Pornography and Prostitution in Canada

Report of the Special Committee on Pornography and Prostitution

Volume 1

Canada

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Special Committee on Pornography and Prostitution

February, 1985

The Honourable John Crosbie, P.C., M.P.,
Minister of Justice and
Attorney General of Canada

Dear Mr. Crosbie,

As required by the Terms of Reference assigned in June, 1983, we have inquired into and hereby report to you upon the problems associated with pornography and prostitution in Canada.

In the course of our work, we have received the valuable assistance of a number of the departments and agencies of the government of Canada, including, most particularly, the Department of Justice. In addition, we have been assisted by suggestions received from hundreds of Canadians who made presentations at the Committee's public hearings, or otherwise gave us the benefit of their views.

The recommendations contained in this Report contemplate comprehensive legal change to deal with the effects of pornography and prostitution. Just as important are the recommendations that are addressed to the need for social change and understanding in order that the very causes of the problems can be understood and remedied.

The members of the Committee have considered it a privilege to have undertaken this work.

We respectfully submit our recommendations.

Susan Clark

Mary Eberts

Jean-Paul Gilbert

John McLaren

Andrée Ruffo
(Dissenting on the
Subject of Adult
Prostitution)

Joan Wallace

Paul Fraser, Q.C.
Chairman

Preface

In a free society, basic questions about how people are required to behave and how they are entitled to express themselves, rank among the most important to be asked. They are also among the most difficult to answer. The answers to these fundamental questions, asked by each generation of Canadians, have ultimately defined our freedom and our responsibilities.

This Committee has been in pursuit of answers to these questions in the mid-1980s, and this Report is the product of our work. It is a digest of what we were told, and what we were able to find out; and, it is a product of compromises forged by seven people with differing backgrounds and experiences.

In a sense, the very fact that we were asked to discuss these issues publicly says something about this generation. Perhaps it was the reluctance of preceding generations to talk openly, or at all, about some of the manifestations of human sexuality that caused subjects such as pornography and prostitution to be whispered about, and not discussed.

We have been privileged to have discussions with Canadians. The concerns about pornography and prostitution are serious ones involving the dignity and equality of people and an appreciation of the depth and variety of human affection. We found that there was a developed and a developing interest in the two issues, not so much because they have confounded legislators, but because the practice of prostitution and the presence of pornography are clear manifestations of our contemporary society.

In the course of this Report we attempt to fairly record all sides of the debate and, at the same time, to reflect the intensity of feeling that we encountered.

In areas as complex as these it is difficult to be certain about anything. On one issue, however, we are certain: the answers to the problems raised by pornography and prostitution in Canada are not just legal answers. They are to be found, instead, in the social order of things and in the way in which Canadians practise the equality, dignity and respect that our Constitution enshrines.

To the extent we have succeeded in the performance of our responsibilities, credit is due to a number of people whom we wish to acknowledge.

We thank those hundreds of Canadians who prepared for and attended our public hearings. Their interest not only encouraged us, but confirmed that Canadians did, indeed, want a public forum to discuss these subjects.

The Committee is grateful to the Deputy Minister of Justice, Roger Tassé for his encouragement and valuable support. We also wish to thank Daniel Sansfaçon for his capable assistance in co-ordinating the empirical research commissioned by the Department of Justice and for his co-operation in the production of this Report.

Many people have assisted in the legal research that is reflected in this Report. We are particularly indebted to Professor Robin Elliot of the University of British Columbia Law School who has been the Committee's legal researcher and who also directed the work of several student assistants: Robert Grant, David Butcher, Birgit Eder, Michelle Reynolds, Terry Abelsen, Jane Ingman-Baker, Kay Vidall and Richard Brunton, all from the University of British Columbia Law School.

David Nobbs, Osgoode Hall, assumed major responsibility for analyzing the written submissions to the Committee and International Conventions dealing with pornography and prostitution. Cameron Duff, University of Windsor Law School and Diane Ryan, Fanshawe College, provided valuable assistance with legal research projects. In addition, the Committee benefitted from the work or counsel of Professors Diane Pask and Chris Levy of the University of Calgary Law School, Mr. David Porter of Toronto, and Professor John Heinz of the Department of Philosophy, University of Calgary.

The Committee's secretary, Robin Jamieson, undertook general responsibility for administration. She managed our office, organized the public hearings and co-ordinated our publications. Her assistance was invaluable.

We have had the benefit of the administrative assistance of Carolyn Partridge and Rosemary Newman of Vancouver, and Deborah Walker of Toronto. The word processing leading to the production of this report was cheerfully and patiently provided by Cecelia Klassen, Tana Nicholson, Sandra Dyrndahl and Gloria Henry of Vancouver. We are also grateful to the members of the library staff at our respective offices and universities.

All Committee members have assumed responsibilities for the writing or production of the report. While Susan Clark, Mary Eberts, John McLaren, Joan Wallace and I have written the Report, Jean-Paul Gilbert and Andrée Ruffo have willingly taken on the task of overseeing the translation and production of the french language version.

Finally, the Committee would like to record its special appreciation to those who made it possible for us to have been a part of this Committee for the past 20 months. We could not have functioned without the support and understanding of our families and those with whom we work. We give

particular thanks to those colleagues who willingly took on extra responsibilities in our absence and by so doing, allowed us to undertake the work of the Committee.

While we gratefully acknowledge all the assistance which has been given to us, any short-comings in the Report are, of course, the sole responsibility of the Committee.

Paul Fraser
Vancouver, British Columbia
February, 1985.

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The Work of the Committee

1. Establishment of the Committee

1.1 Terms of Reference and Mandate

In the last decade, the contemporary realities of pornography and prostitution have been the subject of increasing public debate in Canada. With conflicting descriptions of the problems, have come equally conflicting views of the social and legal solutions. There have been sharp lines of division in the debate. Few other social issues have so divided our public's opinion.

If Canadians have been unable to agree on exactly what should be done and why, there seems at least to be agreement that it should be done quickly and clearly.

In June, 1983, the Government of Canada established the Special Committee on Pornography and Prostitution to report to the Minister of Justice. The Committee was asked to study the problems associated with pornography and prostitution and to carry out a program of socio-legal research in support of our work.

Our specific terms of reference were:

1. to consider the problems of access to pornography, its effects and what is considered to be pornographic in Canada;
2. to consider prostitution in Canada with particular reference to loitering and street soliciting for prostitution, the operation of bawdy houses, living off the avails of prostitution, the exploitation of prostitutes and the law relating to these matters;
3. to ascertain public views on ways and means to deal with these problems by inviting written submissions from concerned groups and citizens and by conducting meetings in major centres across the country;
4. to consider the experience and attempts to deal with these problems in other countries, including the U.S., European

Economic Community and selected Commonwealth countries such as Australia and New Zealand;

5. to consider alternatives, report findings and recommend solutions to the problems associated with pornography and prostitution in Canada.

1.2 Members of the Committee and Staff

SUSAN CLARK — is a Sociologist, and Dean of Human and Professional Development and Director of the Institute for the Study of Women, Mount St. Vincent University, Halifax, Nova Scotia.

MARY EBERTS — B.A., LL.B., LL.M., is a partner in the Toronto law firm Tory, Tory, DesLauriers & Binnington, and practises civil litigation. She is co-editor of *Equality Rights under The Canadian Charter of Rights and Freedoms* and serves on the board of the Canadian Civil Liberties Association and of the Metro (Toronto) Action Committee on Public Violence Against Women and Children.

JEAN-PAUL GILBERT — B.A., M.A. (Criminology) is Senior Board member (Quebec Region) National Parole Board; Director of the Montreal Police Department 1964-1969; President Quebec Society of Criminology 1978-1984.

JOHN McLAREN — is a Professor of Law at the University of Calgary. He was previously Dean of Law at the University of Windsor, as well as at the University of Calgary. His teaching and research interests lie in the field of Canadian legal history and accident compensation. He is a member of the Ontario Bar.

ANDRÉE RUFFO — B.A., B.Ed., LL.B. M.Ed., is a barrister and solicitor in private practice in Montreal, working mainly in family law and as a consultant to numerous organizations.

JOAN WALLACE — B.A., former chairperson, Commission of Inquiry into Part-time Work, Labour Canada. Former member, Canadian Advisory Council on the Status of Women (1973-77). Former director, Canadian Research Institute for the Advancement of Women. Founding President, Vancouver Status of Women. Served on human rights tribunals for the Canadian Human Rights Commission. Writer and consultant.

PAUL FRASER (Chairman)	B.A., LL.B., Q.C., is a partner in the Vancouver law firm, Fraser Gifford, and practises civil and criminal litigation. He is a past President of the Canadian Bar Association, and former part-time member of the Law Reform Commission of British Columbia. He is currently a Vice-President of the Commonwealth Lawyers Association.

The Committee appointed Professor Robin Elliot of the Faculty of Law at the University of British Columbia as its Director of Legal Research.

Ms. Robin Jamieson has been Director of Administration and Secretary to the Committee.

2. Research

2.1 Empirical Research

Empirical research was commissioned by the Department of Justice after consultation with the Committee. The following working papers have been prepared for the Department and were available to the Committee:

Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity, N. Boyd, Working Paper #16;

A Report on Prostitution in the Atlantic Provinces, N. Crook, Working Paper #12;

Canadian Newspapers Coverage of Pornography and Prostitution, 1978-83, M. El Komos, Working Paper #5

A Report on Prostitution in Ontario, J. Fleischman, Working Paper #10;

A Report on Prostitution in Québec, R. Gemme, A. Murphy, M. Bourque, M. A. Nemeh, and N. Payment, Working Paper #11;

The Ladies (and Gentlemen) of the Night and the Spread of Sexually Transmitted Diseases, M. Haug and M. Cini, Working Paper #7;

Prostitution and Pornography in Selected Countries, C.H.S. Jayewardene, T.J. Juliani and C.K. Talbot, Working Paper #4;

A Survey of Canadian Distributors of Pornographic Material, B. Kaite, Working Paper #17;

Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden, John S. Kiedrowski and Jan, J.M. van Dijk, Working Paper #1;

A Report on Prostitution in the Prairies, M. Laut, Working Paper #9;

Vancouver Field Study of Prostitution, Research Notes, 2 vols., J. Lowman, Working Paper #8;

The Impact of Pornography: an Analysis of Research and Summary of Findings, H.B. McKay and D.J. Dolff, Working Paper #13;

A Content Analysis of Sexually Explicit Videos in British Columbia, T.S. Palys, Working Paper #15;

National Population Study on Pornography and Prostitution, Peat Marwick & Partners, Working Paper #6;

Agreements and Conventions of the United Nations with Respect to Pornography and Prostitution, D. Sansfaçon, Working Paper #3;

Pornography and Prostitution in the United States, D. Sansfaçon, Working Paper #2;

The Development of Law and Public Debate in the United Kingdom in Respect of Pornography and Obscenity, Ian Taylor, Working Paper #14 Department of Justice, Ottawa, 1984.

Particular findings and descriptions from this research are referred to throughout this Report. The Department of Justice proposes to publish the Working Papers following the publication of this Report.

2.2 Legal Research

The Director of Legal Research undertook research in the following areas:

(i) Comparative legislation and jurisprudence in the United States, the United Kingdom, Australia and New Zealand;

(ii) the provisions of the *Criminal Code* and related Canadian jurisprudence;

(iii) the provisions of the *Charter of Rights and Freedoms* as they relate to pornography and prostitution;

(iv) Canadian municipal by-laws and related jurisprudence;

(v) previous proposed Canadian legislation and suggestions for Law Reform;

(vi) review of reports of various Canadian Parliamentary Committees, Law Reform Commission, American, English and Australian Commissions and Committees on obscenity, pornography, film classification and prostitution.

3. The Committee's Approach

Obviously, each of the members of the Committee had formed some views about both pornography and prostitution before their appointment. It could hardly be otherwise. However, each member approached the Committee's task with a determination to regard previously formed views as tentative. We were determined to rethink our individual biases on both subjects.

We hope that our approach has been successful. We mention the approach we took in order to record the importance we all attached to impartially

obtaining and treating the views of those individuals and groups who made submissions to us.

The establishment of the Committee was controversial. Some groups and individuals considered that the creation of the Committee was an indication of the government's determination to legislate in an informed way. Others considered that the government of the day had established the Committee as an excuse to avoid needed legislative action. Clearly the Committee did not share this latter view, but we came to understand it. Indeed, we soon learned to appreciate the depth of feeling, urgency and concern held by those who had been living with the realities of pornography and prostitution.

It was necessary for us to acquire more than an abstract understanding of how the law appeared to be working or not working in these areas. It was also necessary for us to appreciate that changing the law was an exercise in dealing with effect and not cause.

The Committee considered that the most important aspect of its work was to ascertain the views of the public, both formally and informally. We had been asked whether there was a consensus among Canadians about what should be done to solve the problems of pornography and prostitution. We decided that we had to know as much as we could about what Canadians thought the problems actually were, if we were going to really understand the range of available solutions.

4. The Public Hearings

In order to do this we decided to hold public hearings across the country. We wanted to hear from those who had not only thought about the problems, but had experienced their social reality. We wanted to attract our critics as well as those who had welcomed the establishment of the Committee.

Before the meetings began, Committee members spent the Fall of 1983 familiarizing themselves with what appeared to be the issues involved in both subjects. We had early contact from the existing groups who had forceful ideas about both subjects, but what was also needed was some general public reaction from individuals, groups and institutions who had not previously expressed themselves on these issues.

In order to describe and publicize the issues as a means of focusing discussion at our public meetings, the Committee decided to publish an *Issues Paper* for circulation to those who were or might be interested in our work. A basic circulation list was established by collecting the names of groups and individuals who had expressed interest. The *Issues Paper* was published and distributed in December, 1983. The first run of 5,000 copies went quickly and eventually a total of 16,200 copies were made and circulated. The level of interest exceeded our expectations.

The public hearings took place from January to June 1984 in 22 centres across Canada. The cities and towns visited by the Committee (in order) are:

Calgary	Victoria
Edmonton	Regina
Vancouver	Winnipeg
Toronto	Ottawa/Hull
Niagara Falls	St. John's
London	Charlottetown
Windsor	Fredericton
Montréal	Halifax
Val D'or	Thunder Bay
Sherbrooke	Yellowknife
Québec City	Whitehorse

Hearings were held in every province and territory of Canada, in large and small cities, border cities and towns in order to obtain the thinking, reaction and suggestions of Canadians living in all parts of the country and in all sizes of communities.

The hearings were advertised in advance and were usually very well attended. Most presenters supplied the Committee with written copies of their briefs, either before the hearings or during them. Recordings of the hearings were made and were available to the Committee in the course of our deliberations.

The hearings were informal and as unstructured as possible. Usually there was time for a number of questions and answers and, where it was important to do so in order to understand the submissions we received, the Committee visited sections and districts of cities and towns.

Appended to this Report is a list of the individuals and groups who made submissions to us in the course of the public hearings. Throughout the Report will be found references from the various briefs.

At the same time as the Committee held public hearings, we met privately with those persons who, for one reason or another, did not want to make a public submission. These private interviews were just as important to our work as the public proceedings. We encountered prostitutes, former prostitutes, performers, parents of young prostitutes, social workers, community workers and many others who shared the benefit of their experience and particular insights.

Altogether, our contact with the Canadian public was highly informative. The briefs and submissions we received often showed evidence of weeks of preparation and work as well as an even longer previous involvement with the issues. We benefitted greatly from the hearing process and we are grateful for the many hours of effort which people devoted to them.

While ascertaining the views of the public was the most important aspect of our research, we did not consider that our mandate was, in effect, to conduct

a referendum across the country on the issues of pornography and prostitution. We considered that we were appointed to do more than tabulate differing views.

5. Consultations

The next phase of our work involved superimposing on the views that we had received from the public, those of the administrators, bureaucrats, researchers and others involved day-to-day with the effects and regulation of pornography and prostitution.

We consulted with the Department of Communications, the Law Reform Commission of Canada and the Canadian Human Rights Commission, as well as Canada Customs, Canada Post Corporation, the RCMP, the Canadian Radio-Television Telecommunications Commission, various of the provincial film classification boards, the representatives of the Joint Law Enforcement Project in Ontario concerned with pornography and known as Project "P". Without exception, our consultations were straightforward, informed and informative.

In addition, the Committee met with Drs. Edward Donnerstein and Neil Malamuth, whose experimentation and writing on the subject of pornography have become well known and is referred to frequently in the course of this Report.

The Committee was also privileged to meet with Professor Bernard Williams, the chairman of the Committee on Obscenity and Film Censorship appointed by the Government of the United Kingdom in 1977. Professor Williams' comments and suggestions have been invaluable.

One other aspect of the Committee's work that should be mentioned is the effort to view the material that is said to be pornographic and is currently in circulation in Canada. A number of individuals and groups who appeared at the public hearings brought with them material that was commercially available. We examined this material when it was presented and we also looked at a large variety of material that was referred to in several of the recent cases. We observed the practice of viewing the material in full and not out of context.

In coming to prepare our Report and make recommendations, the Committee imposed upon itself the discipline of preparing draft legislation whenever we recommend legislative change. We concluded at an early stage that any legal changes we might recommend should have the effect of bringing clarity and certainty to the law. It seemed to us that our contribution to law reform would be most useful if we were prepared to show precisely how the law should be changed.

If there has been a benefit to preparing draft legislation, there has also been a risk. No doubt some of it is less than perfect. However, we hope that it

will form at least the basis for further discussion and ultimately, for an overdue reform of the law.

What follows in our Report is a document that is in five parts. We first deal with the philosophical considerations that we have applied in approaching both subjects, and discuss the Canadian constitutional landscape. The issues of pornography and prostitution as they affect adults are discussed separately, and are followed by a separate part devoted to both subjects as they particularly affect young persons and children. The report ends with our recommendations.

Section II

Philosophical and Constitutional Considerations

Chapter 2

Philosophical Considerations

1. Introduction

Any attempt by a society to deal with pornography and prostitution must take account of its own philosophical and ethical traditions. A necessary prelude, then, to examining social and legal strategies for dealing with these problems is to analyze the thinking about pornography and prostitution in Canada and other societies which have a similar pattern of social and cultural development. Our discussion will entail a review of three different philosophical traditions, the liberal, the conservative and the feminist.

2. The Liberal View

There is deeply ingrained in the political and philosophical tradition in western societies, the belief that the fundamental value is the freedom of individuals to develop their own view of life, without direction from the state or from the majority. In countries with an Anglo-American legal heritage this view of the world, which penetrates deeply into all aspects of our culture, has its most influential embodiment in the writings of John Stuart Mill.[1] Those who espouse what might be described as the liberal view of the relationship between law and morality, emphasize Mill's dual contention that society benefits from an "open marketplace of ideas" rather than the prescription of majoritarian "wisdom", and that each individual is the best judge of his or her own interests.[2] The necessary corollary of this view of society is that the state is justified in intervening only to punish or control human conduct when it does harm to other people.

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[3]

Apart from children and adults incapable of conducting their own affairs, what people do to themselves or in concert with others, which has no injurious impact on third parties, is the individual's own business, even if it involves the self infliction of either physical or moral harm.[4]

Although Mill himself did not articulate with great certainty or precision the limits of the "harm principle",[5] generations of followers have attempted to give substance to it, not without disagreement. At one end of the spectrum are philosophers who attach such central importance to the notion of individual autonomy that only the narrowest interpretation of the principle is acceptable.[6] At the other are those who postulate a more flexible notion, including those who believe that there is a legitimate principle of "paternalism" which qualifies the harm principle. Under the latter, state intervention may be warranted in a limited range of circumstances to protect individuals from themselves.[7]

Mainstream liberal thought seems to be agreed that harm does embrace both physical harm to others, and the sort of psychic harm involved in people being involuntarily subjected to offensive or objectionable conduct or representations of it.[8] It clearly does not extend to mere feelings of moral distaste that such conduct or depictions of it exist and are being enjoyed by others. Also central to the liberal view of harm is the idea that it is the immediate cause of it which is culpable, not the more remote causes. Thus, for example, it is legitimate to proscribe driving while under the influence of drink because it has been proven to cause accidents. It is not, however, legitimate to proscribe drinking for that reason.

