of both males and females of varying degrees, including full nudity, was common at these events, the evidence is not clear whether the genitalia and other private areas of the performer's bodies were displayed as graphically as in the Eleven Videos.

[30] Ms. Sylvia Schneider, a thirty-year old hobby farmer from the lower mainland of B.C., testified that she took part in and enjoyed all manifestations of BDSM activities including those portrayed in the Eleven Videos. She had watched the Eleven Videos and enjoyed watching them. Ms. Schneider impressed me as an intelligent, well spoken and thoughtful person. She has a teenage daughter who is generally aware of Ms. Schneider's involvement in the BDSM community. Ms. Schneider did not think it would be appropriate for her daughter to watch the Eleven Videos due to her daughter's age.

[31] Dr. Moser, who filed an extensive six page *curriculum vitae*, was qualified to give expert evidence regarding the practice of BDSM. I have accepted all of the following from his evidence.

[32] According to Doctor Moser pain and pleasure are closely associated factors in the human sexual experience. Pain giving rise to sexual pleasure is a normal sexual experience and is the basis for practising BDSM.

[33] Doctor Moser testified there are many different levels of BDSM. For example, a person biting another person on the neck during love play is an example of a low level of sadomasochism. On the other hand, the scenes portrayed in the Eleven Videos are portrayals of a high level of sadomasochism. As another example, a person may gently restrain their partner's wrists with a silk handkerchief while making love to them which is an example of a low level of bondage. Again, on the other hand, the scenes portrayed in the Eleven Videos are portrayals of a high level of bondage.

[34] Dr. Moser testified that providing all parties involved, consent, all of this is normal and appropriate sexual behaviour. Consent is the overriding ingredient of normal and appropriate sexual behaviour. For instance, the inability of a child to consent is what makes sexual relations with children abnormal and inappropriate. Although the sections were not specifically put to Dr. Moser, I am satisfied that the form of consent envisioned by him, met the definitions of consent set out in sections 265 and 273.1 of the **Criminal Code**.

[35] Doctor Moser had watched all Eleven Videos. He was of the opinion the procedures portrayed in the Eleven Videos were part of normal and appropriate human sexual behaviour.

[36] Dr. Moser testified that his best estimate was that about 10 per cent of the North American adult population "engages in or is aroused by BDSM". (Transcript March 3, 2004, p. 2, l. 28) I agree with the Crown that little weight can be given to this estimate alone. However, I am satisfied from this estimate

coupled with the other evidence I heard about BDSM events taking place throughout Canada that BDSM is not an obscure practice.

[37] In particular, Mr. MacDonald, as a result of his investigation had concluded that there were a significant number of people from a wide cross section of society involved in BDSM. According to Mr. MacDonald, he was aware during his career as a police officer in Vancouver that the BDSM culture existed but regarded it as being on the periphery of society. Mr. MacDonald recalled that during the 1960s BDSM was not socially acceptable. As a result of his investigation he had concluded it was now socially acceptable.

[38] Although Mr. MacDonald's opinion regarding the present social acceptability of BDSM was not that of an expert, given his experience as a police officer, during which time, as he testified, he "had seen a lot", I am prepared to give a reasonable amount of weight to his opinion.

[39] According to Dr. Moser, people who engage in BDSM derive cerebral and erotic pleasure from watching material like that presented in the Eleven Videos. The cerebral pleasure is derived from their appreciation of the mechanical and artistic skill used by the dominant party in carrying out the various procedures. For instance, blows by whips are applied in a carefully systematic manner. The welts or reddening of the skin is done in a particular pattern. Similarly, needles are inserted in particular patterns. Particular colours are used in specific combinations.

