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R v Labaye and Sexual Expression- By Khan Montelban

The Courts in Canada over time have developed and tinkered with tests to determine conduct that could be criminal due to being obscene and indecent. In *R v* Butler the test referred to a "community standards of tolerance test" which took into account harm.[1] Over time, the tests have changed to become less subjective, and put more emphasis on harm as a principle.

Having a community standard teeters closely to questions of morality, asking what Canadians think is morally right or wrong. Particularly, the judge in question was in a position to ask this question and make a decision. Asking this question in a vacuum is not a problem, but when the answer infringes upon the rights of other Canadians, it becomes problematic because the right to expression is clashing with what a judge holds falls within the standard.

Now, with *R v Labaye*, the court has moved to a test that looks at whether there was harm caused by the conduct, and if there was, that would make the conduct indecent.[2] *Labaye* is a step in the right direction to protect the right to freedom of expression and although there are some issues with one of the categories of harm it presents, the other parts of the test and how it has been applied seem to protect expression.

Labaye presented a two-part test, with the first being that the conduct must present a significant risk of harm to individuals or the public at large, with harm being split into three categories: 1. Harm that affects the autonomy of a person; 2. Harm that causes people to act in an antisocial manner; 3. Harm that physically or psychologically harms those who participate it in.

Of these three categories of harm, the first and the third have the most merit. The second category of harm proffers the idea that indecent activity can cause people to act in an antisocial manner. However, this is often not substantiated by social science evidence, and so should not be used to infringe upon the rights of others to express themselves. There should be a high threshold for activities to fall under the second category, with evidence supporting anti-social behaviour being caused.

The first category of harm, refers to situations where people cannot avoid being presented with the activity or material. That is to say that their autonomy to not participate or view the activity is affected. In *Labaye*, the fact that the space in question was a private member's club, prevented it from scrutiny on this point. In *R v Kouri*, the owner of the bar having a gatekeeping mechanism where couples had to affirmatively answer that they were a "liberated" couple before entering into the area where indecent activity occurred, was considered sufficient.[3] It was even considered sufficient despite evidence from undercover police that sometimes the question was not asked, and that someone left the bar upset. This seems to be a good decision that protects the right to freedom of expression. The bar was proactive in having a practice of checking people, and considering they were charging people money to get into the special area, most people would ask what it was that

[1] *R v Butler,* [1992] 1 SCR 452 at 26, 1992 CarswellMan
[2] *R v Labaye*, 2005 SCC 80
[3] *R v Kouri*, 2005 SCC 81

they were spending money on, and if they did not want to go in, then they did not have to. So, their autonomy was not affected. Many bars that have special areas may advertise the method to enter or people may know about it from word of mouth, and so they may actively enter the bar to go into the special area, as opposed to just having to come upon the bar, and then the special area from the street. These decisions protected the right of commercial businesses to have freedom of expression in their premises.

The third category of harm should be given the most weight. Conduct that actively harms its participants should be considered indecent. This includes when the people have not consented to participating in the activity, are not aware of what the activity itself entails, or have been trafficked or forced to participate. One may argue that certain types of BDSM may constitute a "harm" on the participants but as long as they have consented and it is a safe form of sexual expression it should not fall under this category.

The second step of the test is whether the degree of harm is incompatible with the proper functioning of society, with it being more than just the subjective standard of the judge. The second step is important for all three categories of harm, but particularly the second category because this part of the test allows weighting to be taken into account because it considers the degree of the harm. This way, even if there is an argument made that the activity could increase anti-social behaviour, without evidence or if the behaviour itself was not very harmful, the argument could potentially be snuffed out at this part of the test.

To conclude, *Labaye* and *Kouri* emphasised the role of harm in deciding when to potentially interfere with activities that could be considered indecent. Although "harm" as a general principle can be considered vague or broad, the way the Court refined and applied the principle of harm in the test from *Labaye* and on the facts in *Kouri* was effective and protects sexual expression. The analysis in *Kouri* in particular reflected the court's consideration of the relevant factors and evidence and did not emphasise moral judgements on the performers or the bar itself, rather focusing on whether there was a harm caused by it. This ideally will protect sexual expression so long as it does not constitute sufficient harm.