The practical ramifications of these views for lawmaking in the areas of both pornography and prostitution are clear. In the case of prostitution, it would follow that the law has no legitimate function in prohibiting anyone from choosing or practising that lifestyle, or in penalizing adults who, by consent, engage in sexual activity for money, as long as no physical harm is caused or threatened to either participant, and neither physical harm nor psychic offence done to others. The law may legitimately interfere with those who forcibly coerce others, even adults, to become and remain prostitutes, and who exploit them against their wishes.[9] It may also be invoked to penalize or control the nuisance caused to other people by prostitution.[10]

With pornography, it would be argued that the law has no acceptable role in preventing the production, distribution, sale or possession of pornographic material, unless some recognized harm can be attributed to it. It is legitimate for the law to intrude to prevent physical harm being done or even threatened to those who participate in pornographic productions.[11] Moreover, the law may be used to ensure that pornographic materials are not marketed in such a way that they cause involuntary offence to members of the public.[12] The law has no role in curbing the sort of alleged "harms to society" foreseen by those of a conservative philosophical view, for example, the moral disintegration of society, unless it can be demonstrated clearly that there is a direct link between the consumption of pornography and physical harm or threat of it to individuals. Such a causal relationship must rest upon empirical study and statistical probability, not upon supposition or anecdote, even though these may claim to reflect common sense.[13]

3. The Conservative View

Although the liberal view on the legal proscription and control of these phenomena is dominant in philosophical writing and jurisprudence in western countries, it is by no means the exclusive view. Modern liberal theory on the relationship of law and morality grew out of a need to answer the more traditional conservative position that there is a necessary coincidence between law and the moral values of the community.

This conservative view has two variants. The first states that societies are not simply collections of individuals, but organic units with shared ideas and institutions. The shared moral values of societies are rooted in their cultures, have stood the test of time, and embody the sober wisdom of the majority.[14] Their embodiment in the law is preferable to the easy or uncertain morality of pluralism, which ignores the reality that individual actions, even if directed towards the actor alone, have an impact on the "moral environment" of the community.[15] The second, generally associated with the views of the distinguished British jurist Lord Devlin,[16] adopts the more pessimistic view that, unless the law embodies and enforces traditional moral values, society will lose its "moral cement" and gradually disintegrate. The cohesive power of shared morality is essential to society's welfare, and requires the support of the law.[17]

Both these strains of thinking allow in theory for significant intervention by the law to proscribe immoral conduct, even where it is freely chosen by the individual or individuals concerned, conducted in private and of no direct harm to anyone else.[18] They posit that the state has a right to step in and prevent personal immorality where it clearly offends the sense of propriety and decency of the majority of the community. Moreover, the criminal law, apart from its other functions, has an important symbolic role to play in stating what the common morality will not tolerate. In fact, however, some of the advocates of the "moral environment" and "moral cohesion" approaches admit that these values have to be balanced against others such as liberty and privacy. Furthermore, they accept some pragmatic reservations to these principles, such as those which stem from difficulty of enforcement.[19]

The translation of conservative theory into practice on pornography and prostitution reflects to some extent the tensions mentioned in the last paragraph. The act of prostitution, although detrimental to the dominant and shared morality, is normally considered by conservatives to be less serious than other forms of sexually deviant conduct. This, together with obvious difficulties in enforcement, has persuaded them that adult female prostitution will remain beyond the reach of the law. There is less certainty with respect to homosexual prostitution, because some conservatives see it as possessing the additional characteristic of "unnaturalness" which makes it particularly repellent to the community's sense of morality. The deviance here is extreme enough that it may well outweigh other considerations.[20]

There is also strong condemnation of those who exploit prostitutes for personal profit or commercial gain. Here, conservatives often introduce the

idea of someone being a social parasite. Those who do not earn their own living and, in addition, live on earnings gained through immoral activities, are particularly reprehensible. Finally, the conservative view results in strong legal proscriptions against the public conduct of the trade, for example, street soliciting. Such action is justified on the ground that prostitution offends the common moral values and, therefore, ordinary citizens should not have to contend with this affront to their sensibilities as they move about their communities.[21]

The conservative approach to the law and prostitution is not an unambiguous one, but represents to varying degrees an accommodation between principles and what is practical in the twentieth century. The approach to pornography, however, is much more uniform and consistent.

Whatever its character, the fact that pornography is produced to stimulate sexual feelings or fantasy is subversive of the moral values of the community. Thus the intent of the material, rather than any empirical association with harm to an individual, is the measure of its illegality.[22] As some conservatives have a limited view of what is acceptable sexual conduct, the ambit of legislation to control pornography is predictably wide, with the consequence that representations which others would see as permissible eroticism, may be considered as indecent or immoral in the conservative's mind.[23] In particular, the conservative is concerned to preserve the sanctity of the family and the view that sexual relations should take place only within the context of marriage. Any activity which might be seen to encourage sexual activity outside of this context is thus to be strongly discouraged.

4. The Feminist View

Traditionally, conflict on moral issues in western societies has centered on the opposition of liberal and conservative thought. In recent years, feminist thinkers and writers have begun to challenge the assumptions of both, and to give their own interpretations to the relationship between law and morality. It must be said at the outset that feminism is not itself a discrete philosophy. It is, rather, a broad coalition of interests dedicated to the common purpose of improving the status of women in society. As with other coalitions designed to achieve a practical outcome, it embraces a wide range of philosophical convictions.

The common objective of achieving true social equality itself influences and modifies the underlying philosophical positions of these feminist writers. They attempt to reconcile the traditional philosophical positions of western societies, which they have learned and often accepted, with their goal of achieving equality for women and thereby changing in a fundamental way the attitudes and structure of society. As a result, we are beginning to see feminist critiques of contemporary society which draw upon various philosophical traditions, and at the same time attempt to inform and infuse those traditions with a sense of the struggle of women for real, rather than merely formal,

equality. The resulting literature represents an important and challenging contribution to our understanding of the two social phenomena under examination, and forces us to ask whether orthodox philosophical positions really have that property of innate wisdom which is claimed for them.

In the view of feminist thinkers, our society is built around a sexual class system, which frustrates the legitimate aspirations of half the population for economic, social and sexual freedom.[24] Pornography is seen as especially odious because it reinforces that system by instilling and perpetuating notions about women's inferiority and limited role within society. It sets women apart as different and characterizes them as the legitimate objects of not only male sexual pleasure, but male frustration and violence.

With prostitution, the sexual class system operates in a more limited but nevertheless vicious manner, in that it sets aside a small and disadvantaged group of women to satisfy the sexual needs of men who cannot find the satisfaction they want elsewhere.[25] Both pornography and prostitution are predicated on the assumption of men's power over women. Men are seeking depersonalized sexual relations which call for no commitment on their part, whether this is achieved through buying the services of a prostitute or pornographic representations.

Differences exist between feminist writers as to the strategies to be adopted to combat these manifestations of sexism. Those who have a Marxist orientation incline to the view that the answer to sexism lies in the removal of the capitalist values and structures which make it possible.[26]

A second and larger group sees women's problems as those of gender discrimination rather than of classical economic exploitation and takes a somewhat different view. They assume the continuation of liberal democracy, and relate their critique of sexism to that politico-legal context. Some writers in this group see little value in the use of legal expedients to reform society, believing that education and other socialization processes are likely to be much more successful in the long run.[27]

The majority, however, favour the vigorous use of legal, as well as political and social strategies, to combat and eliminate sexism. Reorientation in the legal system requires, first of all, a change of focus in the substantive law. In prostitution this means decriminalization of the activities of prostitutes.[28] In the case of pornography, what is required is a new emphasis on proscribing the violence and degradation of women and children which it contains.[29] At the level of structures and process, steps have to be taken to make it easier for women to use the legal system to challenge the product of the pornographer, and to seek protection for themselves and their children.[30] Although many of these women are strong civil libertarians by conviction, they see orthodox liberal thinkers as blinkered and conscious only of the rights of their exploiters and detractors. If the rights issue is to be debated seriously, they say, then their rights to equality, freedom from personal abuse or threat, and to dignity are entitled to consideration and protection.[31]

It is the feminist position on the rights question which provides a significant challenge to orthodox liberal theorists. According to feminists, the liberal tends to characterize the rights issue in terms of the infringement by the state on the rights of an individual. Little or no attention is paid to the fact that rights issues often develop out of what is, at base, a conflict in the exercise of rights by two individuals. True, the immediate agent of one side may be the state, but that does not alter the fact that a clash of rights between individuals is involved.[32]

If this is correct, then the legal system is not only called upon to protect rights, but also to choose which right is entitled to greater protection. This is unlikely to give the liberal any trouble when it is clear that the exercise of a right by one has caused harm to the other in the exercise of those rights. Much less clear is the liberal reaction when the opposing right has not, in fact, been abridged in the concrete sense but only in the abstract, for example, when a woman claims a pornographic publication infringes her right to equality in that it treats women as degraded or subhuman. Here, the liberal would argue that in the absence of a tangible interference with the "victim's" right, there is no warrant for curtailing the offending activity.

The feminist response to this line of argument is that it demonstrates the bankruptcy of the narrow characterization of the harm principle, and points to the need to redefine the notion of rights in liberal theory.[33] As long as rights in the liberal glossary mean liberty in the sense of being free to act without restraint, they have little value in a society in which fundamental inequalities exist. Thus for women, the fact that on the formal level they enjoy the liberty to do certain things is of little consequence if the social environment prevents the exercise of those rights, and there is no correlative duty on the part of others to see that the rights are exercisable.[34] The distinction is one between "privilege" or "liberty" rights, which merely raise an obligation on others not to infringe, on one hand, and on the other, "claim" rights which generate positive responsibility to see that the claimant is enabled to exercise her rights.[35]

Using this extended notion of rights and tying it to the unequal position of women in society, the feminist argues that greater freedom and equality for women entails some loss of liberty and status for men:

> Equality cannot flourish without limiting the privileges some already have in both the private and public spheres, because the inequalities of the present system were a product of the unequal attribution of rights in the first instance; thus greater equality and liberty for those least advantaged under the present system necessitates placing restrictions on the privilege rights of those who are presently most advantaged. And since this must be done by creating obligations either to do or forbear actions previously permitted, it can be accomplished only at the expense of negative liberty.[36]

The point is also made that this view is not revolutionary. The empowerment of disadvantaged groups in society has typically been achieved by this sort of social engineering.[37]

Feminist writers also join issue with the liberals on the interpretation of the "harm" requirement. As the discussion of the liberal view has demonstrated, the philosophical liberal has a limited perception of harm as a basis for invoking legal proscription or restraint. Either measurable harm, for example, economic, physical or mental to an individual, or statistically verifiable general harm must be established.

Feminists react in two ways to this approach. The first is to challenge the assertion that the "harm" principle is necessarily so limited. Given their perception that sexism in our society is endemic, and their belief that eradication of it requires recognition of the special claims of women, they construct a broader notion of harm which includes a social harm, and in particular, the adverse and potentially divisive effects of a significant segment of the male community developing or reinforcing a thoroughly misogynistic attitude.

Secondly, they will argue that, even if a narrower view of harm is adopted, there is enough data to demonstrate that women are victimized by the sexism inherent in pornography and prostitution.[38] They point to an increasing body of research by social psychologists which, it is claimed, suggests a link between pornography and violence against both women and children. The existence of this link is, they argue, supported by a growing number of reported cases in which battered women report that pornography influenced the conduct of their partners. Finally, they claim, common sense would suggest that frequent exposure to this type of material is likely to have an adverse and brutalizing effect on male perceptions of women as well as male sexuality.

In the same way that feminist writers have difficulty with liberal theory, so they reject acceptance of conservative ideas. On the surface, feminist and conservative theory seem to coincide in that they see "harm" as embracing harm to the community or to society in general. Moreover, insofar as feminist theory views the sexual exploitation of women as subversive of society, it has some similarities to the disintegration theory of Devlin. However, feminist writers are quick to point out that similarities are superficial. They see conservative theory as oppressive and unsatisfactory, because its fundamental assumption is that the ideal society is one in which women have a subordinate and submissive role, and in which sexual expression of all but the most orthodox type is frowned upon.[39]

Feminists view themselves not as opponents of sexual freedom (they see it as essential to female liberation), but of a form of male sexual licence which prevents the full expression of female sexuality, and threatens the physical and psychic welfare of women. Their fear of embracing conservative theory is that it would mean inviting a repressive, institutionalized sexual regime. Furthermore, they note with concern that some conservatives fail to distinguish erotica from pornography, because of their inability to break out of the paternalistic and stifling sexuality of the past.[40]

It will be apparent from our discussion of philosophical considerations that we have given only a broad overview of what are, in fact, very complex debates.

We have not included the many different versions of liberal, conservative and feminist thought, nor have we made specific reference to what could be termed a socialist viewpoint. Rather, our discussion is intended to present the essential arguments in each of the three approaches, since these are the foundations on which the presentations we heard at the public hearings were based. In addition, these philosophical traditions are at the root of the principles which we believe must inform any attempt to reform our legal and social responses to pornography and prostitution.

5. The Role of the Criminal Law

Each of the philosophical positions discussed above is reflected in attitudes towards the criminal law and its role in society. A wide range of views were put to us during the hearings as to the appropriate role of criminal law in dealing with both pornography and prostitution. These ranged from the extreme conservative position that there should be a complete identification of the criminal law of the state with the "moral law", to the extreme libertarian view that the criminal law should intrude only when physical harm had been caused by one person to another.

It is our view that the role of the criminal law lies mid-way between these extremes. The view that criminal law is somehow the solvent of all social ills is, we believe, naive. History has shown that the enactment of draconian laws has typically had a marginal impact on behaviour patterns. With the possible exception of communities in which there has been a complete identification of church and state, a highly retributive body of law and rigid enforcement, the effectiveness of harsh criminal law has been more apparent than real. The reality has, in fact, been uneven and capricious enforcement, and mitigation of its harshness by those charged with applying the law, whether judges or juries.

We appreciate fully that law, especially criminal law, has an important and often invisible impact in moulding and influencing peoples' behaviour, and it is clear that some criminal law provisions affect behaviour beneficially without the instrumentation of enforcement. It is important however, that we recognize that "law-abidingness" may be attributed to a range of factors other than the fact and severity of the criminal law. Moreover, there are situations, some of them in the interface between the criminal law and morality, where the criminal law is so patently ineffective that no redeeming purpose can be ascribed to it.

We also disagree with the view that the criminal law should be confined to the tangible harm caused by one individual to another. Although we think that there should be less rather than more intrusion of the criminal law into the lives of citizens, we also think that it has a wider, legitimate ambit than is often claimed for it. Criminal law is, in part, a reflection of the values of society. We penalize culpable homicide not only because it involves a "harm" by one to another, but also because we consider it undesirable for the welfare of society

that people should kill each other. This latter view reflects both the pragmatic concern that violence is disruptive of the life of a community, and the moral sense that it is bad.

In short, criminal law has something to say about both the values of society and the need to protect them by a system of proscriptions and punishments. In this, we agree with the position taken by the Law Reform Commission of Canada in its working paper on "The Limits of Criminal Laws", and the publication of the federal Department of Justice, *The Criminal Law in Canadian Society*. In the former the Commission observed:

> ... The criminal law serves partly to protect against harm but more importantly to support and bolster social values. Protection against harm it seeks to achieve through deterrence, rehabilitation and - most successfully - prevention. Support of social values it manages through "morality play" technique - by reassuring, by educating and above all by furnishing a necessary response when values are threatened or infringed. And this on the face of it suggests using criminal law only against conduct causing harm or threatening values.[41]

In the Department of Justice study the statement was made:

> The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.[42]

To what degree social values and their protection or furtherance should be the concern of the criminal law is a question on which there will be widely differing viewpoints. That in part is why the question of the role of the criminal law in relation to both pornography and prostitution is so highly charged. There are dangers in criminal law being used in inappropriate ways to solve problems which may be more susceptible to other legal strategies or to non-legal social regimes. Thus we are strongly of the view that great care has to be taken to establish what are the social values that need to be reinforced and protected, and to demonstrate the propriety and efficacy of using the criminal law for these purposes.

6. Essential Principles

We have received briefs representing each of the several points of view elaborated upon in the foregoing sections. Each has, of course, urged that the Committee espouse the proponent's particular view, be it the liberal, the feminist, or the conservative. We do not, in this Report, adopt in its entirety any one perspective or theory of society or of pornography and prostitution.

It is undeniable, however, that certain basic principles have informed our thinking on these issues. They have influenced the way we have formulated our recommendations, and may well have had a bearing on how we as a Committee have synthesized the public's views and found or interpreted areas of consensus.

We want to make our premises explicit, so that readers of this Report may more fully appreciate its perspective, and the pattern for public policy which we have tried to develop. We feel confident, as a result of the deliberative phase of our Committee's work, that the principles set out below reflect some reasonable degree of social consensus, and that these principles should inform the approach of the legislator to pornography and prostitution.

Here, then, are the essential principles upon which we have sought to craft our proposals.

6.1 Equality

We are fully persuaded that any legal regime of dealing with pornography and prostitution must be founded upon the rights of women and men to legal, social and economic equality. We agree with the argument that the phenomena of pornography and prostitution are at least reflections (if not causes) of perceptions that women are inferior, and that men can expect women to be available to service their sexual needs. We know that many individual men do not share these perceptions. It is, however, clear that the maintenance of these attitudes towards women over the centuries has played a significant role in the historical allocation to women of subordinate roles in the social, political and economic order.

Much progress has been made toward achieving legal equality for women in Canadian society, and work continues on the discrepancies in the economic and political opportunities available to women. Yet we find convincing the arguments of those, feminists and non-feminists, who argue that the role assigned to women in pornography and in prostitution reflects the sort of social attitude that is inhibiting improvement of the status of women.

We believe that Canada should be ready, collectively, to reject the view of women which is embodied in much contemporary pornography, and in the conception of what can be expected from a prostitute. The proposals which this Committee makes for legislation, education and social programs are designed to carry forward the egalitarian impulse which we have perceived during the public hearings, and to confirm that it is not merely an impulse but also a commitment.

We recognize that the issue of equality also arises in the context of young persons. They are, in many important respects, fully the equals of adults: they deserve the same respect as human beings, regard for individual differences, and concern for human dignity that we, as adults, expect for ourselves. In our view, social policy should proceed on the basis of a firm recognition of the child's right to equality in these important areas.

However, we do not think that the child can be treated as the full legal equal of the adult, for purposes of fashioning the criminal law. Liberal thought has long recognized the particular vulnerability of the young: they are,

depending on their age and development, less able to care for themselves and protect their own interests. Society must accept a greater measure of responsibility for their welfare, and young persons may, in turn, expect some corresponding curtailment of their capacity to act as free agents. This observation leads to the second principle which we believe important to take into account in formulating policy.

6.2 Responsibility

We are of the view that as a general rule, the adult must accept responsibility for his or her actions. We heard during the public hearings that adult women, in particular, who become involved in pornography or prostitution should be seen as victims, whether of the economy or patriarchal social structure, or of abuse directed at them during their early years. We have sympathy with this point of view, and do not think that it would be out of place as a consideration in sentencing the individual case. However, we do not accept it as a principle upon which to structure the criminal law.

In contrast, it is our view that children should be regarded as vulnerable, and in need of society's protection, when dealing with the issues of pornography and prostitution. Children would thus be seen as victims or potential victims of people engaged, or wanting to engage, in these activities.

There is one exception to this basic approach. We have reviewed the issue of what age should be considered the upper age limit for childhood, and recommend that for legislation relating to pornography and prostitution, we adopt uniformly the age of 18 found in the *Young Offenders Act*. From this follows the real possibility that young persons of 16 and 17 (or perhaps younger) may be involved in taking advantage of still younger children, by introducing them to prostitution, to performing in pornographic displays for filming, and so on. Such exploitation might be of the older child's own motion, or it might be engineered by adults who perceive the advantage in having as fronts those who are free from serious criminal responsibility. Accordingly, we think that it would be wise to except from the general principle of the child as victim, those activities where people under 18 exploit others under 18. In such cases, the exploiter should be made to accept responsibility for his or her actions.

6.3 Individual Liberty

The basic idea that adults are responsible for their conduct carries with it the corollary that the law should permit them a zone free from regulation, in which they are responsible only to themselves. An important aspect of this personal liberty is, in our view, freedom of expression. The rights to speak, to think, and to create are essential to the preservation of our society, and deserving of a high degree of protection from state interference.

However, where the behaviour of an adult begins to impinge on the lives or conduct of others in unacceptable ways, there is a place for the state. We see the zone of no regulation as that where the adult's conduct does not coerce others, and where it does not impinge unacceptably on the values which are basic to our society. Equality has already been signalled as a basic principle, and we note that in the area of pornography at least, the right of some to equality will sometimes run directly counter to the right of others to create and to enjoy the creations of others. Balancing these two important values has been for us, and will be for society, a difficult yet essential task.

Other values which could readily be seen as conflicting with the principle of individual liberty are human dignity and voluntary sexual expression. So concerned are we that human dignity and voluntary sexual expression be protected in the legal regime that we include these two values with those we consider basic to our recommendations.

6.4 Human Dignity

It was striking to observe how often during the course of the public hearings people would affirm their view that human beings are special, caring and possessed of a basic worth and dignity which they believed was being seriously interfered with by pornography, and the treatment of prostitutes in our society. The public hearings brought to the fore many calls for a regime of regulation which fosters, not destroys, human dignity. In our view, an important part of human dignity is basic physical integrity (which can also, of course, be viewed as an aspect of individual liberty). Activities which threaten the physical well-being of others can find no real place in a civilized society.