[40] Participants in the BDSM culture derive erotic pleasure from watching the portrayal of BDSM procedures which are part of the appropriate sexual fantasies experienced by those participating in the BDSM culture. The subservient parties in the Eleven Videos are portrayed as being under duress to participate in the procedures. The subservient parties are not portrayed as consenting to the procedures. According to Dr. Moser, a key element for enjoyment of BDSM videos, by BDSM participants, is the knowledge that the subservient party, despite what is being portrayed, is actually consenting to the procedures.(Transcript, March 3, 2004, p. 39, l. 36)

[41] Moreover, according to Dr. Moser, BDSM procedures are not meant to be demeaning to those taking part. Both the dominant and subservient parties in BDSM procedures derive a "sense of accomplishment and feeling good and a whole variety of other emotions...." (Transcript March 3, 2004, p. 42, l. 6)

[42] Even the BDSM videos involving one person urinating on another, are not regarded as demeaning in the BDSM culture. Rather, the subservient party sees themselves as receiving the distillate of the dominant party's body. (Transcript March 3, 2004, p. 42, l. 42.) Dr. Moser testified that the scenes portrayed in the Video called **Rage**, (see paragraph 32 above), were part of the BDSM culture but acknowledged the video portrayed extreme violence and an uncommon BDSM fantasy.(Transcript March 3, 2004, p. 46, l. 42)

[43] Dr. Moser also pointed out that BDSM has been written about for hundreds of years. Videos similar to the Eleven Videos were available long before the advent of the Internet.

[44] According to both Dr. Moser and Dr. Fisher there is a growing body of valid scientific evidence that watching pornography, even violent pornography is not harmful to adults. While Dr. Moser alluded briefly to this, Dr. Fisher was qualified as an expert on this subject. His credentials, set out in a 36 page *curriculum vitae* were impressive. I have accepted the following from his evidence.

[45] Dr. Fisher had also viewed the Eleven Videos.

[46] Dr. Fisher pointed to various studies conducted by his colleagues, of countries such as West Germany, Sweden and Japan, where all forms of pornography are legally and readily available. This pornography includes portrayals of unwilling victims who are subjected to sexual and physical violence.

Dr. Fisher testified that these studies concluded "pornography simply was not associated with an increase in sex crimes." (Transcript, March 9, 2004, p. 15, l. 30)

[47] Dr. Fisher, in a variety of studies, conducted by himself or in conjunction with a variety of his colleagues, has confirmed the same results in Canada and the United States. These studies were directed particularly to the proliferation of pornography on the Internet.

[48] Dr. Fisher testified that "the Internet has provided anonymous, accessible, unfettered access to every variant of sexually explicit material from erotic to violent pornographic to what have you, so there's no question but that there has been a dramatic increase in the last say decade....in availability of all forms of explicit material on the Internet." (Transcript March 9, 2004, p. 21, l. 39)

[49] Dr. Fisher testified that they "found no impact of increasing levels of exposure to Internet pornography on any measure of attitudes to women or acceptance of rape or rape myth.... including attitudes that are regarded as important in respect to acceptance of sexual assault and likelihood of sexually assaulting women" (Transcript, March 9, 2004, p. 20, l. 21).

[50] Moreover, Dr. Fisher relying on statistics provided by Statistics Canada and the FBI in the United States has concluded that the proliferation of pornography via the Internet has not resulted in any increase in sexual assault. In fact, the opposite is true. During the period 1994 to 1999, while the Internet was "rolled out", the number of reported sexual assaults has declined dramatically. (Transcript March 9, 2004, pages 22-23).

[51] The thrust of Dr. Fisher's opinion was that exposure to diverse forms of pornography does not:

- a) cause attitudinal harm;
- b) cause anti-social attitudes towards men or women;
- c) cause harm to Canadian Society in that it does not cause sexual aggression;
- d) cause people to act in an anti-social manner;
- e) cause the mental or physical mistreatment of women or men.

[52] Dr. Fisher testified there had been no research conducted with regards to the effect of pornography on children. His opinions were limited to adults.

[53] There was no evidence called to contradict any of the opinions of Dr. Moser or Dr. Fisher.

[54] Through cross-examination of Dr. Moser, it was apparent that he was closely affiliated with the Institute for the Advanced Study of Human Sexuality in California. This institute has a particular view of basic human sexual rights which Dr. Moser subscribes to. While those rights may be controversial for some, I do not accept the notion that his acceptance of those rights undermined the objectivity of his observations and opinions regarding the BDSM culture to the extent that I should have a doubt as to their reliability.

