

**DECISION OF FILM AND LITERATURE BOARD OF
REVIEW**

UNDER the Films, Videos and Publications Classification Act
1993

IN THE MATTER of an application under section 47(2)(e) by Brian Johnston
of Christchurch for a review of the publication(s) entitled:

Christchurch Mosque Attack Livestream

INTRODUCTION

1. The following members of the Board met in Wellington on 7 June 2019 to consider this application for review:

R Schmidt-McCleave (President)

N Dunlop (Vice-President)

Dr T Brown

S Gill

J Peters

Dr M Waitoki

2. The publication subject to this review is an audio-visual video allegedly livestreamed on Facebook and other social media on 15 March 2019 (the “video”) apparently by means of a camera attached to the head or chest of the person filming. The video depicts a man¹ armed with several automatic weapons driving to the Al Noor Mosque in Christchurch, entering the mosque and proceeding to coldly and callously shoot the unarmed persons who he encounters within the mosque. The video shows the man returning to rooms in the mosque three times, repeatedly discharging his automatic weapons at the bodies of the victims again and again. The video then records the man leaving the mosque, while he continues to search for victims who he shoots. The man can be heard laughing during this time. The video then depicts the man in his car, shooting through his windscreen at passing pedestrians on his departure and, with apparent heartless indifference, driving over a prone victim on the footpath. As the person filming drives away from the scene, the camera continues to capture audio of the man talking, in a celebratory way, about the atrocity he had just filmed himself committing, before cutting out at almost the 17 minute mark.
3. By decision dated 18 March 2019, the Office of Film and Literature Classification (the “OFLC”) classified the video as objectionable under sections 3(2)(f) and

¹ At one point the person filming the video engages in a “selfie”.

3(3)(d) of the Films, Videos, and Publications Classification Act 1993 (the Act). As required by the Act, the Board has not had regard to that OFLC decision.

4. Under a combination of section 47(1) and (2)(e) of the Act, a person granted leave by the Secretary of the Department of Internal Affairs (the Secretary), who is dissatisfied with any decision of the OFLC with respect to the classification of any publication is entitled, on application, to have the publication reviewed by the Board.
5. The Applicant has been granted such leave by the Secretary.

THE PRINCIPLES OF REVIEW AND THE LEGAL PRINCIPLES APPLICABLE

The Films, Videos and Publications Classification Act 1993

6. Section 52(2) of the Act requires that the Board conduct its review by way of re-examination of the publication at issue (the video) without regard to the decision of the Classification Office.
7. Section 52(3) of the Act requires the Board to examine any publication referred to it to determine the classification of the publication.
8. In determining the classification of any publication referred to it, the Board is required by section 52(4) to take into account the matters referred to in sections 3 to 3D of the Act.
9. The relevant parts of sections 3 to 3D of the Act are set out below.
10. Section 3 of the Act sets out the meaning of “*objectionable*” for the purposes of the Act. Section 3(1) provides that a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is

likely to be injurious to the public good. In this case, the applicable matters are horror, crime, cruelty and violence.

11. Section 3(2) *deems* a publication to be objectionable for the purposes of the Act if it *promotes or supports, or tends to promote or support*, certain behaviours, including (at section 3(2)(f)), “*acts of torture or the infliction of extreme violence or extreme cruelty*”. As made clear by the Court of Appeal in *Moonen v The Film and Literature Board of Review* [2000] 2 NZLR 9 (*Moonen 1* and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (*Moonen 2*), there is a high threshold to be overcome before the deeming provision renders a publication objectionable. The Court of Appeal’s judgments in *Moonen 1* and *Moonen 2* will be returned to later in this decision.
12. Section 3(3) is relevant if the publication is not *deemed* objectionable. That provision states that in determining whether or not a publication (other than a publication which has been *deemed* objectionable under section 3(2)) is objectionable, particular weight must be given to the extent and degree to which, and the manner in which, the publication does certain things, including:
 - a. Describes, depicts, or otherwise deals with, *inter alia*, acts of torture, the infliction of serious physical harm or acts of significant cruelty (section 3(3)(a)(i)).
 - b. Degrades or dehumanises or demeans any person (section 3(3)(c)).
 - c. Promotes or encourages criminal acts or acts of terrorism (section 3(3)(d)).
13. Finally, for those publications not *deemed* objectionable, section 3(4) requires that, in determining whether or not a publication (other than a publication which has been deemed objectionable under section 3(2)) is objectionable, the Board must consider the following matters:
 - a. The dominant effect of the publication as a whole.
 - b. The impact of the medium in which the publication is presented.

- c. The character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters.
- d. The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available.
- e. The purpose for which the publication is intended to be used.
- f. Any other relevant circumstances relating to the intended or likely use of the publication.