6.5 Appreciation of Sexuality

We think that it is essential to accept as a point of departure for policy-making, the idea that human beings enjoy and benefit from open and caring sexual relationships, characterized by mutuality and respect. This principle extends to those under 18 as well, for the child is, in our view, a sexual being. There was little support in the public hearings for repression of sexuality as a means of eliminating what people found offensive about pornography and prostitution. Rather, the submissions which addressed this issue stressed quite the opposite theme. It was pointed out, for example, that young people often turn to pornography, soft or hard core, in the search for information about their developing sexuality, because good sex education courses and healthy erotic literature, are unavailable to them. We often heard that one of the harms of pornography was the insult offered in such material to the joy and satisfaction of non-exploitative sexual relationships. We were cautioned against developing a regime so strict that it would hamper the human need for sexual expression, whether in art, or particularly in the case of young people, in relations between consenting peers.

We believe that all of these concerns have real merit.

7. Conclusion

In the ensuing chapters, we propose in detail changes to the *Criminal Code*, other statutes and social programs in order to deal with pornography and prostitution. The rationale for these recommendations and their relationship to the principles outlined above will be elaborated upon. Here, however, let us simply sketch a few of the major implications of these principles.

With respect to pornography, the emphasis on equality will, we believe, require a shift from the traditional focus on sexual immorality as a basis of criminal prohibitions against pornography. We believe that the development of theory which views pornography as an assault on human rights, will have to be integrated into the conceptual framework of the criminal law on pornography. Our recommendations thus include a complete reworking of the *Criminal Code* prohibitions in this area, to create offences based not on concepts of sexual immorality but rather on the offences to equality, dignity and physical integrity which we believe are involved in pornography. The concern for the vulnerability of young persons has prompted us to devise a number of prohibitions against the use of young persons in sexually explicit material, against the sale, distribution or possession of such material, and the accessibility of such material to young people.

In each case, we have striven for specificity and clarity in the legislative description of prohibited conduct. Similarly, we have attempted to be reasonably sparing in our use of the criminal sanction. Both of these strategies stem from the desire to leave to responsible adults as much freedom of choice and as much capacity to govern their own conduct as is consistent with protection of basic values. They arise also from our hope that the criminal law will, if properly fashioned, interfere with freedom of expression only to the degree necessary to safeguard the other basic values.

With respect to prostitution, our recommendations feature withdrawal of sanctions against simple soliciting: only when the conduct causes actual adverse effect on neighbours and environment is it criminalized. The adult prostitute is accorded by our proposed regime, some leeway to conduct his or her business in privacy and dignity. We would permit one or two prostitutes to receive customers in their own home, hoping thereby to provide people with a safe alternative to the street and parked cars. In addition, we are recommending that the possibility of allowing small prostitution establishments in non-residential areas be discussed by the federal government and the provinces and territories.

Allowing prostitutes to work from their homes would also provide a less exploitative alternative to hotels, motels and other premises which they now have to rent on a temporary basis. We acknowledge that allowing full play to the concept of the responsibility and dignity of the adult prostitute may well require active consideration of treating prostitution exactly like any other business. There is, indeed, an argument that this course is the only way of ensuring that the sexual and other subordination of women who are prostitutes, will come to an end.

The idea that adults who engage in prostitution can and should be counted upon to take responsibility for themselves has led us to recommend cutting back the criminal prohibitions against procuring and living on the avails of prostitution. Only procuring which is effected by coercion or threats will be criminalized in the case of an adult. So, too, we stipulate that receiving financial support from an adult prostitute should be criminal only when that support is exacted by means of coercion or threats.

Where young persons are concerned, the emphasis of our recommendations is to provide strong protection against exploitation. Procuring children to engage in sexual activity for reward is made criminal even where no threats are used. So, too, is receiving support from the paid sexual activities of young persons. We have recommended adding to the *Criminal Code* a specific prohibition against engaging, or offering or attempting to engage, in sexual activity with a young person. However, we do not recommend criminalizing the behaviour of young persons, except to the extent that they come within the general prohibitions because of their own exploitation of other young persons.

The full dimensions of our recommendations will be explored in detail. One further point about the implications of the basic principles should be noted here. The full working out of these principles will in some cases require considerable social adjustment. In particular, the equality principle, even if accepted at the theoretical level, will still need for its full implementation, substantial reallocation of economic and social resources. There remains, too, a formidable task in re-education and reshaping of attitudes in certain sectors of society. These long range tasks cannot be accomplished by means of legislation. They require social will and commitment. We cannot delay legislation, however, until this process has been completed.

Footnotes

[1] John Stuart Mill *On Liberty* 1859. ed. E. Rapport, (Indianapolis: Hackett Publishing Co., 1978). So deep seated is this view that it is accepted by many socialists and social democrats.

[2] The tendency in contemporary liberal thinking is to emphasize the importance of freedom of expression for the autonomous development of the individual. See the *Report of the Committee on Obscenity and Film Censorship*, Cambridge: Cambridge University Press, 1981 (the Williams Committee Report), at 53-7.

[3] Mill, *On Liberty*, at 9.

[4] *Ibid.*, at 9-10.

[5] The uncertainty of its ambit in Mill's mind is revealed in the last chapter of his essay, *ibid.*, at 93-113.

[6] See Robert Nozick, *Anarchy, State and Utopia*, 1981, Rowman and Littlefield.

[7] H.L.A. Hart, *Law, Liberty and Morality*, (London: Oxford University Press, 1963), at 30-4.

[8] See Joel Feinberg, "Pornography and the Criminal Law". In D. Copp and S. Wendell eds., *Pornography and Censorship*, (Buffalo: Prometheus Books, 1983), at 105.

[9] Canadian Advisory Council on the Status of Women, *Prostitution in Canada*, Ottawa, 1984.

[10] Williams, note 2, at 131-3.

[11] *Ibid.*, at 112-4.

[12] *Ibid.*, at 132.

[13] *Ibid.*, at 123.

[14] See *Brodie* v. *R.*, [1961] B.R. 610 (Que. C.A.) per Casey J.

[15] For discussion of variants of the "conservative view", see W. Barnett, "Corruption of Morals - the Underlying Issue of the Pornography Commission Report", (1971) *Law and Social Order* 189, at 201-5.

[16] As expounded in particular in Patrick Devlin, *The Enforcement of Morals*, London: Oxford University Press, 1965.

[17] *Ibid.*, at 12-14.

[18] *Ibid.*, at 12-18.

[19] *Ibid.*, at 16-25.

[20] Lord Devlin took the view that it was certainly legitimate to ask whether homosexuality is so abominable 'that its mere presence is an offence' (ibid., at 17). Others have answered that question in the affirmative.

[21] The liberal would not necessarily demur from legal restraint here, but would justify it on the ground of "harm" in the sense of public offence.

[22] See the critique of Fred Berger, "Pornography, Sex and Censorship" in D. Copp and S. Wendell eds., *Pornography and Censorship* at 83-104.

[23] *Ibid.*, at 89-9.

[24] L. Clark, "Liberalism and Pornography" in D. Copp and S. Wendell eds., *Pornography and Censorship* at 53-7.

[25] K. Barry, *Female Sexual Slavery*, (New York: Avon Books, 1979).

[26] See Charnie Guettel, *Marxism and Feminism*, (Toronto: The Women's Press, 1974).

[27] See for example Beatrice Faust, *Women, Sex and Pornography*, (Harmondsworth: Penguin Books, 1980, 180-9).

[28] See Barry, *Female sexual slavery*. Not all feminists agree on the implications of decriminalization, with a majority favouring strict legal enforcement against male exploiters and educational and social programs to educate against prostitution, and a minority favouring treating adult prostitutes as individuals running a business, subject to normal legal rights and obligations which go with that.

[29] See Diana E.H. Russell, "Pornography and the Women's Liberation Movement" in Laura Lederer ed. *Take Back the Night:* Women on Pornography, New York: Bantam Books 1980, at 301-6.

[30] This has led some feminists to look at human rights mechanisms as the most productive route, because they are more sensitive to exploitation concerns.

[31] Much of the most vigorous writing on the theme has been from the United States. See Lederer, *Take Back the Night: Women on Pornography*, at 237-58. See also "Colloquium: Violent Pornography: Degradation of Women versus Right of Free Speech" (1978), 8 N.Y.U. *Rev. Law and Soc. Change* at 181 *et seq.*

[32] Although Mill recognized this, there is little in *On Liberty* which addresses the problem of balancing conflicting rights.

[33] Clark, "Liberalism and Pornography", at 45-59.

[34] Clark entertains doubt as to whether liberalism is adequate to the challenge of changing its conception of rights, *ibid.*, at 57-8.

[35] *Ibid.*, 45-47. The right analysis is adopted by Clark from Isiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty*, 1969, London, at 118-172.

[36] Clark, "Liberalism and Pornography".

[37] *Ibid.*, at 48.

[38] *Ibid.*, at 54-7.

[39] K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique", paper presented to Law and Justice Beyond 1984 conference, Canada Institute for Administration of Justice, Ottawa, October, 1984 at 20.

[40] *Ibid.*

[41] Law Reform Commission of Canada, *Limits of the Criminal Law, Obscenity: A Test Case*. Ottawa, 1977.

[42] Department of Justice, *Criminal Law in Canadian Society*, Ottawa, 1982.

Chapter 3

The Impact of the Charter of Rights and Freedoms and the Constitutional Division of Powers

1. Introduction

The development of recommendations on criminal and regulatory law in Canada must necessarily take place within the context of constitutional law and practice. In particular the recommendations must be sensitive to two elements in the Canadian constitutional system: (a) the existence of the *Charter of Rights and Freedoms* which represents the first attempt in Canada to enshrine a legal statement of basic rights and values in a fundamental constitutional document (a document which unlike ordinary statutory law is not subject solely to the sovereignty of Parliament); and (b) the division of powers established between the federal Parliament and the provincial legislatures within the structure of Canadian federalism by the *Constitution Act* (formerly the *British North America Act).*

The *Charter* is a very recent document which means that many of its practical implications have yet to be determined. Accordingly, any account of its operation in general and in particular contexts must be to some extent tentative and speculative. The division of powers within the Canadian Constitution is an issue which has exercised the courts since Confederation in 1867. There is accordingly a large body of case law on it, although changing and sometimes conflicting views on where the balance between federal and provincial power should lie, results in uncertainty in some areas. However, guidance is easier to find on the *Constitution Act* than it is on the *Charter.*

2. Canadian Charter of Rights and Freedoms

Guarantee of Rights and Freedoms

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physicial disability.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

The Charter of Rights and Freedoms is very much a creature of the late twentieth century. Although section 2 of the *Charter* contains the traditional rights and freedoms which are recognized in all classical written constitutions (the "fundamental freedoms": freedom of conscience and religion, of thought, belief, opinion and expression, of peaceful assembly and association) the *Charter* also reflects the more instrumental vision of the modern liberal state.

Thus it contains rights which represent, to one degree or another, the conscious desire of the Canadian polity to correct social injustices and inequalities. Section 15 recognizes both the equality of every individual "before and under the law", and to "equal protection and equal benefit of the law" without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. It also recognizes the need to exempt affirmative action programs designed to assist people who are disadvantaged by those attributes.

Certain groups whose rights and freedoms were considered to be in need of emphasis are specifically referred to in the document. Under section 28, for example, the rights and freedoms in it are "guaranteed equally to male and female persons", and section 23 provides protection to minority linguistic groups in education. Certain economic rights are also recognized, in particular the right of citizens to move and gain a livelihood anywhere within the country, which is secured by section 6(2).

Finally, the *Charter* recognizes a series of legal rights, which include not only the general statement that "everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", but also a series of more specific rights to protection by and within the criminal law process.[1]

The *Charter* recognizes a diverse range of rights. However, it also embodies the notion that rights are not absolute, but need to be balanced in some contexts against the greater claims of the community. Thus in section 1 the rights and freedoms set out in the *Charter* are guaranteed, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Moreover, as a result of political compromise during the constitutional negotiations leading to adoption of the *Charter*, section 33 was included giving Parliament and Provincial legislatures the power to override the fundamental freedoms in section 2, the legal rights set out in sections 7 to 14, and the equality rights in section 15. Accordingly, it is open to the Canadian government, or a particular provincial government, to abridge the rights included, if political or social conditions are considered to warrant such a step. This is subject to a requirement of express declaration of purpose.

By virtue of section 32, the *Charter* applies to the Parliament and government of Canada, and the legislatures and governments of the provinces. Constitutional opinion is divided over whether it governs the activities of private organizations, corporations or individuals.[2]

Although we are still in the early days of interpretation of the *Charter* by the courts, it does seem that a more or less standard pattern of analysis is emerging, at least at the appellate level. As one would expect given the terms of the *Charter*, the issue in *Charter* litigation will typically centre upon a claim that an individual's rights have been infringed by some form of state action, and a claim by the state, that the "infringement" is justified under section 1. Experience so far suggests that the courts first will require the plaintiff to

Issue (iv) provides the courts with an opportunity to distinguish and rank the stated purposes of government action. It is likely, for example, that legislation which enhances or protects constitutional values or those inherent in our general law will draw greater support than that which embodies novel or seemingly repressive principles. The courts will also be enabled by issue (v) to make qualitative distinctions, this time on the basis of the seriousness of the infringement. For example in relation to a case involving an infringement of equality rights the court would be concerned with the characteristics of the group allegedly affected by the legislation, (e.g. age, race, sex, etc.) and of the interests at stake. Canadian courts have already indicated that they are ready to distinguish serious and minor infringements.[8] In litigation under section 15 (the equality section) it is not fanciful to expect that the courts will be far more protective of the rights of groups and attributes which are typically the target of discriminating conduct and attitudes, i.e. those specifically mentioned in the section rather than of those which are associated with anti-social or exploitative behaviour of the type which would be associated, for example, with procurers and pimps.

Under issue (vi) the courts will be able to determine whether the government might have resorted to expedients which would have avoided impinging on protected rights, although there may well be some reluctance in "second guessing" governments on this. Finally issue (vii) raises the ultimate question of where the balance between the right or freedom at stake and the purposes of the impugned legislation should lie. This involves taking all of the preceding issues into account. It is too early to determine whether the Canadian courts will follow their U.S. counterparts in the United States and establish a formula to assist (or complicate) this process. Whatever aid to analysis is utilized, however, the balancing process should take place within the context of Canadian constitutional, political, legal and social values rather than those of other countries.

3. The Division of Powers

The Canadian Constitution divides the power to make laws between the federal Parliament and the ten provincial legislatures in relation to "matters" that fall within two lists of "classes of subject" set out in the *Constitution Act* of 1867.[9] Under section 91 of that *Act*, the following subjects which fall within federal jurisdiction are:

(a) "regulation of trade and commerce" [section 91(2)];

(b) "the postal service" [section 91(5)];

(c) "criminal law ... including the procedure in criminal matters" [section 91(27)]; and,

(d) "works and undertakings connecting [one] province with any other or others of the provinces, or extending beyond the limits of the province" [section 91(29) and 92(10)(a)].

Section 92 gives the provinces jurisdiction over a list of subjects which includes:

(a) "property and civil rights in the province" [section 92(13)];

(b) "local works and undertakings" [section 92(10)];

(c) "the imposition of punishment by fine, penalty or imprisonment for enforcing any laws of the province" falling within its jurisdiction by [section 92(15)]; and,

(d) "generally all matters of a merely local or private nature in the province" [section 92(16)].

The power to make laws in relation to "matters" that do not "come within" any of the enumerated "classes of subjects" (known as the "peace, order and good government power") is given to the federal Parliament by the preamble to section 91.

These constitutional provisions have naturally been subject to judicial interpretation since 1867. Accordingly, judicial decisions provide some (although not always clear and definitive) guidance on the ambit of the "classes of subjects" and the possibility of overlap between federal and provincial powers, which has relevance to both pornography and prostitution. In particular, the decisions assist in determining the relative ambits of the regulatory power of both levels of government to regulate commercial activities; the relationship of the federal criminal law power to the provincial power to sanction breaches of provincial law; the ability of the provinces to act out of concern about morality; and the location of jurisdiction over matters such as Customs, Broadcasting and Communications, which are not expressly referred to in the *Constitution Act*.

The possibility of conflict between section 91(2) (regulation of trade and commerce) and section 92(13) (property and civil rights) has been reduced by the confining of section 91(2) to the regulation of international and interprovincial trade, and of general trade and commerce throughout the dominion. The power to regulate local trades or businesses within a province lies with provincial legislatures. Although the criminal law power is clearly within the federal domain by section 91(27), it is accepted that the provinces, by virtue of section 92(15), have the power to sanction transgressions of valid provincial law, for example, highway traffic and public health legislation, and in this sense to enact "offences". Moreover, there is no bar to provincial legislatures acting out of a concern for morality. The provinces may legislate morality incidentally as part of a purpose which clearly falls within their jurisdictions, for example, "property and civil rights in the province" and "matters of a merely local or private nature." It is thus legitimate for a province to regulate a business within the province, in part for moral reasons. Provincial attempts to regulate film distribution, sex stores, massage parlours and escort services has been upheld as legitimate exercises of the regulatory power, although the attempts reflect in part a moral impulse. What the provinces clearly cannot do is to legislate the proscription of immoral conduct.

The *Constitution Act* of 1867 makes no reference to the place of certain activities within the division of powers. These were either assumed to fall within a more general category, or were activities which were unknown to the legislators of that era. Customs activity was, of course, well known in 1867. By judicial interpretation it has been placed firmly under federal jurisdiction, as a specific example of "the regulation of trade and commerce" in section 91(2). Broadcasting and electronic communications were unknown at that time. Because of the national and, indeed, international dimensions of this type of activity the courts have reposed jurisdiction in the federal Parliament. However, left unclear is whether the source of the jurisdiction is the "peace, order and good government" power in the preamble to section 91, or the power to regulate interprovincial undertakings in section 92(10)(2).

As the discussion above on morality shows, federal and provincial jurisdiction may overlap in certain areas. The courts have taken the position that as far as possible the jurisdiction of each should be recognized as operable unless there is a real conflict, in which case the federal jurisdiction predominates. In approaching cases in which conflict exists, the Supreme Court of Canada in particular has taken pains to confine the area of conflict as narrowly as possible. [10]

An account of general constitutional considerations would not be complete without reference to the constitutional position of municipalities. Municipalities are corporations which have been created by a provincial government. They have no independent constitutional status. As a consequence, they can exercise only that power which is delegated to them. Any by-law which is passed by a municipal government without enabling legislation, is invalid.

Whether or not a particular kind of power is delegated to the municipalities within a province is governed by a number of factors, including the division of law-making power between Parliament and the provincial legislatures. It is by no means certain, therefore, that a province can or will give municipalities the power they request. Even if a particular power could be delegated, a provincial government may decide that the matter in question should not be controlled at the local level. However, in the areas of pornography and prostitution, the major issue has been whether the provinces have the constitutional authority to legislate. There is no evidence that the provinces have hindered any attempts by municipalities to control these problems by refusing to delegate authority to them. It is apparent that all municipalities have authority to license and otherwise regulate businesses and to zone land use within their boundaries. They also have a limited power to control the highways and public places within their boundaries, to control nuisances and to legislate for the health, safety, welfare and morality of their inhabitants.

As we shall point out later, the main sources of challenge by the courts to the exercise by municipalities of their powers in the areas of pornography and prostitution, has been to strike down provisions which are vague[11] or which, while they have the stated purpose or the appearance of regulation, amount to an attempt to proscribe a particular activity or type of conduct, in effect to enact criminal law.[12]

As will be apparent from our discussion of the *Charter* and the division of legislative powers, attempts to address the issues of pornography and prostitution through law reform are necessarily complex. This intricacy is compounded by the complexity of the issues themselves. The present realities of the issues are addressed in subsequent parts of the Report.

Footnotes

[1] *The Constitution Act*, 1982, ss. 7-14 (enacted by the *Canada Act*, 1982 (U.K.), c. 11)

[2] See K. Swinton, "Application of the Canadian Charter of Rights and Freedoms (ss. 30, 21, 32)" in W. Tarnopolsky and G. Beaudoin eds., *The Canadian Charter of Rights and Freedoms: A Commentary* (Toronto: Butterworths, 1982) at 44-8.

[3] See for example, *Regina and Federal Republic of Germany* v. *Rauca* (1983), 34 C.R. (3d) 97 (Ont. C.A.); *In re Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors* (1983), C.R. (3d) 7 (Ont. Div. Ct.), appeal dismissed (1984), 5 D.L.R.(4th) 766 (Ont.C.A.).