[55] During cross-examination, Dr. Fisher was directed to statistics provided by the FBI for the years 2001 and 2002 showing an increase in the United States of forcible rape. Dr. Fisher was not aware of these statistics. While Dr. Fisher agreed that one plausible interpretation of the 2001, 2002 U.S. statistics might be that pornography had caused an increase in reported sexual assaults he testified there were other plausible explanations. Significantly, Dr. Fisher did not resile from his opinion because he pointed out, the 2001, 2002 FBI statistics confirmed there was still an overall decline in reported sexual assaults in the U.S. since 1994. Dr. Fisher also pointed out that Statistics Canada confirmed that reported sexual assaults continued to decline in Canada in 2001 and 2002.

[56] Ultimately, I have concluded that Dr. Fisher's opinions regarding the harmfulness of pornography were not undermined by this cross-examination. His opinion was corroborated by other studies conducted not only by himself but other researchers in the field and did not rest exclusively on the correlation between the rise of Internet pornography and the decline of reported sexual assaults. The evidence does not leave me with a doubt as to the reliability of Dr. Fisher's opinions.

[57] With one exception the Eleven Videos all portrayed similar scenes of BDSM. The one exception was a video called **Rage**.

[58] The plot of **Rage** is simple and brutal.

[59] A man suspects his female partner of infidelity. He verbally abuses her and then compels her to go to the bathroom where she is bent backwards over a toilet with her mouth open. The man urinates into her mouth. The urine overflows her mouth. The man expresses anger about the resulting mess the urine has made and to further punish the woman forces her head into the toilet's bowl and uses the woman's head to scrub it. There is virtually no dialogue other than verbal abuse of the woman by the man. The woman is obviously not consenting to the activities.

[60] The remaining ten of the Eleven Videos (the Ten Videos) all portray scenes similar to each other. In two of the Ten Videos the subservient party is male while the dominant party is female. In one of the Ten Videos the subservient party is female while there are two dominant parties, one male one female. In the remainder of the Ten Videos the subservient party is female and the dominant party is male. In all of the Ten Videos the subservient party is totally naked for the majority of the video. The genitalia, anus and all other private areas of the subservient parties' bodies are closely, fully, and graphically displayed. The genitalia are either clean or nearly clean shaven. In all of the Ten Videos the dominant parties are clothed to some degree, although in the case of the dominant women the manner of dress is revealing.

[61] There is very little dialogue in any of the Ten Videos. What little there is consists primarily of commands and directions to the subservient party. There is enough dialogue to gather that the subservient party is being punished for not doing their job properly at a brothel where they are employed to provide sexual services. The subservient party is expected to obey all commands of the dominant party without question and address the dominant party as Master or Mistress. The subservient parties are portrayed as being under duress to participate. They are not portrayed in the Ten Videos as consenting to the procedures.

[62] Each subservient party is punished by the consecutive administration of various procedures. Some of the procedures are applied in combination. Usually, each subsequent procedure is more severe than the last. The following list of these procedures is not exhaustive:

- a) Confinement to a small cage;
- b) Whipping with canes, crops, switches or cat o' nine tails. All sensitive parts of the subject's bodies including the soles of feet, breasts, nipples, buttocks, inner thighs and genitals are whipped;
- c) The application of hot wax from burning candles to all parts of the body including the inner thighs, breasts, genitals and buttocks. After the wax cools, it is whipped off with a cat o' nine tails;
- d) The application of clothes pegs, clamps, mousetraps and similar devices to breasts, nipples and genitals. Weights are suspended from these devices. When the weights are suspended from clamps attached to their genitals, the subservient party is required to do deep knee bends which cause the weight to be relieved and then reapplied. The devices are ultimately removed.

