IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2006 485 1611

UNDER	The Broadcasting Act 1989
IN THE MATTER OF	An appeal against a decision of the Broadcasting Standards Authority
BETWEEN	DENIS BROWNE Appellant
AND	CANWEST TV WORKS LIMITED Respondent

Hearing: 21 May 2007

Counsel: R C Laurenson and T A Roberts for the Appellant
C F Bradley for the Respondent
A E Scott-Howman and J Sneyd for the Broadcasting Standards Authority

Judgment: 31 July 2007

JUDGMENT OF WILD J

Introduction

[1] This is an appeal against a decision of the Broadcasting Standards Authority (the Authority) given on 28 June 2006. The appeal is brought by Bishop Denis Browne, in his capacity as President of the Catholic Bishops Conference (the Conference).

[2] The Authority's decision declined to uphold complaints about a programme telecast by the respondent CanWest TV Works Limited (CanWest). Bishop Browne's complaint for the Conference was that the programme breached the

standards of good taste and decency, and of fairness, in the Free to Air TV Code of Practice (the Code).

[3] The appeal is opposed by CanWest.

[4] The Authority has exercised its entitlement under r717 to be heard on all matters arising from the appeal.

Background

[5] On 22 February 2006 CanWest telecast Bloody Mary, an episode in the South Park programme it has been screening for many years.

[6] For CanWest, Ms Bradley explained that:

> South Park is a well-known adult cartoon that has screened in New Zealand for nine years. In the time that South Park has been on air the show has poked fun at most major religions, nationalities and authority figures. The religious groups it has satirised include Christians, Mormons and Jews.

[7] Ms Bradley offered the following description of the characters who execute these satires:

> South Park is a show with a black character named Token, a homophobic teacher who has had a sex change operation, a parent who is a drug addict, prostitute and a hermaphrodite, a Christmas figure – *Mr Hanky the Christmas Poo* and Cartman, who can be credibly described as the root of all evil in the universe. These are all recurring or main characters on the show.

[8] Considerable public controversy had preceded the telecast of Bloody Mary, originally scheduled for May 2006. CanWest brought the screening forward. Ms Bradley claimed this was to enable the many people who had seen excerpts of Bloody Mary and/or were aware of the controversy surrounding it, to view the whole programme "in context". I suspect the move was also, if not largely, ratings driven.

[9] At counsel's request I have viewed Bloody Mary and the four other episodes of South Park which were provided to me, on the same CD, so I could make an

"assessment of audience expectation". My understanding is that no complaints were made to CanWest about any of those other four programmes.

[10] The Authority's decision describes Bloody Mary in this way.

> 1 *South Park* is an animated satirical programme which highlights social, political and other current issues in a controversial and provocative manner. On 22 February 2006, at 9.30 pm, C4 broadcast an episode of *South Park* entitled "Bloody Mary". The episode was originally planned to be screened in May, but was brought forward following considerable public controversy.
>
> 2 In this episode, one of the characters, Randy, is arrested for driving while drunk, and is made to attend Alcoholics Anonymous meetings. There Randy is told that alcoholism is a disease, that he is powerless to control his drinking, and that only submitting to a higher power (God) can help him stop.
>
> 3 Following the meeting, Randy succumbs to his disease and drinks more heavily than ever, until he sees a news story on television about a statute of the Virgin Mary which is apparently bleeding, as the reporter puts it, "out her ass". A cardinal visits the statue, is showered in blood (accompanied by a "farting" sound), and declares the bleeding to be a miracle. Randy rushes to see the statue, hoping that he will be cured. When Randy approaches the statue, he too is showered in blood, and he declares himself "cured".
>
> 4 Later, when Randy is attending an AA meeting, having been sober for five days, another news report is broadcast, showing footage of the Pope visiting the statue. The Pope is shown peering at the statue from close range, whereupon he too is showered in blood, again with the same sound effects. The news item then reports that the Pope had declared the statue not to be a miracle. The reporter said:
>
> > Having investigated closely, the Pope determined that the blood was not coming from the Virgin Mary's ass, but rather, from her vagina. And the Pope said, quote, "A chick bleeding out her vagina is no miracle. Chicks bleed out their vaginas all the time."
>
> 5 At this point, Randy realises he could not have been miraculously cured. He reverts to drinking heavily, along with the other AA members, before his son points out that if there was no miraculous intervention, it must have been his own willpower that had kept him sober for five days.

[11] Ms Bradley was at pains to explain to me the satire involved, but I think the summary just given sufficiently outlines it.

[12] Prior to the screening, on 24 January 2006, leaders of other Christian churches and other faiths had joined the Conference in writing a letter to CanWest asking it not to screen Bloody Mary because of the deep offence it would cause Christians, Maori and people of many cultures.

[13] Following the screening of Bloody Mary, the Conference wrote, on 17 March 2006, to CanWest complaining that, in telecasting Bloody Mary, CanWest had failed its responsibility to maintain two standards in the Code:

- Standard 1: Good taste and decency.

- Standard 6: Fairness: especially guidelines 6f and 6g.

Guideline 6f requires broadcasters to recognise the rights of individuals, particularly vulnerable ones, not to be exploited or humiliated. Guideline 6g requires broadcasters to avoid portraying people in programmes in a manner encouraging denigration of or discrimination against sections of the community on bases which include religious belief. Guideline 6g also states:

> This requirement is not intended to prevent the broadcast of material which is …
>
> (iii) in the legitimate context of a … satirical work.

[14] The Conference's letter of complaint alleged "great offence" to the Catholic community in particular, but also to other Christians and to the New Zealand Muslim community, with "a high and in some cases unexpected degree of support from a wide section of the New Zealand community". The letter asserted the offence was the deeper because:

> The broadcast was a quite deliberate action on the part of (CanWest) to assert its power to do as it pleases without boundary, and part of a deliberate attempt to establish a precedent that might be seen to widen to the maximum possible degree its unrestricted right to say and do what it pleases no matter the consequences.

