

R. v. Jorgensen, [1995] 4 S.C.R. 55

**Randy Jorgensen and
913719 Ontario Limited**

Appellants

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Jorgensen

File No.: 23787.

1995: February 21; 1995: November 16.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

*Criminal law -- Obscenity -- Selling obscene material -- Mens
rea -- Accused charged with "knowingly" selling obscene material without
lawful justification or excuse -- Interpretation of
"knowingly" -- Whether s. 163(2) of Criminal Code requires that retailer
have knowledge of specific acts which make material obscene in law --
Whether sufficient for Crown to show that retailer had general knowledge
that materials deal with exploitation of sex -- Criminal Code, R.S.C.,
1985, c. C-46, s. 163(2), (8).*

Criminal law -- Obscenity -- Selling obscene material -- Effect of provincial film board approval -- Accused charged with knowingly selling obscene material "without lawful justification or excuse" -- Whether provincial film board approval of obscene material negates mens rea of offence -- Whether film board approval provides legal justification or excuse -- Criminal Code, R.S.C., 1985, c. C-46, s. 163(2), (8).

J is the sole officer of the co-accused company which owns and operates an adult video store. Undercover police agents purchased eight videotapes from that store and, despite the fact that the Ontario Film Review Board ("OFRB") had approved all of them, J and his company were charged with eight counts of "knowingly" selling obscene material "without lawful justification or excuse" contrary to s. 163(2) (a) of the *Criminal Code*. The trial judge found three of the eight videos to be obscene within the meaning of s. 163(8) of the *Code* because some of their scenes portray explicit sex coupled with violence. She also found that, with respect to the *mens rea* for a s. 163(2) offence, the Crown must prove beyond a reasonable doubt that the accused are aware of the presence or nature of the matter that constitutes the subject of the charge in a general sense. It is not necessary that the Crown prove the accused were aware of the specific factual contents of the forbidden material at issue. The trial judge rejected the arguments made by the accused that the OFRB approval negates any possibility that an accused acted knowingly, or

constitutes a lawful justification or excuse. The accused were convicted on the three counts relating to the obscene videos. The Court of Appeal upheld the convictions.

Held: The appeal is allowed and a verdict of acquittal entered.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: It is a general rule of statutory construction that the term "knowingly" used in a criminal statute applies to all elements of the *actus reus*, and there is nothing in the language of s. 163(2), or in its legislative history, to suggest that the word "knowingly" should be given a restricted meaning. In including the word "knowingly" in s. 163(2), Parliament chose to set an onerous standard of proof in the case of sellers or retailers. Thus, to satisfy the *mens rea* requirement of the offence under s. 163(2), the Crown must show not only that the retailer was aware that the subject matter of the material had as its dominant characteristic the exploitation of sex, but also that he knew of the specific acts which make the material obscene in law. Material is generally obscene if it involves explicit sex with violence, or explicit sex which is degrading or dehumanizing. If the court is unable to specify any particular scene but still concludes that, overall, the film is obscene in law, then sufficient proof must be offered to show that the retailer was aware of the "overall" obscene nature of the film.

A retailer, however, will not be immune from charges merely because he does not know how the law defines obscenity. This would amount

to the defence of mistake of law and it is well established that ignorance of the law is no defence. Further, proof that a retailer had "knowledge" that he was selling obscene material does not necessarily require the Crown to prove that he actually viewed the obscene material. "Knowledge" of the obscene character of the film can be acquired by means other than direct viewing. In this regard, in appropriate circumstances, the Crown can avail itself of the principles of wilful blindness. Deliberately choosing not to know something when there are reasons to believe further inquiry is necessary can satisfy the mental element of the offence. The approval of a film by a provincial censor board may be relevant to the issue of wilful blindness.

The accused's reliance on the OFRB approval does not negate the *mens rea* of the offence. The OFRB screens and classifies films, but it is not its function to determine whether a film is obscene. While the approval of a film by a provincial censor board may be relevant to the determination of community standards of tolerance, the approval is not relevant with respect to the issue of the accused's knowledge. The question whether a film exceeds community standards of tolerance may be characterized as a question of mixed fact and law. As such, the Crown need not generally prove intent or knowledge where these mind states are otherwise an essential ingredient of the offence, nor can the accused rely on a mistake of fact in relation to the issue. Accordingly, if the Crown establishes that the accused knew of the presence of the specific acts or set of facts in the film which the court finds exceed community

standards, that is sufficient for a conviction. The Crown need not prove that the accused knew that the film exceeded community standards.

Furthermore, approval by a provincial censor board does not constitute a justification or excuse. First, one level of government cannot delegate its legislative powers to another. Second, approval by a provincial body cannot as a matter of constitutional law preclude the criminal prosecution of a charge under the *Criminal Code*. In using the words "lawful justification or excuse", Parliament did not intend that conduct which is criminalized by s. 163(2) be rendered lawful, or that the person engaging in it be excused, as a result of a decision of a provincial body.

Since there was no evidence in this case to suggest any knowledge on the part of the accused, beyond the fact that the videos in question were sex films in the general sense that they involved the exploitation of sex, the Crown did not satisfy the *mens rea* requirements of s. 163(2) and the accused are entitled to an acquittal.

The issue of officially induced error of law as an excuse has not been considered in this appeal because the matter was not raised either here or in the courts below. It would be preferable to address this issue in a case in which it is properly raised and argued.

Per Lamer C.J.: There is agreement with Sopinka J.'s reasons on the question of the requisite *mens rea* for the offence under s. 163(2)

of the *Criminal Code*, and with his conclusion that the OFRB approval of a film cannot negative the *mens rea* of this offence. On the question of whether the accused acted "without lawful justification or excuse", while the OFRB approval of the films did not justify the accused's criminal actions, in the circumstances of this case it would have permitted the accused to be excused from conviction on the basis of an officially induced error of law. Officially induced error of law is an exception to the rule that ignorance of the law does not excuse which is codified in s. 19 of the *Criminal Code*. Like the other exceptions to this rule, it ensures that the morally blameless are not made criminally responsible for their actions.

Allowing OFRB approval to constitute an excuse is not an impermissible delegation of power from one level of government to another. Officially induced error of law can only be raised after the Crown has proven all elements of the offence. As this excuse is considered only after culpability has been proven, there is no issue of the action of a provincial board precluding criminal prosecutions. Further, advice from an official of any level of government can meet the test for this excuse.

There is no particular link between the phrase "without lawful justification or excuse" and officially induced error of law. Where an accused raises an officially induced error of law argument, the trial judge must assess whether the excuse is made out in law, regardless of the wording of the offence. Officially induced error is distinct from

a defence of due diligence and is applicable to regulatory as well as criminal offences.

In order for an accused to rely on an officially induced error as an excuse, he must show, after establishing he made an error of law (or of mixed law and fact), that he considered his legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in his actions. When considering the legal consequences of his actions, it is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that his conduct was permissible. The advice came from an appropriate official if that official was one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question. If an appropriate official is consulted, the advice obtained will generally be presumed to be reasonable unless it appears on its face to be utterly unreasonable. The advice relied on by the accused must also have been erroneous, but this fact does not need to be demonstrated by the accused. Reliance on the official advice can be shown by proving that the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation.

A successful application of an officially induced error of law argument will lead to a judicial stay of proceedings. As a stay can only be entered in the clearest of cases, an officially induced error of law argument will only be successful in the clearest of cases. Finally, the question of whether officially induced error constitutes an excuse in

law is a question of law or of mixed law and fact. While a jury may determine whether the accused is culpable, and hence whether this argument is necessary, it is for a judge to determine whether the precise conditions for this legal excuse are made out and if a stay should be entered. The elements of officially induced error are to be proven on a balance of probabilities by the accused.

Since the accused are entitled to an acquittal in this case, nothing turns on the application of an officially induced error of law analysis. Had the accused had the requisite *mens rea* for the s. 163(2) offence, however, they would have been entitled to a judicial stay of proceedings as a result of officially induced error of law. The argument put forward by the accused would have been one based on error of law -- the conclusion that the films they retailed were not legally obscene; the accused sought the OFRB opinion on these films and relied on its advice; and the OFRB was the appropriate official body to consult when seeking a determination about whether a film can be legally sold in Ontario.

Cases Cited

By Sopinka J.

Referred to: *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Rees*, [1956] S.C.R. 640; *R. v. Metro News Ltd.* (1986), 29 C.C.C. (3d) 35; *R. v. Cameron*, [1966] 4 C.C.C. 273 (Ont. C.A.), leave to appeal to S.C.C. refused, [1967] 2 C.C.C. 195n; *R. v. Kiverago* (1973), 11 C.C.C. (2d) 463; *R. v. McFall* (1975), 26 C.C.C. (2d) 181; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; *R. v. Blondin* (1970), 2 C.C.C. (2d) 118; *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; *R. v. Prairie Schooner News Ltd. and Powers* (1970), 1 C.C.C. (2d) 251; *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494; *R. v. Furtney*, [1991] 3 S.C.R. 89; *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35; *Perka v. The Queen*, [1984] 2 S.C.R. 232.

By Lamer C.J.

Referred to: *Molis v. The Queen*, [1980] 2 S.C.R. 356; *Long v. State*, 65 A.2d 489 (1949); *R. v. Maclean* (1974), 17 C.C.C. (2d) 84; *R. v. Potter* (1978), 3 C.R. (3d) 154; *R. v. Flemming* (1980), 43 N.S.R. (2d) 249; *R. v. MacDougall* (1981), 60 C.C.C. (2d) 137, rev'd [1982] 2 S.C.R. 605; *R. v. Ross*, [1985] Sask. D. 5845-02; *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295; *R. v. Provincial Foods Inc.* (1992), 111 N.S.R. (2d) 420; *R. v. Dubeau* (1993), 80 C.C.C. (3d) 54; *R. v. Erotica Video Exchange Ltd.* (1994), 163 A.R. 181; *R. v. Forster*, [1992] 1 S.C.R. 339; *R. v. Pontes*, [1995] 3 S.C.R. 44; *R. v. Mack*, [1988] 2 S.C.R. 903.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, ss. 19, 163(1), (2), (6) [rep. 1993, c. 46, s. 1], (8).

Theatres Act, R.S.O. 1990, c. T.6, ss. 3(7)(a), 33(1), (2), (5) to (9).

Authors Cited

Arnold, Terence. "State-Induced Error of Law, Criminal Liability and *Dunn v. The Queen*: A Recent Non-Development in Criminal Law" (1978), 4 *Dalhousie L.J.* 559.

Barton, P. G. "Officially Induced Error as a Criminal Defence: A Preliminary Look" (1979-80), 22 *Crim. L.Q.* 314.

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Canada. Law Reform Commission. Working Paper 29. *Criminal Law -- The General Part: Liability and Defences*. Ottawa: The Commission, 1982.

Kastner, Nancy S. "Mistake of Law and the Defence of Officially Induced Error" (1985-86), 28 *Crim. L.Q.* 308.

LaFave, Wayne R., and Austin W. Scott, Jr. *Substantive Criminal Law*, vol. 1. St. Paul, Minn.: West Publishing Co., 1986.

Stuart, Don. *Canadian Criminal Law: A Treatise*, 3rd ed. Scarborough, Ont.: Carswell, 1995.

Williams, Glanville. *Criminal Law: The General Part*, 2nd ed. London: Stevens & Sons, 1961.

APPEAL from a judgment of the Ontario Court of Appeal rendered October 19, 1993, dismissing the accused's appeal from their conviction under s. 163(2) of the *Criminal Code*. Appeal allowed.

Alan D. Gold, for the appellants.

David Butt, for the respondent.