- e) The use of a device to apply electric shocks to all parts of the subject's body including breasts, nipples, inner thighs, anus and genitals;
- f) The piercing with small gauge needles, of breasts, nipples, and genitalia including the glans of the penis and the clitoris. In some cases thread is woven in and around the needles and weights are suspended from the needles. In most cases the needles are inserted through folds of subcutaneous skin and in some cases the needles are simply inserted into the skin and flesh below. The needles are ultimately removed. In some cases the insertion/removal of the needles causes minor amounts of bleeding. Alcohol as a disinfectant is poured over the pierced area both before and after the insertion and removal of the needles;

[63] In one of the Ten Videos, after the application of a combination of a variety of the procedures described above, the male dominant party urinates into the face of the female subject. Similarly in another of the Ten Videos a female dominant party urinates into the face of a male dominant party;

[64] Some of the procedures are carried out while the subservient party is standing, seated or lying on a bench unrestrained. In some cases the subservient party is confined in stocks, strapped to a St. Christopher's Cross or strapped to benches of varying degrees of complexity. In some cases the subservient party is strapped by hands and feet into elaborate devices and suspended above the floor. In some cases the subservient party is hooded and gagged. The subservient party is attached to the devices with leather straps or rope tied in elaborate knots.

[65] The subservient parties in the Ten Videos respond in varying degrees to the application of these procedures. Some shriek and writhe continuously. Some merely wince or twitch in discomfort. Some, after being asked, expressed pleasure. Some subservient parties exhibited reddening of the skin or welts and some subservient parties bled slightly.

[66] All subservient parties are completely calm while awaiting the next procedure. In some cases the subservient parties willingly help set up the various devices used.

[67] Except for the video **Rage**, the relationship between the subservient and dominant parties has virtually no emotional component. At best I would describe it as mechanical.

[68] The evidence conclusively demonstrates that despite what is portrayed, the subservient parties in all Eleven Videos consented to the taking part in the procedures before hand and were completely satisfied with how the procedures were carried out.

[69] Any indication of fear, pain or lack of consent portrayed by the subservient parties in the Eleven Videos is merely play acting. I accept the evidence of Doctors Fisher and Moser that any pain or injury caused the subservient parties during the making of the Eleven Videos was minor and completely transitory.

THE LAW

[70] The exclusive and exhaustive test for obscenity is found in S. 163(8) of the **Criminal Code**.

[71] S. 163(8) says a publication shall be deemed obscene if it meets one of two criterion:

- a) If it is a "publication a dominant characteristic of which is the undue exploitation of sex" or

- b) it is a "publication a dominant characteristic of which is.....sex
andviolence."

[72] The seminal case of **R. v. Butler**, [1992] 1 S.C.R. 452 affirmed the right of parliament to criminalize the sale and distribution of obscene material. Although S. 163 infringes the **Charter's** guarantee of freedom of expression, **Butler** determined that the section was directed at the prevention of harm and therefore S. 163 was a reasonable limit on this freedom pursuant to S. 1 of the **Charter**.

[73] **Butler** also directed trial judges on how to correctly interpret and apply S. 163(8). **Butler** at page 498 states, "S.163 (8) criminalizes the exploitation of sex and sex and violence, when on the basis of the community test it is undue."

[74] Earlier, **Butler** at page 475 states, "In order for a work to qualify as 'obscene', the exploitation of sex must not only be its dominant characteristic, but such exploitation must be 'undue'."

[75] Since the promulgation of S. 163 in 1959, Canadian courts have formulated three tests to determine undueness:

- a) the Community Standard of Tolerance test;
- b) the Degradation or Dehumanization test;
- a. the Internal Necessities test.

[76] According to **Butler**, (p. 484-485) the arbiter of these three tests is the community of Canada as a whole. While explicit sex with violence will almost always constitute the undue exploitation of sex, triers of fact must still 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....The stronger the inference of a risk of harm the lesser the likelihood of tolerance."