[15] In a decision given on 28 March 2006, CanWest's Standards Committee declined to uphold the Conference's complaint.

[16] CanWest's Chief Operating Officer sent that decision to the Conference under cover of a letter dated 28 March 2006 stating:

> …
>
> I have read your complaint and the decision and I support the Committee's decision in this matter.
>
> As I am sure you are aware this programme was at the centre of considerable controversy, and we did not anticipate the level of concern that developed over the screening.
>
> Although your complaint has not been upheld, we have made the decision to not replay the episode in question.
>
> We are very sorry that you were offended and upset by the programme.

[17] On 24 April 2006 the Conference formally complained to the Authority.

[18] As I have mentioned, the Authority's decision was given two months later, on 28 June 2006. The decision extends to 139 paragraphs. Rather than attempting some inadequate general summary of it, I will set out the relevant part(s) when dealing with the Conference's several grounds of appeal.

The right of appeal

[19] The Conference's right of appeal is pursuant to s18(1) of the Broadcasting Act 1989. Section 18(4) provides:

> The Court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.

[20] When summarising the threshold which must be met by an appellant from a discretionary decision, the Court of Appeal now again routinely applies the formula outlined in *May v May* (1982) 1 NZFLR 165 (CA): the appellant must show that the decision-maker acted on the wrong principle, failed to take into account some relevant matter, took into account some irrelevant matter, or was plainly wrong. That formula precludes the appellate Court re-weighting relevant considerations.

[21] I say 'again' because, for a time, the Court departed from that formula. For instance, in *Comalco New Zealand Ltd v The Broadcasting Standards Authority & Anor*. (1995) 9 PRNZ 153 McKay J, delivering the Court of Appeal's judgment said:

> Section 18(1) of the Broadcasting Act requires the Court to hear and determine an appeal "as if the decision or order appealed against had been made in the exercise of a discretion". This means that the appeal should only be allowed if the Authority has proceeded on a wrong principle, given undue weight to some factor or insufficient weight to another, or is plainly wrong: *Fitzgerald v Beattie* (1976) 1 NZLR 265, 268 (CA); *Havelock-Green v West Haven Cabaret Ltd* (1976) 1 NZLR 728, 730 (CA)."

[22] That statement was itself wrong in principle. The reason was persuasively explained by William Young J (now William Young P) in *B v C* [2002] NZFLR 433 (HC) at [49]:

> It is the *May v May* approach which is to be adopted. The difference between the *May v May* and *Fitzgerald v Beattie* formulations is significant. The weight to be given to the factors relevant to the exercise of a discretion are primarily for the Judge at first instance. Arguments addressed to the weight which that Judge gave to various factors are tantamount to an invitation to me to re-exercise, afresh, the discretion which by law was vested in the Judge.

[23] The expression "plainly wrong" posits a higher threshold than simply "wrong". Applied here, it requires the Conference to persuade me that, although the Authority's discretion may permit of more than one tenable answer, the decision it made was not such an answer.

The appeal generally

[24] From initial reliance on all four *May v May* limbs, Mr Laurenson refined the Conference's case to submit that the Authority's decision was wrong in principle and (I gathered as a consequence) also just plainly wrong.

[25] The nub of the appeal was that the Authority could not correctly or tenably have held that Bloody Mary did not breach standards 1 and 6, particularly the first of those. The programme was so crassly tasteless, offensive and denigratory that it could not on any balanced and sensible view be said to observe the requisite standards of good taste and decency, and of fairness.

[26] Because Mr Laurenson repeatedly and forcefully advanced the appeal on the basis that the Authority's decision was simply and plainly wrong, I deal further with that in [98]-[101] below. But, first, I need to deal with the particular grounds of appeal.

Application of the New Zealand Bill of Rights Act 1990

[27] I took it to be accepted that s4(1)(a) Broadcasting Act is a derogation from the s14 BORA right to freedom of expression. Authority for this is *TV3 Network Services Ltd v Holt* (2002) 6 HRNZ 759 (HC) at [36], as well as *TVNZ v Viewers for Television Excellence* [2005] NZAR 1 (HC) at [42] (a decision I will refer to as *VOTE*). But one can readily see why this derogation is not central to the Conference's case. In the first place, even if Mr Laurenson could persuade me that s4(1)(a) is not justified under s5 of BORA, s4 of BORA means that the standard must anyway be applied. This was explained by McGechan J in *Television New Zealand Ltd v Ministry of Agriculture & Fisheries* HC WN AP 89/95 13 February 1997 at 34-35. But more fundamentally, to succeed in a frontal assault on s4(1)(a) would be to score an own goal. For the Conference case depends for its success on *limiting* the right to freedom of expression.

[28] It is therefore unnecessary to the resolution of this case to say more on a s14 BORA challenge to the s4(1)(a) standard. I observe that our freedom of expression jurisprudence is still in an embryonic state. I also note that the lack of frontal assaults on provisions limiting or abrogating the right to freedom of expression may be explained by the difficulty of deciding whether a provision like s4(1)(a) *in the abstract* constitutes a justified limitation on the right to freedom of expression. But this is not to say that an *in abstracto* challenge is doomed to fail. There may, for example, be a limitation on the s14 BORA right that is so opaque as to fall foul of the principle of legal certainty.

[29] Lord Cooke of Thorndon alluded to this possibility in his judgment for the Board in *Observer Publications Ltd v Campbell "Mickey" Matthew & Ors* [2001] UKPC 11 (19 March 2001) at [26]-[29]. In *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1984) 41 O.R. (2d) 583 the Ontario High

Court went a step further. It held a film censorship law invalid for failure to supply ascertainable and understandable standards of censorship. The decision of the Ontario Supreme Court in *R v Glad Day Bookshops Inc et al* (2004) 239 DLR (4th) 119 can be contrasted. At [91] the Court concluded that the standard in question was "sufficiently intelligible to limit the discretion of the Board and to prevent it from exercising its powers arbitrarily or in a discriminatory fashion".