The following are the reasons delivered by

LAMER C.J. --

I. Introduction

1 This appeal from a conviction under s. 163(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, raises two issues for our consideration because of the wording of the section: (i) did the accused "knowingly" sell obscene material? and (ii) did he do so "without lawful justification or excuse"? Regarding the first issue, the question of the requisite

mens rea for this offence, I agree with the reasons of my colleague Justice Sopinka. In particular, I concur in his conclusion that the law requires the Crown to prove that an accused retailer knew of the specific acts or set of facts which lead the court to the conclusion that the material in question is obscene. The Crown is not, of course, required to prove that the accused knew the material was obscene in law, nor is the Crown required to prove that an accused actually viewed the obscene material. As my colleague has pointed out, there are other ways to acquire knowledge of the obscene character of a film. In addition, I concur in Sopinka J.'s conclusion that approval of a film by the Ontario Film Review Board ("OFRB") cannot negative the *mens rea* of this offence. Accordingly, I concur in Sopinka J.'s disposition of the appeal; the accused are entitled to be acquitted.

2 On the second issue raised by this appeal, the question of whether the accused acted without lawful justification or excuse, I disagree with Sopinka J.'s conclusion. In my view, the circumstances of this case permit the accused to be excused from conviction on the basis of an officially induced error of law by virtue of the OFRB's approval of the films in question. While I do not believe film board approval negatives *mens rea* or justifies the accused's criminal actions, I believe that reasonable reliance on this type of official advice is sufficient basis for a judicial stay of proceedings to be entered. Requiring that a stay be entered only in the clearest of officially induced error of law cases does not offend the maxim that ignorance of the law does not excuse. Rather, it provides an exception from this provision, in line with the

existing exceptions, which ensures that the morally blameless are not made criminally responsible for their actions.

3 To elaborate my conclusions, I will first examine the rationale of the *ignorantia juris neminem excusat* maxim which is one of the backbones of our criminal law. Next I will consider emerging trends in Canadian cases, and briefly examine the American position. I will then outline how I propose that the officially induced error of law excusing provision be limited. Finally, I will demonstrate why I believe the accused in this case would have been entitled to a judicial stay of proceedings had the *mens rea* requirement for culpability been met.

II. Analysis

A. *Ignorance of the Law Does not Excuse*

4 While mistakes of fact relevant to the commission of a criminal offence excuse an accused from criminal responsibility, mistakes regarding the law do not. There is no significant difference between a mistake of law and ignorance of the law (see *Molis v. The Queen*, [1980] 2 S.C.R. 356). The common law rule that ignorance of the law does not excuse the commission of a criminal offence is codified in s. 19 of the *Criminal Code*:

19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

This principle is a significant barrier to the appellants here because the question of whether or not a film is obscene is a question of law, specifically a question of the interpretation and application of the definition of obscenity contained in s. 163(8) of the *Criminal Code*.

5 Don Stuart identifies four aspects of the rationale for the rule against accepting ignorance of the law as an excuse:

1. Allowing a defence of ignorance of the law would involve the courts in insuperable evidential problems.

2. It would encourage ignorance where knowledge is socially desirable.

3. Otherwise every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law.

4. Ignorance of the law is blameworthy in itself.

(*Canadian Criminal Law: A Treatise* (3rd ed. 1995), at pp. 295-98.)

While Stuart finds the rule against ignorance of the law crude, and these principles unconvincing in the present era, this maxim is an orienting principle of our criminal law which should not be lightly disturbed. I have concluded that certain types of officially induced errors of law should be permitted to excuse an individual from criminal sanction for his actions, in part because I find that this does not infringe any of the four rationales for the ignorance of the law rule set out above.

6 Despite the importance of this rule, some exceptions to it are already well established in our law. An accused is excused when the law she was charged under was impossible to gain knowledge of because it had not been

published. In addition, a certain number of our *Criminal Code* offences provide an excuse for an accused who acted with colour of right. The existence of these exceptions demonstrates that the *ignorantia juris* rule is not to be applied when it would render a conviction manifestly unjust.

7 Academic commentators for some time now have argued that a form of an officially induced error of law doctrine should be accepted by the courts as an exoneration from criminal responsibility. Reviewing the tentative steps taken by judges towards this defence, Stuart asserts that courts to date have been "too timid". He advocates a full defence, which would consider whether reliance on a particular statement of the law was reasonable, and states (at p. 317):

None of the four suggested rationales for the ignorance of the law rule is undermined. Such a defence is capable of proof, and the accused can demonstrate that he was sociably responsible, not lawless and not blameworthy. Like the claim of right defence, we are considering only those who were not simply ignorant of law but made a mistake. The recognition of a common law defence of reliance on advice as to the law is a very healthy development in our criminal law and substantially ameliorates the harsh ignorance of the law rule. It is vastly preferable to the devious [case cite omitted] device of classifying the mistake made as one of mistake of fact rather than law.

8 The difficulty of distinguishing errors of fact from errors of law is also the starting point for Professor Barton's critique. Barton argues in support of a full justification defence which would remove the need to distinguish between errors of fact and errors of law. He would support a defence for an accused whose reliance on advice is reasonable, and he finds it difficult to distinguish advice from an official of a government

agency charged with administering the law from advice given by a lawyer or a police officer. The starting point of Barton's analysis is an assessment of moral blameworthiness:

Because it is so difficult to fashion an adequate test to help distinguish between mistake of fact and of law, and because judges spend so much time focussing on this issue and miss the ultimate question of the effect, if any, of the mistake, perhaps it is time to abandon the distinction and to look at the position of the accused from the point of view of "should the accused be excused?"

(P. G. Barton, "Officially Induced Error as a Criminal Defence: A Preliminary Look" (1979-80), 22 *Crim. L.Q.* 314, at p. 315.)

From this perspective of moral blameworthiness, it is difficult to justify convicting an individual who has considered that her behaviour may be illegal, consulted an appropriate authority regarding the legality of her actions, and relied on the advice she obtained in a way that appears objectively reasonable.

9 Discussing the defence which he would name "state-induced error of law", in the context of reliance on a judicial decision which was later overturned, Terence Arnold states:

The principle that ignorance or mistake of law constitutes no defence is treated by many as expressing a proposition of self-evident utility and necessity. So simple and absolute a rule may have been appropriate at a time when the criminal law was narrow in scope and therefore fundamental in nature. It is not appropriate in a modern legal context, however. In recognition of this many courts and legislatures have reassessed the doctrine, retaining it in respect to certain offences or situations, modifying in respect to others. My criticism of the Court in the *Dunn* case [(1977), 21 N.S.R. (2d) 334] is not that they accept the basic mistake of law doctrine -- s. 19 of the *Code* compels them to do that. It is, rather,

that the Court shows no sensitivity to the fact that [the] doctrine's applicability in some situations requires reconsideration. Furthermore, in order to apply the doctrine to the fact situation urged in *Dunn* the Court had to apply a legal theory, long since abandoned by legal analysts, which has no connection with reality, does not achieve individual justice and cannot be justified on public policy grounds.

("State-Induced Error of Law, Criminal Liability and *Dunn v. The Queen*: A Recent Non-Development in Criminal Law" (1978), 4 *Dalhousie L.J.* 559, at pp. 584-85.)

Arnold's sense of injustice is perhaps overly sensitive, but his point reflects our contemporary reality. The number of laws under which any person in Canada may incur criminal liability is nothing short of astounding. While knowledge of the law is to be encouraged, it is certainly reasonable for someone to assume he knows the law after consulting a representative of the state acting in a capacity which makes him expert on that particular subject.

10 Nancy S. Kastner also urges that a defence of officially induced error of law be accepted by the courts:

. . . the traditional rationalia for the rule that ignorance of the law does not excuse are not done violence by the incursion of the defence of officially induced error, where the offender in good faith is duly diligent in attempting to guide his conduct by the law as stated by "a party in the know".

("Mistake of Law and the Defence of Officially Induced Error" (1985-86), 28 *Crim. L.Q.* 308, at p. 335.)

In its Report 30 entitled *Recodifying the Criminal Law* (1986), the Law Reform Commission of Canada proposed the following provision as part of a new General Part of the *Criminal Code* (at p. 31):

3(7) Mistake or Ignorance of Law. No one is liable for a crime committed by reason of mistake or ignorance of law:

(a) concerning private rights relevant to that crime; or

(b) reasonably resulting from

(i) non-publication of the law in question,

(ii) reliance on a decision of a court of appeal in the province having jurisdiction over the crime charged, or

(iii) reliance on competent administrative authority. [Emphasis added.]

In a working paper which preceded this draft, the Law Reform Commission proposed extending a "reliance on administrative authority" excuse only to offences outside the *Criminal Code* (Working Paper 29, *Criminal Law -- The General Part: Liability and Defences* (1982), at p. 82). The shift between that provision and the final report indicates a broader approach to an officially induced error of law provision.

11 This steady trickle of academic commentary has been fuelled by tentative steps toward the recognition of officially induced error of law as either a complete defence or an excusing provision by Canadian jurists, as well as more widespread support for this defence in the United States. Before outlining the precise form this doctrine should take, I will examine some of this jurisprudence to illustrate situations where this doctrine will assist judges in achieving just results.

B. *Developments in the Jurisprudence*

12 The defence of officially induced error of law emerged in American jurisprudence with the 1949 case of *Long v. State*, 65 A.2d 489 (Del.). In that case a man who had obtained a divorce in Arkansas returned to his native Delaware, married for a second time, and was convicted of bigamy. He presented evidence that he had consulted a reputable attorney before going to Arkansas to obtain the divorce, and again upon his return to Delaware, regarding the legal effect in Delaware of his divorce. The Reverend who performed the second marriage sought and obtained the same advice, and the lawyer who had advised them both signed the marriage application. The Supreme Court of Delaware ordered a new trial where the jury would be instructed to consider this evidence based on a defence that "before engaging in the [prohibited] conduct, the defendant made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under our legal system, to ascertain and abide by the law, and where he acted in good faith reliance upon the results of such effort" (p. 497). The Court stated (at p. 498):

It is difficult to conceive what more could be reasonably expected of a "model citizen" than that he guide his conduct by "the law" ascertained in good faith, not merely by efforts which might seem adequate to a person in his situation, but by efforts as well designed to accomplish ascertainment as any available under our system. We are not impressed with the suggestion that a mistake under such circumstances should aid the defendant only in inducing more lenient punishment by a court, or executive clemency after conviction. The circumstances seem so directly related to the defendant's behavior upon which the criminal charge is based as to constitute an integral part of that behavior, for purposes of evaluating it. No excuse appears for dealing with it piecemeal. We think such circumstances should entitle a defendant to full exoneration as a matter of right, rather than to something less, as a matter of grace.

While the American jurisprudence has since backed away from accepting reliance on the advice of a lawyer as a form of officially induced error of law, the defence is well established in American law in cases where government officials are relied upon. *Long v. State* itself has influenced the Canadian jurists who have opened the way for the establishment of this defence here. Discussing the present state of the defence in American law, W. R. LaFave and A. W. Scott state:

Consistent with the above [reasonable reliance on lower court decisions], the better view is that if a defendant reasonably relies upon an erroneous official statement of the law contained in an administrative order or grant or in an official interpretation by the public officer or body responsible for interpretation, administration, or enforcement of the law defining the offense, then his belief that the conduct was not criminal is a defense.

(*Substantive Criminal Law* (1986), vol. 1, at pp. 592-93, and see generally pp. 589-96.)

- 13 The first Canadian decision to reflect the defence was in *R. v. Maclean* (1974), 17 C.C.C. (2d) 84 (N.S. Co. Ct.), where O Hearn Co. Ct. J. sought to develop the realm of common law defences available in Canada by relying on *Long v. State*. Maclean's driver's licence had been revoked after he was convicted of refusing to take a breathalyser test. He worked at the Halifax airport and had obtained the permission of his supervisor to drive on airport property without his licence. His supervisor's advice was based on Maclean's telephone call to the Registrar of Motor Vehicles who had advised him that driving on federal government property, with his boss's permission, was fine. O Hearn Co. Ct. J. confined his reasons to the field of delegated legislation. He was clearly influenced by the

accused's conscientious effort to ascertain his legal position and by the fact that in inquiring about his legal status he "went to the source that people ordinarily use to secure information about drivers' licences and the requirements of licensing and in that sense the source was appropriate" (p. 107).