[77] The tests in **Butler** were discussed at length by the Ontario Court of Appeal in **R. v. Hawkins**, 86 C.C.C. (3d) 246 (leave to appeal to the Supreme Court of Canada refused). At page 263 the Court said "Under the **Butler** test, not all material depicting adults engaged in sexually explicit acts which are degrading or dehumanizing will be found to be obscene. The material must also create a substantial risk of harm to society....Like any element of a criminal allegation, it must be proved beyond a reasonable doubt and that proof must be found in the evidence adduced at trial."

[78] I am satisfied from reading **Hawkins** and **Butler** that this applies as well to material portraying sex and violence.

[79] Therefore, portrayals of explicit sex without violence or portrayals of explicit sex without violence but which subject people to degrading or dehumanizing treatment (two of three types of pornography identified by **Butler**) cannot, without more evidence, be assumed to be incompatible with current Canadian standards of tolerance and substantially harmful. However, where explicit sex and violence are portrayed together (the third type of pornography identified by **Butler**), it can be assumed without expert or other evidence, that the portrayals exceed Canadian standards of tolerance and are substantially harmful. That is because there is a strong inference of a risk of harm in such portrayals. Nonetheless, even if sex and violence are portrayed together, it remains open to the Court to find that the evidence does not establish beyond a reasonable doubt the portrayals exceed Canadian standards of tolerance and that the harm component has been established.

DISCUSSION

[80] The Crown argues that the Eleven Videos depict graphic sex and violence without any "wider artistic, literary or other similar purpose." Therefore, the Crown says, as a result of the **Butler** tests, I must infer the Eleven Videos carry a risk they will predispose people to act in an anti-social manner. Thus, the Crown argues, they have proved beyond a reasonable doubt, the Eleven Videos are obscene.

[81] The Crown says the evidence of Dr. Moser that the Eleven Videos depict normal and appropriate human sexual behaviour, the evidence of Dr. Fisher that there is no potential the Eleven Videos will cause harm and the evidence that other similar material is readily available to the Canadian public in all manner of venues, is therefore irrelevant.

[82] The Defence argues that even if I do not accept the opinion of Dr. Fisher that viewing violent pornography does not cause harm, all the evidence taken together, at least raises a doubt that Canadians would not tolerate other Canadians viewing the Eleven Videos. Since Canadians are the final arbiter of what will harm other Canadians, such tolerance raises a doubt that the Eleven Videos if viewed would cause harm and therefore the Crown has not proved beyond a reasonable doubt the Eleven Videos are obscene.

[83] The Defence urged me in their final submissions to take a bold step and acquit Mr. Price. There is no need for me to be bold. My only role is to examine the evidence before me against the law and determine whether I am satisfied that the Crown has proven beyond a reasonable doubt that the Eleven Videos are obscene.

[84] I agree with the Crown that the Eleven Videos are devoid of any artistic or literary purpose. There is no plot, it is an understatement to describe the dialogue as marginal and the filming is at best amateur.

[85] I agree with the Crown, that I cannot conclude from Dr. Fisher's evidence that pornography, including violent pornography is harmless and therefore the Eleven Videos are not obscene. S.163 (8) of the Criminal Code says that in particular situations violence and explicit sex is obscene. **Butler** says that S. 163 is a valid law because Parliament has a reasonable basis for concern that violent sexual pornography may cause anti-social behaviour. I note that while Dr. Fisher's evidence regarding the harmlessness of violent pornography was not before the Supreme Court of Canada in **Butler**, the Court was alive to the notion that some segments of society, quite validly, took a similar position. In particular **Butler** at page 484 discusses the **Fraser Report** which was endorsed by Dr. Fisher in his evidence.

[86] Therefore, while I have no reason to reject Dr. Fisher's opinions regarding violent pornography, his opinion that the Eleven Videos will not cause harm as contemplated by S. 163 of the **Code**, simply contradict Parliament's reasonably based concerns as found by **Butler**. Therefore, Dr. Fisher's opinions do not assist me and I am not prepared to consider them in determining the charges before me.

[87] I agree with the Crown, that the Eleven Videos, although they do not depict any classic sexual activity such as vaginal or anal intercourse or oral sex, are entirely sexual in nature. This was confirmed by the evidence of Doctors Moser and Fisher who testified the Eleven Videos portrayed BDSM sexual fantasies.