[30] I return to Mr Laurenson's challenge on behalf of the Conference. He submitted that the Authority erred in applying s14 of BORA to the good taste and decency standard. The nub of Mr Laurenson's submission was that BORA was relevant only to whether the standard as reflected in s4(1)(a) is a statutory derogation from the right to freedom of expression. It does not bite, he argued, when applying the s4(1)(a) standard to individual complaints.

[31] In terms of the *May v May* framework, Mr Laurenson's argument was that the Authority acted on a wrong principle in applying BORA as it did. Mr Laurenson sought support for this submission from *Holt*. There, Rodney Hansen J held at [37] that BORA does not require the Authority "to consider, as a matter of course, whether an unjustifiable limitation is raised by the complaint". It "goes a step too far", Rodney Hansen J continued at [39], for the Authority to test the decision it has reached against s5 of BORA, having applied the relevant standard(s) to the facts.

[32] Mr Laurenson's submission faces the immediate hurdle of my own contrary view in *VOTE*. I disagreed in that case with Rodney Hansen J's observations in *Holt*, emphasising at [48] that even if the s4(1) standards *in abstracto* are unassailable (and there is no suggestion in this case that they are not), it is possible that they will be misconstrued so as to produce a non-BORA-compliant result. In support of this approach I pointed out that it is not hard to contemplate, for example, a decision that takes too broad an approach to the privacy principles at the expense of free expression. To guard against this danger – and to ensure that the s14 right is not mere window dressing – the meaning of the standard adopted, i.e. the particular interpretation or application, ought to be justifiable in terms of s5 of BORA, a point I reiterated at [52], [56] and [58] of my judgment.

[33] I am not persuaded that the approach I took in *VOTE*, and the approach the Authority took in this case, is wrong in principle. To the contrary, I think it is correct. I note the approach I took in *VOTE* seems to find favour in England as well as in Europe. I refer first to *R (on the application of ProLife Alliance) v BBC* [2004] 1 AC 185 (HL). It concerned the obligation of English broadcasters not to broadcast programmes that contravened standards of good taste or decency or that were otherwise offensive. Lord Nicholls (with whom Lord Millett agreed) spoke of the Court's role under the Human Rights Act 1998 in cases of this kind as being to "decide whether legislation, *and the conduct of public authorities*, are compatible with Convention rights and fundamental freedoms" (at [6]). He went on at [10] to summarise in the following terms the case on appeal:

> For present purposes what matters is that before your Lordships' House ProLife accepted, *no doubt for good reasons*, that the offensive material restriction is not in itself an infringement of ProLife Alliance's convention right under article 10. The appeal proceeded on this footing. The only issue before the House is the second, narrower question. The question is this: should the court, in the exercise of its supervisory role, interfere with the broadcasters' decisions that the offensive material restriction precluded them from transmitting the programme proposed by ProLife Alliance?
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> (My emphasis)

[34] Lord Scott made similar comments at [91]-[92]. Lord Hoffman, on the other hand, was blunt in dismissing an *in abstracto* challenge to the offensive material restriction. He said at [73]:

> The Alliance had no human right to be invited to the party and it is not unreasonable for Parliament to provide that those invited should behave themselves.

[35] While shy on Lord Hoffman's directness, the European Court of Human Rights seems also to align itself with the approach I took in *VOTE*. *Groppera Radio AG & Ors v Switzerland* [1990] ECHR 7 is one example. In that case the European Court of Human Rights was required to address an Article 10 challenge to a ban on cable retransmission in Switzerland of programmes broadcast from Italy. It wrote at [72]:

> According to the Court's settled case-law, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an

> interference is necessary, but this margin goes hand in hand with European supervision *covering both the legislation and the decisions applying it*; …
>
> (My emphasis)

[36] In a more recent decision, *Karhuvaara and Iltalehti v Finland* [2004] ECHR 630, the same Court said this at [49]:

> The Court must assess the importance of the said provision [Article 10] in the light of the particular circumstances of the case (see *Waite and Kennedy v. Germany [GC]*, no. 26083/94, § 64, ECHR 1999-I). It observes in this respect that *its task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention* (see, mutatis mutandis, *Padovani v. Italy*, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 24).
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> (My emphasis)

[37] Returning to these shores, the Authority seems to be of the view that Rodney Hansen J's approach in *Holt* is incorrect. It has tested the decision it has reached against BORA in a number of post-*VOTE* decisions. These include *The Mäori Party v Raukawa FM* (BSA Decision No. 103, 13 September 2005) at [37]; *The Hon David Benson Pope v Radio New Zealand* (BSA Decision No. 83, 19 October 2006) at [188]; *Cronin v Canwest TVWorks Ltd* (BSA Decision No. 140, 31 March 2005) at [80]; *Continental Car Services Ltd v Television New Zealand* (BSA Decision No. 81, 28 November 2005) at [60]; *Department of Child, Youth and Family Services v Television New Zealand* (BSA Decision No. 58, 19 December 2006) at [153]; as well as the decision the subject of this appeal (at [63]-[74]).

[38] Outside of the Authority, but still within New Zealand, *VOTE* is cited by Miller J in *TVNZ v BSA* HC WN CIV-2004-485-001299, CIV-2004-485-001300 13 December 2004 at [34]. Miller J noted my observations at [56] in *VOTE*. While he does not appear to have been referred to *Holt*, and while he does not analyse my approach to BORA as summarised in [56], Miller J's decision is notable in that it does not disagree with *VOTE*.

