

Before the Film and Publication Review Board

In the matter between:

The Film and Publication Board

and

JT Wholesale (Pty) Ltd

In re: Appeal in respect of the films:

A lover's guide to self pleasuring

Sexual techniques for lovers

Professor K. Govender

Introduction

1. Both of these films were produced by the Sinclair Institute, and are part of a catalogue of similar films/DVDs produced for the apparent purpose of improving interpersonal relationships by informing and educating people about sex. Given the similarities between the DVDs, we have taken the unusual step of dealing with both appeals in a single award. We shall lay down the general legal principles applicable to both appeals, and then deal with each film/DVD on its merits. Both films were reviewed by a classification committee (CC) and were assigned a classification of X18. From the reports submitted to us, the classification committee decided upon these classifications because of the sexually explicit nature of films.

Sexually explicit conduct, including penetration, cunnilingus, and fellatio was clearly depicted in both films. The explicit nature of these depictions convinced the classification committee to impose the restrictive classification of X18.

2. JT Wholesale (Pty) Ltd submitted very brief grounds of appeal, simply stating that the titles were of an educational nature and part of the range offered by the Sinclair Institute. Previous titles from the same Institute were, according to the applicants, viewed and certified for general distribution under the restrictive age classification of 18. They sought to set aside the X18 classification and replace it with one of 18 with a consumer advisory for sex and nudity. The obvious intent of the appeal was to make the DVDs more accessible to the general public over the age of eighteen. The sale and distribution of DVDs classified as X18 may only take place from premises licensed as adult premises. Such DVDs may not be distributed in South Africa from any other premises or through any other means. A more lenient classification would allow the distributors to sell these DVDs to persons over the age of 18 from outlets other than adult premises, such as pharmacies and book and DVD stores.

3. The CC correctly come to the conclusion that both films contained scenes of explicit sexual conduct and that they accordingly fell within Schedule 7 of the Film and Publication Act 1996 (as amended). From this they concluded that the DVDs should be classified as X18. Regrettably an essential part of the enquiry does not appear to have been undertaken by the CC. From the reports submitted, it appears that they did not consider the implications of Schedule 9 on both these films.

An analysis of the relevant legal principles

4. Section 18 (4) (a)(ii) of the Act provides that the CC must classify the film as X18, if it falls under Schedule 7. Schedule 7 provides:

A film shall be classified as X18 if it contains a scene or scenes, simulated or real, judged within context, of explicit sexual conduct which, in the case of sexual intercourse, includes an explicit visual presentation of genitals.

Schedule 9 deals with art and science exemptions for films and provides:

The XX and X18 classification shall not be applicable to a bona fide scientific, documentary, dramatic, or ... artistic film or any part of a film which, judged within context, is of such a nature.

Given the nature of the films under consideration, it was imperative to consider the application of Schedule 9 in the classification of these films. In order to assist examiners, we suggest the following process of analysis in dealing with films of this nature.

- a) Does the film or DVD contain a scene or scenes of explicit sexual conduct as defined in Section xix of Chapter 1 of the Act?
- b) If the film or DVD does contain such scenes, then the presumption arises that an X18 classification is the most appropriate one.
- c) In the event of the film/DVD containing scenes of explicit sexual conduct, can it be deemed to be a bona fide scientific, documentary, dramatic, or artistic film?
- d) If the answer to question (c) is "Yes", then the film/DVD must attract a classification less restrictive than X18.

- e) If the answer to question (c) is "No", then the film/DVD must be assigned an X18 classification.
5. In making the determination required in Schedule 9, the film/DVD must, if judged within context, be a *bona fide* scientific, documentary, dramatic or artistic work. The term *bona fide* has been defined as "with good faith, without fraud or deception; genuine".¹ The test is whether a reasonable person objectively assessing the film/DVD would come to the conclusion that it is a genuine scientific, documentary, dramatic, or artistic work. In our Award handed down in October 2005 in respect of the film *In the Realm of the Senses*, we stated:

In effect the law permits a film to be exhibited in public, distributed, or broadcast if it falls within schedule 9, even if the film could be classified XX under schedule 6. This approach is not very different from that adopted in other jurisdictions.² The operation of the Canadian equivalent to this exception was described as follows in Butler v The Queen:³

Put another way, is undue exploitation of sex the main objective of the work or is the portrayal of sex essential to a wider artistic, literary, or other purpose? ...The Court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the

¹ Webster's New Universal unabridged dictionary (2nd edition) 207

² In *Miller v California* 413 U.S. 15 (1973), the courts adopted the following test to balance the freedom of expression and the need to regulate pornographic material:

- a) Whether the average person applying contemporary standards, would find the work, taken as a whole, appeals to prurient interest;
- b) Whether the work depicts or describes in a patently offensive way, sexual conduct defined by the applicable state law; and
- c) Whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.

³ *Butler v The Queen* 1992 (1)SCR 453.

heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.