14. Section 4(1) provides that the question whether or not a publication is objectionable is a matter for the expert judgment of the person or body authorised or required to determine it, and evidence as to, or proof of, any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination. Without limiting subsection (1), where evidence as to, or proof of, any such matter or particulars is available, it is required to be taken into consideration (section 4(2)).

Restriction

15. Under section 3A, a publication may be age-restricted if it contains highly offensive language likely to cause serious harm.

16. Further, under section 3B, a publication may be classified as restricted if it contains material specified in section 3B(3) to such an extent or degree that the availability of the publication would, if not restricted to persons who have attained a specified age, be likely to be injurious to the public good for any or all of the reasons specified in section 3B(4).

17. The material in section 3B(3) is material that:

- a. Describes, depicts, expresses or otherwise deals with (i) harm to a person's body whether it involves infliction of pain or not (for example, self-mutilation or similarly harmful body modification) or self-inflicted death; or (ii) conduct that, if imitated, would pose a real risk of serious harm to self or others or both; or (iii) physical conduct of a degrading or dehumanising or demeaning nature (section 3B(3)(a)).
- b. Is or includes 1 or more visual images (i) of a person's body and (ii) that, alone, or together with any other contents of the publication, are of a degrading, dehumanising or demeaning nature (section 3B(3)(b)).

18. The reasons set out in section 3B(4) are that the general levels of emotional and intellectual development and maturity of persons under the specified age mean that the availability of the publication to those persons would be likely to –

- a. Cause them to be greatly disturbed or shocked (section 3B(4)(a)).
- b. Increase significantly the risk of them killing, or causing serious harm to, themselves, others, or both (section 3B(4)(b)).
- c. Encourage them to treat or regard themselves, others, or both as degraded, dehumanised, or demeaned (section 3B(4)(c)).

Case law

19. The three decisions of the Court of Appeal in *Moonen v The Film and Literature Board of Review* [2000] 2 NZLR 9 (*Moonen 1*), and *Living Word Distributors v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570 apply to the Board's review.

20. In *Living Word Distributors*, the Court of Appeal described section 3(1) of the Act as a “*subject matter gateway*” to being found to be objectionable, in that if a publication does not describe, depict, express, or otherwise deal with matters such as sex, horror, crime, cruelty, or violence, it cannot be classified as objectionable.

Once a publication makes it through the subject matter gateway, the Board must then consider whether the subject matter is dealt with in such a manner that the availability of the publication is likely to be injurious to the public good. The remaining subsections of section 3 of the Act may assist the Board in that analysis.

21. In both *Moonen* decisions, the Court of Appeal espoused the importance of the New Zealand Bill of Rights Act 1990 (BORA) and the fact that the Board must be mindful that, in applying the Act, it must act consistently with BORA. Section 14 of BORA states that everyone has “*the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.*” Under section 5 of BORA, this freedom is subject “*only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*” Further, section 6 of BORA provides that “[*wherever*] *an enactment can be given a meaning that is consistent with the rights and freedoms contained [in BORA], that meaning shall be preferred to any other meaning.*”
22. In *Moonen 1*, the Court of Appeal made the following statement which the Board recognises is key to its consideration of the section 3(2) “deeming” provision for objectionability (at [29]):

“The concepts of promotion and support are concerned with the effect of the publication, not with the purpose or the intent of the person who creates or possesses it. The concepts denote an effect which advocates or encourages the prohibited activity, to borrow the words of Rowles J of the British Columbia Court of Appeal in an allied context in R v Sharpe (1999) 136 CCC 3d 97 at para 184. Description and depiction (being the words used in s 3(3)(a) of the Act) of a prohibited activity do not of themselves necessarily amount to promotion of or support for that activity. There must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity.”

SUBMISSIONS RECEIVED

23. The Board received submissions from the Applicant and from the OFLC (including submissions from the Applicant in response to those of the OFLC). These submissions are summarised here and the Board confirms it has had full regard to the submissions of both the Applicant and the OFLC in its consideration of the video.

Submissions on behalf of the Applicant

24. The Applicant's submissions can be briefly summarised as follows:

- a. The OFLC's objectionable classification needs to be lifted so that New Zealand citizens can access the video to carry out their own independent analysis of it and potentially to assist them in any submissions they may wish to make to the Royal Commission of Inquiry into the Attack on Christchurch Mosques (the Royal Commission).²
- b. The video is not graphic, does not incite hatred and could not reasonably be considered as offensive.
- c. The public view more violence on television news broadcasts and on YouTube than what is portrayed in the video.
- d. The video is obviously not a livestream of the 15 March shooting as it took place.³ The Applicant in response to the OFLC submissions made clear that, in this regard, he was not advocating a "false flag" argument,⁴ but rather is seeking to have the ban lifted on the grounds the video for whatever reason may not be real but, rather, a drill or mock up and therefore is not "in a real sense" violent or graphic.⁵
- e. The video is presently being examined frame by frame overseas and thousands have viewed the video, meaning the ban is pointless.
- f. Section 14 of BORA, and the right to freedom of expression, provides sound reasoning to have the ban lifted.