[39] The same cannot be said of the authors of *The New Zealand Bill of Rights Act: A Commentary* (2005) Andrew and Petra Butler. After summarising both *Holt* and *VOTE*, the authors say this at 363:

> It could be argued that both approaches should have the same outcome in the end since both approaches, at one stage in the decision-making process, involve a BORA analysis. However, in the authors' view Hansen J's approach is preferable. Wild J's approach bears the danger that on review it is not the law that becomes the issue but rather the evaluative decision which should lie with experts.

[40] The Butlers' concerns are, with respect, unfounded. On an appeal of this sort, the Court will not interfere with a determination of the Authority merely because it disagrees with the result. To intrude in this way would be to step outside the *May v May* parameters. It would also be to disregard the fact that the Authority is an expert body making judgmental assessments. Lord Hoffman articulated the inappropriateness of so intruding in *ProLife Alliance* at [80]:

> "Public opinion in these matters is often diverse, sometimes unexpected and in constant flux. Generally accepted standards on these questions are not a matter of intuition on the part of elderly male judges".

This is an important point, to which I will revert.

[41] But before doing so, I come back to the decision the subject of this appeal. The Authority, at [63]-[74] of its decision, took the approach which I outlined in *VOTE* and which I affirm. It concluded in the last of those paragraphs:

> [74] For these reasons, the Authority concludes that it must consider the impact of the right to free expression set out in section 14 of the Bill of Rights Act, and assess whether any limit on the right imposed by its determination of a complaint is reasonable and demonstrably justifiable in a free and democratic society.

[42] It follows that I remain of the view that my approach in *VOTE* is correct, and do not consider that the Authority erred in principle in its application of BORA.

Context

[43] As mentioned in [42], the Conference took issue with the Authority's view that s4(1)(a) is indistinguishable from Code Standard 1. The Conference's point is

that s4(1)(a) does not have the guidelines attached to Code Standard 1. Guideline 1a requires that:

> Broadcasters must take into consideration current norms of decency and taste in language and behaviour bearing in mind the context in which any language or behaviour occurs. Examples of context are the time of the broadcast, the type of programme, the target audiences, the use of warnings and the programme's classification (see Appendix 1). The examples are not exhaustive.

[44] Mr Laurenson submitted that s4(1)(a), as the statutory provision, must prevail, and required the Authority to impose the requirement of good taste and decency without regard to context. Thus, the Authority erred in taking context into account, as it did in [104]-[110] of its decision, particularly at [107]:

> [107] Accordingly, while some may have found the subject matter distasteful, the Authority agrees with CanWest that the show's adult target audience would not have been offended. Those outside the demographic at which *South Park* is aimed would have been sufficiently well informed by the 9.30pm timeslot, the AO classification, the pre-broadcast warning, and the well-known nature of this series, to enable them to make an informed choice about whether or not to watch.

[45] For the reasons I have outlined in [27] to [42], I reject Mr Laurenson's submission. Good taste and decency cannot be assessed in a vacuum, without regard for time, place, audience and so on. As Lord Walker emphasised at [121] of his judgment in *ProLife Alliance*, "the context is of crucial importance, and what could not possibly be justified as entertainment may be justified (in news or current affairs programmes) as educating the public about the grim realities of life". Lord Nicholls (with whom Lord Millett agreed) in the same case held at [12]: "Clearly the context in which material is transmitted can play a major part in deciding whether transmission will breach the offensive material restriction". The dissenting Judge, Lord Foscote, also emphasised the importance of context, relying on it to support his parting of ways with the other Law Lords; see [94]-[100].

[46] *Attorney-General, ex rel. McWhirter v Independent Broadcasting Authority* [1973] 1 QB 629 is to the same effect. In this case an injunction had been sought to stop the screening of a television programme on Andy Warhol. The English Court of Appeal discharged the injunction, Lawton LJ emphasising that "whether an

incident is indecent must depend upon all the circumstances, including the context in which the alleged indecent matter occurs" (at 659B).

[47] I note that these comments, which I endorse, accord with the approach the Authority has taken in its other decisions. See, for example, *Cooling v TVNZ* (BSA, Decision No: 2004-076, 15 July 2004) at [24]-[26] and *Fox v Television New Zealand Ltd* (BSA, Decision No: 2003-021, 20 March 2003) at [20]-[21].

Failure to consider a relevant consideration – the BORA religious rights

[48] Mr Laurenson did not directly cite the religious freedom provisions of BORA (ss 13, 15 and 19(1)). But implicit in the Conference's case on appeal is an assertion that the broadcast of Bloody Mary was an unjustified infringement upon the right to respect for religious opinions and beliefs. Although the Authority did not refer to these rights either, I am satisfied it did implicitly balance them (see similarly, *VOTE* at [57] and [58]). In paras. [111] to [118] of its decision the Authority recognised that the broadcast was offensive to the Catholic community. But it found, on balance, that Bloody Mary "did not cross the requisite threshold" (at [118]) so as to be contrary to good taste or decency.

[49] I am not prepared to disturb this finding. First, I am not satisfied that the Authority erred in principle in finding (implicitly) that the s 14 right was a weightier consideration than the BORA religious rights. I refer in support of this conclusion to the decision of the European Court of Human Rights in *Otto-Preminger-Institut v Austria* [1994] ECHR 26. It emphasised at [49] that the right to freedom of expression:

> … is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

I am mindful also that the right to freedom of expression entails the freedom of a broadcaster to *impart* information and ideas as well as the freedom of the audience to *receive* that material. This is emphasised in *Sunday Times v United Kingdom* (1979)

2 EHRR 245 (ECtHR) at [65]-[66], noting that the freedoms to 'receive' and 'impart' information are two *independent* rights and not merely corollaries of one another.