An objective assessment must be made as to whether the film is a bona fide scientific, documentary, dramatic, or artistic film. The term bona fide means “in good faith”, “honestly”. The scenes of explicit sexual conduct, explicit violence, bestiality, incest or rape must be necessary to communicate the scientific, documentary, dramatic or artistic intent of the film in order for a film that would normally be classified as XX to fall within schedule 9. The more remote the connection, the less likely it is that a finding would be made that the film falls within the provisions of schedule 9. In making this assessment, regard must be had for the main objective, themes, message/s, cinematographic style and content of the film on the one hand, and the frequency, intensity, explicitness and the degrading and damaging nature of the various scenes on the other, in order to determine whether the film can be classified under any one of the exceptions listed in schedule 9. It is particularly important that the film or publication be judged in context, and that the test of tolerance and not of taste be adhered to.

Assessment of the facts in the light of the above legal principles

Re: A lover’s guide to self pleasuring

6. It is clear from the documentation submitted by the applicant, JT Wholesalers (Pty) Ltd, that this is part of a catalogue of similar films/DVDs that are put out for sale by the Sinclair institute. This film/DVD depicts self and mutual sexual stimulation with the professed aim of improving sexual relationships. The introduction deals with fallacies and taboos about

masturbation, and there are interviews with experts on the subject with comments from members of the public. In addition, there is a brief historical overview of how the medical and broader community has reacted to the issue of masturbation over the years.

7. Much of the film/DVD deals with the explicit depiction of various sexual activities involving ten couples. In some instances these scenes are accompanied by an explanatory voice-over. In other scenes, the individuals or couples engage in explicit sexual activities without interruption except for soft background music. Some of these scenes are not materially different from many similar scenes in pornographic films. Scenes of masturbation, mutual stimulation, fellatio and cunnilingus are explicitly portrayed. Many of these scenes are repeated. For instance, there are repeated scenes involving the use of sex toys. If these scenes are meant to be illustrative of particular techniques or modes of self-pleasuring, the objective could have been served by fewer or a single scene. In the self stimulation segment, there are explicit demonstrations involving the use of about six materially similar products. In the mutual stimulation segment there is similar incessant repetition. The use of these toys is explicitly demonstrated, and each of these exhibits is identified and named. The Film/DVD indicates that these items are offered for sale, and this segment is similar to an infomercial of a sexually explicit nature. It is clear that the producers are using some of the scenes to sell their products.

8. The scenes involving couples cover the same message, and the various participants engage in similar or the same explicitly sexual conduct in scene after scene. The scenes are prolonged, and there are clear and explicit close-up shots of genitalia and of other sexual activity. The length of the scenes, the repetitiveness of the content, and the prolonged, explicit and clear depiction of the sexual activity appear, from a reasonable and

objective assessment, to appeal primarily to prurient interests as opposed to being a genuine educational film/DVD. The repetitiveness of the various scenes, the explicitness of the sexual conduct, and the close-up filming of genitalia and sexual activity go beyond what would be required to demonstrate the principles enunciated. When producers make a DVD of this nature, they appear to be testing the limits and boundaries of what could be classified as an educational film/DVD. In this instance, the producers of this DVD have gone beyond what can be judged a genuine scientific or documentary film. We thus support the conclusion that this film be assigned an X18 classification.

Re: Sexual Techniques for Lovers

9. This film/DVD follows the same formula as the previous one. There is a loose thematic structure, with experts dispensing somewhat simplistic and obvious advice debunking certain stereotypes, and interviews with individuals. The bulk of the film comprises scenes of explicit sexual conduct. The professed intent of this film is to deal with the sexual behavior of African Americans and to make suggestions on how to improve the quality of their sexual relationships. There are explicit scenes of masturbation, with close-up and prolonged displays of genitalia and self masturbation. In some instances these scenes are accompanied by a commentary or voice-over, and in others there is simply background music. There are scenes of actual penetration, cunnilingus, and fellatio. The depiction of sexual acts is graphic and prolonged. Similarly there are explicit close-ups of genitalia in the scenes involving fellatio and cunnilingus. Some of these scenes are not accompanied by a voice-over or commentary. In addition there is a bonus segment depicting couples engaging in explicit sexual activity. The scenes portraying explicit sexual activity comprise the significant and dominant part of the film.

10. Once again we are of the view that, given the length of scenes, the repetitiveness of the content, and the prolonged, explicit and clear depiction of sexual activity, the primary intent is to appeal to prurient interests as opposed to being a genuine educational film/DVD. The repetitiveness and explicitness of the scenes goes beyond that which is required to demonstrate the principles or points of better love-making that are being made. It is our opinion that, on an objective and reasonable assessment, the conclusion would be reached that this film goes beyond the limits of a bona fide documentary or educational film. For these reasons we are of the opinion that the classification committee was correct in its conclusion that an X18 classification would be appropriate.

Conclusion:

The decision of the classification committee is affirmed, and the film ***A Lover's Guide to Self Pleasuring*** is classified X18, and the film ***Sexual Techniques for Lovers*** is also classified X18.

Concurred by:

Mr D. Kwinda

Adv. R. Lessick

Mrs P. Marek

Revd M. McCoy

Dated: 5th July 2007