14 The defence was again considered in *R. v. Potter* (1978), 3 C.R. (3d) 154 (P.E.I.S.C.), where the accused was charged with keeping a gambling device despite the fact that the persons importing the goods to Canada had specifically inquired to customs officials about their legality and customs officials had inspected the shipments and collected duty over a period of years. McQuaid J. considered and praised the decision in *Maclean*, but decided that based on the jurisprudence of this Court he could not follow the path struck by O Hearn Co. Ct. J. Instead, he ordered an absolute discharge.

15 O Hearn Co. Ct. J. had the opportunity to elaborate his reasoning in *R. v. Flemming* (1980), 43 N.S.R. (2d) 249, where he upheld an acquittal on a driving while disqualified charge. Flemming's driver's licence was under suspension and he had consulted the Motor Vehicle Bureau about whether he was permitted to steer and brake a car which was being towed. In a thoroughly reasoned judgment, O Hearn Co. Ct. J. found that this Court's decision in *Molis*, *supra*, about which I have more to say below, barred a defence of insufficient promulgation but not a defence of officially induced error. On the basis of *Molis*, however, he rejected his earlier distinction between statutory and regulatory offences.

Considering s. 19 of the *Criminal Code*, O Hearn Co. Ct. J. stated (at p. 272):

If a person does his best to conform his conduct [to] the law but is misled by officials charged with the administration of the law, he is not doing anything at odds with the purpose of the maxim "Ignorance of the law is not an excuse" in its application to criminal law. The mischief that the policy is aimed at has not occurred.

He specifies that the official whose advice is followed must be involved in the administration of the law in question so that following his advice is reasonable, and that the opinion itself should be reasonable in the circumstances. In his conclusion on this issue he states, and I fully agree (at p. 274):

Moreover, most people would consider it radically unjust for the same government to prosecute an individual for an offence that it had already assured him was not an offence, through one of its bureaus.

Such prosecution, I would assert, may bring the administration of justice into disrepute.

16 The Nova Scotia Court of Appeal recognized an officially induced error of law as a defence in *R. v. MacDougall* (1981), 60 C.C.C. (2d) 137. MacDougall's licence had been cancelled following a criminal conviction. He received an "order of revocation" and when he commenced appeal proceedings, received a "notice of reinstatement". After he was informed by his lawyer that his appeal had been dismissed, he continued driving until receiving a second "order of revocation". In that interim,

he was charged with driving without a licence. Macdonald J.A. for the majority stated (at p. 158):

Assuming . . . that the error of the respondent as to revocation was one of law I am prepared to say that the facts as found by the trial Judge give rise to a defence of justification based upon reliance by the respondent on a previous course of conduct on the part of the Registrar. This defence might be classified as officially induced error or perhaps as a form of colour of right.

Upholding the trial court's acquittal, he concluded (at p. 160):

The defence of officially induced error has not been sanctioned, to my knowledge, by any appellate Court in this country. The law, however, is ever-changing and ideally adapts to meet the changing mores and needs of society. In this day of intense involvement in a complex society by all levels of Government with a corresponding reliance by people on officials of such Government, there is, in my opinion, a place and need for the defence of officially induced error, at least so long as mistake of law, regardless of how reasonable, cannot be raised as a defence to a criminal charge.

17 This Court reversed this decision on other grounds, [1982] 2 S.C.R. 605. However, in his judgment for the unanimous Court, Ritchie J. wrote (at p. 613):

It is not difficult to envisage a situation in which an offence could be committed under mistake of law arising because of, and therefore induced by, "officially induced error", and if there was evidence in the present case to support such a situation existing it might well be an appropriate vehicle for applying the reasoning adopted by Mr. Justice Macdonald. In the present case, however, there is no evidence that the accused was misled by an error on the part of the Registrar.

Clearly, this Court has not foreclosed the possibility of raising officially induced error of law as a defence or excuse. Significantly, the *MacDougall* decision also affirmed the validity of the s. 19, ignorance of the law does not excuse, provision. Accordingly, the excuse and the traditional rule are not viewed as contradictory.

18 The defence of officially induced error of law was accepted by Ferris Prov. Ct. J. in *R. v. Ross*, [1985] Sask. D. 5845-02. Ross did not have an appropriate licence to drive the truck he had been driving for several years. He had inquired about this at the Highway Traffic Board on several occasions as he was concerned about his insurance. On each occasion he was assured that he was appropriately licensed. He also stopped at weigh scales dozens of times per year and had his licence inspected. Ferris Prov. Ct. J. held that this constituted an excuse to a charge of obstruction of justice when he continued to drive after police officers told him not to because he did not have a proper licence.

19 In 1986, the Ontario Court of Appeal acknowledged the defence in the context of regulatory offences in *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295. Cancoil was charged under the *Occupational Health and Safety Act*, R.S.O. 1980, c. 321, after removing a protective shield from a piece of machinery. A Ministry of Labour inspector had approved operation of the machine without the shield, but an employee subsequently suffered a serious injury which the shield would have prevented. The court overturned the original acquittal on the basis of another error,

but stated (at p. 303) that the defence of officially induced error should be available at the new trial:

The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

The court distinguished this defence from the defence of due diligence, which would also be available to Cancoil.

20 In *R. v. Provincial Foods Inc.* (1992), 111 N.S.R. (2d) 420, Palmetter C.J. Co. Ct. accepted the defence of officially induced error of law when a vegetable seller relied on the advice of an applications clerk in the Building Inspection Division of the City of Halifax that no permit was required to run his business in a particular building. The defence was also successful in *R. v. Dubeau* (1993), 80 C.C.C. (3d) 54 (Ont. Ct. (Gen. Div.)). Dubeau was acquitted of a charge of carrying on the business of firearms and ammunition sale without a permit after selling approximately 30 guns at a series of garage sales. Ferguson J., relying on *Cancoil Thermal, supra*, considered that the accused had asked the local firearms officer specifically about permits for garage sales, and had written a letter on the advice of that officer to the head office in Toronto. These

actions, in combination with the complexity of the law, led to an acquittal.

21 Recently, in *R. v. Erotica Video Exchange Ltd.* (1994), 163 A.R. 181, James Prov. Ct. J. held that two of three corporate accused charged under the same provision as the accused in this case, had made out a "lawful justification or excuse" because of their reliance on the approval of the obscene videos they had retailed by the British Columbia Film Board. James Prov. Ct. J. considered detailed evidence of the organization, mandate and functioning of the British Columbia Film Board before coming to this conclusion. A third accused, who had relied upon approval by Quebec's Régie du cinéma, was not excused, on the basis that there was not sufficient evidence about that body. It is unnecessary in this case to consider the role of approval by film boards in provinces other than that where business was carried out and criminal charges were laid.

22 Both Stuart and Kastner have interpreted this Court's decision in *Molis*, *supra*, as foreclosing the opportunity for developing an officially induced error of law defence. In light of these interpretations, I will clarify the extent of the decision in *Molis*. In that case, writing for a unanimous Court, I asserted that no defence of ignorance of a regulation exists (at p. 361) and I concluded (at p. 364):

. . . the defence of due diligence that was referred to in *Sault Ste. Marie* is that of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation.

As the Ontario Court of Appeal in *Cancoil Thermal* noted, the defence of due diligence is separate from officially induced error. While due diligence in ascertaining the law does not excuse, reasonable reliance on official advice which is erroneous will excuse an accused but will not, in my view, negative culpability. There are two important distinctions between these related provisions. First, due diligence, in appropriate circumstances, is a full defence. If successfully raised, the elements of the offence are not completed. Officially induced error, on the other hand, does not negative culpability. Rather it functions like entrapment, as an excuse for an accused whom the Crown has proven to have committed an offence. Second, diligence may be necessary to obtain the advice which grounds an officially induced error. This is so because an accused who seeks to rely on this excuse must have weighed the potential illegality of her actions and made reasonable inquiries. This standard, however, does not convert officially induced error into due diligence. In *R. v. Forster*, [1992] 1 S.C.R. 339, I contrasted these two exculpatory provisions (at p. 346):

It is a principle of our criminal law that an honest but mistaken belief in respect of the legal consequences of one's deliberate actions does not furnish a defence to a criminal charge, even when the mistake cannot be attributed to the negligence of the accused: *Molis v. The Queen* [cite omitted]. This Court recently reaffirmed in *R. v. Docherty*, [1989] 2 S.C.R. 941, at p. 960, the principle that knowledge that one's actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence.

I do not rule out the possibility that, in an appropriate case, an officially induced error as to the state of the law might constitute a defence. However, I do not consider that it would be appropriate to rule on this question in the context of this appeal.

Forster again shows, as was established in *MacDougall*, that this Court has opened the door for an officially induced error excuse while at the same time upholding the *Molis* rule.

23 Most recently, the existence of an officially induced error defence was recognized in *obiter dictum* by Gonthier J. in his dissenting reasons in *R. v. Pontes*, [1995] 3 S.C.R. 44. While I disagreed with Gonthier J. on the principal issue in that case, I agree with his characterization of this defence (at p. 88):

Assuming without deciding that such a defence would be available if an accused were misled by the Superintendent of Motor Vehicles or by some other official responsible for the administration of the *Motor Vehicle Act*, such a defence would not demonstrate absence of negligence in relation to the *actus reus* of driving while under a statutory prohibition, but rather would be an additional defence thereto, operating as an exception to the rule that ignorance of the law does not excuse.

Here again, the contrast between officially induced error of law and the defence of due diligence is clearly outlined.

24 Several themes run through the Canadian jurisprudence to date on this defence and raise issues which must be determined to outline the scope of the defence. Most of the cases to date have dealt with regulatory offences only, raising the question of when this defence is applicable. A second group of questions revolves around who is an official and what constitutes "official advice". Finally, officially induced error has

sometimes functioned as a full defence, a development which should be discouraged. I turn next to these issues.

C. Officially Induced Error of Law

25 Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. As several of the cases where this rule has been discussed note, the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather, extensive regulation is one motive for creating a limited exception to the rule that *ignorantia juris neminem excusat*.

26 As complexity of regulation is linked to the justification for this excuse, it is predictable that it will arise most often in the realm of regulatory offences. Nonetheless, this excuse is equally valid for "true crimes" with a full *mens rea* component. As the involvement of the state in our day to day lives expands, and the number of officials from whom advice can potentially be sought increases, the chance that an official may give advice about an enactment which would not be classified as "regulatory" multiplies. Officially induced error is distinct from a defence of due diligence, and there is no reason to confine it to the regulatory offence context, though it is obvious that for certain crimes,

such as those involving moral turpitude, the chances of success of such an excuse will be nearly nil.

27 Furthermore, although the section of the *Criminal Code* under which the appellants here were charged contains the phrase "without lawful justification or excuse", there is no particular link between those words and officially induced error of law. Where an accused can raise this argument on the evidence presented, the trial judge must assess whether the excuse is made out in law, regardless of the wording of the offence.

28 The first step in raising an officially induced error of law argument will be to determine that the error was in fact one of law or of mixed law and fact. Of course, if the error is purely one of fact, this argument will be unnecessary. Unlike Professor Barton, I do not agree that officially induced error should be used to eradicate the distinction between mistakes of fact and mistakes of law. This distinction is important for all the reasons that I believe the principle that ignorance of the law does not excuse must stand firm. Distinguishing between mistakes of fact and those of law remains conceptually important. Mistakes of law will only be exculpatory in narrowly defined circumstances.

29 Once it is determined that the error was one of law, the next step is to demonstrate that the accused considered the legal consequences of her actions. By requiring that an accused must have considered whether her conduct might be illegal and sought advice as a consequence, we ensure

that the incentive for a responsible and informed citizenry is not undermined. It is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that her conduct was permissible.

30 The next step in arguing for this excuse will be to demonstrate that the advice obtained came from an appropriate official. One primary objective of this doctrine is to prevent the obvious injustice which O Hearn Co. Ct. J. noted -- the state approving conduct with one hand and seeking to bring criminal sanction for that conduct with the other. In general, therefore, government officials who are involved in the administration of the law in question will be considered appropriate officials. I do not wish to establish a closed list of officials whose erroneous advice may be considered exculpatory. The measure proposed by O Hearn Co. Ct. J. is persuasive. That is, the official must be one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question. Therefore, the Motor Vehicle Registrar will be an appropriate person to give advice about driving offences, both federal and provincial. The determination of whether the official was an appropriate one to seek advice from is to be determined in the circumstances of each case.