[50] My second reason for not disturbing this finding is one of competence and expertise. I accept that the Authority had to strike a balance between the right to freedom of expression and the right to respect for religious beliefs. Again, this was commented on in *Otto-Preminger-Institut v Austria*, in particular at [45], [47] and [55] of the majority judgment. In the last of these paragraphs the majority stated:

> 55. The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand. In so doing, regard must be had to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole.

This received partial support in the joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk:

> 6. The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.
>
> Nevertheless, it must be accepted that it may be "legitimate" for the purpose of Article 10 (art. 10) to protect the religious feelings of certain members of society against criticism and abuse to some extent; tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed. Consequently, it must also be accepted that it may be "necessary in a democratic society" to set limits to the public expression of such criticism or abuse. To this extent, but no further, we can agree with the majority.
>
> 7. The duty and the responsibility of a person seeking to avail himself of his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others. Only if he fails to take necessary action, or if such action is shown to be insufficient, may the State step in.
>
> Even if the need for repressive action is demonstrated, the measures concerned must be "proportionate to the legitimate aim pursued"; according to the case-law of the Court, which we endorse, this will generally not be the case if another, less restrictive solution was available (see, as the most recent

> authority, the Informationsverein Lentia and Others judgment referred to above, p. 16, para. 39).
>
> The need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society.

[51] I am not prepared to second-guess the weight that the Authority accorded to the right of freedom of expression, relative to the right to respect for religious beliefs. Nor was McGechan J in *Television New Zealand Ltd v Ministry of Agriculture & Fisheries* HC WN AP 89/95 13 February 1997.

[52] Mr Laurenson is effectively asking me to carry out my own balancing exercise of the rights to religious freedom and the right to seek and to impart information and ideas. But this is not a legitimate exercise for the Court, which lacks any expertise to undertake it. In particular, the Court is not in a position to determine what are generally accepted standards of good taste and decency. On the other hand, it is a task for which the Authority is specially qualified. Like the broadcasters in *ProLife Alliance,* it undertakes its own researches as to what accords with the standards of good taste and decency and it is in the front line for complaints by members of the public (see *Laws of New Zealand,* Media and Communication, at para. [97]).

[53] I am not prepared to say that the Authority must have been wrong to hold, as it did, that Bloody Mary did not breach the standard of good taste and decency. Instead, I endorse and apply Cairns LJ's approach in *Attorney-General, ex rel. McWhirter v Independent Broadcasting Authority* at 655B-D. I set it out because the Judge's comments are as valid today as they were when he made them in 1973:

> I adhere to the opinion which I formed on the basis of the newspaper descriptions and which I found amply confirmed by seeing the film, that in my opinion it contains a substantial amount of indecent material. It is a matter of surprise to me that ten members of the authority were unanimously of the opinion that it does not offend against good taste or decency; and a matter of greater surprise that 17 out of 18 members of the General Advisory Council took the same view of it. But they did.
>
> The position here is not comparable to that which exists when a court holds that the verdict of a jury is perverse; because the court there knows nothing

> of the character or background of individual members of the jury and 11 rather weak jurymen may have been persuaded by one prejudiced strong-minded man. Here we know that the people who formed this opinion are intelligent, cultured people with a wide range of types of background. To say that they must all but one have applied some wrong test or that they must themselves be lacking in good taste and decent feeling would be a bold statement. The authority are the censors; I am not. The General Advisory Council has the duty of advising them; I have not.

[54] I hold that the Authority's duty is fairly and reasonably to comply with the "good taste and decency" restriction, loose and imprecise though it may be and involving though it does a significantly subjective element of assessment. The "good taste and decency" standard employs very wide concepts and the accumulated experience of the Authority forms the appropriate safeguard, in the public interest, subject to any challenge to the courts on the basis of *Wednesbury* perversity. Refer *Attorney-General, ex rel. McWhirter v Independent Broadcasting Authority* at 652F-G (*per* Lord Denning MR) and 658D-E and 658G (*per* Lawton LJ); *R v Broadcasting Complaints Commission, ex parte BBC* [1995] EMLR 241 (QB); and *R v BBC and Independent Television Commission, ex parte Referendum Party* [1997] EWHC Admin 406 at [44]. This high threshold has not been met.

Incorrect division of complaints

[55] At the start of its consideration of the complaints that the telecast of Bloody Mary breached standard 1, the Authority said this:

> **Standard 1 (Good taste and decency)**
>
> [103] As noted earlier in this decision, the complaints alleging a breach of good taste and decency fell into two general categories: first, that the programme's portrayal and description of menstruation, and in particular the blood being projected onto the faces of some characters, was offensive; and second, that the programme demeaned Catholic icons and practices.

[56] The Authority then considered the first category of complaints against the contextual factors it listed in [104] of its decision (the programme's AO classification, 9.30 pm screening time, imbedded warning and so on), and then expressed the view that the highly unrealistic and farcical portrayal dulled any offence caused by the depiction of "menstrual blood being squirted into the face of another person".

[57] The Authority's conclusion on the first category is in [107] of its decision (which I have set out in [44] above), and also at [110]:

> [110] In the present case, however, the material was of such a farcical, absurd and unrealistic nature that it did not breach standards of good taste and decency in the context in which it was offered.

[58] The Authority then turned to the second category of complaints:

> [111] The second category of good taste and decency complaint was that it was a statue of the Virgin Mary that was shown menstruating over the faces of a cardinal and the Pope. This, complainants felt, was deeply offensive to their Catholic faith.

[59] The Authority referred to its earlier, but recent, decision (Decision No. 2005-112) about three episodes of the *Popetown* programme, citing several paragraphs from that decision. It expressed its conclusion in this way:

> [116] Although it accepts and acknowledges the degree of hurt apparent in the complaints it has received, the Authority is of the view that the institution of the Catholic Church, its practices and its icons, are entitled to no greater degree of protection than any other institution in our society, whether it be religious, political or cultural.