[88] I also agree with the Crown, there is strong evidence simply from the content of the Eleven Videos themselves by which I may infer a risk of harm and that Canadians would have no tolerance for other Canadians viewing this material. The Eleven Videos portray explicit, graphic sexual activity coupled with explicit, graphic portrayals of violence. These portrayals are the very nature of BDSM sexual fantasies. But that is not the end of the matter.

[89] Of the three tests for undueness, considered in **Butler**, the most important is the community standard of tolerance test. **Butler** specifically instructed triers of fact how to apply this test. The trier of fact must consider what Canadians would tolerate other Canadians viewing. The standards of the community of Canada as a whole must be considered and not the standards of a small segment of the

Canadian community. Canadian community standards change. Canadian Community standards as to what is harmful have changed since 1959. The standard therefore must be a contemporary one. (*Butler* p. 476-477 and p. 496)

[90] I have considered the following as evidence of what contemporary Canadians would tolerate other Canadians viewing.

[91] First, I accepted Dr. Moser's opinion that consensual BDSM is part of normal and acceptable adult sexual behaviour and that viewing material similar to the Eleven Videos is a normal and appropriate part of that sexual behaviour.

[92] Second, I accept Mr. MacDonald's evidence that BDSM practices similar to those portrayed in the Eleven Videos, are regularly carried on in public venues. These venues are well known to the police who take no interest in preventing these public activities from taking place. These public venues are easily accessible by any adult with sufficient financial means to attend an ordinary movie theatre. These public venues are available through out Canada and are widely advertised in the public domain.

[93] Third, while the Supreme Court of Canada, in 1992, described in *Butler* at page 498, a "burgeoning pornography industry" they could not contemplate, the impact, the Internet, since 1995, has had on this industry and on Canadian society generally. It is an understatement to say there is an immense amount of BDSM material, on the Internet, readily available to the Canadian public.

[94] Fourth, I agree with the Crown, that there are distinctions to be made between the material in the Eleven Videos and the additional examples of pornographic material filed by the Defence described in paragraphs 23-27 above (the Supplementary Materials). I accept that some of the Supplementary Materials are in some cases less graphic than the Eleven Videos or in some cases, such as the documentary films described in paragraph 26, provide serious treatment of a theme which is lacking in the Eleven Videos.

[95] I accept that the films **I Spit On Your Grave, Rape Me, Irreversible, American Psycho** and **Henry Portrait of a Serial Killer**, (the Fictional Material) have a more sophisticated plot than the Eleven Videos. However, the Fictional Material contains graphic, protracted portrayals of the highest degree of sexual violence towards women. The book and the subsequent film, **American Psycho**, contain an almost unbroken litany of unimaginable gore and savagery, much of which is directed towards women in a sexual context. While the portrayal of genitalia and other private sexual areas may be less graphic in the Fictional Materials, the level of violence in the Fictional Materials is higher than that portrayed in the Eleven Videos.

[96] Other than having a plot, there is little to distinguish the explicit sexual violence portrayed in the Fictional Materials from the explicit sexual violence portrayed in the Eleven Videos.

[97] All of the Fictional Materials are widely available to the general Canadian public either through theatres, video stores, well known book stores, public libraries or broadcast by cable television companies.

[98] It is not my role to determine whether any of the Fictional Materials are obscene.

[99] However, the contents of the Fictional Materials, coupled with their wide spread availability, satisfies me that Canadians, for better or for worse, tolerate other Canadians viewing explicit sexual activity coupled with graphic violence which is more or less indistinguishable from the Eleven Videos.

[100] This evidence of tolerance coupled with the evidence I have described in paragraphs 91 to 93 leaves me with a reasonable doubt that the contemporary Canadian community would not tolerate other

Canadians viewing the Eleven Videos on the basis that harm would flow from watching the Eleven Videos.

[101] I must resolve that doubt in favour Mr. Price. I acquit him of counts one through twenty.

The Honourable R. R. Low, P.C.J.