[4] See *Koumoudouros* v. *Metro Toronto* (1984), 6 D.L.R. (4th) 523 (Ont. Div. Ct.); *Schinder* v. *Deputy Minister, Revenue Canada, Customs and Excise* (unreported), 1983, (Ont. Co. Ct.).

[5] See *The Sunday Times* v. *The United Kingdom*, [1979] 2 E.H.R.R. 245 (E.C.J.).

[6] See in *Re Ontario Film and Video Appreciation Society*, *supra*, note 3.

[7] See W. Conklin, "Interpreting and Analysing the Limitations Clause: An Analysis of Section 1" (1982) 4 *Sup. Ct. L. Rev.* at 75.

[8] See *Re Smith* (1983), 34 C.R. (3d) 52 (Ont. H.C.) *Southam Inc.* v. *Hunter* (1985), 11 D.L.R. (4th) 641 (S.C.C.).

[9] *The Constitution Act*, 1867.

[10] See *Multiple Access Ltd.* v. *McCutcheon* (1983), 138 D.L.R. (3d) 1 (S.C.C.).

[11] See *Hamilton Independent Variety and Confectionery Store* v. *City of Hamilton* (1983), 137 D.L.R. (3d) 499 (Ont.C.A.).

[12] *R.* v. *Westendorp* (1983), 144 D.L.R. (3d) 259 (S.C.C.).

Part II

Pornography

Section I

Pornography as a Social Issue

Chapter 4

What is Pornography?

1. Introduction

Among other tasks assigned to it, our Committee was asked to study the problems associated with pornography, including access to pornography, its effects, and what is considered to be pornographic in Canada. The terms of reference for the Committee did not contain any definition of the term "pornography". Although the term is widely used in popular and academic literature, it does not appear in Canadian criminal law, nor is this term used in other federal legislation dealing with the control of offensive material.

Accordingly, we had first to consider whether we would formulate our own working definition of pornography for purposes of the public hearings, so that interested citizens would know exactly what we wanted to hear about. We decided not to publish such a working definition at the outset of our proceedings, because we believed that an essential part of our work was to hear what Canadians thought was encompassed in the term. Therefore, in the Committee's *Issues Paper*, published in 1983 to promote discussion at the public hearings, we included a description of the present terminology used in federal legislation to describe prohibited material, but did not suggest a definition of pornography. At the public hearings, we received many thoughtful and well-reasoned submissions about what should be considered pornography. The main themes of these presentations will be described below.

Firstly, however, let us examine the terminology used in the present law, and discuss the implications of that terminology for public policy.

2. The Definition in the Present Law

The *Criminal Code* does not use the word pornography in its prohibitions dealing with offensive material. Subsections 159(1) and 159(2)(a) deal with the production, distribution and sale of "obscene" matter. Subsection 159(8) provides that for purposes of the *Code*, any publication "a dominant characteristic of which is the undue exploitation of sex, or of sex and any one

or more of the following subjects, namely crime, horror, cruelty and violence" is deemed to be obscene.

Certain other sections of the *Code* also use the term obscene. Section 160 permits the seizure, forfeiture and disposal of obscene material. Section 161 prohibits distributors from requiring retailers to accept for sale obscene materials along with others, in a so-called "tied sale" arrangement.

In some sections, obscene is used in conjunction with other terms. Section 163 creates the offence of presenting or allowing to be presented "an immoral, indecent, or obscene performance, entertainment or representation". Section 164 makes it an offence to use the mails to transmit or deliver anything that is "obscene, immoral or scurrilous".

In all these sections the key test invalues the application of "community-standards". This community standards test developed in response to the use of the term "undue" in subsection 159(8). The question posed by the community standards test is, essentially, whether the exploitation of sex or of sex and crime, horror, cruelty or violence, is undue in the sense that it exceeds the contemporary Canadian community standards of tolerance. As we shall discuss below in greater detail, the application of this test, whether by judges or juries, can make the interpretation of this provision quite unpredictable.

Other provisions of the *Criminal Code* do not use "obscene" at all. Subsection 159(2) of the *Code* makes it an offence to exhibit a disgusting object or an indecent show. Subsection 162(1) makes it an offence to print or publish in relation to any judicial proceedings "any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals." This use of an injury to public morals test in subsection 162(1) is the only use of such a test in the *Criminal Code* treatment of prohibited materials.

The sections described above feature terminology which is very general. By contrast, a few sections of the *Criminal Code* describe quite particularly the kind of material which will attract the criminal sanction. Take, for example, subsection 162(2). The subsection makes it an offence to publish, in relation to any judicial proceedings for dissolution of a marriage, nullity of marriage, judicial separation or restoration of conjugal rights, any particulars other than the names, addresses and occupations of the parties and witnesses, a concise statement of the charges, defences and countercharges in support of which evidence has been given, submissions on points of law, the summing up of the judge, the finding of the jury and the judgment and observations of the court.

All of the sections dealing with obscene and indecent materials appear in the part of the *Criminal Code* entitled "Offences Tending to Corrupt Morals."

In Schedule C to the *Customs Tariff*[1] we find a prohibition against the importation into Canada of books, printed paper, drawings, paintings, prints, photographs or representations of any kind of an immoral or indecent

character. It has been held that this language, too, is to be interpreted on the basis of the community standards of tolerance test. In the guidelines issued to Customs officers to assist in the application of this test, we find a rare use of the actual term pornography. In these guidelines, "hard core pornographic pictures" are described as ones which lewdly and explicitly display the male and female sexual organs, sexual intercourse, sexual perversions and acts like bestiality. Prohibited reading material contains "explicit hard-core fictional text dedicated entirely to sexual exploitation and containing no redeeming features."[2]

Regulations made under the *Broadcasting Act*[3] present yet another variation on this language. The regulations for AM and FM radio licensees provide that no station or network operator shall broadcast anything contrary to law, or any "obscene, indecent or profane language".[4] The comparable regulations for television licensees prohibit broadcast of anything that is contrary to law or any "obscene, indecent or profane language or pictorial representation."[5]

From the foregoing review of the terminology employed in the various legislative provisions aimed at what may be popularly known as pornography, a number of observations can be drawn. One of the clear impressions is of the lack of uniformity in the terminology. However, although there is a diversity of language, it is noticeable that many of the main provisions refer to obscenity or indecency. The title heading in the section of the *Criminal Code* containing most of these provisions makes it plain that these terms, and these offences, deal with what the legislators regarded as "corruption of morals".

3. What is Obscenity?

This Committee has received many interesting and forceful submissions criticizing the use of the term obscene in the present criminal law. The emphasis of this terminology is almost exclusively on sexual morality (or immorality). This emphasis is captured well by this description of obscenity taken from an early Canadian decision: "something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd".[6] This interpretation echoes the dictionary definition of obscenity: indecency, lewdness, foulness, loathsomeness.[7] Indeed, as was mentioned in the public hearings, the Latin root of obscenity, "obscenus", means foul, repulsive, filthy, morally impure, or indecent.[8]

The emphasis on sexual immorality is at the heart of United States jurisprudence on obscenity. The touchstone for obscenity is that enunciated in *Miller* v. *California*:

> ...whether "the average person, applying the contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest, ... whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and ... whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[9]

Only material which is within that definition is outside the protection of the First Amendment guarantee of freedom of speech.

However, obscenity has not always been identified with the sexually impure. One of the definitions of its Latin root is "ill-omened, unpropitious"[10], and it has been suggested that its English counterpart originally had only this meaning. In Shakespeare's day, we are told, the term obscene meant primarily "offensive to the senses, filthy, foul, disgusting". Only secondarily did it refer to what was offensive to modesty or decency.[11]

In assessing the terminology used in the present law, these historical antecedents of the meaning of obscene are well worth keeping in mind. The main focus of the law does indeed seem to be on the moral, or sexual, aspect of the definition, but there is still an element of the definition which reflects the more general idea of offence and disgust. Consider, for example, the double elements in the definition of obscene, namely sex and crime, sex and horror, sex and cruelty and sex and violence. In Bill C-19 proposed by the Minister of Justice in 1983, the elements of violence and cruelty were detached from the element of sex, thus emphasizing the dual nature of the obscenity definition. The omnibus bill proposed a new definition of obscene:

> ... any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any one or more of the following subjects, namely, sex, violence, crime, horror or cruelty through degrading representations of a male or female person or in any other manner.[12]

We note that although the sense of obscenity involves both the element of moral impurity and the element of disgust or offence, these two elements are not mutually exclusive. To many, the disgust and offence category is a wide one, capable of including offensive sexual material as well as that which is offensive but not sexual. During the course of our work, we saw an image that most particularly seems to be within this category that is offensive without being sexual. The scene is a highway, located in flat country. Military figures are present, moving about in a purposeless way. A large mechanized vehicle with a roller on the front comes down the road toward the viewer and runs over one of the figures who is standing in its path, with his back to the audience. We see first the grisly scene of the machine rolling over the human being, and subsequently, the gory shape on the road which is all that remains of the victim.[13] There was, to our minds, nothing remotely sexual in content or effect about that scene, and yet it was powerfully offensive.

The Williams Committee has said of the term obscenity that "it principally expresses an intense or extreme version of ... 'offensiveness'".[14] The Report of that Committee continues:

> It may be that it particularly emphasizes the most strongly aversive element in that notion, the idea of an object's being repulsive or disgusting: that certainly seems to be the point when a person or animal is said to be, for instance, "obscenely" ugly or fat. [15]

The Williams Committee, quite rightly in our view, points out that there will be obscene things which are not pornographic, illustrating its remark with the observation that it would be obscene to exhibit deformed people at a funfair, but not, in its view, pornographic to do so.[16]

The Williams Committee also trenchantly observes:

> We suspect that the word "obscene" may now be worn out, and past any useful employment at all. It is certainly too exhausted to do any more work in the courts.[17]

We are strongly inclined towards this view. On the one hand, it seems that the "offence" or "disgust" view of the "obscenity" meaning, with its strong subjective element, may cast the net of the criminal law too widely. It is not everything that disgusts or offends that can or should be prohibited; and even when the *Code* seeks specificity by such formulations as "undue" exploitation of violence or sex and cruelty, it is still, in our view, very sweeping. On the other hand, a focus on sexual morality, either alone or primarily, seems to be missing the essence of what is objectionable about much contemporary material. In the course of our hearings and deliberations, therefore, we found ourselves becoming more and more receptive towards the argument that there should be an overhaul of the terminology used in the *Criminal Code*.

Having reached the point of agreeing that an overhaul is in order, however, we must next address the question of what is more appropriate terminology. Significant numbers of people urged that the term "pornography" be adopted as the keystone of the criminal law, and proposed various quite particular definitions of the term. These recommendations, of course, return us to the discussion with which we began this chapter.

4. What is Pornography?

Even more so than in the case of obscenity, the problem of defining pornography is compounded by the vast and varied popular usage of the term. We suspect that the very sound of the word pornography makes it attractive to those who are describing material that ranges from the "naughty", "racy" or "off-colour" to the "hard-core" depictions of violence and degradation. The abbreviation "porn" seems to be welcomed by many as an addition to the litany of four-letter words, in the company of such stalwarts as "muck", "dirt" and "smut". The versatile prefix "porno" combines well to form such amusing, yet appropriate, terms as "pornokitsch" (for pornography with "artistic" pretensions), pornocrat (an inhabitant of the pornocracy which some see established in contemporary culture) and pornostrasse (a street featuring outlets reserved for the sale of pornographic material).

The very wealth of popular applications for the term pornography points to one very interesting dilemma for those who seek to legislate in this area. Almost everyone could say of pornography, in company with Justice Potter Stewart of the United States Supreme Court, "I know it when I see it".[18]

However, because it depends on the standards and sensibilities of the viewer, such a subjective approach to the definitional task would be doomed to failure in the courts.

In the course of our public hearings, we became aware of the wide range of opinion among Canadians about what is offensive. At what could be called the conservative end of the spectrum are views like those of two witnesses at the Edmonton hearings, who want the legal definition of pornography to include any depiction or occurrence of sexual, physical relations outside heterosexual marriage; and those of REAL Women of Canada whose definition of pornographic contains material setting forth representations or descriptions of a person in a nude or suggestive pose or of sexual intercourse, and the promotion, exploitation, glorification or glamorization of promiscuous conduct. At the other end of the spectrum is one memorable presenter at the Montréal hearings who regarded everything as acceptable (not pornographic), except for sexually explicit portrayals of children and representations of sex with the dead. The majority of views, of course, lay somewhere between these two extremes. We describe them in more detail below.

Many legal definitions of obscenity have attempted to take account of this subjective element by including a judgment factor to be applied by courts in determining what is criminal. The *Criminal Code* of Canada, as has been mentioned, uses the community standards of tolerance test, triggered by the phrase "undue exploitation" in the *Code*; the American jurisprudence also refers to the average person applying contemporary community standards. These formulations attempt to account for the role of taste and sensibility in determining what should be prohibited, while trying to limit that subjective component to the views of the mainstream of the community.

We are not convinced that this sort of accommodation to taste on the subjective element is necessary or desirable in the criminal law. Many people at the hearings criticized the community standards test referred to above as unworkable. We think that this component tells us more about the viewer, or hypothetical viewer, of the material than about the material itself. Although we are concerned that persons not be forced to look at or to consume material which they find offensive, we think that provisions aimed at that problem are a better solution than a definition of pornography which contains as a key element, this subjective approach.

We are not concerned here with refining the popular use and extension of the term pornography. We are, however, concerned about finding a definition which will assist in determining what might properly be the subject of legislative control.

A useful starting point for this inquiry is, once again, an examination of the roots of the term. The Shorter Oxford Dictionary on historical principles describes pornography as a description of the life, manners, etc. of prostitutes and their patrons; hence, the expression or suggestion of obscene or unchaste subjects in literature or art. The term is derived from the Greek words for

"harlot" and "writing".[19] These origins should remind us of at least one aspect of "pornography" as the term now is used. The term refers to something "graphic", a representation. An object which is not a representation (underwear, for example) could not be said to be pornographic, whether one is using that term in a popular or a more specialized way.[20]

Our review of definitions of pornography given to us at the public hearings, and in the literature, has led us to the conclusion that there are really two types of pornography being discussed by those who have explored this area. Both of these types are encompassed within this general definition offered by the Williams Committee:

> Pornography essentially involves making public in words, pictures or theatrical performance, the fulfilment of fantasy images of sex or violence. In some cases the images are forbidden acts: so it is with images of violence. In other cases, the line that is transgressed is only that between private and public; the acts represented in the images would be all right in private, but the same acts would be objectionable in public.[21]

The notion of a line between private and public takes its meaning from the fact that it is sexual conduct that is at issue. Pornography is said to cross the line because it makes available for voyeuristic interest some sexual act of a private kind. The act is private to its participants, but cast into the public because of the medium in which it is portrayed.

From this common starting point, however, there is some divergence. One sort of pornography is that which could be said to be merely sexually explicit, with very little emphasis on violence or forbidden (in the sense of illegal) acts. As the emphasis on violence or illegality increases, we move to another type of pornography, described by feminist thinkers such as Jillian Riddington and Helen Longino. The real message of such material is said to be sexual exploitation and degradation of its participants, with portrayal of men as aggressors and women as subordinate.

We divide this material into two types here largely for purposes of discussion. Practically speaking, there can be no real dividing line between the two, since interpretation of a particular image depends to such a great degree on shades of meaning and implication, and on what a particular viewer brings to it. Indeed, some feminist observers say that all pornography, even that which is "merely" sexually explicit, conveys these messages of sexual exploitation and degradation. Consider, for example, the photographs in so-called soft-core pornography involving no representations of violence. It was pointed out that these images may portray women as ever eager to accommodate men's sexual pleasure, with no mind or inclinations apart from that. Their eyes are vacant, their mouths slightly open, so that they look mindless. They are shown as nude or partially clad. Males, when they appear at all, are invariably clothed. Women are not shown in poses of mutually enjoyed sex, but often by themselves, displayed as objects for the male onlooker, who is the reader. Their bodies may be divided into zones or pieces by garter belts, the hems of robes, and so on, so that they resemble the "meat chart" at the grocery store meat

counter. Their pubic areas are often shaved into "acceptable" shapes, and the labia turned back to provide a better display of their sexual organs. All of these images from so-called soft-core pornography are cited by many witnesses as demeaning to women.

The scheme of describing two types of pornography is adopted here merely to facilitate elaboration and description of what it is that people are saying merits, and does not merit, the attention of the law.

The material which is "merely sexually explicit" we see best described by a definition developed by the Williams Committee, which we have modified to a certain extent. The second type of material is well described by Longino, Riddington, and Dworkin and MacKinnon. We discuss each of these approaches in turn.

The Williams Committee proposes as its own working definition of pornography the following:

> ...a pornographic representation is one that combines two features: it has a certain function or intention, to arouse its audience sexually, and also a certain content, explicit representations of sexual material (organs, postures, activity, etc.). A work has to have both this function and this content to be a piece of pornography.[22]

Many people think that pornography has an element of explicit sex to it, suggested by the terms "skin flicks", "nudie magazines" and the like. While somewhat more obscurely, in some minds there is probably also a connection between pornography and sexual arousal. Here again, everyday language is instructive: pornography may be seen as a "turn on", something to "get off on", and so on. The Williams Committee definition does, then, encompass a great deal, if not most, of what the ordinary person would think of as pornography.

For this reason, we think that this definition, with the change which we discuss below, usefully represents one of the types of pornography with which the lawmaker must deal. However, having said that, we nonetheless hasten to point out that from the point of view of the lawmaker, the Williams Committee definition presents a major problem.

The difficulty with the Williams definition as a basis for legislative drafting, is its reliance on an intention to stimulate sexually its consumers, as an element of pornography. We think that the element of sexual stimulation was included in this working definition because of the concern of the Committee for what can be called "the context problem". It was pointed out during the public hearings of our Committee, that an image found offensive in one context, may be quite acceptable in another: a detailed photograph of sexual organs may quite inoffensively be included in a medical textbook, but would offend in a teen movie magazine. A photo of a naked infant being bathed by his or her mother would be acceptable, but a photo of a naked infant, surrounded in a threatening way by leather-clad adults, might not be. In

the former case, the issue is about the context in which the photograph appears. In the latter, it is a concern for the context, within the photograph, in which the nude infant is located.

In both cases, persons looking at the photographs will be making certain inferences about what is going on in the photograph and, perhaps, in the mind of its producer. These inferences have a lot to do with someone's determination of whether or not something is pornographic. An observer may infer, for example, that the photograph in the movie magazine is there to arouse the magazine's reader. He or she may infer that the photo of the baby with the leather-clad figures is intended to arouse the reader, at least, in part, because of some other inference, namely that the baby may have something to do with the arousal of the leather-clad figures. Very few observers would infer that the medical book or the photo of the mother bathing her infant, were intended to stimulate sexually the viewer. Thus the impression in the mind of the observer about the presence or absence of intention to stimulate the consumer of the material, will have a bearing on the observer's conclusion about whether material is pornographic. This type of impression is not, of course, the only one which influences the observer's decision about what is pornographic, but it is a significant one.

However, to focus on an intent to promote sexual stimulation as a test in law, simply because it is an element of the "context" analysis, is fraught with difficulty. Our observations of the current market in various types of pornographic material, lead us to suggest that the intent of the makers of most of it has a great deal to do with generating profits, and not very much at all to do with sexual stimulation. Much of this material is stilted, tawdry, and merely gymnastic, and any sexual stimulation connected with it would more likely happen because of the existing mindset of the consumer, than because of the intention of the producer. Any criminal offence which had as a necessary element an intent to bring about sexual stimulation, would, in our view, result in very few convictions. For this reason, we have restricted our use of a "sexual situation" test to only one section of our suggested reforms.

Although we do not think that the Williams Committee definition is an appropriate foundation for the criminal law, we consider that it would be a reasonably popular definition of the sexually explicit sort of pornography. It might be made more exact by the introduction of a small refinement. Thus, we would say that a work is pornographic if it combines the two features of explicit sexual representations (content) and an *apparent or purported* intention to arouse its audience sexually. This formulation is not wholly satisfying because as we have discussed earlier, the emphasis would be on the inference drawn by the observer, and each person's inference would be different. However, to leave only the content branch of the definition means that quite straightforward clinical material in an anatomy textbook would be regarded as pornographic, and that accords with neither the popular understanding nor the proper policies of the criminal law. To depart from an intent standard in favour of an effect standard would not really serve either. If effect were the test, then sexually explicit material which appalled or disgusted

rather than aroused would not be within the range, even if the maker's actual intent had been to stimulate.