31 My colleague Sopinka J. argues that, in this case, allowing OFRB approval to constitute an excuse is an impermissible delegation of power from one level of government to another. In my view, this argument does not bar officially induced error from constituting an excuse which is considered after culpability has been proven. There is no issue of the action of

a provincial board precluding criminal prosecutions. Indeed, we must recall that it is the provincial Attorney General who makes the decision to prosecute offences, even when the offence charged is in the *Criminal Code*. The advice of officials of any level of government may induce an error of law and trigger this provision provided that a reasonable person would consider that particular government organ to be responsible for the law in question. The determination relies on common sense rather than constitutional permutations.

32 Several other types of advice have been considered in the cases dealing with this excuse, for example advice from private lawyers and reliance on judicial pronouncements. As these examples are beyond the scope of this case, I make no comment at this time on whether these types of advice may provide the basis for officially induced error of law.

33 Once an accused has established that he sought advice from an appropriate official, he must demonstrate that the advice was reasonable in the circumstances. In most instances, this criterion will not be difficult to meet. As an individual relying on advice has less knowledge of the law than the official in question, the individual must not be required to assess reasonableness at a high threshold. It is sufficient, therefore, to say that if an appropriate official is consulted, the advice obtained will be presumed to be reasonable unless it appears on its face to be utterly unreasonable.

34 The advice obtained must also have been erroneous. This fact, however, does not need to be demonstrated by the accused. In proving the elements of the offence, the Crown will have already established what the correct law is, from which the existence of error can be deduced. Nonetheless, it is important to note that when no erroneous advice has been given, as in *MacDougall, supra*, this excuse cannot operate.

35 Finally, to benefit from this excuse, the accused must demonstrate reliance on the official advice. This can be shown, for example, by proving that the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation.

36 In summary, officially induced error of law functions as an excuse rather than a full defence. It can only be raised after the Crown has proven all elements of the offence. In order for an accused to rely on this excuse, she must show, after establishing she made an error of law, that she considered her legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in her actions. Accordingly, none of the four justifications for the rule that ignorance of the law does not excuse which Stuart outlined is undermined by this defence. There is no evidentiary problem. The accused, who is the only one capable of bringing this evidence, is solely responsible for it. Ignorance of the law is not encouraged because informing oneself about the law is a necessary element of the excuse. Each person is not a law unto himself because this excuse does not affect culpability. Ignorance

of the law remains blameworthy in and of itself. In these specific instances, however, the blame is, in a sense, shared with the state official who gave the erroneous advice.

D. Procedural Considerations

37 As this excuse does not affect a determination of culpability, it is procedurally similar to entrapment. Both function as excuses rather than justifications in that they concede the wrongfulness of the action but assert that under the circumstances it should not be attributed to the actor. (See *R. v. Mack*, [1988] 2 S.C.R. 903, at pp. 944-45.) As in the case of entrapment, the accused has done nothing to entitle him to an acquittal, but the state has done something which disentitles it to a conviction (*Mack*, at p. 975). Like entrapment, the successful application of an officially induced error of law argument will lead to a judicial stay of proceedings rather than an acquittal. Consequently, as a stay can only be entered in the clearest of cases, an officially induced error of law argument will only be successful in the clearest of cases.

38 The question of whether officially induced error constitutes an excuse in law is a question of law or of mixed law and fact. While a jury may determine whether the accused is culpable, and hence whether this argument is necessary, it is for a judge to determine whether the precise conditions for this legal excuse are made out. Only the trial judge is in a position to determine if a stay should be entered. The elements

of the officially induced error excuse are to be proven on a balance of probabilities by the accused.

III. Application to This Case

39 I agree with Sopinka J. regarding the *mens rea* issue and, hence, the disposition of this appeal. Accordingly, nothing turns on the application of an officially induced error of law analysis in this case. Nonetheless, as I believe this excuse would be effective in this case had the Crown proven *mens rea*, considering this application is instructive.

40 If the appellants had been proven to have the requisite *mens rea* for an offence under s. 163(2) of the *Criminal Code*, the argument put forward here would have been an argument based on error of law. That is, the error would have been in concluding that the films they retailed were not legally obscene. The appellants were aware that they were involved in a business which risked infringing the *Criminal Code*, accordingly they were careful to retail only videos which had been approved by the OFRB. As the films in question were "close to the line", that is, Newton Prov. Div. J. determined them to infringe the s. 163(8) definition of obscenity only after careful analysis and only on the basis of a few scenes, the opinion of the OFRB would seem reasonable even to a knowledgeable retailer who had watched every minute of the films. It is also significant that those seeking OFRB approval and classification for films must pay the OFRB per minute of film. As the appellants sought, and paid for, the

OFRB opinion of these particular films before putting them on their shelves, the question of reliance on the advice is proven.

41 The difficult issue in this case is whether the OFRB is an appropriate official body to consult when seeking a determination about whether certain films are legally obscene, that is, whether they infringe community standards of tolerance. The *Theatres Act*, R.S.O. 1990, c. T.6, states that:

3.-- . . .

(7) The Board has power,

(a) subject to the regulations, to approve, prohibit and regulate the exhibition and distribution of film in Ontario;

33.-- (1) Before the exhibition or distribution in Ontario of a film, an application for approval to exhibit or distribute and for classification of the film shall be made to the Board.

(2) After viewing a film, the Board, in accordance with the criteria prescribed by the regulations, may refuse to approve the film for exhibition or distribution in Ontario.

Thus the OFRB is charged with determining which films may be shown in Ontario and with classifying those films. The Act also provides for an appeal of the Board's decision first to a differently constituted panel of the Board and then to the Divisional Court. Appeals may be on questions of law, of fact, or of both (s. 33(5), (6), (7), (8) and (9)). While clearly the OFRB is not legally responsible for deciding whether a film infringes the *Criminal Code* provisions, it could presumably itself attract criminal responsibility for approving for distribution a criminally obscene film.

42 Most importantly, in my view, the OFRB is understood by the general public as the body which approves films for play in Ontario. When a film is rejected as obscene by the OFRB, the headlines proclaim the film's obscenity. When someone refers to the "censor board", the OFRB is the board Ontarians think of. There is no other public body which would be the logical choice for someone to consult if seeking advice about whether a film can be legally retailed in Ontario. In these circumstances, therefore, I would conclude that had appellants had the requisite *mens rea* for this offence, they would be entitled to a judicial stay of proceedings as a result of officially induced error of law.

IV. Disposition

43 I would allow the appeal and enter an acquittal.

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

SOPINKA J. --

I. Issue

44 This appeal concerns the interpretation of s. 163(2) (a) of the *Criminal Code*, R.S.C., 1985, c. C-46, which deals with "knowingly" selling obscene material "without lawful justification or excuse". Does s. 163(2) (a)

of the *Code* require that the retailer have knowledge of the specific acts which make the material obscene in law or, is it sufficient to show that this retailer had a general knowledge that the material deals with the exploitation of sex?

45 A second issue in this case concerns the effect of provincial film board approval of the obscene material. Does such approval preclude conviction either because it effectively negates the *mens rea* for the offence or because it provides legal justification or excuse?

II. Factual Background

46 The appellant, Randy Jorgensen, is the sole officer of 913719 Ontario Limited which owns and operates a store in Scarborough under the name of "Adults Only Video and Magazine". Acting in an undercover capacity, members of the Metropolitan Toronto Police Force and the Pornography and Hate Literature Section purchased eight videotapes from the appellant's store. Despite the fact that the Ontario Film Review Board ("OFRB") had approved the videotapes, members of the Pornography and Hate Literature Section viewed the videotapes and concluded that they were obscene. The appellants were charged with eight counts of selling obscene material without lawful justification or excuse contrary to s. 163(2)(a) of the *Criminal Code*.

III. Relevant Statutory Provisions

47 Section 163 of the *Criminal Code*, R.S.C., 1985, c. C-46, provides:

163. (1) Every one 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;

. . .

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

- (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

. . .

(6) Where an accused is charged with an offence under subsection (1), the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge. [Repealed S.C. 1993, c. 46, s. 1.]

. . .

(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. [Emphasis added.]

IV. Judgments

Ontario Court, Provincial Division

48 At trial, Newton Prov. Div. J. found three of the eight videos (*Bung Ho Babes*, *Made in Hollywood* and *Dr. Butts*) to be obscene contrary to s. 163(8)

of the *Criminal Code*. Newton Prov. Div. J. found these videos to be in violation of the *Code* due to their portrayal of sex coupled with violence.

49 With respect to the *mens rea* of the offence under s. 163(2) for "knowingly" selling these obscene materials, Newton Prov. Div. J. reviewed the jurisprudence and then outlined the following propositions:

1. Censor Board or Customs Department approval is not a bar to prosecution. It is the function of the court to determine whether the material at issue is obscene.
2. One cannot escape accountability for criminal acts by stating that he was led to believe his acts were not criminal.
3. The authorities establish a distinction between retailer and wholesaler. This distinction between the offences established by s. 163(1) and 163(2) remains important in the post-Charter interpretation.
4. It is not incumbent on the Crown, even on a charge under s. 163(2) where the Crown must prove that the accused knowingly committed the offence to prove that an accused, who is aware of the presence and nature of the subject matter also knew it was obscene in the legal sense.
5. The Crown must prove only that the accused had knowledge that the dominant characteristic of the material was the exploitation of sex, not knowledge that the exploitation of sex was undue.
6. A mistake of fact which negatives the mental element which is part of the definition of the offence negatives the offence.
7. The accused's honest and mistaken belief that the exploitation of sex was not undue or did not exceed the community standards of tolerance does not fall within the defences of mistake of fact or due diligence.
8. Knowledge can be inferred from the surrounding circumstances.
[Emphasis added.]

50 With respect to the *mens rea* for an offence under s. 163(2), Newton Prov. Div. J. ultimately concluded that:

I am of the view that the Crown must prove beyond a reasonable doubt that the accused is aware of the presence or nature of the matter that constitutes the subject of the charge in a general sense. It is not necessary that the Crown prove the accused was aware of the specific factual contents of the forbidden material at issue.

51 In elaborating on how knowledge can be inferred from the surrounding circumstances, Newton Prov. Div. J. explained:

I am of the view that implicit, in the historical analysis of the statutory scheme and the factual foundation provided in the authorities that I have referred to is the necessity of a blameworthy state of mind with respect to the offence in Section 163(2) of the Criminal Code.

My review of the authorities and principles of criminal law indicate that the requirement can be satisfied by evidence such as statements made by an accused person, warnings by police officers with respect to the content of the materials and continued dissemination of those materials in the face of the warning, non-compliance with in rem proceedings, non-compliance with judicial determinations, outstanding charges, condition of the material and location at the time of seizure, the nature of the material itself, evidence of some form of clandestine activity, and non-compliance with requirements with respect to excising portions of a film to meet appropriate approval standards.

52 With respect to whether reliance on OFRB approval negates any possibility that an accused acted knowingly, Newton Prov. Div. J. decided that it is the function of the court to determine whether the material at issue is obscene and therefore, censor board or customs approval is not a bar to prosecution. She emphasized the principle that one cannot escape accountability for criminal acts by stating that he was led to believe that his acts were not criminal.

53 In arriving at this conclusion, Newton Prov. Div. J. first acknowledged that the appellant, Jorgensen, had stated that he had relied on the film board approval:

It was further agreed that the accused relied on the Ontario Film Review Board approval with respect to all of the video tapes which form the subject of these charges. Mr. Jorgensen advised the officers that he purchased only video tapes passed by the Ontario Film Review Board.