[60] Mr Laurenson encapsulated the Conference's complaint about this approach by submitting that the Authority had failed to take a whole look at the complaint and, by dividing the complaints into two parts and rationalising each part separately and differently, the offence escapes. Put differently, the Conference's complaint is that by compartmentalising the complaints against CanWest, the Authority lost sight of their overall gravamen and allowed CanWest to escape.

[61] I do not accept that the Authority's approach was wrong. Mr Laurenson emphasised that the Conference's complaint was that the portrayal of the Virgin Mary, the Pope and a cardinal compounded the basic offence of the crass and tasteless portrayal of menstruation – menstrual blood being squirted into the face of other people.

[62] A careful reading of [111] of the Authority's decision persuades me that the Authority understood exactly the Conference's complaint, namely that the second

category of complaints was on top of the first, compounding it, and was not quite separate from the first.

First (secular) complaints - Authority's reasons for rejecting

[63] In [57], I noted that the Authority's reasons for not accepting the first category of complaints were a combination of contextual factors and the farcical, unrealistic portrayal in Bloody Mary.

[64] The Conference submitted that neither reason was sound.

[65] First, as to contextual factors, the Conference argued that what constitutes good taste and decency ultimately has elements universal to all sectors of the community. Included in those elements are notions of good manners and respect for the sensibilities of others, including those who respect or adhere to a faith. It also recognises that some subjects are indelicate or have a limited place in general discourse. There is no reason why these factors do not apply to the audience who viewed Bloody Mary, or the other episodes of South Park.

[66] This first argument again contends for some universal, objective standard of good taste and decency. I reiterate my rejection that this can be correct. Who set or sets that standard and when and how? Does it change with the times or is it permanently fixed? This submission by the Conference is, in a sense, self defeating, in that it demonstrates that the Conference's view of what currently constitutes good taste and decency differs from that of the Authority. I should perhaps restrict that difference of view to what, consistent with good taste and decency, can be telecast at 9.30 pm with an AO classification and after the warnings that were given in relation to Bloody Mary. So, I am faced with two different views, each expressed by a reputable institution after careful, if not anxious, consideration. Which is correct? More importantly, from my viewpoint as the Judge who must decide this appeal, on what basis can I say that the Conference's view is correct, and that expressed by the Authority plainly wrong?

[67] Relevant to the points I am making are the following two passages from the judgment of Lord Walker in *ProLife Alliance*:

> [120] "Good taste" is an expression with a distinctly old-fashioned timbre. It seems very possible that in the days of Lord Reith (when newsreaders were males wearing dinner jackets and speaking the King's English) there really were no unseemly references in any broadcast to sexual activities or bodily functions, and no disrespectful jokes about living (or recently deceased) members of the Royal Family. Those times are long since past. They disappeared, perhaps forever, during the 1960's. It now needs an effort of memory or imagination to call to mind the strict statutory censorship of theatres which continued until its final abolition by the Theatres Act 1968.
>
> …
>
> [122] It would be absurd to test offensiveness by the standards which prevailed in or before the middle of the last century. …

[68] Second, Mr Laurenson argued that the fact that CanWest targeted its South Park programme at an audience under 30 years of age did not mean that audience's sense of good taste and decency was not offended; "all it means it that that demographic may be prepared to bear the offensiveness".

[69] I struggle with this submission. If viewers did not complain that Bloody Mary (or any other episode of South Park) breached the standards, then offence cannot reliably be imputed to them.

[70] Third, and somewhat supporting what I have just said, Mr Laurenson submitted that, in any event, Bloody Mary did cause offence, as evidenced by the complaints listed by the Authority at the start of its decision. While most of the 38 complainants are individuals, ten of them are couples and six are on behalf of organisations or firms. Bishop Browne's complaint on behalf of the Conference is one of those six.

[71] Mr Laurenson contended that the bringing forward by three months of Bloody Mary, and its screening amidst a public controversy, removed the Authority's ability to excuse the offence because the viewing audience was wider than CanWest's target "demographic". That controversy was not restricted to Bloody Mary, or even to South Park. It extended to the earlier programme called *Popetown*, which had attracted a number of complaints to the Authority. It

encompassed also the debate about what are now commonly called the "Danish cartoons": the series of cartoons published in a Danish newspaper which gave great offence to the international Muslim community, and resulted in retribution and violence.

[72] Assuming this was the case (and I have no evidence about that), it does not detract from the relevance of the contextual factors listed by the Authority in [104] of its decision. Let me take two examples of different television viewer situations. Viewer X allows his 10 year old daughter to watch Bloody Mary. 9.30 pm is well after the child's usual bedtime. X knows the programme is rated AO (unsuitable for children) and sees the warnings which precede it on the screen. X has also seen previous episodes of South Park and is familiar with the programme content. Viewer Y is the mother of two children, aged 7 and 9. The children are watching the 6 pm television news, while Y is busy preparing the family's evening meal. Y suddenly becomes aware that footage of some rebel soldiers raping and assaulting women in a remote village is being screened.

[73] I do not accept that a subsequent complaint by X of a breach of Code Standard 1 would have the same validity as a similar complaint by Y. It has, now famously, been said that "in law, context is everything" (per Lord Steyne in *R v Secretary of State for the Home Department* ,ex parte *Daly* [2001] 2 AC 532 (HL) at [28]). In my view, the same can be said of television and other media broadcasts or publications. This is really another way of my expressing disagreement with the Conference's submission that there are universal standards of good taste and decency, that can and must be upheld irrespective of the context of the matter in issue.

[74] Fourth, Mr Laurenson submitted that the Authority had failed to take into account further contextual factors, in particular:

a) CanWest bringing forward screening of the episode from May to 22 February, because of the controversy and publicity surrounding it.

b) Adverse comments by the Prime Minister on the content of Bloody Mary.

c) CanWest's subsequent apologies, specifically to the Conference and generally to the public.