² Established by Order in Council of 8 April 2019.

³ The Applicant gave several reasons in his submissions for this point of view.

⁴ As noted by the OFLC at footnote 1 of its submissions, a 'false flag' is an attack or hostile action that misrepresents the identity of the perpetrator or group responsible to implicate another individual or group.

⁵ Again, the Applicant sets out reasons for this point of view.

- g. To ban the video for reasons of violent content would necessitate the banning of all violence across a range of media.

Submissions by OFLC

25. In response, in summary, the OFLC submitted that:

- a. It is not a tenable argument that the video is in some way fake, fabricated or falsified and, with the known evidence, is an actual record of events on 15 March 2019.
- b. Even if the Applicant's arguments about veracity are accepted, the overall promotional and instructional impacts of the video would still dictate that it be classified objectionable.
- c. The video ought to be deemed objectionable under section 3(2)(f) because it depicts the infliction of extreme violence and cruelty, once the shooting begins, and glorifies the graphic mass murder of unsuspecting victims.
- d. There is nothing present that denounces such activity or supports an alternative reading of the video. The high threshold for the deeming provision is therefore met.
- e. Notwithstanding the clear application of section 3(2)(f) of the Act, the video can also be considered objectionable under section 3(3)(d), which requires that particular weight be given to the extent and degree to which, and the manner in which, the video promotes or encourages criminal acts or acts of terrorism. In making this submission, the OFLC referred also to the factors set out in section 3(4).
- f. In terms of freedom of expression as articulated in BORA, rights can be limited where it is reasonable and demonstrably justifiable to do so. An objectionable classification for the video is a demonstrably justified limit on the right to freedom of expression in this case due to the high likelihood

of significant injuries to the public good arising directly from the video's continued availability.

- g. The terms of reference for the Royal Commission only includes the alleged attacker's use of social media prior to the attack and therefore does not extend to the production or distribution of the video. The video has already been widely reported on in the media and any ongoing interest will likely be to those who are supportive of the attacker's actions or at risk of radicalisation.

ANALYSIS

- 26. The Board is unanimous in its decision that the video be deemed objectionable under section 3(2) of the Act because it promotes or supports, or tends to promote or support, the infliction of extreme violence and extreme cruelty.
- 27. The Board in reaching this decision played careful regard to the Court of Appeal's comments on section 3(2), as set out above. It is satisfied that the video does more than just depict extreme violence and extreme cruelty and it celebrates and endorses the massacre of Muslims.
- 28. There are a number of aspects of the video, discussed below, which in the Board's mind clearly encourage and, indeed, celebrate in a graphic and horrific way the slaughter of innocent Muslim men, women and children in a manner the availability of which is, without doubt, likely to be injurious to the public good.
- 29. The Board is mindful of the section 14 BORA right to freedom of expression but considers that, in this case, the classification of the video as objectionable is a reasonable limit that is demonstrably justified in a free and democratic society.
- 30. Because the Board has decided unequivocally that the video is to be deemed objectionable under section 3(2) of the Act, it apprehends there to be no need to go on to consider section 3(3(a) and (d) and the factors in section 3(4) of the Act.

31. Further, the Board has no need to resolve the Applicant's submission that the video may not be a real recording of actual events as they took place on 15 March 2019. For the reasons set out below, even if that submission could possibly be correct, the video contains aspects which justify it being deemed to be objectionable in any case. To test this position, the Board considered the video on its face putting to the side the contextual matters the members were aware of as a result of the media coverage since 15 March 2019. In undertaking this exercise, the Board was satisfied that the section 3(2) test was met.
32. The Board summarises below those aspects of the video which have led it to reach the conclusion that it be deemed objectionable.
33. In contrast to the Applicant's submission to the contrary, the events depicted in the video are indisputably horrific. Unarmed and innocent persons are systematically shot by the alleged attacker. He returns to rooms in the mosque again and again, discharging his weapons repeatedly into persons running away from him or already injured, dying or deceased. At one point, leaving the mosque in his car, the alleged attacker drives over a person lying prone on the footpath in front of the mosque. He fires indiscriminately at pedestrians passing by. There is no doubt that these events depict the infliction of extreme violence and extreme cruelty.
34. But that is not the end of the matter. The Board is satisfied that, rather than just the *depiction* of such extreme violence and cruelty, the livestream video goes further to in fact *promote* such extreme violence and cruelty to Muslims. The video comes across clearly as a celebration of such extreme violence and cruelty to Muslims. It employs cultural props to convey the message that it is acceptable to kill Muslims and comes across as a form of instructional manual.
35. In reaching this view, the Board points to the following aspects of the video:
 - a. It is obvious that the alleged attacker has entered a mosque. The nature of the building itself is evident, as is the distinctive recurring pattern on the carpet (depicting the shape of a mosque).