54 After establishing the fact that the appellants had relied on Board approval, Newton Prov. Div. J. outlined the composition, mandate and standards of the Board. Referring to the testimony of Mr. Payne, Chairman of the OFRB, Newton Prov. Div. J. summarized as follows:

The Board is comprised of men and women from various educational, geographical, religious, racial and cultural backgrounds throughout Ontario in an attempt to reflect the diversity of the population. . . . He testified that the Ontario Board is more conservative than other Canadian Boards, with respect to sexual content issues.

He indicated that Canadian community standards of tolerance are determinative of approval for distribution. . . .

. . . He confirmed that while the Board serves the population of Ontario, it applies a National standard of tolerance. He recognized that it is the function of the courts to determine obscenity, but maintained that the Board would not knowingly approve material that was obscene. [Emphasis added.]

55 Following the principles outlined above, Newton Prov. Div. J. concluded that film board approval was not a bar to prosecution and that it was the function of the court ultimately to determine whether the material was obscene in law.

56 As for the final issue of whether OFRB approval constitutes a lawful justification or excuse, Newton Prov. Div. J. concluded that such approval did not provide a complete defence. She concluded:

While I appreciate that there is evidence before me that in exercising their mandate, the Board considers factors relevant to the s. 163(8) determination, I am of the view that the Ontario Film Review Board approval is not a justification or excuse, as it is the function of the Court to determine whether the material is obscene within Section 163(8) of the Criminal Code. Their approval, though lawful, would not make the conduct lawful if it was proven to the requisite degree that the video tape was obscene within the parameters of the legislation.

57 Newton Prov. Div. J. did acknowledge, however, that Board approval would be relevant in the court's determination of whether the materials were obscene in law. Again referring to the evidence of Mr. Payne, Newton Prov. Div. J. noted:

Based on the examination-in-chief and the cross-examination before me, I am satisfied that his evidence is such that I cannot reject it as being indicative of community standards of tolerance. While I am mindful that he did not view any of the videos before me, and while some of his evidence would negate current Board approval, I am satisfied that it is a matter of weight to be attached to his evidence.

Ontario Court of Appeal (Robins J.A., Doherty and Austin JJ.A. concurring)

58 The Court of Appeal unanimously decided that the Crown need only show that the retailer of the obscene materials was "aware of the videos and the nature of their subject matter". The court rejected the argument that the OFRB approval negated the possibility of finding that the appellants acted knowingly in selling obscene films. The court held that OFRB approval was

irrelevant to the question of *mens rea*, although it may be a relevant factor in the mitigation of sentence. Robins J.A. held:

In my opinion, the Board's decision that the films did not exceed the community's standard of tolerance and should therefore be approved for restricted viewing is irrelevant to the question of whether the appellants can be fixed with sufficient knowledge of their contents to be found to have 'knowingly' sold obscene films. The Crown is not required to prove that they had specific knowledge of those parts of the film which were determinative in the trial judge's assessment of whether they were obscene. The appellants were aware of the videos and the nature of their subject matter. The fact that they may not have known that the films were obscene in the legal sense, or that the board's approval may have led them to believe that the films were not obscene, may be mitigating factors on the question of sentence, but are immaterial to the issue of whether the appellants acted 'knowingly'. [Emphasis added.]

59 The court also affirmed the trial judge's decision that the OFRB approval of the videos does not amount to a lawful justification or excuse. The court noted that the approval of certain material by a body charged with considering whether the material is suitable for purposes other than the criminal law cannot constitute lawful justification or excuse within the meaning of s. 163(2)(a). The court regarded it as untenable that a provincial board would be able to determine the criminal issue of whether material is obscene.

60 Despite the fact that Board approval cannot be determinative, Robins J.A. also acknowledged its relevance. He wrote:

While the Board's approval of video films depicting explicit sexual activity between consenting adults without violence, bestiality, necrophilia and the like clearly cannot be determinative of the criminal law of obscenity, or preclude a

court from ruling otherwise, it is plainly relevant to the question of community standards of tolerance. . . .

61 The Court of Appeal ultimately decided that weighing all the factors in issue, the trial judge's decision was supported by the evidence and that she made no error of law. Robins J.A. concluded:

As I have already stated, the Board's approval of the films may be evidence of what the contemporary community will tolerate. However, the Board's approval is not binding on a court or determinative of whether the films are criminally obscene. The trial judge properly treated this evidence as indicative of community standards of tolerance, and fully recognized that due weight must be given to it. Nonetheless, for reasons she carefully explained, she was not persuaded that it raised a reasonable doubt as to the appellants' guilt. Her review of the films led her to conclude that their contents, which are outlined above, included the portrayal of sex coupled with violence and coercion or subordination and created the requisite risk of harm. She accordingly found that the films unduly exploited sex and were obscene within the *Butler* test. The trial judge was entitled to reach this conclusion on the evidence before her and made no error in law in so doing.

V. Analysis

A. *Knowingly*

62 The central issue in this appeal is the nature of the *mens rea* requirement in s. 163(2) (a) of the *Criminal Code* when it states that it must be shown that the accused acted "knowingly" in selling obscene material. Is an accused acting knowingly when he or she is aware only of the general nature or the subject matter of the work in question? The Crown responds in the affirmative and submits that it is sufficient that it is established that the accused was aware that the dominant characteristic is the exploitation

of sex. On the other hand, the accused appellants contend that the term "knowingly" should extend to all factual elements of the *actus reus*. On the basis of this submission, it must be shown that the accused was aware of particular content of the material which makes it criminal. Material, the dominant characteristic of which is the exploitation of sex, crosses the line and becomes criminal only when it is shown that the exploitation of sex is undue. The appellants contend that the prosecution must establish knowledge on the part of the accused of the content of the material which renders the exploitation undue in law.

63 To put the positions of the parties in context it is helpful to observe that, pursuant to this Court's decision in *R. v. Butler*, [1992] 1 S.C.R. 452, material that involves the exploitation of sex which does not involve sex with violence and is neither degrading nor dehumanizing is generally not obscene. Accordingly, the Crown's submission would limit the operation of the word "knowingly" to awareness of conduct which is not criminal. Knowledge of such conduct would not, therefore, constitute a blameworthy mind state. I have concluded that the Crown's submission does not accord with the rules of statutory construction and is not supported by any policy reason.

64 It is a general rule of statutory construction that when the term "knowingly" is used in a criminal statute, it applies to all elements of the *actus reus*. In *R. v. Rees*, [1956] S.C.R. 640, this Court considered whether, on a charge of contributing to the delinquency of a child under the age of 18, honest belief that the child was over the age was a defence.

The majority held that in accordance with the rule of statutory construction to which I have referred, the term "knowingly" must be applied to all elements of the offence and in particular to the age of the child. Cartwright J., at p. 652, cited with approval a statement from Glanville Williams:

In his book on Criminal Law (1953) at pages 131 and 133, Mr. Glanville Williams says:—

It is a general rule of construction of the word "knowingly" in a Statute that it applies to all the elements of the *actus reus* . . .

The sound principle of construction is to say that the requirement of knowledge, once introduced into the offence, governs the whole, unless Parliament has expressly provided to the contrary.

In my opinion these passages are supported by the authorities collected by the learned author at the pages mentioned and correctly state the general rule.

And at p. 653 he expressly adopted the following passage from the reasons of the Chief Justice of British Columbia:

In my view of the matter we must start out with the proposition that sexual intercourse with a woman, not under the age of 18 years and with her consent, is not a crime, except under exceptional and irrelevant circumstances. It follows that if the appellant had sexual intercourse with a girl not under 18 years of age he could not be convicted of contributing to her becoming a juvenile delinquent for the simple reason she is not a child within the meaning of the Act.

It is the age factor alone that, in these circumstances, moves the act from a non-criminal to a criminal category.

It follows, it seems to me, that when a man is charged with knowingly and wilfully doing an act that is unlawful only if some factor exists which makes it unlawful (in this instance the age of the girl) he cannot be convicted unless he knows of, or is wilfully blind to, the existence of that factor, and then with

that knowledge commits the act intentionally and without any justifiable excuse.

He then continued as follows:

It would indeed be a startling result if it should be held that in a case in which Parliament has seen fit to use the word "knowingly" in describing an offence honest ignorance on the part of the accused of the one fact which alone renders the action criminal affords no answer to the charge.

65 All the judges in the majority agreed with this application of the rule of statutory construction. Fauteux J. dissented.

66 I find nothing in the language of the section to suggest that the word "knowingly" should be given a restricted meaning. Moreover, an examination of the history of these provisions and an analysis of policy considerations tend to support the position of the appellants.

67 In reviewing the history and purpose of s. 163 it is useful to note the distinction that the *Code* makes between those who produce or distribute obscene materials and those who sell or retail such materials.

68 Section 163(1) focuses on the producers and distributors of obscene material:

163. (1) Every one 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; or

- (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

Section 163(2), on the other hand, focuses on those who sell such materials:

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

- (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever; [Emphasis added.]

69 It is immediately apparent that in the case of producers and distributors, the *actus reus* need not be committed knowingly, whereas in the case of sellers and retailers it is an essential element.

70 A most helpful history of these provisions is contained in the reasons of Martin J.A. in *R. v. Metro News Ltd.* (1986), 29 C.C.C. (3d) 35 (Ont. C.A.). In that case the accused was charged under s. 163(1) (then s. 159(1)) with distributing an obscene publication: an edition of *Penthouse* magazine. The court found that s. 163(6) (then s. 159(6)), which barred the defence of honest mistake of fact to the offence of distributing obscene material under s. 163(1), infringed s. 7 of the *Canadian Charter of Rights and Freedoms* in that it created an absolute liability offence having imprisonment as a potential punishment. Martin J.A., for the court, first noted that the obscenity provision dates back to the *Criminal Code* of 1892. He further observed that the words "knowingly without lawful justification or excuse" had originally qualified both the offences of "selling" and "distributing" obscene matter. The *Code* was later amended in 1949 and this

qualification was altered, such that it no longer applied to distributing obscene matter.

71 Martin J.A. further noted that the purpose of the 1949 amendment was quite simply to remove the knowledge requirement for distributing obscene material but left the requirement intact for selling obscene matter. As Martin J.A. observed, at p. 56: "Patently, the purpose of the 1949 amendment was to make the absence of a blameworthy state of mind irrelevant on a charge of distributing obscene matter."

72 Martin J.A., speaking for the court, went on to declare s. 163(6) invalid by reason of its inconsistency with s. 7. In accordance with the principles of fundamental justice, however, while the Crown was not required to prove knowledge on the part of a producer or distributor, the latter was entitled to be acquitted if there was evidence raising a reasonable doubt that the accused had an honest and reasonable belief in a state of facts which, if true, would render his conduct innocent. I am generally in agreement with Martin J.A. that it was Parliament's intention to make a clear distinction between the elements of the offences created by s. 163(1) and (2). With respect to the former, Parliament intended to create an absolute liability offence but the principles of fundamental justice require that it be treated as a strict liability offence.

73 This history of the section provides no support for a restricted interpretation of the term "knowingly". Indeed it supports the view that in order to comply with Parliament's intention a clear distinction should

be maintained between the subsections. If subs. (1) is now a strict liability offence, the logical interpretation which will maintain a clear distinction is to give the word "knowingly" its usual interpretation in accordance with the rule of statutory construction to which I have referred.

74 In my view there are sound reasons for such a distinction. Producers and distributors can be presumed to be familiar with the content of the material that they create or distribute. Furthermore, if the law casts upon them the obligation of being familiar with the material they make or distribute, that can easily be discharged. On the other hand, a seller of pornographic material may include among her merchandise magazines, books and a myriad of other products. Until the materials arrive at the seller's shop, he or she has had nothing to do with the material. It might be suggested that the seller can ask the distributor or producer about content when the material is ordered. This is not likely to produce a helpful response. Anyone in the business of producing or distributing pornographic material for profit is not likely inclined to scare off buyers by telling them his or her product can potentially subject the potential purchaser to criminal liability. It would, therefore, be perfectly reasonable for Parliament to have assumed that the seller would ordinarily not be aware of the specific nature of the contents of the material sold, in which circumstance imposing criminal liability would result in the conviction of many persons who did not possess a blameworthy mind state.