[75] This is a submission, in terms of *May v May*, that the Authority omitted relevant considerations. I have already made it clear that I do not agree that (a) was relevant.

[76] The Prime Minister's comments could be viewed as indicative of current standards of good taste and decency. Because of her position as leader of three successive Governments, the Prime Minister's views command respect. On the other hand, it could be objected that, on a topic such as Bloody Mary, the Prime Minister's views had no more validity than those of any other responsible individual. A further point that may have influenced the Authority in not referring to the Prime Minister's views is that the Authority is constituted as an independent body. Section 21(5) of the Broadcasting Act provides:

> (5) Except as expressly provided otherwise in this or any other Act, the Authority must act independently in performing its statutory functions and duties, and exercising its statutory powers, under –
>
> (a) this Act; …

Referring to the Prime Minister's views about Bloody Mary would invite the criticism that the Authority was not acting independently. It would also cause the Authority to infringe the general principle of law that discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion. See my recent decision in *Wyeth v Ancare* HC WN CIV-2006-485-2596 18 June 2007 at [116], following *R v Anderson; ex parte Ipec Air Pty Ltd* (1965) 113 CLR 177 (HCA) at 189 per Kitto J, Menzies J concurring

[77] I have set out in [16] the apology CanWest subsequently made to the Conference. Mr Laurenson attached to his written submissions a printout from the www.stuff.co.nz website reporting Canwest's public apology. This reads:

> **Television channel C4 has apologised for the screening of the Bloody Mary episode of the South Park series and said it would not repeat the programme.**
>
> And while it rejected about 100 formal complaints about the programme, C4 said it had reviewed its internal processes for dealing with religious programmes.
>
> Chief operating officer Rick Friesen said C4 probably would not have screened the episode knowing what it did now about the amount of offence taken.
>
> Because of the strong reaction, the company had decided not to take up its rights to repeat the episode.
>
> …
>
> Today Mr Friesen said formal complaints about the programme had been before a standards committee and had not been upheld.
>
> …
>
> "However, C4 acknowledges the strength of feeling in relation to the programme, and we sincerely apologise for any offence taken," Mr Friesen said.
>
> "We have detected a shift in the public's perspective on matters of a religious nature. As a result, we have reviewed our internal processes for dealing with religious programmes, particularly in relation to religious satire."
>
> If it was felt a programme was going to offend a large group the broadcaster would have to look closely at whether or not it was run, or edited.
>
> "It's simply being responsive to the communities we serve. We want our audience to respect and understand what we do as broadcasters, and to do that we have to be sensitive to what viewers want and what they can be offended by," Mr Friesen said.
>
> "It doesn't mean we're going to get rid of all offence, that's not going to happen. It would limit what television broadcasters run too severely. It's extreme cases we're talking about."
>
> …

[78] I suggested to Ms Bradley that her submissions for CanWest had perhaps gone too far in contending that these apologies were irrelevant to the Authority's task.

[79] However, on reflection, I am not prepared to hold that, in not referring to these apologies, the Authority overlooked a relevant consideration. The point, I

think, is the same one I made in relation to the Prime Minister's comments. CanWest's apologies reflect its own view about Bloody Mary, after the event and in the face of the complaints to it which the screening of Bloody Mary generated. Referring to those complaints could invite the criticism that the Authority had been influenced by the broadcaster's own views about Bloody Mary.

[80] There is a further point. The "Stuff" website I refer to in [77], also reported the response of Lindsay Freer, a spokeswoman of the Catholic Church, to CanWest's public apology. Ms Freer is reported as categorising the "so-called sincere apology" as "self-serving". The report of Ms Freer's comments continues:

> "They knew in advance that screening Bloody Mary would give deep and widespread offence, given the correspondence they had received in advance from Christian leaders and leaders of other faiths. Yet they went ahead and screened the programme," she said.
>
> "CanWest was wrong and now seeks to restore its position with a semi-apology. Clearly they are feeling the heat and are taken aback by the extent of the offence and outrage that has been caused".
>
> The broadcaster could have been expected to uphold the formal complaints had its regret been genuine, Mrs Freer said.
>
> "When CanWest said it had detected a shift in the public's perspective, it really meant it had learned the hard way that the public would not put up with arrogant denigration of groups of their fellow citizens simply because the media perceived it could get away with it.
>
> "The public can be expected to see through the commercial interest that motivates some media to generate public controversy whatever the consequences or hurt that results."

[81] Consistently, the Roman Catholic Church cannot complain that CanWest's apologies were a relevant consideration overlooked by the Authority, and dismiss those apologies as insincere and self-serving.

[82] Fifth and last, Mr Laurenson took "direct issue" with the view the Authority expressed in [106] of its decision:

> [106] The portrayal of this in *South Park*, however, was highly unrealistic and farcical. The programme's animation is simple and crude, and bears no resemblance to reality. In the Authority's view, this crude animation and lack of realism mitigated to a significant extent the shock value and offensiveness that a more realistic portrayal might have generated.

[83] Mr Laurenson made three points:

a) Despite animation which may have been crude and lacking in realism, the message, imagery and words employed were unmistakable, and offensive.

b) The Authority's acceptance that Bloody Mary was satire contradicts and negates the views it expressed in [106] of its decision.

c) The basic and rudimentary animation heightened rather than mitigated the offence. It deepened the crassness and crudity of the whole episode.

[84] Neither singly nor in combination do these three points expose the view taken by the Authority in [106] of its decision as plainly wrong. In fact, had the portrayals of the Virgin Mary, the Pope and the cardinal been lifelike, I can but agree with the Authority that a complaint of breach of both Code Standard 1 and 6 would have been much much stronger, perhaps irrefutable. I agree with the Authority that the crude and simple animation made unmistakable the satirical aim and message of the episode.