As for our reservations about the definition for purposes of the criminal law, we have created a scheme of criminal law which does not depend on having first of all elaborated a satisfactory definition of "pornography". We have concentrated on identifying the kinds and types of representations which we believe merit a criminal sanction, without striving to attach to one or the other of these types any particular legal or popular label. The terms obscenity, pornography and erotica all have such an elaborate web of primary, secondary and popular meanings, and so many different connotations dependent on the background of the particular person, that we have decided to avoid them for purposes of the criminal law. Similarly, where we believe that context should be taken into account in determining whether to impose a criminal sanction, we have spelled out what we think should be the defence, rather than relying on the presence or absence of an intent to stimulate sexually.

This popular or general definition of pornography, as we have said above, really does not take account of what some persons appearing before us have called "the new pornography". In the terms of the description in the Williams Committee, its images are fantasy images of sex and violence, which involve forbidden acts of violence.

Although these kinds of images might be included in the broad definition, there is almost no real profit in doing so. In fact, to include them would be to submerge them in the general, and to blunt the meaning which these images have assumed in the contemporary pornography debate. Accordingly, we consider it highly worthwhile to study this type of material separately, and to explore the popular definition of it, so that we can understand its implications for lawmaking. The origin of the word pornography in the classical Greek, meaning a description of the life and manner of prostitutes and their patrons, is one point of departure for those who theorize about the new pornography. From this root, it is argued that in pornography, women are graphically depicted as whores by nature. All women are demeaned by such a portrayal, and the humanity and aspirations of all women are circumscribed within this narrow compass.

Helen Longino defines pornography in the sense that we have been discussing. After pointing out that not all sexually explicit material is pornography, nor is all material which contains representations of sexual abuse and degradation pornography, Longino continues:

> What makes a work a work of pornography, then, is not simply its representation of degrading and abusive sexual encounters, but its implicit, if not explicit, approval and recommendation of sexual behaviour that is immoral, i.e., that physically or psychologically violates the personhood of one of the participants. Pornography, then, is verbal or pictorial material which represents or describes sexual behaviour that is degrading or abusive to one or more of the participants *in such a way as to endorse the degradation.* (emphasis in original)[23]

Longino writes that behaviour that is degrading or abusive includes physical harm or abuse, and physical or psychological coercion. She would also classify as degrading "behaviour which ignores or devalues the real interests, desires, and experiences of one or more participants in any way."[24] We were referred to this definition in the course of the public hearings, as well as to a similar formulation by Jillian Riddington:

> a presentation whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the representation, and in which such behaviour can be taken to be advocated or endorsed.[25]

This approach to pornography has been given legislative expression in a by-law passed by the City of Indianapolis to control pornography.

The by-law defines "pornography" as follows:

> Pornography shall mean the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that includes one or more of the following:
>
> (1) women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) women are presented being penetrated by objects or animals; or
>
> (5) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy and inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.[26]

The drafters of the Indianapolis Ordinance, Andrea Dworkin and Catharine MacKinnon, also drafted a by-law for the City of Minneapolis, which was passed by Council but not approved by the Mayor. The Minneapolis by-law includes, besides those elements set out above, these four:

> (i) women are presented dehumanized as sexual objects, things or commodities;
>
> (ii) women are presented in postures of sexual submission;
>
> (iii) women's body parts — including but not limited to vaginas, breasts and buttocks — are exhibited, such that women are reduced to those parts;
>
> (iv) women are presented as whores by nature.[27]

Although these two definitions are framed in terms of depictions of women, both by-laws also provide that the use of men, children or transsexuals in the place of women in these depictions is also pornography.

One of the crucial components of thinking behind these definitions of pornography is the association between pornography and misogyny, or woman-hating. The architects of the Indianapolis by-law, Andrea Dworkin and Catharine MacKinnon, contend that over the ages, the influence of pornography on men who rule societies has produced misogynist institutions. Only now that changes in technology and the market have brought pornography into widespread circulation have we begun to appreciate this connection.[28] Others may argue that misogyny is expressed in pornography, but not created by it. Whichever argument is advanced, there is said to be a clear and unmistakable link between pornography and women-hating.

What is common to both of these approaches in viewing the relationship between pornography and misogyny, is that they see pornography as part of a political problem, relating to power imbalances in society. As such, it is a manifestation of a moral problem, taking the term "moral" in its wider sense, and not merely an issue of sexual morality. The point is made that use of the term obscenity, with its connotations of sexual morality, at best confines the problem too narrowly. At worst, it misstates its essential nature. Accordingly, some of the persons holding this view wish to replace obscenity in the *Criminal Code* with pornography, giving that term a definition consistent with the Dworkin/MacKinnon theory.

In our view, this theoretical approach to pornography (or to the "new pornography") is a valuable contribution to the debate. We think that the shape of the law should be taken not just from the general understanding of pornography expressed in our reworking of the Williams Committee's definition, but also from an awareness of the particular violence to women's aspirations and equality which figures in many of these representations. Again, however, we see some difficulties in completely absorbing into the *Criminal Code* the definitions proposed, particularly the Indianapolis by-law definition. We are concerned about having in the criminal law very broad terms that would cover a wide range of conduct. To criminalize images that present women as commodities would catch much of contemporary advertising, and we think that such an approach to the problems in advertising would be regarded as contrary to the *Charter of Rights* guarantee of freedom of expression: it is not a "reasonable" limit on the right. Similarly, a prohibition on presenting women as whores by nature might be regarded as so vague as to offend the freedom of expression guarantee.

However electrifying these concepts may be in popular or academic thought, it remains inescapable that a regime of criminal law requires more precision and restraint than is in the Indianapolis or Minneapolis by-law definitions. Thus, while we believe that the thinking about the new pornography should influence public policy, we have refrained from incorporating the particular formulations presented to us into our draft legislation. We have, as we discuss below, identified certain kinds of representations which we believe merit the criminal sanction, and have tried to describe these specifically rather than setting out a conceptual definition in the law. We have also recommended

changes to the hate literature section of the *Criminal Code* to recognize that pornography may be hate literature directed toward women.

5. Pornography and Erotica

Not all of those who seek changes in the criminal law advocate the use of the pornography terminology and approach as described. They comment within the framework of the existing law, with its emphasis on sexual morality, professing themselves content with the existing obscenity terminology. There is, however, much common ground occupied by those who have complaints about the present law, whether their orientation is toward the use of the pornography terminology or not.

One such area of agreement is to draw a distinction between pornography or obscenity on the one hand and "erotica" on the other. Erotica, as defined by Margaret Laurence, is the portrayal of sexual expression between two people who desire each other and who have entered this relationship with mutual agreement.[29] Gloria Steinem defines the erotic as a mutually pleasurable, sexual expression between people who have enough power to be there by positive choice.[30] Briefs submitted to the public hearings echoed these definitions of erotica.

In the recent decision of Mr. Justice Shannon of the Court of Queen's Bench of Alberta in *R.* v. *Wagner*[31] the court declined to convict the accused under section 159(8) of the *Code* where the videotape in question was erotic. He accepted the definition of erotic presented to the court by Professor James Check, a definition very similar to those of Gloria Steinem and Margaret Laurence given above. In the judge's words, the definition of "sexually explicit erotica" is material which "portrays positive and affectionate human sexual interaction, between consenting individuals participating on a basis of equality".[32] There is no aggression, force, rape, torture, verbal abuse or portrayal of humans as animals. The court found that contempory Canadian community standards would tolerate erotica, so defined, no matter how explicit it might be.

Another slightly different, but entirely compatible, view of erotica is that taken by the Williams Committee. According to them, the erotic is what expresses sexual excitement, rather than causes it. In this sense, the erotic work will suggest or bring to mind feelings of sexual attraction or excitement. Referring back to its earlier definition of pornography as that which intends to cause sexual excitement, the Committee adds that erotic material may cause feelings of sexual excitement and put the audience actually into that state, but if so, that is a further effect. It follows from the Committee's definition, therefore, that what is represented in an erotic work of art need not be just a "milder version" of the pornographic. Indeed, many erotic works of art have no explicit sexual content of any kind,[33] and would thus not be regarded as pornographic at all.

We appreciate this separation of the erotic from the pornographic, and agree with it. We have not, therefore, considered it appropriate to adopt the working definition of pornography proposed by the Badgley Committee: "The depiction of licentiousness or lewdness: a portrayal of erotic behaviour designed to cause sexual excitement."[34]

Many briefs stressed the importance of devising a legal regime which would not criminalize erotica, in order to reach pornography. Some saw the absence of true erotica in the Canadian culture as one reason why young people turn for information about sexuality to magazines and films which teach them that sex is violent and brings pain. Other briefs pointed out that a real harm of pornography is (in the straightforward words of one presenter), that it tells lies about women. Erotica, on the other hand, does not lie about women, or about their sexual partners. Erotic literature or art created by women, it was argued, will do much to counteract the message that is propagated in pornography; it will provide a voice for the expression of what women really are. Not only women, but also men and young people of both sexes will benefit from this development.

We agree strongly that the criminal law should not stifle the development of erotic art. Nor do we want to fashion a criminal law regime that, in the name of protecting women, may serve to silence them. We do not, however, think that including a specific exemption for the "erotic" in the *Criminal Code* is the way to achieve these ends. Once again, while accepting the popular, or non-legal meaning of erotica, and the thinking behind its characterization, we have chosen to avoid the use of the specific term in our draft *Code* provisions. Instead, we have tried to be limited, and clear, about what we seek to expose to a criminal penalty, so that the "chilling effect" of our recommendations on genuine erotic expression will be minimized.

6. Conclusions

We have not tried to distil from the variety of popular meanings a pithy definition of pornography. In the discussions in this Report, we use the term pornography fairly generally and in the popular sense described in this chapter, because we are talking about what people complained to us about. When we come to our recommendations, however, we do choose specific terminology. Whereas we consider that it is natural and inevitable that different understandings of the term will proliferate in the public mind, we have decided to avoid for the most part use of "pornography" for legislative purposes. We are impressed with the variety of meanings attached to the term, and do not wish to import these into a system which we think should be characterized by clarity and certainty. We have similarly decided not to incorporate the term erotica into our recommended provisions. The only exception to this rule occurs in the titles of the sections we have drafted, for there we use the term pornography. It is, in that context, very carefully defined by specifying what sorts of acts are at issue.

For different reasons, we are recommending that the term obscene be retired from the criminal law and related federal legislation. It will simply not encompass the kind of material which is being described as the new pornography, and to rely on the opinion of the hypothetical viewer for its interpretation (the community standards test), introduces an element of subjectivity with which we feel uneasy.

Although we have avoided the formulation of our own brief working definition of pornography, we have been very aware of the two main sorts of pornography which preoccupy those concerned with this issue. Some would say that these are really one type, but in our effort to understand the phenomenon, we have left the apparent distinction as it stands, at least for purposes of analysis. One sort of material is the merely sexually explicit, characterized by both sexual content and an assumed or apparent intention to stimulate sexually the viewer. Missing from this sort of pornography is any appreciable amount of violence and degradation. Again showing the sexual content, but this time in combination with violence, degradation or abuse in such a way as to suggest approval of that abuse, is the second category of pornography. The theoretical underpinnings of our contemporary appreciation of this sort of material are laid by such thinkers as Jillian Riddington, Helen Longino, Andrea Dworkin and Catharine MacKinnon.

We believe that our recommendations must encompass both of these two large, and admittedly loosely defined, areas of pornography. Clearly, not all of it will merit criminal sanctions. Much may attract only regulation; other material will simply be left to individual taste and discretion. If we do not formulate our own precise working definition of pornography, though, there are those who will be wondering on what basis we will make these kinds of distinctions.

As we have mentioned above, our approach has been to try to define as precisely as possible the kinds of images and representations which deserve a criminal sanction, or regulation. We have done this by calling into play the principles enunciated at the beginning of this report. Of all the images and types of images there may be, we have tried to determine which sorts merit the criminal sanction because of the extent and degree of their harm to these principles, which ones may we more appropriately leave to regulation because the nature and extent of their impact may be more in the area of "offence" than of harm, and thus containable by means other than the criminal law; and which should simply be left alone. In coming to our own determinations on these points, we have been very conscious of our debt to those who have struggled with the question of the meaning of pornography, whether we agree with them or not. They have created an intellectual matrix for these discussions which, we venture to suggest, is richer and more challenging than that of a few years ago. We shall describe in some depth in Section IV the provisions which we propose for the criminal law and related statutes. Now let us turn to an examination of what we have been told and what we have learned about the reality of pornography in Canada today.

Footnotes

[1] *Customs Tariff Act*, R.S.C. 1970, c. C-41, as amended.

[2] Revenue Canada, Customs and Excise, Memorandum R9-1-1, Ottawa, July 1, 1982, at Item 28.

[3] *Broadcasting Act*, R.S.C. 1970, c.B-11, as amended by S.C. 1970, c.16 (1st Supp.), s. 42; c.10 (2nd Supp.), s. 65 (Item 2); S.C. 1974-75-76, c.49, s.18.

[4] *Radio (A.M.) Broadcasting Regulations*, C.R.C. 1978, c. 379, s.5(1)(a) and (c) respectively; *Radio (F.M.) Broadcasting Regulations*, C.R.C. 1978, c.380, s. 6(1)(a) and (c) respectively.

[5] *Television Broadcasting Regulations*, C.R.C. 1978, c. 381, s.6(1)(a) and (c) respectively.

[6] *R.* v. *Beaver* (1905), 9 O.L.R. 418 (Ont. C.A.), *per* MacLaren, J.A. at 424.

[7] *The Shorter Oxford English Dictionary on Historical Principles* (3d ed.) (Oxford, The Clarendon Press, 1973) Vol. II, at 1428. For a discussion of the evolution of this dictionary definition, see *Badgley Report* at 1079 and at 1086.

[8] *Cassell's New Latin-English English-Latin Dictionary* (London, Cassell & Company Ltd., 1959), at 403.

[9] 413 U.S. 15 (1973), at 24.

[10] *Cassell's New Latin-English English-Latin Dictionary*.

[11] Law Reform Commission of Canada, Working Paper 10, *Limits of the Criminal Law; Obscenity: A Test Case* (Minister of Supply and Services Canada, Ottawa, 1977), at 8.

[12] See s.19 of Bill C-19, 1983.

[13] This scene was contained in the film of "outtakes" from the Ontario Censor Board.

[14] Williams Report, para. 8.4, at 104.

[15] *Ibid.*

[16] *Ibid.*, para. 8.6, at 105.

[17] Williams Report.

[18] *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964), at 197.

[19] *The Shorter Oxford English Dictionary on Historical Principles* (3rd), Vol. II, at 1631.

[20] Williams Report at 103.

[21] Williams Report at 96.

[22] Williams Report at 103.

[23] Helen E. Longino, "Pornography, Oppression, and Freedom: A Closer Look". Laura Lederer, (ed.), *Take Back the Night: Women on Pornography* (Toronto & New York, Bantam Books, 1980) at 29.

[24] *Ibid.*, at 29-30.

[25] Jillian Ridington, *Freedom from Harm or Freedom of Speech?* a discussion paper prepared for the National Association of Women and the Law, Ottawa, 1983. Among those recommending adoption of this definition are the Newfoundland Teacher's Association, the New Brunswick Advisory Council on the Status of Women, and Le Regroupement Féministe Contre la Pornographie, which has translated the definition into French, as follows:

> La pornographie est une représentation réelle ou simulée, en mots ou en images, filmée, sur bande vidéo, ou sous toute autre forme, de comportements sexuels, dans laquelle un-e ou plusiers-des participant-e-s sont ouvertement ou implicitement contraint-e-s à cette participation, ou sont blessé-e-s ou molesté-e-s physiquement ou psychologiquement: comportement dans lesquels un déséquilibre de pouvoir est évident ou implicite du fait de l'immaturité en âge de tout-e participant-e, ou du fait de certains aspects du contexte de la représentation; représentation dans laquelle ces comportements peuvent être interprétés comme étant encouragés ou endossés.

[26] City-County General Ordinance No. 24, 1984 (June, 1984), Sec. 16-3(v).

[27] An ordinance of the City of Minneapolis Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights, 1983, Adding a new section (gg) to Section 139.20.

[28] Memorandum to Minneapolis City Council from Catharine A. MacKinnon and Andrea Dworkin, Re Proposed Ordinance on Pornography, December 26, 1983, at 1.

[29] Margaret Laurence, "On Censorship (A Speech Given to the Ontario Provincial Judges and Their Spouses), Peterborough, Ontario, June 2, 1983 (unpub. Ms.), at 9.

[30] Gloria Steinem, "Erotica and Pornography: A Clear and Present Difference". Laura Lederer, (ed.), *Take Back the Night: Women on Pornography* (Toronto & New York, Bantam Books, 1980) at 23.

[31] 16 Jan. 1985, unreported (Alta Q.B.).

[32] *Ibid.*, at 19.

[33] Williams Report at 104.

[34] Badgley Report, Vol. II, at 1080.

Chapter 5

Views from the Public Hearings

1. Introduction

Any attempt to summarize in a few pages the views presented by hundreds of different organizations at public hearings in 22 different centres across Canada might seem to be an impossible task, doomed to failure, particularly when one considers the wide divergency in the views held by these organizations. Analysis of the briefs submitted at the hearings showed that there is a wide range of opinion among Canadians about what is offensive and what should be considered pornographic.

At the conservative end of the continuum are those who want the legal definition of pornography to include any depiction of sexual activity, whether it be inside or outside of marriage, or any depiction of persons in nude or suggestive poses. At the other end of the spectrum are those who found all pornography acceptable, except for explicit sexual portrayals of children. Between these two extremes, there was a wide range of opinion as to what is acceptable. The position of most feminist groups, and some church organizations, was that erotica, which they described as sexually explicit material which contains no violence or coercion and in which the participants were there by choice, was acceptable. They were totally opposed however, to violent pornography, which they defined as material with a sexual content combined with violence, degradation and abuse, with men shown as the aggressor and women as the subordinate or victim.

Indeed, despite the differences of opinion as to what should be considered pornographic, there was consensus in this area: the question of what should be done about violent pornography. A large majority of presenters expressed strong concerns about the prevalence of violent pornography and urged that government controls be strengthened to ensure that such material is kept off the newsstands and is prohibited on television.

The witnesses and groups favouring controls came from women's organizations, churches and church groups, with a smaller number of community organizations and educational associations, such as teachers' federations in several provinces. There were also a few men's organizations,

which had been set up specifically to oppose pornography, a sprinkling of elected representatives from every level of government, some municipal officials, and some representatives of police forces or police unions.

Opposed to control or censorship of pornography were: firstly, civil liberties groups, some professional associations and film and video organizations; secondly, the Periodical Distributors Association, the Video Retailers Association and a handful of retailers in a few cities; and thirdly, gay rights organizations in major cities.

In its analysis of the briefs from such a wide diversity of organizations, the Committee found that the majority of submissions had concentrated on similar aspects of pornography, although some focus more strongly on certain issues. Large numbers of briefs described the proliferation of pornography in their own communities and many reported on their efforts to control or prohibit its availability, either through the use of municipal by-laws, provincial censorship powers over movies, or local enforcement of *Criminal Code* provisions prohibiting obscene materials.

There was considerable discussion of a new definition of pornography and of the difference between pornography and erotica. Many briefs explored the issue of the link between pornography and violence and supported their positions with local anecdotal evidence, as well as reference to academic research studies, many of which were from the United States.

We received numerous recommendations, some in considerable detail, for changes to legislation at all three levels of government. At the federal level, major changes to the *Criminal Code* provisions on obscenity were proposed, as well as to the *Customs Act*, the *Broadcasting Act* and regulations of the Canadian Radio-Television and Telecommunications Commission. At the provincial level, there were strong suggestions that provincial censorship or classification boards, which now censor and classify movies for public showing, should also deal with home videotapes. At the local level, there was unanimous support for the introduction of municipal by-laws to control the display of pornographic magazines and videotapes so as to keep them out of sight of children.

2. The Prevalence of Pornography

Many groups, in preparing their briefs, had conducted local surveys to determine the type and availability of pornography in their own communities. The Manitoba Advisory Council on the Status of Women reported, for example, that a random survey of 17 local retail stores in Winnipeg revealed that only two of the stores did not sell pornographic material. In the others, the material ranged from two to well over 400 different examples of pornography. The London Status of Women Action Group reported that over 80 percent of local variety stores sell pornography, with many having as many as 100 different titles in stock. Community Against Pornography in St. John's was

particularly incensed over the use of government funds and community halls by male service clubs to show pornographic movies at club social functions.

Many expressed their concern at the increasing amount of violence, both in pornographic magazines and videotapes, as well as in movies shown in public theatres. The Canadian Federation of University Women, in Toronto, quoted a report from Mary Brown, director of the Ontario Film Review Board which estimated that in 1982 only one film in twenty contained sexual violence. By 1983, it was one film in nine.