75 Conversely, the producer or distributor will generally be aware of the contents of the material which may result in its being found to be obscene. The imposition of criminal liability in the absence of knowledge of the contents will be less likely to result in the conviction of those that are mentally blameless. In addition, a producer or distributor who knows that absence of knowledge in default of a reasonable inquiry cannot be relied on can easily find out what the material contains. On the other hand, it would be unreasonable to expect the seller to read every book or magazine and view every video or film to ferret out the portions that may run afoul of the obscenity provisions.

76 I therefore conclude that in using the word "knowingly" in s. 163(2) Parliament did not intend to restrict its meaning. In all the circumstances it would make little sense to conclude that Parliament required proof of knowledge but limited the requirement to proof of the aspect of the *actus reus* that is perfectly lawful. Although, as a constitutional imperative, a blameworthy mental element need not extend to all aspects of the *actus reus*, Parliament can choose to legislate beyond minimum constitutional limits. In my view, in choosing the term "knowingly", it has done so in this case.

77 Both parties contended that the case law supported their respective positions. In my view the case law, while inconclusive on this point, is not inconsistent with the position of the appellants. I now turn to an examination of the principal cases.

78 In *R. v. Cameron*, [1966] 4 C.C.C. 273 (Ont. C.A.), leave to appeal to S.C.C. refused, [1967] 2 C.C.C. 195n, the accused, who managed the affairs of a commercial art gallery in Toronto, was charged with seven counts of exposing obscene drawings to public view. With respect to the interpretation of "knowingly", Aylesworth J.A., speaking for the court on this point, framed the issue in the following manner (at pp. 285-86):

Did the appellant do what she did knowingly and without lawful justification or excuse? No argument was addressed to us suggesting that there was any lack of proof that what appellant did, she did knowingly. Reference already has been made to the fact that she collected these drawings through private galleries and from the artists themselves, and that she arranged for their exposure to public view; she well knew, of course, the subject-matter of the drawings; she could scarcely assent to and arrange for their exhibition and grouping in her gallery for sale to the public and at stated prices without such knowledge. "Knowingly" does not require that appellant should possess the legal knowledge of whether or not the drawings were obscene; it is sufficient if she knew the subject-matter and caused the drawings to be publicly exhibited. [Emphasis added.]

79 The use of the words "knowledge of the subject-matter" are consistent with a *mens rea* requirement of subjective knowledge of the factual content of the drawings which rendered them obscene in law. Although the court stated that knowing that the material is obscene in law is clearly not necessary, Aylesworth J.A. focused on whether the accused was aware of the subject matter of the drawings.

80 The issue was also addressed in *R. v. Kiverago* (1973), 11 C.C.C. (2d) 463 (Ont. C.A.), in which the accused was charged with exposing an obscene poster to public view. The central issue was whether an accused's honest belief that the material is not obscene provides a defence. The Court of

Appeal found that since having knowledge that the material is obscene in law is not a constituent element of the offence, an honest belief that the material is not obscene would not provide a defence. However, in considering this point of law, the court (*per* Gale C.J.O.) cited approvingly the above passage from *Cameron*, and then commented (at p. 465):

In this case, Mr. Kiverago certainly knew the nature of this poster and caused it to be exposed to public view. . . .

. . . s-s. (2) seems to us to suggest that, even assuming the material is obscene, the person who exposes it cannot be guilty of an offence unless he knows that he has exposed it and does not have some lawful justification or excuse for doing so. . . . [Emphasis added.]

Kiverago thus makes clear that the *mens rea* for the offence which was discussed was subjective knowledge of the specific content of the material. It is true that the nature of the medium allowed the court to infer knowledge of the specific subject matter. Like displaying pictures in an art gallery which was the situation in *Cameron*, putting up a poster necessarily requires actual subjective detailed knowledge of the material. The nature of the obscene material was openly observable such that merely seeing the painting or poster made one knowledgeable as to its contents. Perhaps, therefore, it was unnecessary for the court to consider a reduced level of knowledge.

81 Films and videos raise a different problem as they are not as readily observable as paintings or posters. The same types of inferences or assumptions about whether an accused is aware of their contents cannot be made. This issue was dealt with in *R. v. McFall* (1975), 26 C.C.C. (2d)

181 (B.C.C.A.). The accused was charged with having possession of obscene films for the purpose of exposing them to public view. The films, which were owned by the accused corporation, were shown in cubicles in the back of a book store managed by another accused, with signs reading: "Restricted to persons over 18" and "Sex — exciting movies". Taggart J.A. reviewed the *Cameron* and *Kiverago* decisions, and then commented (at p. 194):

Counsel for the Crown submitted that it is not incumbent on the Crown to show that the accused had seen all or any part of the film in question in order to prove knowledge but that it is sufficient if the Crown shows that the accused had knowledge of the nature of the film. I think that is a correct position for the Crown to take for I am of the opinion that in *R. v. Cameron, supra*, Aylesworth J.A., accurately describes what is meant by the word "knowingly". In saying that, I am not overlooking the obvious distinction that in that case the Court was considering paintings whose content must have been known to the accused who had handled and arranged them whereas here we have a film which would have to be projected to be seen and which the Crown has not proved was seen by any of the appellants. Notwithstanding that I think the Crown has satisfied the requirement of s. [163(2) (a)] if it shows that the accused had knowledge, not that the film was obscene in the legal sense, but that they had knowledge of its nature, that is that it was a film of which a dominant characteristic was the exploitation of sex. [Emphasis added.]

82 Taggart J.A. quite plainly addresses the distinction between paintings, posters and films. Despite the acknowledgment that it could not be said how much of the contents of the film were known to the appellants, Taggart J.A. decided that it was only necessary for the Crown to show that the appellants knew that the film's dominant characteristic was the exploitation of sex.

83 If this were all that was required, the Crown's task would not be very onerous. Pornographic films deal with the exploitation of sex. Their plots are thin or non-existent and the quality of acting makes awards for acting excellence rather doubtful. It can almost be assumed that a retailer of pornography will be aware of the fact that the materials that he is selling are those where the dominant characteristic is the exploitation of sex.

84 This assumption does not, however, appear to have resolved the case for Taggart J.A. Taggart J.A. carefully considered the evidence which was available to support the conclusion that the accused acted "knowingly" despite the fact that he had not seen the film. He noted at pp. 194-95:

It is next necessary to consider whether the Crown adduced evidence which the jury could find that the appellants had knowledge of the nature of the film in question in count 2. I think there was evidence of that kind and it included:

- (a) the signs posted on one of the cubicles;
- (b) the circumstances under which the film might be seen by members of the public, including the cubicles;
- (c) the following facts: count 2 charges an offence alleged to have taken place later in time than the offence charged in count 1. The films referred to in count 1 had been seized and both Mr. Candella and Mr. McFall had been warned that charges of possession of obscene films might be preferred against them in respect of the films referred to in count 1;
- (d) the following facts: . . . Mr. McDonald, the film classification director for British Columbia, was called as a witness for the defence. He said the film referred to in count 2 had been received from the appellant McFall for approval, had been looked at and approved for showing as "restricted" provided about 20 or 30 feet of the film was excised. The film was then returned to McFall. [Emphasis added.]

85 The fact that Taggart J.A. looked for this type of evidence suggests that merely knowing that the film was a sex film was not sufficient to convict. In particular, the previous seizure of the materials and the explicit directions from the film classification director to delete certain portions of a film before showing the film, are good indications that the accused was either aware of or wilfully blind to the contents of the obscene films. It appears that Taggart J.A. was looking for some indication that the accused had knowledge of the fact that the film contained certain elements which could be deemed as obscene in law. It appears, therefore, that although the definition of *mens rea* by Taggart J.A. would support a lesser level of *mens rea*, in reviewing the evidence, he exacted a level of knowledge of the content of the materials which in law rendered it obscene.

86 In *Metro News*, to which I have already referred, Martin J.A. considered whether the *mens rea* for the offence of distributing obscene matter required proof of knowledge that the material exceeded community standards of tolerance. At page 56 he stated:

It is, in my view, well established that it is not incumbent on the Crown, even on a charge under s. [163(2)] where the Crown must prove that the accused "knowingly" committed the offence, to prove that an accused who is aware of the presence and nature of the subject-matter also knew that it was obscene.

Martin J.A. continued at p. 58:

In *Hamling v. U.S.* (1974), 418 U.S. 87, the defendant was charged with use of the mails to carry an obscene book in violation of 18 U.S.C. The Supreme Court of the United States held that the

requirement of "knowingly" in art. 1461 of 18 U.S.C., making it an offence to "knowingly" use the mails for the mailing of non-mailable matter, was satisfied by proof that the defendant had knowledge of the contents of the materials he distributed and that he knew the character and nature of the materials. [Emphasis added.]

87 All of this suggests that Martin J.A. was convinced that the word "knowingly" should be given its plain meaning so as to require actual subjective knowledge of the nature and character of the material which would qualify it as obscene. This, according to Martin J.A., was necessary to reflect the nature of *mens rea* in this context (at pp. 54-55):

The minimum and necessary mental element required for criminal liability for most crimes is knowledge of the circumstances which make up the *actus reus* of the crime and foresight or intention with respect to any consequence required to constitute the *actus reus* of the crime. Wilful blindness is equated with actual knowledge. . . .

88 Having reviewed these cases, I would suggest that the jurisprudence supports the conclusion that for the Crown to convict on a charge of "knowingly" selling obscene materials, it must show more than that the accused had a general knowledge of the nature of the film as a sex film. Although the cases have been few and are by no means clear on this point, cases such as *McFall* and *Metro News* illustrate that courts have looked for some indication that the seller of the obscene material was aware of the relevant facts that made the material obscene. In the case of displaying paintings or posters, it could be inferred that the person selling these paintings or posters had knowledge of what made them obscene. The obscene material is plainly in view and its contents and knowledge of the specific nature of its contents can be assumed "known". The same cannot be said

concerning films, videos and other media involving a collection of images and where it takes some time and active steps to observe and "know" the contents. In the case of pornographic films and videos, it cannot be easily inferred that those selling these materials "know" their contents. As noted above, it may be inferred that the retailer is aware that the materials are erotic or pornographic and deal with the exploitation of sex. But selling films which deal with the exploitation of sex is not an illegal activity in itself. There must be something in the material that transports it into the realm of obscenity. Not only must the dominant characteristic of the material be the exploitation of sex, but the exploitation of sex must be undue.

89 What distinguishes mere pornographic material which may constitute an exploitation of sex from obscene material which constitutes an "undue exploitation of sex" was elaborated in *Butler, supra*. In my reasons I suggest that pornography can usefully be divided into three categories (at p. 484):

- (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.

The significance of this classification was explained at p. 485:

In making this determination with respect to the three categories of pornography referred to above, 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.

90 Applying the principles set forth in *Butler*, Newton Prov. Div. J. concluded that three of the eight videos taken from Mr. Jorgensen's store involved the undue exploitation of sex according to s. 163(8) of the *Code*. These films were titled *Bung Ho Babes, Made in Hollywood* and *Dr. Butts*. The specific characteristics of these videos which led Newton Prov. Div. J. to conclude that the videos were contrary to the *Code* are clearly relevant to determining whether a retailer "knowingly" sold obscene materials contrary to s. 163(2) (a).

91 In *Bung Ho Babes* the video portrays a female prison warden ordering that the female inmates disrobe and that one of the inmates spank the other. The woman complies in spanking the other inmate and this produces visible reddening of the woman's buttocks. Newton Prov. Div. J. held that this video constituted the undue exploitation of sex due to the manner in which it equated sex and punishment in the context of subordination.

92 In *Made in Hollywood*, one of the scenes shows a male ordering women to perform various sexual acts. One of the women appears distressed and the

other, with whom he is having intercourse, is slapped several times on the buttocks producing visible red marks. This was also viewed by Newton Prov. Div. J. as the undue exploitation of sex due to the manner in which it coupled sex and violence.