Second complaints – Authority applied too strict a test

[85] The nub of this submission by the Conference is that, in restricting breaches of Code Standard 1 to vitriolic or vicious attacks, the Authority applied, not only too strict and narrow a threshold, but one the Conference had never asserted had been crossed by Bloody Mary.

[86] The Authority deals with the second category of complaints in [111]-[118] of its decision, too long to set out in full here. These paragraphs incorporate a lengthy quote from the Authority's earlier *Popetown* decision (Decision No. 2005-112). The Authority's reasoning concludes with this:

> [118] As noted in the *Popetown* decision, vitriol or vicious attack may well breach the standard. The Authority does not agree that *South Park* did this,

> however. While clearly the episode showed no respect for the revered status of the Virgin Mary within the Catholic faith, or indeed for the Pope and cardinals, it did not cross the requisite threshold …

[87] I treat this submission as one asserting error of principle on the Authority's part. While I cannot agree, I do accept that error in the way the Authority expressed itself is made out.

[88] First, the Authority was surely wrong to treat Bloody Mary as "strikingly similar" to the three episodes of *Popetown* which were the subject of its Decision No. 2005-112. In [112] the Authority states that *Popetown*, "apart from its religious content contained little challenging material". The depiction in Bloody Mary of "menstrual blood being squirted into the face of another person" is surely "challenging material". As the Authority had noted in [111] (set out in [58] above), this second complaint was of this physical depiction of menstruation in combination with the use of religious figures, one of them iconic.

[89] Second, the Authority's [118] could be read as stating that the use of depictions of the Virgin Mary, the Pope and a cardinal were irrelevant to Code Standard 1, unless they were used or attacked in a vicious or vitriolic manner. While that may be correct of the denigratory aspect of Guideline 6g, it is not correct of Code Standard 1. Good taste and decency are measured, at least to some extent, against notional community standards. In the 2006 Census approximately 32% of New Zealanders stated they had no religion i.e. about 68% apparently do have a religion. The fact that a religious institution, and icons and individuals revered by it, was the target of the "challenging material" in Bloody Mary, is consequently relevant to the assessment the Authority needed to make of good taste and decency.

[90] Paragraphs [111]-[119] of the Authority's decision I think show that the Authority recognised this. It gave various examples of material that might offend good taste and decency, irrespective of the context in which it was telecast. Material objectionable in terms of the Films, Videos and Publications Classification Act 1993 was one example. Eroticised sexual violence was another (the Authority instanced its Decision No. 2004-007). Satire which was particularly vicious or vitriolic was a third example given. These were but three examples of material crossing "the

requisite threshold" referred to by the Authority in [118]. But the Authority did not intend them as an exhaustive list.

[91] To summarise, I do not agree that the Authority erred in principle. I do think it caused confusion by drawing an analogy with the three episodes of *Popetown* it considered in its Decision No. 2005-112, where the subject matter was not comparable.

[92] Even if some error of principle does exist in the Authority's reasoning, I am unable to regard its decision as plainly wrong. I expand on that in [98]-[101] below.

Complaint on grounds of unfairness – denigration

[93] The Conference's complaint to the Authority that Bloody Mary had also breached Code Standard 6 was not the focus of this appeal, and I think rightly not.

[94] At [121] in its decision, the Authority noted that the test for establishing denigration is well settled: the issue is whether a telecast blackens the reputation of an identifiable class of people.

[95] The Authority's view of this aspect of the Conference's complaint is sufficiently captured in paragraph [133] of its decision:

> [133] The Authority is unable to conclude that the broadcast encouraged the denigration of Catholics. The intent of this programme was to satirise, among other things, belief in the miraculous power of religious icons. The programme was not, however, a direct attack on the Church or on Catholics, although it was deliberately provocative in making its point. There is no doubt that aspects of their religion revered by devout Catholics were treated in a disrespectful and cavalier fashion, in particular a statute representing the Virgin Mary. But showing disrespect, in the view of the Authority, does not amount to the sort of vicious or vitriolic attack that the standard envisages.

[96] Mr Laurenson concluded his submission on this aspect by stating:

> If the episode is not a denigration of the institution of the Roman Catholic Church and the faith, it remains of crass poor taste and lacking in decency.

[97] That appropriately puts the focus of the appeal back on Code Standard 1.

The appeal generally

[98] The threshold for the Conference in bringing this appeal which is set by s18(4) of the Broadcasting Act is a tough one, the more so because Parliament established the Authority as the arbiter of good taste and decency in the broadcasting area.

[99] The four members of the Authority who sat on this appeal were appointed by the Government with the aim of making the Authority representative and reflective of community views and standards. Those four members were unanimous in dismissing the Conference's complaint.

[100] What is driving this appeal is a deep and real sense of outrage at the Authority's decision by an appellant uniquely and acutely offended by Bloody Mary. But the problem the Conference faces, which is evident from its submissions both on this appeal and to CanWest's Standards Committee and subsequently the Authority, is that the Conference's sense of outrage is not shared by the wider community.

[101] To persuade a single High Court Judge that the Authority's decision was "plainly wrong" is no small task. Mr Laurenson was wise to accept he could achieve that only by pointing to some error of principle rendering the Authority's decision plainly wrong. I cannot detect any error of principle.

Result

[102] For the reasons I have given, I dismiss the appeal.

Costs

[103] Although it might be viewed, at least by the Conference, as adding insult to deep injury, I order the Conference to pay CanWest's costs of this appeal. Mr Laurenson accepted that costs should follow the event. Whether CanWest seeks payment or is content to let the matter rest is its decision.

[104] The Authority's participation, pursuant to r717, was voluntary. It should accordingly meet its own costs. I view its participation in appeals such as this as part of its statutory functions and as an expense that should accordingly come out of its budget. I note that Mr Scott-Howman did not seek costs for the Authority.

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