The effect of pornography on women, children and on society as a whole was described in sensitive terms by some church as well as lay organizations:

> In recent years, pornographic publications and movies have become more and more explicit as well as more readily available. Pornography victimizes and debases women by portraying them as mere objects, and degrades men by portraying a stereotype of aggression. Pornography increasingly uses children as subjects, and increasingly depicts and incites to violent behaviour.
> *Anglican Diocese of Toronto*

> Pornography does not recognize or celebrate the holistic reality of our humanity, the integration of body, mind and spirit. Pictures and descriptions reduce women to sexual parts, mindless bodies to be played with, poked or even mutilated ... Pornography fails to recognize the wide range of emotions made possible by human encounters ... Pleasure for men is portrayed through acts of inflicting pain or exercising power. Women, supposedly, find pleasure in experiencing pain ....

> Pornography promotes racism ... (and) supports and promotes the belief that female sexuality is dirty or evil ... (It) perpetuates the terrible myth that sexual violence is deserved and needed by the normal female ....
> *United Church of Canada, London*

> ... the nihilism of pornography can only be considered as anti-life, harmful to the dignity of people and to the development of sane and lasting personal relationships as the basis of healthy family life. Because it fails to accept sexuality as a unique gift for understanding and for creating new life in the image of another person, pornography is anti-sex.
> *Canadian Conference of Catholic Bishops, Ottawa*

Of particular concern to municipal officials who participated in the public hearings was the difficulty encountered in trying to draft and enforce by-laws to control or prohibit pornography. Additionally, several cities, among them Ottawa, Toronto and Vancouver, complained that the present *Criminal Code* provisions on obscenity are so nebulous and so open to various interpretations, that they are extremely difficult to enforce.

> We have ... a situation in Vancouver where 15 charges of obscenity were laid against an adult entertainment store in January of 1983. The case has been adjourned pending an appeal on yet another case in Victoria where a decision is expected shortly. However, if the Victoria decision finds for the prosecution, local Crown Counsel expect that that decision will be appealed all the way to the Supreme Court of Canada and they want a ruling at that level before proceeding with any other charges. Obviously, there is little point in laying new charges at this time, yet the Police Department has cabinets

full of books, magazines and videotapes which they deem to be obscene. The distributors of these materials are still in operation.
Alderman May Brown, Vancouver

The Committee received many different estimates regarding the size of the pornography industry in Canada and North America. The Canadian Coalition Against Media Pornography, Ottawa, estimated that in North America the income grossed by pornography "ranges from $12 billion a year to $50 billion a year, not including videos. In Canada, estimated earnings from pornography controlled by organized crime is $500 million a year." David Scott, of Toronto, told the Committee that after discussions with law enforcement personnel he formed the view that these sales figures are significantly inflated by the money from other criminal activities being "laundered" through the pornography industry: profits from drugs, racketeering, and loan sharking. He estimated that conceivably two thirds of the income is laundered money.

In each city in which public hearings were held, the Committee was provided with samples of pornography and descriptions of the nature and availability of pornography in that community. In Montréal, Monica Matte observed that the line between soft and hard core material is disappearing. She presented an exhibit of pornography available from one downtown store. It featured incest of all kinds, explicit sexual representations of pregnant women, bondage, racial pornography, child pornography and child prostitution. Excerpts from some of the descriptions of pornography follow.

... [the] images present in the mass media have become ever more pornographic over the last decade. Society has increasingly allowed these images to become an acceptable and normal component of entertainment. The juxtaposition of "sex" and overtly aggressive behaviour, from beatings to rape, is commonly found on prime-time television. Each time a new frontier of violence and sexual exploitation is crossed by mass culture, traditional pornographic images become more violent and explicit.

... [in soft-core pornography] the images of women ... are exclusively vulnerable and available. Women are often referred to as "girls" or by even more denigrating terms, and they exist solely for the sexual gratification of male masters. Soft-core pornographic magazines such as *Playboy* and *Penthouse* depict women on their backs or in crawling positions, often with their buttocks or vaginas displayed for male approval. The positions signal total submission.
B.C. Teachers Federation, Vancouver

Examination of soft-core magazines shows that there is much more incest, pedophilia, and violence and humiliation of women than there was ten years ago. [We see as pornographic] material which is produced with the intention of or effect of sexually stimulating the consumer *by the portrayal of a power relationship* .... The mere fact that material has the effect of sexually stimulating the consumer does not make it pornographic.
Toronto Area Caucus of Women and the Law, Toronto

Pornography is yet another way to silence women. Most women ignore pornography; it is marketed by men for men. The instinctive reaction of many women to pornography is revulsion. The increasing violence, abuse and degradation of women in pornography reveals it to be not about sex or love,

but about power of men over women. A common thread running through it is that women are animals, slavishly devoted to carnally pleasing their masters, who are fully dressed, rational and in control of them and the situation.
Young Women's Christian Association, Winnipeg

[We] feel in danger of being swamped with a flood of pornography - magazines, movies and now videotapes, almost all made outside Canada. Our very culture is being undermined and our way of life threatened.
Canadian Federation of University Women, Toronto

3. The Effect of Pornography

The effect of pornography on women, children and society was described in considerable detail in many briefs. The concern of most participants was threefold: that pornography degrades women, robs them of their dignity as individual human beings and equal partners within a relationship and treats them as objects or possessions to be used by men; that male violence against women is treated as socially acceptable and viewers are desensitized to the suffering of others; and thirdly, that these two influences will have a strong negative influence on children and on the family.

All pornography degrades women. The spectrum of soft to hard core is often alluded to, with the implicit or explicit connection that hard core pornography is dangerous, while soft core pornography is not, or at least, not so dangerous. We dispute this. All pornography is dangerous to women, because it robs us of our dignity, the right to be treated with respect as complete beings, and it squanders our needs as men and women to engage with others as equals.
Manitoba Advisory Council on the Status of Women, Winnipeg

The dignity of women is undermined, dehumanized, and [they] are seen by men as objects, possessions to be used as they see fit, which contributes to the problem of battered women. Even the most mild form of pornography is harmful. The values which support family love, mutual respect, and generosity are undermined, and lust, exploitation, selfishness are promoted.

The growing presence of pornography harms society [because] it:

1) increases violence;

2) damages family relationships;

3) influences young people to engage in pre-marital sex;

4) children are harmed and exploited.
Concerned Morality League, Winnipeg

Nous considérons en effet que *toute pornographie*, qu'elle soit douce ou "dure" et même dans les cas où elle ne recourt pas explicitement à la violence *est violente* lorsqu'elle suggère que les femmes ont pour unique fonction d'exciter sexuellement les hommes, qu'elle les ravale à l'état d'objets destinés à être manipulés, exploités, dégradés, qu'elle les réduit à leurs seuls organes sexuels, qu'elle refuse aux femmes tout statut d'égalité et d'humaine autonomie. Cette perception de la femme est incompatible avec la dignité humaine. La pornographie alimente des attitudes et des comportements foncièrement sexistes, discriminatoires à l'égard des femmes alors même que notre société prétend promouvoir l'égalité des femmes. Il y a certes une grave incohérence à se préoccuper des problèmes du viol et des femmes battues

alors que l'on permet que des femmes soient agressées et violentées à l'écran, sur photos, dans les livres ou de toute autre façon.
La Fédération des Femmes du Québec, Montréal

Pornography is unacceptable not because it portrays explicit sex but because it promotes hatred, violence, degradation and dehumanization. Pornography is sexist material that portrays women as a distinct sub-human species that does not feel pain or humiliation in the same way as men, and which desire violence and degradation for sexual pleasure. Pornography advocates, encourages and condones coercion, sexual violence and battering and portrays these activities as normal behaviour. As an expression of sexist ideology, pornography promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged.

Women are ... terrorized by the message that male violence and power is so prevalent and menacing. Pornography alienates women and men. In no way does it foster healthy sexual or human relations any more than other forms of hate literature would foster healthy relations between races or religions.
Ontario Advisory Council on the Status of Women, Toronto

... exposure to pornography leads to an increase in violent sexual crimes and aggressive anti-social behaviour. The person exposed to pornography is being conditioned to think that not only is violence socially acceptable, but that it is sexually stimulating and that the person who is unwilling to be the recipient of the violent act will enjoy it if forced to submit ... Pornography suggests that a woman's value lies in her physical appearance and her ability to sexually satisfy a man. All other capabilities are trivialized ... Pornography undermines values that are important to our society because it dehumanizes the participants, desensitizes the viewers to the suffering of others, and distorts mutual, caring expression into a base act committed by a powerful figure upon a powerless object.
Provincial Advisory Council on the Status of Women, St. John's

Pornographic material ... makes us inclined to accept violence, to downgrade and even deny the dignity of other people, and to unleash our tendencies to dominate others ....
Canadian Conference of Catholic Bishops

Pornography negates sexuality as an expression of love and a form of intimate communication between equal human beings. It focuses merely on parts of the body ... (and) ignores mind and spirit, and turns human beings into objects.
United Church of Canada, Toronto

[Pornography] distorts wholesome and God-given sexual relationships (and) exploits them for profit, so that persons who, in God's purpose, are capable of and deserving of fulfilling personal relationships are deceived into accepting debased fantasies in place of love and commitment.
Anglican Diocese of Toronto

Pornography desensitizes people to each other and destroys the foundations of love, of family, and of human relationships.
Salvation Army, Toronto

One of the most interesting perspectives on the effect of pornography on children, its effect on young boys, was presented by one of the few men's organizations to appear at the public hearings, Le Groupe d'hommes contre la pornographie et l'exploitation sexuelle (Men Against Pornography), Québec City.

> Il est malheureux de constater que la sexualité des hommes gravite beaucoup autour de la pornographie ... Tout cela n'est pas surprenant, car c'est souvent à partir de la pornographie que les hommes apprennent à donner forme à leurs désirs, y puisent leurs "techniques" et leurs croyances par rapport à leur sexualité. Cet apprentissage commence très tôt dans la vie. Pour la plupart des hommes de notre génération, c'est dès le début de l'adolescence que nous avons commencé à consommer de la pornographie. C'est surtout là que nous avons tiré nos critères de performance sexuelle, de virilité et ce que nous croyons savoir sur la sexualité féminine. Il en va de même de la génération des 15-20 ans: une enquête menée par un professeur de sexualité du CEGEP Lévis-Lauzon auprès d'étudiants de 19 ans a montré que 98.5% d'entre eux avaient déjà "consommé" de la pornographie, et ceci en moyenne dès l'âge de 13-14 ans. Un sommet semblait atteint vers 17 ans, pour diminuer ensuite. Mais l'apprentissage était fait. Dans un atelier que nous avons récemment animé, un des hommes présents a avoué qu'il avait commencé à regarder les revues pornographiques de son frère à l'âge de 8 ans. Même avant l'éveil de sa sexualité adulte, il avait déjà la tête pleine d'images pornographiques qui allaient orienter ses désirs dès leurs premières manifestations à son adolescence.
> *Le Groupe d'hommes contre la pornographie et l'exploitation sexuelle, Québec City*

While most of the briefs focused on the social harms that are caused by pornography, one economist described the effects which pornography has on women's position in the economy.

> ... it is not pornography, existing independently, that threatens women's acceptance into and contribution to our economic infrastructure, but pornography as a particularly invidious form of sexism that has thus far defied our legislators in their attempts to protect women from sexual discrimination. Only an intrinsically sexist society could so wholeheartedly support (financially and legally) the sheer volume of pornographic materials available ... it is pornography, the most visible and virulent symptom/form of sexism that may continue to segregate women's abilities from the economic mainstream long after legislation protecting equal pay for work of equal value, or prohibiting sexual harassment, or even encouraging affirmative action is in place and is being practised ... [Pornography is] as much to blame for the slow integration of women into our economic framework as any other manifestation of sexist attitudes.
> *Carl Beigie, economist, Toronto*

4. Definitions of Pornography

The nature of pornography and how it should be defined created a great deal of discussion during the public hearings. The discussion raised two important questions: first, the difference between pornography and erotica, and secondly, the question of where, in the continuum of sexist portrayals of women in the news media, the portrayal of women becomes actually pornographic. While many definitions were proposed, the three most often quoted definitions were those developed by Helen Longino, an American feminist and writer, by Jillian Ridington, a Vancouver researcher, and by Andrea Dworkin and Catharine MacKinnon, of Minneapolis. All of these definitions are discussed in the previous chapter.

Helen Longino's definition, which was quoted in many briefs, is as follows:

> Pornography is verbal or pictorial material which represents or describes sexual behaviour that is degrading and abusive to one or more of the participants *in such a way as to endorse the degradation.* (Emphasis in original)

The distinction between pornography and erotica created differences of opinion between groups with a feminist perspective and those on the conservative end of the spectrum. According to many groups, the distinction is crucial.

> [Erotica] represents images in which the participants are not degraded or abused and are presented as participating equally and freely. Erotica celebrates the positive, healthy experiences of mutual sexual enjoyment between adults.
> *Manitoba Action Committee on the Status of Women, Winnipeg*

> Erotica is for sexuality, since its message implies a mutually pleasurable expression between people; pornography is about commercialized sex, dominance, conquest, and violence against women. Erotica suggests a more balanced power relationship and respect for the body; pornography forces a distorting commercial relationship between the conqueror and victim, and hence is degrading to both male and female.
> *Deborah Seed, Montréal*

The conservative position on erotica was that it should be included in the definition of pornography and prohibited or controlled.

> ... consensual sex, as portrayed in the media, can be destructive of Canadian societal values ... Depictions of explicit, consensual sex would lead to an expectation that any woman will consent, leading further to coercion in real man-woman relationships. Even depictions of loving, indeed marital, sexual intimacy in full, explicit detail ... ultimately dehumanizes sexuality itself ....
> *Roman Catholic Archdiocese of Toronto, Toronto*

> ... there is a direct relationship between habitual exposure to standard sexual material referred to as "erotica" and an increased desire for more bizarre material .... If the people in the representation ... seem to be "consenting adults" rather than people involved in "degrading" or "demeaning" activity, the material could still be pornographic .... Pornography should be defined so as to include ... explicit sexual acts.
> *REAL Women of Canada, Toronto*

4.1 Pornography as Part of a Continuum

The view that pornography was only the extreme end of a continuum of sexist portrayals of women was held by many of the organizations which presented briefs to the Committee. As one participant put it, "pornography is the heartbeat of a sexist society." It reflects and reinforces the sex-role stereotyping and existing inequalities of the larger society, reflecting the power relationships of males and females, as well as those in adult-child relationships and inter-racial relationships.

> Media Watch considers that sex role stereotyping of women creates an environment that encourages the dehumanization, misrepresentation and

degradation of women. The extreme form of this attitude is pornography. Presently our environment is polluted with messages that tell us women are powerless, feebleminded, submissive, victims, and only valuable if they are young, beautiful and white ....

Male dominance and female submissiveness are at the very heart of the stereotype of men and women. Pornography is the extreme portrayal of dominance-submissiveness, the objectification and the abuse of women. Media Watch views sex role stereotyping and pornography as a continuum which must be uprooted from our culture.
Media Watch, Calgary

Pornography has an important function in society's oppression of women. It is the propaganda, the prop, supplying men with examples of society's model of masculinity. Pornography helps to ensure women's sexual, social, political and economic repression. It cannot be a coincidence that pornography exists in a society where women are raped, beaten by husbands, pushed into low income work and generally not taken seriously.

It is a painful act of self-recognition of Christians, especially male Christians, that the Church has transmitted and shaped male domination in western culture. It is beyond doubt that the Church is part of the problem. But with God's grace, we may find courage to become part of the solution.
United Church of Canada, Toronto

5. The Link Between Pornography and Violence

One of the most controversial aspects of the public hearings was the conflict that arose over the link between pornography and violence against women. Those advocating the strengthening of government controls over pornography were convinced that psychological and sociological research had definitely established that such a link existed. Civil liberties groups and others who opposed controls were just as firmly convinced that no such link had been established. The Committee's conclusions on this issue are discussed elsewhere in the Report. This section will simply provide a sample of the views presented at the public hearings, with no comment as to their validity.

The Metro Toronto Task Force on Public Violence Against Women and Children provided a brief summary of the highlights of the research that has been done on pornography and violence.

1. Research in communications and psychology shows that the portrayal of violence in the media contributes to subsequent anti-social behaviour by its viewers. Scientists no longer question this effect; rather they now investigate to what degree anti-social behaviour is elicited, from whom, and under what conditions.

2. Research in experimental settings shows that the portrayal of sexual violence leads to subsequent violence against women. Under certain conditions of arousal, viewing sexual violence causes male subjects to be even more violent toward women than when they view non-sexual violence.

3. Research evidence is growing that so-called 'non-violent' or 'soft' pornography also causes males to behave aggressively toward women, although less intensely than the portrayal of violence alone or the portrayal of sexual violence.

4. While social science shows unequivocally that exposure to violent pornography is a *contributor* to sexual aggression and violence, the rules of scientific evidence make it difficult, if not impossible, to prove that it is the direct *cause* of such behaviour.

   However, as prominent scientists have noted, neither has the Surgeon General (in the United States) unequivocally proven that cigarette smoking is a direct cause of cancer in human beings. Both, however, have accumulated compelling evidence of causal links.

   These findings, and many related findings described in the literature, indicate ample justification for our society to quickly take steps toward the elimination of violent and aggressive pornography.
   Metro Toronto Task Force on Public Violence Against Women and Children, Toronto

Many groups provided the Committee with anecdotal evidence of the connection between pornography and violence in their own communities. The Ontario Advisory Council on the Status of Women included a compendium of anecdotal and circumstantial evidence linking pornography to actual crimes committed in North America. Le Regroupement Féministe Contre la Pornographie, in Montréal, described their work with battered women and reported that they are increasingly encountering women who have been forced to re-enact scenes from pornography consumed by their partners. The Canadian Federation of University Women in Toronto cited several Canadian murder cases in which there was said to be a connection between the murderer's actions and his use of pornography. A social worker, a member of La Fédération des Femmes du Québec, conseil Régional Saguenay, told the Committee that she frequently meets situations where women are required by their spouses to engage in unusual practices, to join in group sex and exchange partners, to engage in the sexual practices their spouses have seen on pornographic films in local bars, and to pose nude.

The Toronto Area Caucus of Women and the Law, like many other groups, cited studies by Professors Malamuth and Donnerstein to support their view that pornography encourages male violence against women by linking men's sexual arousal to violence and conditioning them to perceive violence as an essential component of sexual excitement; by showing violence against women as acceptable; by depicting women as enjoying violence against themselves.

Many took the view that while research linking pornography and violence is in its beginning stages, they personally do not want to wait for confirming evidence of the negative long-term effects of violent pornography. They believe that the probability of a strong link between violent pornographic videos and an increase in sexual offences must be taken seriously until proven false by statistical evidence.

They point out that pornography, like advertising, is a message with the aim of influencing behaviour. Since studies have already established that sexist advertising reinforces sexual stereotypes, pornography must have some influence on male behaviour.

I compare pornography to racist films or literature: the medium does not cause misogyny in the case of pornography, nor racism in the case of racist material, but can serve to confirm these values, lend them legitimacy and encourage behaviour based on those values. From this confirmation, this legitimization, stems the harm.
Mayor Marion Dewar, Ottawa

Current scientific study (Malamuth and Check) has proven that in the laboratory setting there is no question that the sexual violence depicted in aggressive, violent pornography leads to aggression toward women. Specifically, there is considerable evidence showing that exposure to aggressive pornography dealing with rape produces a lessened sensitivity to rape, an increased acceptance of rape myths and *interpersonal* violence against women, as well as self-reported possibility of raping.
Canadian Coalition Against Media Pornography, Ottawa

6. Municipal By-Laws and the Display of Pornography

Many groups described their efforts to persuade their municipalities to introduce or enforce by-laws to control the access of children to pornography. Major difficulties arose because of the vagueness of the federal legislation regarding obscenity and the enabling provincial legislation in some provinces, as well as the reluctance of local governments to act.

The recommendations made by most groups, including civil liberties associations, was that the display and sale of sexually explicit materials should be restricted to adults. Some suggested that all such magazines should be displayed behind opaque barriers at a height of 1.5 meters above the floor and that such publications should be sold in sealed plastic packages.

7. Film Classification and Censorship

Most groups favoured the continued provincial classification or censorship of all movies to be shown in public, although there was some criticism of particular provincial boards. There was also strong support for the proposal that provincial censor boards expand their duties to include the censorship of videotapes destined for private viewing.

[This group] favours the establishment of a classification and labelling process of all video recordings, including a process of pre-screening by a permanent board and forfeiture of all material deemed illegal ....
People and Organizations in North Toronto, Toronto

[We] recommend that censor boards be given more adequate staff to cover the enormous volume of material being imported; have their mandates expanded to cover video cassettes, be they shown in public, rented or sold for private use; and similarly, be made responsible for the review of all television transmissions.
Roman Catholic Archdiocese of Toronto, Toronto

[NAC] cautiously advocates limited and clearly defined censorship and recognizes the need and difference between prior and post restraint measures.