93 The other video, *Dr. Butts*, includes a scene where a husband and wife are in their bedroom discussing the wife's current job prospects. The husband orders his wife to perform anal sex as a prerequisite to her pursuit of a movie career. During anal intercourse, the man slaps the woman's buttocks repeatedly thereby producing visible red marks. She appears to be grimacing in pain and her remarks do not indicate that she is consenting. Newton Prov. Div. J. found that this video also involved the undue exploitation of sex in that the woman is coerced into sexual relations and that the violence and her position of subordination are legitimized.

94 As these comments illustrate, it was not merely the fact that the videos in question dealt with the exploitation of sex that made them offensive and contrary to s. 163(8). It was the fact that the videos combined explicit sex with violence. This type of material falls directly within the first category outlined in *Butler*. What Newton Prov. Div. J.'s comments further suggest by implication, is that other parts of the videos which did not combine sex and violence did not offend s. 163(8). It was only those scenes that depicted the undue exploitation of sex that were in contravention of the *Code*.

95 If we relate these observations to the application of s. 163(2)(a), it suggests that merely showing that a retailer knows that the material that he or she is selling deals generally with the exploitation of sex fails to link the retailer to the offence of "knowingly" selling obscene material. In my view, the law requires that in order to make the necessary link it must be shown that the retailer knew of the specific acts or set of facts which led the courts to the conclusion that the material in question was obscene under s. 163(8). If, for example, the offensive part of the video was that which showed a male spanking the female and forcing her to have sexual relations, then for an accused to be convicted under s. 163(2)(a), it must be shown that the retailer was aware or wilfully blind that the video being sold contained this scene.

96 There may of course be cases where the obscenity results from the overall character of the film. This may occur, for example, where a video portrays women in positions of subordination, servile submission or humiliation without any verbalization or other express reference to this depiction as a theme in itself. This type of ubiquitous portrayal may have a cumulative degrading effect sufficient to render it undue in accordance with the criteria in *Butler*. To be undue, pornography that falls within this category requires the determination that the degrading or dehumanizing treatment create a substantial risk of harm. This risk is assessed by reference to the community standards test. The complexity of this assessment can be compared to the relatively straight-forward first category: whereas sex with violence is usually readily identifiable visually, sex with degrading or dehumanizing treatment can be more abstract

or subliminal. I noted in *Butler* that in some cases, the very appearance of consent makes the depicted acts even more degrading or dehumanizing. Videos falling within the second category are therefore more likely than those in the first category to be deemed obscene because of an overall effect without reference to specific acts or portions of the whole. In such instances, if the court is unable to specify any particular scene but still concludes that, overall, the film is obscene in law, then it only makes sense that sufficient proof be offered to show that the retailer was aware of the "overall" obscene nature of the film.

97 This is not, of course, to suggest that a retailer must know that the materials being sold were obscene in law. If the retailer says he viewed the films and saw the particular spanking or noticed the underlying degradation but thought that it was harmless and inoffensive, this will not provide a defence. The retailer will not be immune from charges merely because he or she does not know how the law defines obscenity. Nor will a retailer be immune from conviction because he or she is unaware that there are any laws against selling obscene material. This would amount to the defence of mistake of law and it is well established that ignorance of the law is no defence. What is required is that the Crown prove beyond a reasonable doubt the retailer's knowledge that the materials being sold have the qualities or contain the specific scenes which render such materials obscene in law.

98 The Crown expressed some concerns that requiring proof beyond a reasonable doubt that the retailer was aware of the specific facts or nature of the

film which led the court to decide that the material was obscene in law, is impractical and would effectively make prosecution impossible. The Crown argues that the reality of mass-market video retailing is such that it is highly unlikely that a retailer will have viewed the products on the shelves. Furthermore, it is argued that retailers will simply choose not to view their videos thereby escaping conviction.

99 The Crown also submits that retailers of pornography, having consciously chosen to enter this regulated and financially profitable field, should be held responsible for the social harm caused when the pornography that they sell crosses the line into obscenity. The Crown suggests that these retailers are best placed to prevent the harm in the first place by applying greater caution in the materials that they sell. Essentially, as the argument goes, a retailer knows his merchandise may be obscene even if passed by the OFRB, or at the very least, one can say that he knows that he is engaging in an activity where the product is possibly subject to criminalization. By not enquiring for himself as to the character of the film, the retailer is wilfully blind to the risk that the product poses. OFRB approval may significantly reduce, but does not eliminate, the risk that the material is obscene. A retailer who has not viewed the film is thus as morally blameworthy as someone who has viewed the film, since he knows there is a risk but chooses to sell the film in spite of this risk.

100 There are two observations that tend to meet these concerns. First, proof that a retailer has knowledge of the specific acts or characteristics that make a video obscene does not necessarily require proof that the retailer

actually watched the obscene material in question. "Knowledge" of the obscene character of the film can clearly be acquired by other means than direct viewing. On this issue, Newton Prov. Div. J. noted that a blameworthy state of mind can be shown in a number of ways short of demonstrating that the film was actually seen. In her oral reasons she explains:

My review of the authorities and principles of criminal law indicate that the [knowledge] requirement can be satisfied by evidence such as statements made by an accused person, warnings by police officers with respect to the content of the materials and continued dissemination of those materials in the face of the warning, non-compliance with in rem proceedings, non-compliance with judicial determinations, outstanding charges, condition of the material and location at the time of seizure, the nature of the material itself, evidence of some form of clandestine activity, and non-compliance with requirements with respect to excising portions of a film to meet appropriate approval standards.

Accordingly, evidence which suggests that the retailer was warned of particular materials or failed to comply with requirements with respect to excising portions of a film, can indeed be relevant in determining whether a retailer had "knowledge" that he was selling obscene materials. The use of this type of evidence for this purpose was aptly illustrated by Taggart J.A. in making his determination in *McFall*.

101 In addition, the retailer's knowledge may be determined from other circumstances directly linked to the context of the retailer's activity. Both Taggart J.A. in *McFall* and Newton Prov. Div. J. refer to such circumstances, including the location of the activity and signs of clandestine behaviour. Where, for example, a retailer dealing only in

pornographic videos keeps a separate selection of high-priced videos, secures certain videos in a locked cabinet, shields certain videos from plain view, or maintains a list of videos available on request only, this may constitute a relevant circumstance. Such circumstances can easily be distinguished from those of a corner store that carries the odd porno flick among an otherwise unremarkable video collection. Circumstances that are internal to the retailer's business activity can, therefore, be considered relevant circumstances for the purpose of determining knowledge, similarly to factors such as warnings or directions from external sources.

B. *Wilful Blindness*

102 The second response to the concerns expressed by the Crown relates to the principles of wilful blindness. It is well established in criminal law that wilful blindness will also fulfil a *mens rea* requirement. If the retailer becomes aware of the need to make further inquiries about the nature of the videos he was selling yet deliberately chooses to ignore these indications and does not make any further inquiries, then the retailer can be nonetheless charged under s. 163(2)(a) for "knowingly" selling obscene materials. Deliberately choosing not to know something when given reason to believe further inquiry is necessary can satisfy the mental element of the offence. As Glanville Williams wrote in *Criminal Law: The General Part* (2nd ed. 1961), at pp. 157-58:

[T]he rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. . . .

. . . In other words, there is a suspicion which the defendant deliberately omits to turn into certain knowledge. This is frequently expressed by saying that he "shut his eyes" to the fact, or that he was "wilfully blind".

And, at pp. 158-59, the learned author states:

Before the doctrine of wilful blindness applies, there must be realisation that the fact in question is probable, or, at least, "possible above the average". . . .

. . . A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness.

103 A finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge? Retailers who suspect that the materials are obscene but refrain from making the necessary inquiry in order to avoid being contaminated by knowledge may be found to have been wilfully blind. The determination must be made in light of all the circumstances. In *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, this Court held that the circumstances were not restricted to those immediately surrounding the particular offense but could be more broadly defined to encompass, for example, past events. See also *R. v. Blondin* (1970), 2 C.C.C. (2d) 118 (B.C.C.A.), at p. 122. It would seem, therefore, that a relevant circumstance would include assurances from others who are presumed to know and in particular public officials such as the OFRB.

104 The appellants offer a further answer to the concerns expressed by the
Crown. They submit that any difficulty in proving knowledge against the
seller will have the salutary effect of concentrating enforcement against
the distributor who is better placed to screen out obscene matter. While
this submission is appealing, it is not this Court's function to dictate
enforcement policy. Nonetheless, Parliament chose to set an onerous
standard of proof by adopting the word "knowingly". If its choice of
language renders enforcement difficult as against the seller and it is
considered desirable to make enforcement more effective, there is no reason
why Parliament cannot adopt a lower level of *mens rea*. It is quite properly
not suggested that there is any constitutional impediment in this regard.

C. *Effect of Film Review Board Approval*

105 In reaching her conclusion, Newton Prov. Div. J. acknowledged the fact
that the appellants had relied upon the approval of the OFRB for all of
the videos in question. It was further agreed that the appellant,
Jorgensen, had advised the officers of the Metropolitan Toronto Police
Force and the Pornography and Hate Literature Section that he purchased
only those videos which had been approved by the OFRB. In view of these
accepted facts, the issue is whether the appellants' reliance on the OFRB
approval effectively negates the *mens rea* of the offence or provides the
necessary legal justification or excuse referred to in s. 163(2).

106 In order to determine the effect of OFRB approval, it is necessary to
properly appreciate what the Board does. The evidence establishes that

while, in carrying out its mandate to screen films, many of the considerations which inform a court's decision as to whether certain material is obscene are relevant to the decision of the OFRB, it does not determine whether the film is obscene. The *Theatres Act*, R.S.O. 1990, c. T.6, under which the OFRB operates, does not mention obscenity. Although the Board would not knowingly approve a film that was obscene, in the opinion of the Board Chairman, that is not its function. According to the evidence of the Board Chairman, the OFRB attempts to apply a community standard of tolerance and while the Ontario Board attempts to apply a national standard, the practices of film review boards across the country differ.

107 In light of this evidence, the trial judge considered that the evidence of OFRB approval was relevant to the question of community standards. After reviewing the nature and mandate at the Board, she notes:

Based on the examination-in-chief and the cross-examination before me, I am satisfied that his [Mr. Payne, Chairman OFRB] evidence is such that I cannot reject it as being indicative of community standards of tolerance. While I am mindful that he did not view any of the videos before me, and while some of his evidence would negate current Board approval, I am satisfied that it is a matter of weight to be attached to his evidence.

108 The appellants submit that reliance on OFRB approval negated knowledge and the appellants should be acquitted. This submission presupposes knowledge on the part of the appellants which, absent reliance on Board approval, would subject them to criminal liability. As explained above, such knowledge must extend to awareness of the content of the material

which, in law, is obscene. In these circumstances, the only basis upon which this submission can succeed is that reliance on approval of the OFRB induced a mistake of fact. A mistake of law would not avail unless it constituted a legal justification or excuse, a matter with which I will deal later in these reasons.

(1) Effect of Board Approval on "Knowingly"

109 Did the OFRB approval involve a factual determination upon which the appellants can rely to negative knowledge of the offence? The only aspect of the decision of the OFRB that might be considered a factual determination is in relation to conformity with community standards of tolerance. As I have pointed out above, the trial judge considered the evidence of the Chairman as relevant to that issue. The Chairman's evidence related to the effect of the decision of the OFRB as he had not viewed the videos and could not give first-hand expert evidence independent of the effect of the decision of the Board. In my opinion, however, whether the impugned material exceeds community standards of tolerance is not a pure question of fact. This is a determination that a judge or jury can make without the assistance of evidence. While evidence is often adduced and considered, and indeed desirable, it is not essential. This issue is resolved against an accused by a finding by the judge or jury that the subject matter of the charge exceeds community standards of tolerance. The Crown need not prove that the accused knew that it did and the accused cannot rely on a mistake of fact on the basis that he or she honestly believed that it did not.