- b. In driving to the mosque, the alleged attacker plays music which is associated with either violence or the white supremacist movement.⁶ In doing so, the effect is conveyed that he is working himself up for what he is about to do, and that what lies ahead will be fun and noble.
- c. The alleged attacker returns several times to rooms in the mosque where people are already shot and lying injured or deceased. His continued shooting at those persons is cold and systematic.
- d. The weapons in view of the camera are covered in writing, some of which can be discerned including the use of “14”, a meme associated with the white supremacist movement,⁷ and the name Alexandre Bissonnette.⁸
- e. Leaving the mosque in his car, the alleged attacker then embarks on a prolonged verbal lament to his viewers that the attack did not go to plan. In so doing, for example, he refers coldly to the persons shot as “targets”, bemoans that he was not able to kill more and that there were few women present at the time, and states his wish that he’d burned the “fucking mosque”. He is heard to laugh on occasion. In so doing, the alleged attacker endorses and celebrates the violence earlier depicted and makes light of the atrocities shown.

36. All this, in the Board’s unanimous view, is clearly promoting and supporting extreme violence and cruelty, satisfying the high threshold of section 3(2).

Conclusion

37. In conclusion, then, the Board finds that the video must be deemed objectionable. It promotes and supports the infliction of extreme violence and extreme cruelty (section 3(2)(f)).

⁶ The Board specifically identified the God of Hellfire and the ‘Serbia Strong’ song, the latter widely accepted to be a tribute to convicted war criminal Radovan Karadžić. Should the Board have mistakenly identified any of the music, its conclusions remain, because what is of most importance is the atmospheric effect of the music, which is in conflict with the horror about to unfold.

⁷ The Board interpreted this as a reference to the phrase “we must secure the existence of our people and a future for white children” (14 words, commonly shortened to 14).

⁸ The Quebec City mosque shooter from 2017.

38. The video thus depicts horror, crime, cruelty and violence in such a manner that its availability is likely to be injurious to the public good (section 3(1)).
39. Classification of the video as objectionable is a reasonable limit on the section 14 BORA right to freedom of expression which is demonstrably justified in a free and democratic society.
40. The Board hereby directs the Classification Office pursuant to section 55(1)(e) of the Act to enter the Board's decision in the register.

Dated at Wellington this 14th day of June 2019

R. C. Schmidt-McCleave

Rachael Schmidt-McCleave
President

FILM AND LITERATURE BOARD OF REVIEW

SUMMARY DECISION

1. This was an appeal to the Board under section 47(2)(e) of the Films, Videos and Publications Classification Act 1993 (the Act) by the Applicant Mr Brian Johnston for a review of the decision of the Office of Film and Literature Classification (the Classification Office) dated 18 March 2019.
2. The publication at issue is an audio-visual video allegedly livestreamed on Facebook and other social media on 15 March 2019 (the “video”) apparently by means of a camera attached to the head of the person filming. It depicts a man (the person shows himself by a selfie) armed with several automatic weapons driving to the Al Noor Mosque in Christchurch, entering the mosque and proceeding to coldly and callously shoot the unarmed persons who he encounters within the mosque. The video shows the man returning to rooms in the mosque, discharging his automatic weapons at the unarmed worshippers again and again. The video then records the man leaving the mosque in his car, shooting through his windscreen at passing pedestrians on his departure and, with apparent heartless indifference, driving over a prone victim on the footpath. As the person filming drives away from the scene, the camera continues to capture audio of the man talking about the atrocity he had just filmed himself committing, before cutting out at almost the 17 minute mark.
3. In its decision, the Classification Office classified the livestream as objectionable under the Act.
4. Mr Johnston sought a review of that decision and was granted leave by the Secretary of Internal Affairs to seek such review.
5. After reading submissions from the Applicant and the Classification Office and reviewing the livestream itself, the Board has determined that the livestream should be classified as objectionable under the Act.

6. In summary, the Board considered that the video ought to be deemed objectionable under section 3(f) of the Act. It promotes and supports the infliction of extreme violence and extreme cruelty, being the killing or maiming of persons in the mosque while they were unarmed and at prayer. The promotion and support of extreme violence and cruelty is apparent from a number of features of the video, including the use of music and commentary. The video thus depicts horror, crime, cruelty and violence in such a manner that its availability is likely to be injurious to the public good (section 3(1)). Classification of the video as objectionable is a reasonable limit on the section 14 BORA right to freedom of expression which is demonstrably justified in a free and democratic society.