The attendant problems of the former can best be avoided by issuing clear and explicit guidelines and by the selection of Censor Board members who have a comprehensive awareness of the problems of violence against women ... Prior restraint [should] be used to eliminate only the most blatantly pornographic material and ... post restraint or the use of the Criminal Code provisions [should] be used to deal with material that either escapes the prior restraint process or which clearly exceeds the guidelines.
National Action Committee on the Status of Women, Toronto

The Manitoba government is now examining a host of reforms, including classification of videos for home use and regulating the use of satellite pornography in hotels and beverage rooms. However, without the suggested federal reforms, these initiatives cannot go ahead.
Manitoba Action Committee on the Status of Women, Winnipeg

8. Canada Customs

The inability of Canada Customs to prevent the importation of a great deal of the most violent pornography into Canada was strongly criticized in many briefs. Excerpts from the Ontario Advisory Council on the Status of Women brief summarized the major concerns.

1) Customs officials follow the same procedures as other law enforcement officials in focusing on sexual explicitness rather than violence or degradation. As a result, the more harmful types of pornography are allowed over the border.

2) Customs practices are not the same across Canada. The Joint Forces Project "P" in Toronto has found that British Columbia and Québec allow materials to cross their borders which would be prohibited in other provinces. The Attorneys General in the provinces set their own obscenity guidelines and standards and Customs officials tend to follow those guidelines. Once over the border the material can be freely transported across Canada.

3) The heavy volume of traffic at border crossings creates a situation in which only a comparatively small number of vehicles can be searched.

6) The federal guidelines for determining what is immoral or indecent are vague and decisions made by Customs officials are often subjective.

8) Legitimate movie houses are given 60 days to decide whether they can afford to make the cuts necessary to allow importation. During the 60 days that the film is in Canada thousands of copies can easily be made. The movie house may then take the *original* film back to Customs stating that it could not afford to make the cuts. The original film is then banned by Customs, but copies are not covered and would have to be found and seized.

The recommendations made by most groups focused on the need to: strengthen and standardize the Customs procedures; to train Customs officers and provide them with guidelines; and to eliminate the 60-day period apparently allowed in some Customs areas to importers of commercial films so that they can have the film reviewed and classified by provincial authorities.

9. Recommendations for Change

In summing up their recommendations for change, many witnesses emphasized that it was not only the actual laws that need to be changed, but the administration of the laws. Many believed that the proliferation of pornography is not unrelated to the fact that our society, including its entire justice system, is controlled by men.

> As it stands now, men make virtually every decision about what is and what is not obscene: at the source, in the conceptualization of sex roles by male producers of pornography; at the newsstand, the bookstore and box office, in the acceptance or rejection of pornographic materials for sale or purchase by predominantly male retailers and customers. Obscenity laws are written, argued and passed by legislatures comprised almost entirely of men ... The same laws are enforced at the borders by Customs inspectors who are almost invariably male, and in the community by police departments staffed overwhelmingly with men. Breaches of obscenity laws are prosecuted by male lawyers in courts presided over by a male judiciary. So called "expert" testimony is supplied, almost without exception, by male witnesses ....
>
> Furthermore, day-to-day coverage of the obscenity issue is directed by male publishers, editors, editorial writers and reporters, with the inevitable result that male sensibilities predominate, usually to the virtual exclusion of any comment at all by women.
> *Judith Dobie, Montréal*

The specific recommendations for change made by the majority of women's groups are similar in intent to those proposed by the National Action Committee on the Status of Women whose proposals are outlined below.

1) The present provision regarding 'obscenity' (Section 159, of the *Criminal Code*) should be repealed.

2) (a) A new offence, prohibiting the manufacture and distribution of pornographic material should be incorporated into the *Criminal Code*. This provision should not be located in the "Offences Tending to Corrupt Morals" section of the *Code*, but should either be in a new, independent section or be included in the section dealing with "Offences Against the Person" or under "Hate Propaganda".

Pornography should be defined as:

> any printed, visual, audio, or otherwise represented presentation, or part thereof, which seeks to sexually stimulate the viewer or consumer by the depiction of violence, including, but not limited to, the depiction of submission, coercion, lack of consent, or debasement of any human being.
>
> For the purpose of this definition, the depiction of any person who is under the age of 16 or who is depicted as being under the age of 16 will be sufficient to deem the material pornographic.

(b) Wherever appropriate, the words "obscene" and "obscenity" should be deleted and replaced by the words "pornographic" and "pornography".

3) The *Customs Act* should be amended by removing the current prohibition against "material of an indecent or immoral nature" and replacing it with a prohibition against pornography, as defined in 2(a) above.

4) The *Broadcasting Act* should be amended to prohibit the broadcast of sexually abusive material, and such restrictions should apply to pay television.

5) The "Hate Propaganda" section of the *Criminal Code* should be amended to include sex as an "identifiable group". This section should be further amended by removing the necessity of the consent of the Attorney General before proceeding with an offence. [Some groups also suggested that the word "wilfully" should be deleted from Section 281.2(2)].

Suggestions made by other groups included:

1) The Solicitor General should instruct the RCMP and crown attorneys to keep records of the use of pornography in sex-related crimes, such as sexual assault, wife battering, incest and sexual murder.

2) Women should be given the civil right to sue producers of pornography for damages, as proposed in the Minneapolis by-law in the United States.

3) The guidelines on sex-role stereotyping, which were prepared for the Canadian Radio-Television and Telecommunications Commission, should be given the status of regulations and that licences for radio, television and pay television should be contingent upon adherence to these guidelines.

10. Organizations Opposed to Controls on Pornography

The opposition to controls, or to increased controls, on pornography, was made up of three distinct groups: first, civil liberties groups, some professional associations, and film and video organizations; second, periodical and video distributors and retailers; and third, gay rights organizations. Because their reasons for opposing controls were so different, each group will be treated separately.

10.1 Civil Liberties and Professional Associations

The right to freedom of expression and opposition to censorship were raised in briefs from the Canadian Association of University Teachers, from civil liberties associations and from film and video organizations.

> A great deal of literature from the ancient Greeks onward has as themes violence, horror and degradation. One only has to think of Oedipus Rex or of

> Titus Andronicus or indeed of many of Shakespeare's contemporaries ... or of any novelists or dramatists who have used war as a basic theme. Not only would the definition (as proposed in Bill C-21) place these works in jeopardy, it would also have a chilling effect on booksellers and publishers in Canada who may ... refuse to print, to sell or to distribute such books in order to avoid harassment.
> *Canadian Association of University Teachers, Ottawa*

The Canadian Civil Liberties Association pointed out in its brief that while it "has no hesitation in joining the National Action Committee on the Status of Women in an unequivocal denunciation of the 'new pornography'" it found it necessary to distinguish between moral condemnation and legal prohibition.

> The former is easy; the latter is fraught with difficulty ... How is the law to formulate a standard which will prohibit this vile pornography without simultaneously catching in the same net a lot of other material which it would be unconscionable to suppress?
> *Canadian Civil Liberties Association, Ottawa*

The Civil Liberties Association points out that in several obscenity cases tried under present provisions of the *Criminal Code*, neither trial judges, appeal court judges nor Supreme Court judges were able to agree on whether books such as *Lady Chatterly's Lover* and *Fanny Hill* were obscene. The vagueness and subjectivity of the present law, the Association said, leaves publishers, film makers, authors and booksellers in a state of constant insecurity as to whether they are in compliance with obscenity laws. They conclude that while "one flawed definition does not invalidate the concept of legal prohibition ... there is reason to fear that dangerous imprecision is inherent in the very exercise of attempting to define pornography."

The Association concedes that the definition of pornography proposed by the National Action Committee on the Status of Women "creates fewer dangers than the one proposed by the government [because] it attempts to narrow the subject matter to the issue of coercive sex." However they conclude, after examining the danger posed by pornography, that:

> ... the evidence fails to demonstrate a direct causal link between exposure to pornography and the serious abuse of women and children. We are aware, of course, of the reports that on a number of occasions, those who have violated women and children were found with pornography in their possession. What is not known, however, is whether the pornography produced the violence or whether those violence-prone people were attracted to pornography. Moreover, there has been no adequate measure of the number of people, otherwise violence-prone, whose aggressive impulses may have been moderated by sublimation through pornography.

The Civil Liberties Association concludes that:

> ... the present obscenity sections of the Criminal Code should be repealed. Moreover, it is crucial that they not be replaced by anything broader. The ... recommendations of NAC ... represent welcome steps in the right direction. But ... even they are likely to incur excessive risks.

The Association is firm in its opposition to censorship of any material involving *simulated* sexual abuse, but concedes that in the case of pornography which involves the actual abuse of real people "there is an arguable case for legal prohibition against the resulting film or literature."

Civil liberties associations in several cities gave their qualified support to municipal regulations designed to keep pornography out of the sight and reach of children.

The B.C. Civil Liberties Association explained the rationale behind their acceptance of regulation.

> Regulating a forum is not inconsistent with the maintenance of its freedom. We have an obvious and legitimate interest in protecting the young from forms of expression that we regard as possibly harmful to them. We also have an interest in protecting citizens from effrontery when we can provide that protection without materially limiting access to media on the part of persons who wish to see or hear them. Our association approves of those regulations which impose formal constraints upon those who distribute and sell pornographic materials to do so with that measure of discretion which provides for these two legitimate social interests. It is appropriate, for instance, for the Director of Film Classification to provide movie patrons with advice concerning the presence of possibly disturbing material. Similarly, we do not object to requiring magazine merchants to withhold from public view those of their wares of which the covers could disturb children or affront innocent adults.
> *B.C. Civil Liberties Association, Vancouver*

The Canadian Association also agrees that pay TV stations should comply with certain standards regarding the material they are to carry.

> Where facilities are at a premium, there is a strong argument for some kind of regulations over the mix of things which can be shown, whether it is sexual, religious, nationalistic, or athletic. ... the articulation of the standards is a contentious exercise ... [but it] is not as contentious in the context of granting special licences as it is in the context of restricting general freedoms.

Another organization which expressed strong opposition to censorship of any kind was the Ontario Film and Video Appreciation Society (OFAVAS) which has been involved for two years in court actions against the Ontario Board of Censors (now the Ontario Film Review Board). Their allegation that the Board contravenes the *Charter of Rights and Freedoms* was upheld by the Ontario Court of Appeal with the result that the Ontario government was forced to bring in specific legislation setting out the powers of the Censor Board.

OFAVAS, a group of filmmakers, writers, journalists, artists, performers and others, outlined their reasons for opposing censorship.

> As people involved for the most part in creative fields, we use words and images as the tools of our work. Our creative use of these tools permits us to develop insight for ourselves and others into the nature of the world around us. We fear that if we cannot broach certain subjects or use particular images or words or ideas, that our effectiveness in giving expression to the complex range of human experience will be severely curtailed. We find it short-sighted

and untenable that a government-appointed board is permitted to interpret the meaning of images and ideas on behalf of everyone else in this society. It is gross interference in our work, and something that we feel is intolerable in a democratic society.
Ontario Film and Video Appreciation Society, Toronto

The Society also pointed out that as a group which supports feminist goals, they believe that social change is essential in order to improve the lot of women. However, they believe that censorship of pornography is an ineffective solution to the problems of discrimination against women.

We are aware of the negative image of women that pornography presents. We share the revulsion of many over commercial exploitation of people in pornographic material. However, we do not believe that pornography is the root cause of sexism in society: to the best of anyone's knowledge, a subordinate station in life has been the lot of women in most societies throughout history. We see censorship as a placebo measure that does nothing about the real problems that discrimination causes, and which, in fact, distracts from giving those problems the attention they deserve and require. Furthermore, the very real danger exists that censorship, perhaps even inadvertently, will serve to silence the very voices that could raise awareness toward social change.
Ontario Film and Video Appreciation Society

The Society then goes on to explain why it disagrees with the feminist view regarding violent pornography.

The feminist perspective that has gained wide acceptance and momentum has shifted emphasis away from graphic sexuality to questions of violence and power. This approach, however, implicates a whole range of imagery, from news, sportscasts and documentaries to narrative films like Westerns and horror movies. From our standpoint, it makes more sense to challenge overtly sexist behaviour and the discrimination and hatred behind that behaviour. But if we look for images that show women in a way that could be seen as sexist, it becomes very difficult to define the pornographic. Everything from fashion magazines to the paintings of the old masters could conceivably be seen to be in this category. Our fear, of course, is that if it is so difficult to define pornography, it is inevitable that attempts to define it in law for the purpose of censoring it will affect other areas such as social comment and artistic expression.

OFAVAS agrees that sexism and violence cannot be tolerated, and explains why censorship is not the answer.

But simply curtailing representations of these acts will not stop them from happening. It may even prevent people from discussing and understanding them. Censorship, by simply eliminating "objectionable" images, undermines public challenge and debate over the values which motivated their production. It attacks the symptoms, not the root cause. It is sex discrimination and hatred in the real world that hurts people and that must be stopped.

The solutions recommended by the Society include: a classification system which could be used to inform the public of the nature of material that might be harmful to minors or offensive to some adults; height and placement restrictions for magazines displayed in stores; and adult-only bookstores, if necessary.

It also makes recommendations designed to correct the present sexual inequality in the broadcast and film industry.

> We urge the Committee to recommend and support all affirmative action programs with respect to the training and hiring of women in both the broadcast and film industries. We recommend that the Committee stress to these industries the basic inequality present in a system of production which is dominated by a single gender of our population.
>
> We support the recommendations of the *Report of the Task Force on Sex-Role Stereotyping in the Broadcast Media*, ("Images of Women," CRTC, 1982), which calls for specific programming and media created and administered by women.
> *Ontario Film and Video Appreciation Society, Toronto*

10.2 Periodical and Video Distributors and Retailers

The views of distributors and retailers of periodicals and videotapes were presented to the Committee by the Periodical Distributors of Canada, Ottawa, and the Video Retailers Association of Canada Inc., Toronto, as well as a few individual retailers.

The Periodical Distributors, founded in 1942, said that it represented 37 Canadian-owned or controlled companies which distribute approximately 85 per cent of the magazines and paper back books sold in 12,000 local newsstands throughout Canada. They estimated that their sales are approximately $200 million annually.

In their brief, the distributors outlined their views on what Canadians would consider pornographic and denied any involvement in distributing such material.

> ... most Canadians would describe as pornographic, such hard-core material as that depicting, in an objectionable and most offensive manner, extremes of sexual behaviour, especially within the context of violence and forced submission of women.
>
> While PDC members cannot assume responsibility for everything which may be offered for sale at retail outlets, we can assure the Special Committee that we do not knowingly handle material which is obscene or, by any reasonable standard, pornographic. PDC members have exercised particular concern over the possible presence in the mass market of material which may be exploitative of sex and violence in combination. We believe that "violent pornography" is extremely rare on Canadian newsstands, and that what may exist, is not there as a result of having been distributed by PDC members.
> *Periodical Distributors of Canada, Ottawa*

The Video Retailers Association pointed out that the great majority of their retailers are business people anxious to maintain their reputation within their community. They agreed that the undue exploitation of violence, cruelty and sex should not be acceptable, but that their problem is in trying to define what is "undue." They stated that no one, not the police, the retailers' lawyers, the provincial boards of film censors or Canada Customs will provide guidance on what they can legally distribute.

They urged that standards should be established that would: be tolerable to the public; be clear and helpful to business and to law enforcement; be acceptable to private consumers; and be constitutionally workable.

10.3 Gay Rights Organizations

Several gay rights organizations presented briefs which emphasized that gay pornography is quite different from heterosexual pornography.

> Heterosexual pornography is often said to victimize women as a gender group, women depicted as submissive and passive receptacles of violence by male producers for male consumers. The same cannot be said of homosexual male pornography, however, in which gay male producers, models, and consumers all come from the same gender group and cultural community.
>
> The heterosexual male consumer, by virtue of his gender and place within patriarchal power relations, is automatically constrained to look at a woman in a sexual representation in terms of "otherness" and imposed objectification. In contrast, the homosexual male consumer, looking at gay sexual depictions, is offered a range of identification choices determined not by his gender but by his individual cultural and erotic predispositions. The argument that women as a group are victimized by heterosexual pornography has no equivalent argument with relation to gay pornography: in this sense, gay pornography is primarily a "victimless cultural phenomenon."
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Gay Cultural Workers provided an analysis of the difficulties faced by gays as a minority group in a predominantly heterosexual society.

> Culture is the texture of people's lives, the way a community communicates with itself and the outside world. The state should encourage and protect community cultures not suppress them. State suppression cannot erase a culture, only change its form, drive it underground or distort its language.
>
> As a minority characterized by its sexual orientation and sexual practices, the gay community has always had a flourishing tradition of erotic culture. Whether or not this has been underground or above-ground, written or oral, professional, ... or amateur, has depended on historical factors such as the tolerance of the state, the vigour of police persecution, and the degree of organization or concentration of the gay community.
>
> All gay culture, not only gay erotica, is stigmatized by the heterosexist mainstream as pornography and obscenity. Obscenity statutes have traditionally been an important means by which the state, the Church, and the police attempt to destroy our culture, in the Canadian context as in many others. Since the so-called decriminalization of sodomy by the 1969 Omnibus Bill, and since the emergence of above-ground gay communities in every Canadian city about the same time, this campaign against gay culture by means of obscenity statutes has not disappeared. On the contrary, it has ballooned, ...
>
> For centuries gay culture remained invisible, covert or underground ....
>
> Since the mid sixties our culture has emerged above ground. There exists across Canada a flourishing fabric of gay culture, all including an important erotic component: literature, bookstores, cinema, visual and performing arts, journalism and media ....

> Over the last fifteen years, the mass-produced erotic magazines have not been the only targets of the police (through enforcement of obscenity statutes, and through extra-legal harassment and prior censorship, Customs officials exercising censorship through highly subjective and undefined criteria), and other censorship bodies both official and unofficial. In fact, the more frequent targets of such attacks have been "legitimate" cultural manifestations, within all the categories listed above. The obscenity statutes permit not only the prosecution of our cultural products, including non-erotic print journalism, but create an atmosphere in which the equally dangerous unofficial and regulatory (non-criminal) censorship is encouraged, whether by provincial theatre boards, marauding morality squads, biased Customs officials, crusading private citizens, or puritanical television networks.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The major difficulty with the present obscenity sections of the *Criminal Code*, as far as the gay community is concerned, is the fact that the decision as to what is obscene is made by a judge, based upon "national community standards", and on the assumption that the judge knows what these standards are.

There are four problems with this:

1) Canada is made up of many diverse ethnic and cultural groups. A set national community does not exist.

2) Judges in Canada are appointed. They are not elected from a community to represent that community.

3) Though a gay community definitely exists, it is not limited to one geographic area. It is dispersed throughout a large country in which many community standards exist.

4) No judges are known to be openly gay.

> To have a judge rule over what is degrading and horrifying to a community of which he or she probably has very little understanding and insight is to leave that community very vulnerable .... The existing obscenity laws, ... have been used against the gay community. The proposed changes to the law [Bill C-19 of 1983] make it all the more dysfunctional and thus a much more powerful tool for abuse.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Gay Cultural Workers point out that if community standards are to continue to be the final test of what is obscene, the gay community should be allowed to define the standards for its own community.

> It must be remembered that commercial explicit depiction of homosexual practices are aimed at gays. For the most part, prurient heterosexuals will only see these materials if they make a conscious effort to seek them. For the majority, no matter how large, to decide what materials a minority sees and hears, especially when that material has not been proven to be harmful in any way to the majority, goes against the democratic tradition.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Committee was also urged to explore the idea of extending the hate literature sections of the *Criminal Code* to protect sexual minorities as well as visible minorities and women.

> Many elements within the gay community would welcome legal redress against the frequently vicious homophobic components of mainstream culture and the media (for example the film *Cruising* which many of us felt to be advocating violence against us in an explicit and degrading way) or against more obvious forms of hate literature such as the anti-gay pamphlet campaign that affected the 1980 Toronto municipal elections through lies and smears.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

Most gay groups called for the repeal of present obscenity legislation, some arguing against censorship of any kind, and others suggesting that a new section of the *Criminal Code* should be developed to deal specifically with pornography on the basis of sexual violence and not on the basis of sexual explicitness.

11. Conclusion

The public hearings were an important aspect of the work of the Special Committee. The well-researched briefs, presented by groups and individuals in every region of Canada and representing a wide diversity of opinion, were an invaluable contribution to the body of information collected by the Committee. We thank all of the participants who devoted many hours of their time for their help in the attempt to find acceptable solutions to the problems involved in pornography in Canada.