110 I find support for this view in the decision of the Court of Appeal for Ontario in *Metro News, supra*. In that case, the publication had been approved not only by the Customs Prohibited Importation Branch but by an advisory committee set up to approve or disapprove publication for the guidance of the industry which had set it up. The accused relied on a mistake of fact based on such approval. The reasons of Martin J.A. for the court contain an insightful discussion of this question. Citing Glanville Williams, he points out that the distinction between law and fact which is made for the purpose of allocating issues as between judge and jury does not necessarily apply with respect to mistake of fact. As an example, the authorities establish that in respect of a charge of undue lessening of competition, while whether an agreement restricts competition is treated for some purposes as a question of fact, proof of intent to do so is unnecessary and mistake of fact does not apply. Martin J.A. concludes as follows, at pp. 66-67:

In my view, what is an "undue" exploitation of sex under s. 159(8) or whether the allegedly obscene matter exceeded the community standard of tolerance constitutes what Glanville Williams terms a value-judgment to which the doctrine of mistake of fact is inapplicable. He states in *Textbook of Criminal Law*, 2nd ed. (1983), p. 141:

Where a rule of law involves the making of a value-judgment, the doctrine of *mens rea* does not generally apply in respect of the value-judgment.

"On an issue of negligence, for example, the question whether what the defendant did was 'negligent' on the one hand or 'reasonable' on the other involves a judgment of value made by the jury (or, of course, by magistrates), and the question whether the defendant knew that he was being negligent is not controlling. Similarly a defence of self-defence is excluded if the jury think that the

defendant reacted disproportionately, even though he considered that it was proportionate (s. 21.3); and a defence of necessity is excluded if the jury think that what the defendant had in mind to do was not socially justified, even though he thought it was (s. 24.12). However, where the judge is of opinion that no reasonable jury would convict he should direct an acquittal."

The instances just given are all value-judgments, which are intermediate between questions of fact and questions of law. *As with questions of law, the defendant's failure to foresee the decision of the court does not excuse him.*

(Emphasis supplied [by Martin J.A.].) And further at pp. 142-3:

Similar problems beset the crime of obscenity (the publishing of an obscene article, or having an obscene article for publication for gain), under the Obscene Publications Act 1959, as amended by an Act of 1964. The test of whether an article is obscene under the Act, as at common law, is whether

"its effect . . . is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it" (s. 1(1)).

Here again the jury make the decision on the supposed question of fact without regard to what the defendant thought, and however reasonably he may have believed that the article would not deprave and corrupt.

111 Rather than create an intermediate area between fact and law, I prefer to characterize this question as a mixed question of fact and law. As such, as a general rule, the Crown need not prove intent or knowledge where these mind states are otherwise an essential ingredient of the offence, nor can the accused rely on a mistake of fact in relation to the issue. Accordingly, if the Crown establishes that the appellants knew of the presence of the ingredients of the video which the tribunal finds exceed community standards, in accordance with the principles in *Butler*, that is sufficient for a conviction. It is unnecessary for the Crown to prove or

the tribunal to find that the appellants knew that the video exceeded the community's standard of tolerance.

(2) Board Approval as Lawful Justification or Excuse

112 Two propositions which are somewhat related militate against the submission that OFRB approval can constitute a lawful justification or excuse. First, one level of government cannot delegate its legislative powers to another. Second, approval by a provincial body cannot as a matter of constitutional law preclude the prosecution of a charge under the *Criminal Code*.

113 With respect to the first proposition, in *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, Cartwright J. stated, at p. 574:

It is made clear by the judgment of this Court in *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, and by the earlier decisions of the Judicial Committee and of this Court collected and discussed in the reasons delivered in that case, that neither Parliament nor a Provincial Legislature is capable of delegating to the other or of receiving from the other any of the powers to make laws conferred upon it by the *British North America Act*.

114 The jurisprudence with respect to the second proposition is quite unequivocal. In *R. v. Prairie Schooner News Ltd. and Powers* (1970), 1 C.C.C. (2d) 251 (Man. C.A.), the accused were charged under s. 150(1) (now s. 163(1)) which, unlike s. 163(2) (then s. 150(2)), did not provide for a defence of lawful excuse or justification. The defendants, however, argued that they had acted under a mistake of fact as they believed that

the material found to be obscene had been admitted into Canada by Canada Customs officials and, therefore, there would be no breach of s. 150(1) by distributing it. Freedman J.A. wrote (at p. 261):

We must remember that under the *Criminal Code* it is for the Court, and not the Customs Department, to determine whether or not a publication is obscene. A determination of obscenity is then followed by the imposition of a penalty or punishment under the terms of the law. To say that non-prohibition of these publications by the Customs Department has the effect here claimed would be to deprive the Court of its proper function. It would effectively transfer the adjudication of the issue to the Customs Department.

115 In *McFall*, the court reached a similar conclusion notwithstanding that the defence of lawful justification or excuse was available as a defence. The accused was charged with "knowingly and without lawful justification or excuse" having possession of obscene films for the purpose of exposing them to public view contrary to s. 159(2)(a) (now s. 163(2)(a)) of the *Code*. During the trial, the accused called the provincial censor who testified that he had approved the films in question. The court ruled that provincial censor approval of a film could not excuse the commission of the offence. The court noted that a censor is not required to use the considerations laid out in the obscenity jurisprudence in respect of the interpretation of s. 159(8) (now s. 163(8)) of the *Code*. As a result, it was the court's view that censor approval, though lawful, does not mean that the film is not obscene, but is merely evidence which the jury may consider in reaching its conclusion on the issue of obscenity. Taggart J.A. writes, at p. 212:

I am of the opinion that if the appellants are to succeed on the issue of lawful justification or excuse they must show something more than approval by a provincial film classification director who, though he may have great experience in ascertaining what is the British Columbia community standard of tolerance, has no obligation to have any of the considerations referred to in the foregoing authorities in mind when he grants approval for the showing of films under a designated classification.

116 The apparent decisiveness of the law prompted counsel to concede the point in *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494. Dickson C.J., speaking for himself and Lamer and Le Dain JJ., noted (at pp. 511 and 516-17):

Counsel for the appellant does not contend that censor board approval is a bar to a criminal prosecution. He readily concedes that it is for the courts to decide whether a publication is obscene (*Daylight Theatre Co. v. The Queen (supra)*; *R. v. McFall* (1975), 26 C.C.C. (2d) 181 (B.C.C.A.)).

. . .

As I have indicated, the defence did lead evidence of Mr. Hooper, the Chairman of the Alberta Censor Board for the purpose of showing that the film did not fall below contemporary community standards. The trial judge made only one reference to this evidence:

Now, whether or not the film was approved by the Censor Board, as far as I am concerned, has nothing whatsoever to do with whether or not the Crown can prefer an indictment against it for providing an immoral, indecent or obscene performance. The Court is the one that has to decide that.

The law is clear that a trier of fact does not have to accept testimony, whether expert or otherwise. He can reject it, in whole or in part. He cannot, however, reject it without good reason. [Emphasis added.]

The fourth member of the majority on this point, Wilson J., stated as follows in separate concurring reasons, at p. 531:

There is no question that the approval of the censor board does not preclude the preferring of an indictment.

117 In the face of these propositions which are based on recent decisions of this Court, I find it difficult to accede to the argument that in using the words "lawful justification or excuse" Parliament intended that conduct which is criminalized by s. 163(2) is rendered lawful or the person engaging in it is excused as a result of a decision of a provincial body.

118 While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain. In *R. v. Furtney*, [1991] 3 S.C.R. 89, this Court dealt with an example of the exercise of such authority which is contained in the provisions of s. 207 of the *Criminal Code*. Section 207 exempts from criminal liability lotteries which had obtained a licence issued by the Lieutenant Governor under specified terms and conditions. At pages 104-5, Stevenson J. set out the circumstances under which Parliament may delegate:

Thus Parliament may delegate legislative authority to bodies other than provincial legislatures, it may incorporate provincial legislation by reference and it may limit the reach of its legislation by a condition, namely the existence of provincial legislation.

119 As *Furtney* illustrates, the exercise of this power by Parliament, however, must be in terms which are sufficiently specific that exemption from

criminal liability is not left to the unfettered discretion of provincial legislation. If censor boards, empowered by provincial legislation, can justify or excuse persons who rely on them from the obscenity provision, the criminal law in this regard would for all intents and purposes be administered by the provincial legislatures. The terms under which censor boards operate vary from province to province with the result that conduct that is criminal in one province would be justified in another province. Surely this is not what Parliament intended in continuing the use of the words "lawful justification or excuse" in respect of the offence of selling material which is obscene.

120 In considering Parliament's intention in this regard, it must be remembered that the issue of the application of a lawful justification or excuse only arises once the Crown has proved all elements of the offence beyond a reasonable doubt. This would involve proof that the accused knew of the specific contents of the material which render it obscene. See *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35 (Ont. C.A.). While it is difficult and perhaps undesirable to attempt to define what would constitute a lawful justification or excuse, such examples as are derived from the cases support the conclusion which I have reached. In *Kiverago, supra*, Gale C.J.O., speaking for the court, stated, at p. 465:

In other words, s-s. (2) seems to us to suggest that, even assuming the material is obscene, the person who exposes it cannot be guilty of an offence unless he knows that he has exposed it and does not have some lawful justification or excuse for doing so and, of course, we have in mind as examples of justification or excuse medical or scientific books containing obscene material, for legitimate purposes of education, scientific research and matters of that kind.

121 In *Perka v. The Queen*, [1984] 2 S.C.R. 232, Dickson J. (as he then was) considered whether the defence of necessity constituted a justification or excuse of the offence of importing narcotics and possession of narcotics for the purpose of trafficking. Speaking for the majority, Dickson J. stressed the importance of distinguishing between "justification" and "excuse". The former challenges the wrongfulness of the action while the latter concedes the wrongfulness of the action but asserts that due to the circumstances the actor should be exempted from responsibility for it. The rationale upon which the actor is excused is "the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable" (p. 250).

122 There is no basis upon which it could be said that the conduct in this case, which involves the sale of obscene material, could be said to be justified by the circumstances. It is not contended that the approval by the OFRB *per se* could have the effect of making the conduct rightful. Rather it is alleged that it is the reliance on the approval of the OFRB by the appellants that excuses them. In my view, it cannot be said that in the circumstances if the appellants knew of the contents of the videos, sale of them was realistically unavoidable. In all the circumstances, therefore, I conclude that Parliament could not have intended to excuse the sale of obscene material by reason only of reliance on an approval by a provincial censor board.

123 After preparation of these reasons, I read the reasons of the Chief Justice. I have not considered the issue of officially induced error of law as an excuse in this appeal because the matter was not raised either here or in the courts below. Nothing in these reasons should be taken as agreeing or disagreeing with the reasons of the Chief Justice but I would prefer to address the issue of officially induced error in a case in which it is properly raised and argued.

VI. Summary

124 To summarize, I have concluded that the Crown must prove knowledge on the part of an accused charged with an offence under s. 163(2)(a), not only that the accused was aware that the subject matter had as its dominant characteristic the exploitation of sex but that the accused knew of the presence of the ingredients of the subject matter which as a matter of law rendered the exploitation of sex undue. In this regard, in appropriate circumstances the Crown can avail itself of the principles of wilful blindness. The approval of the subject matter by a provincial censor board may be relevant to the determination of community standards of tolerance and on the issue of wilful blindness. It is not relevant with respect to the issue of the accused's knowledge, and the Crown need not prove that the accused knew that the subject matter of the charge exceeded community standards. Furthermore, approval by a provincial censor board does not constitute a justification or excuse.

VII. Disposition

125 There was no evidence to suggest any knowledge on the part of the appellants, beyond the fact that the videos in question were sex films in the general sense that they involved the exploitation of sex. Since I have concluded that this does not satisfy the *mens rea* requirements of s. 163(2), the appellants are entitled to an acquittal. The appeal is, therefore, allowed, the judgments below are set aside and a verdict of acquittal is substituted.

Appeal allowed.

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Solicitor for the respondent: The Ministry of the Attorney General, Toronto.