Chapter 6

Pornography in Canada Today

1. Introduction

As will be apparent from the preceding chapter, virtually everyone who appeared before the Committee or made a representation to it, had very strong views about pornography. While the majority of those making presentations found pornography to be too widely available, especially with respect to children, and the content of pornography to be abhorrent and despicable, there was a strong minority opinion stating that as awful as some of the pornography is, any moves by the state to ban or control access to the material would have worse consequences than the material itself being easily available.

The issues which were raised at the public hearings can be divided into three general areas: the increased availability of pornographic material; following from this, the implied increase in the number of people who are exposed, willingly or unwillingly, to such material; and thirdly, the harms to individuals and society as a consequence of the first two factors.

Those making representations to the Committee used a variety of sources of information to substantiate their arguments. Some groups had conducted their own surveys in their communities to see what sorts of materials were available and where; others reported on crimes or unacceptable forms of behaviour which appeared to be connected to the use of pornography. In addition, many people made reference to studies conducted by academic researchers which, they argued, supported the views and conclusions they had reached.

In this chapter we will analyze in some detail the evidence bearing on the three issues described above. The question of evidence is an important one. Canadians who wish to see more stringent controls on pornographic material, support this course of action because of the harms they see deriving from the widespread availability of pornography. Groups who are, in general, philosophically opposed to control and censorship, also indicated that controls would be acceptable to them if indeed significant harms were shown to result from use of such materials. Support for certain lines of action are, therefore, contingent on the strength of the arguments about increased availability, increased use and resulting harms.

In order to assist the Committee in its efforts to understand the current situation with respect to the availability and use of pornography in Canada today, the Department of Justice commissioned a number of studies on pornography. The studies fall into four general categories: 1) comparative studies, 2) specific issues within Canada, 3) a National Population Study, and 4) a review of the recent research.

The comparative studies involved an analysis of legislation and control practices in the United States, the United Kingdom, selected European and Commonwealth countries and other jurisdictions thought to be of interest.[1] The research was generally undertaken in conjunction with work on prostitution laws. Information was taken from published sources, interviews with selected officials, if possible, and reports on public attitudes towards the issues.

Within Canada, four empirical studies were commissioned on specific issues: provincial film censor boards,[2] the production of pornography in Canada,[3] a content analysis of triple x and adult videos[4] and an analysis of how selected newspapers covered pornography as an issue.[5]

In addition to these studies, a major element in the research was a National Population Study conducted in June and July, 1984.[6] A sample of 2,018 Canadians, representative of all parts of the country except the Yukon and Northwest Territories, answered questions about the availability of pornography in their communities, their use of such material and their preferences about whether or how the material should be controlled. Although it is difficult to study such complex issues as obscenity and its control in the relatively short time given to survey interviews, the results present some interesting information on Canadian views. As the first such large-scale project in Canada, however, the survey was something of a learning experience for all concerned. Because of this, not all the issues included in the survey were as well addressed as one would wish. The results should, therefore, be seen as one contribution to an understanding of these issues, and not a definitive statement on the topic.

The final project in the Department of Justice's research program was a review of the research literature from 1975 onwards.[7] The review examines the impact of pornography as presented by researchers in sociology, psychology, social psychology, criminology or related fields. Over 450 citations were examined and reported on. This review is very comprehensive and proved invaluable in assisting the Committee to gain an overview of all of the more current research in the area.

Although the Department of Justice's research has provided the Committee with most of its empirical information on pornography, the Committee itself was involved in the gathering of information other than through the public hearings. This information was typically collected through meetings and interviews with officials in various government departments and agencies, for example, Customs and Excise, the Royal Canadian Mounted Police, the Canadian Radio-Television and Telecommunications Commission

(C.R.T.C.), the Post Office, Department of Communications, and provincial film censorship or classification boards. Information from these sources has supplemented and complemented that gained through other means, and has been of significant help to the Committee.

The task of assimilating all the information presented to the Committee has not been an easy one. In the following discussion, however, we present what we believe to be the current situation in Canada with respect to pornography, its availability, use and harms.

2. The Availability of Pornographic Materials

When we consider pornographic material in Canada, we are dealing almost exclusively with material that is imported into the country, rather than material which is produced here. From the information we have it appears that a very small number of pornographic films are produced within Canada but that the production of other forms of pornography, for example, magazines and books is not undertaken for commercial purposes. The only obvious exception to this would be live shows in theatres and bars. Pornographic material coming into the country comes overwhelmingly from the United States. This is the case whether the material is magazines, films or videos. The only other identifiable source of material is European countries, but their contribution to the total volume is very much less than that of the United States. Importation of material and the role of the Customs and Excise and the R.C.M.P. in this regard is discussed in Section II of this Part.

Most people at the public hearings felt there to be an overwhelming pervasiveness of pornography in our society. We made our own attempts to discover what we could about the availability of pornography, rather than relying on these impressions, however forceful they may have been. We will document the basis of the Committee's conclusions on this issue, and in doing so, indicate the areas where our information is not nearly so clear or substantial as one would wish. While we conclude that there can be no doubt that in virtually all parts of the country, pornographic materials are indeed more widely available in 1985 than they were 15 years ago, this conclusion depends not on concise and comprehensive statistics, but on the piecing together of some statistics with indications, trends and general observations.

Research documenting the increased availability of pornography has become a matter of interest only recently. Indeed, until the completion of the research undertaken by the Committee on Sexual Offences against Children and Youths (Badgley Committee)[8] and the Department of Justice in support of our Committee, very little was known about the availability of pornography beyond the personal and anecdotal accounts of people concerned with the issue. The Report on Obscenity and Film Censorship (the Williams Report)[9] from the United Kingdom, points to a similar difficulty in documenting actual increases in the availability of pornographic materials, as do several studies from the United States.[10] It must be remembered, however, that some of the

work in the United Kingdom and the United States was completed before the introduction of pay television or the sudden explosion in the home ownership of video cassette recorders (VCRs).

Anecdotal accounts are, of course, an important source of information. They are, by no means, to be dismissed because they do not meet the current canons of social science research. Frequently, however, more information is required in order to be sure that one is not dealing with a highly aberrant situation. Nevertheless, it would be difficult to argue against the logic of the position that says that if some television stations are advertising adult entertainment and blue movies, and if films are now available on videotapes as well as in the theatres, pornography has indeed become increasingly available.

As indicated by the research conducted for the Badgley Committee, part of this increased accessibility occurs because more stores, and a wider range of stores, carry pornographic magazines and publications than previously.[11] Until relatively recently, pornographic materials were confined to a few stores in any city which were "known" to specialize in such materials. Now, a full range of the material is available in virtually any store which sells magazines. These include the thousands of corner or convenience stores used by people, including children, on a regular and frequent basis. Pornography is also more accessible in that it is not confined now to printed matter and films which can been seen only in theatres. Instead pornography is on television, particularly pay television, with the potential of being seen in virtually every home across the country. Where pay television is not accessible, the films can be seen on videotapes. Satellite transmission of signals is also starting to play a role in the distribution or pornography.

We know also that the print media and adult magazines are readily accessible not only to adults, but also to children, in every region. In the majority of instances, stores which sell adult magazines make no effort to segregate them from any other type of material. Although pornographic magazines are available throughout the country, there are some regional variations. Thus, the western provinces appear to have more of such material than do the eastern ones, with the exception of Québec. Québec is most like British Columbia in terms of the pornography available in its stores, leading to the conclusion that these two provinces are the most permissive with respect to sexually explicit material.

The information reported by the Badgley Committee is confirmed by the information from the National Population Study, in that 73% of the respondents were aware that adult magazines, movies and videos were available in their communities. Close to three-quarters of those participating in the survey concluded that pornography is easily available to anyone who wishes to see it.[12]

With respect to magazines, therefore, we are on firm ground in asserting that such magazines are more accessible than before, and that there has been a substantial increase in their sales over the past 16 years or so. The Badgley

Committee has the most comprehensive and extensive research to date on the availability and circulation of pornographic magazines in Canada.[13] They report that the circulation figures for 17 different magazines for the period 1965-1981 are 3.5 times higher per capita in 1981 than they were in 1965. In 1981 each Canadian bought 0.556 magazines, compared to 0.183 in 1965, with males, in particular, increasing their consumption from 0.364 magazines in 1965 to 1.121 in 1981.

It is undoubtedly the case that the increased availability of pornography, particularly of magazines, is related in part to an increase in the production of such magazines and their importation into Canada. By the 1980s the number of different titles had risen to 540, representing a sharp increase over the past 20 years. While it should be noted that many of these magazines publish only one issue so that the great increase in titles cannot necessarily be equated to an equally overwhelming increase in materials, the general conclusion has to be that more pornographic magazines are now being published than previously.

All the evidence which the Committee has considered leads to the conclusion we stated above that pornography is far more available today than it was 10 or 15 years ago. This availability results from the use of all forms of media, from an increased production in some forms, if not all, and from a distribution network that has increased significantly in size to take in a far wider variety of outlets than previously. Pornography is certainly part of the content of every form of the media and is easily available in every part of the country.

3. The Use of Pornography

The question of whether more people are actually using pornography is not, however, so easily answered. We lack consumer information from previous years, and are not able to make the necessary comparisons between the numbers of people who bought or saw pornography then and those who do so now. Circulation figures for magazines have clearly increased but this does not necessarily mean that more people are buying the magazines. Instead, it could mean that the same number of people who bought magazines in 1965, for instance, are now buying more because there is a greater variety of material available. Accordingly we must ask whether the increased availability of magazines results in a broader dissemination or in a greater concentration in use of the materials.

The information we have does not allow us to give an unequivocal answer to that question. Both trends seem to be occurring but we cannot be precise about the extent of either. The significance of the inquiry about consumption lies in people's theories about why pornography is harmful. The concerns we heard most often at the public hearings were that, for adults, exposure to or use of pornography beyond a certain point was harmful to the individual, groups in society and society as a whole. Implicit in the argument is that the amount of material which a person sees is a relevant consideration in determining whether

harm takes place. It is thought unlikely that an adult looking at one pornographic magazine or video would be harmed irretrievably, whereas, an adult, seeing this material to the virtual exclusion of all other forms of entertainment will develop a corrupted view of human relations. Somewhere between these two extremes, it is assumed that the average Canadian is likely to be harmed when the quantity of material used crosses the threshold between not being harmful and being harmful. The amount of material used is, therefore, crucial to the debate over whether a person is harmed by the material and may then go on to harm others.

There is also a view that a large number of people will be adversely affected by pornography that is pervasive. This argument focuses not on the heavy use of pornography by a few, but rather on use, beyond an acceptable level, by a large number of people. The effects of this pervasiveness theory are twofold. On the one hand, it is argued that the users themselves will be harmed because they acquire from pornography a distorted view. On the other hand, it is argued that harm will be suffered by the group that is portrayed in the material. Generalization of these portrayals throughout society will cause others to think of all members of the group in the way they think of those portrayed.

These different theories about the harms of pornography give rise to different suggestions about how best to deal with it. Thus, the Committee has had to contend with these different theories, as well with the related problem of what it is that people are actually seeing.

From the National Population Survey we know that 11% of Canadians over 18 years old (somewhat over two million individuals), bought at least one "adult entertainment magazine" in the preceding 12 months, i.e., sometime between June/July 1983 and June/July 1984. Men outnumber women buyers by a ratio of 3:1. A further 32%, or nearly 6 million individuals, did not buy a magazine but did leaf through or read one at least once during the previous year, with men again being far more likely to do so than women.

Apart from revealing that the consumer is likely to be male, the survey data indicated that the consumer has a number of characteristics which differentiate him from the non-consumer, although it is difficult to interpret why certain attributes might lead a person to buy magazines of this kind. All we can say at this stage is that those with less than eight years of education buy fewer magazines than those with more education; the unemployed are over-represented among those who buy the magazines; there is a tendency for young people to outnumber older buyers, for the single to outnumber the married and for consumers to come from Ontario and the West rather than Québec and the Atlantic region.[14] Clearly we need considerably more research before we can be confident in talking about the buyers of such magazines. Such research must address questions like why people buy these magazines, whether they buy only one or several, for how many years they buy them, and a whole host of similar questions relating to consumer motivation and behaviour.

The usage statistics of adult-only videotapes are virtually identical with those relating to the use of adult entertainment magazines, according to the National Population Study. Twelve percent of Canadians had bought or rented such videotapes in the previous year.

Although magazines and videos are often cited as the media which people use if they are seeking pornography, in fact most Canadians see on television what the National Population Study termed "adult entertainment". Of the respondents to that survey, 57 percent said they had seen television programs showing nude adults at least once during the previous 12 months, 43% had seen programs containing scenes of heterosexual intercourse, 57% sex combined with violence and 67% sexual activity between people of the same sex.

While these data indicate the wide use of adult entertainment, caution is necessary in their interpretation. As will have been evident from the way in which the results have been presented, the survey dealt with what was termed "adult entertainment" and not pornography. Adult entertainment is probably a broader term than pornography in the minds of most people, and as we have outlined in a previous chapter, pornography itself has many connotations in everyday usage. The terminology used in the National Population Study, then, means that we cannot conclude from the survey anything about the use of the sort of pornography featuring images of perversion or degradation, in comparison with other categories of adult material. Indeed, it may well be the case that some of the material within the category of "adult entertainment", while being inappropriate for children, could actually be considered erotica because it does not demean the nature of sexuality.

The only indication we have of the sort of material the respondents had in mind when answering the questions is in relation to magazines. As is confirmed from circulation figures, *Penthouse* and *Playboy* are the magazines bought most often, by 39% and 30% respectively of the respondents, followed by *Playgirl* (8%) *Hustler (6%)*, then a whole variety of other magazines (7%). *Playboy* is read or leafed though by 38% of respondents, *Penthouse* by 23%, *Hustler* by 7%, *Playgirl* by 6%, and other magazines by 7%. These figures illustrate the overwhelming significance of *Penthouse* and *Playboy*. Whether or not one considers their content acceptable they are certainly the ones that most people see.

Although we can gain some indication of the total number of people who have been exposed to adult entertainment from the National Population Study and magazine circulation figures, we still do not have much information about actual patterns of consumption. We do not know, for example, the extent to which the same individuals buy the different magazines, producing a high concentration of usage rather than a widely dispersed but less intense exposure. For instance, the Badgley Report confirms that *Penthouse* and *Playboy* are the best selling magazines in Canada with monthly sales of 500,000 and 300,000 respectively. But we do not know whether 800,000 different Canadians each buy a copy of these magazines, or whether 300,000 of the half million people

who buy *Penthouse* also buy *Playboy*, or the exact extent of the overlap between buyers of one pornographic magazine and the buyers of another.

Nor are we very informed about the frequency with which individuals buy pornography. The survey figures indicate the numbers who have bought at least one magazine in the past 12 months but do not inform us of the numbers who buy such material every week or every month. Similarly, circulation figures such as those included in the Badgley Report tell us how many magazines are being bought in a month but not whether the same or different people buy them each month.

If one looks for information on the overlap between magazine users and users of other forms of the media, the only data available are from the National Population Study. While the figures reflect the influence of television, there is some overlap in the use of the different media. It is also noticeable that while nearly a third of the respondents use or see no adult entertainment material at all, two thirds do use or see such material. (See Table 1)[15]

Table 1
Use of Adult Entertainment Magazines,
Videos, and/or Television

Material Used	Percentage
None	31.5
Magazines only	6.8
Videos only	1.2
Television only	30.6
Videos & Magazines	1.4
Videos & Television	3.0
Magazines & Television	16.7
Videos, Magazines & Television	5.7
No Answer	3.1
TOTAL	100.0

The wide dissemination and viewing of sexually explicit material thus appears to be a well-established fact. Because of the terminology used in the National Population Study, we do not know whether all of this material would be pornographic in the way we have described that term in chapter 1 of this Section. Certainly we have received complaints during the public hearings about the content of *Playboy* and *Penthouse*. Similarly, we cannot answer whether the viewing of such material has reached a level which could be considered detrimental to either the general population or specific groups of individuals. The answers to these questions rest in part on our understanding of how pornography affects people, a topic which will be discussed later in this chapter. Before doing so, however, we must give further consideration to the content of the material being seen.

4. The Content of Pornography

The question most closely tied to the issue of who is consuming pornographic material is the question of exactly what it is they are seeing. That is, what is the actual content of the depictions or texts? This issue is of central concern in any debate about the value or harm to be attached to pornography. Again, however, the research literature is disappointing.[16]

Generally, studies have been confined to a limited number or type of magazines, and to short time periods in terms of comparison. As with other research on pornography, what is termed pornography can vary considerably from one study to another. It is also significant to note that given the importance of television as a source of adult entertainment, studies of the content of television programs available in Canada, and in particular, longitudinal studies which could document any change in content, are rare.

The research which has been conducted on magazines and videos does not confirm the overwhelmingly awful picture presented by some groups and individuals in their briefs to the Committee. We recognize, of course, that for some people, any film or magazine with a theme of sexual violence is one too many. But the view that large amounts of violent pornography or child pornography are being consumed is not substantiated by the research. Again, one can well argue that the pornography which is available does indeed portray women as degraded, sexual objects and that this is as harmful as portrayals of sexual violence. But, the idea that a great deal of the pornography has taken on the worst possible characteristics of the genre is unconfirmed at this time.

The Badgley Report, in a content analysis of the texts and pictorials of 11 popular adult magazines which were published in June, 1983,[17] stated that most of the depictions are of totally or partially unclothed women in positions which expose their genitalia. Violent images and themes were found in 1.3% of the pictorials and 4.1% of the texts. Children were not depicted in the pictorials but were part of the texts (4%) and of the advertisements (10%). Clearly, violent and child pornography is present but is not an overwhelming theme in these magazines.

It should, perhaps, be no surprise that the content of pornographic magazines changes as does the content of other media. What is difficult to know, however, is what pornography is changing from and to what. Again, we have to conclude that at this time we simply do not know.

The study which is most widely cited in support of the view that there is increasing violence in pornography is that conducted by Malamuth and Spinner.[18] These researchers analyzed the pictorials and cartoons of *Playboy* and *Penthouse* from June 1973 to December 1977. They found that violent images had increased, but that they did not in any event exceed 10% of all

cartoons and 5% of photographs and drawings. The change in content that Malamuth and Spinner reported is both minimal and marginal and could be accounted for by many other variables than simply an escalation in the violent content of the magazines. Again, the research does not lead us to any firm conclusions on the trends in the material.

Consider, also for example, some of the changes in content which may not be related to questions of violence. A 1982 study by Dietz[19] of 1,760 heterosexual pornographic magazine cover photographs stated that in 1970, lone women were the subjects of the majority of cover pictures whereas by 1981, this was the case for only 10.7%. Apart from the 1981 covers which could be said to display normal heterosexual relations between one woman and one man (57.9%), 17.2% portrayed scenes of bondage and domination (perhaps evidence of increased violence although sado-masochism is not necessarily exploitative), 9.8% group scenes and 4.4% transvestism or transsexualism.

What such changes in content indicate is difficult to interpret. The disappearance of lone women from pornographic magazine covers might be a positive development if it is interpreted as an indication that women are coming to be seen not just as sexual objects to be observed. There is some sense of context in that other people are included. On the other hand, the increased representation of the more extreme forms of sexual behaviour is not reassuring. Similarly, the notion that pornographic comics portray women as having the same sexual desires as men, could be regarded as positive by some who see it as an egalitarian approach.[20] Others, however, would argue that this denies the real nature of women's sexuality, particularly where depictions of male sexuality stress impersonality or aggression.

The one other area where we have some information with respect to content is video-cassettes. A study conducted for the Department of Justice in the lower mainland of British Columbia analyzed 150 videos, 58 rated as adult, restricted or x rated by the stores from which they were rented and 92 triple x rated.[21] This area of British Columbia has achieved a reputation as a major source of pornographic material and as an area where the more extreme varieties of sexually explicit material are available. It was believed, therefore, that in studying videos available in the lower mainland, some of the most extreme material available in Canada would be analyzed.

It was assumed that the "adult" videos would be less explicit and extreme in terms of their depiction of sexual and violent activities than the triple x videos. Having completed their analysis of the videos, however, the researchers conclude that the basis of the distinction between adult and triple x videos is not particularly clear. The 150 videos contained 4,203 separate scenes. An analysis of the scenes resulted in 50% (2,101) being excluded from further consideration because they did not include any sex, aggression and/or sexual aggression. Of the 2,102 scenes which did contain these elements, the following distribution was found:

Table 2

Classification of Video Scenes by Content

Scene	% of scenes coded	% of all scenes
Sex	77.4	38.7
Aggression	18.7	9.4
Sexual Aggression	12.7	6.3
Other	—	50.0
N	(2,102)	(2,101)

(Note: the scenes total more than 100% because some scenes contained more than one element.)

While adult videos could be considered less extreme in that they contained fewer scenes involving sex, aggression or sexual aggression than did triple x videos, there was a clear increase over time in the depiction of sex scenes in the adult category. The triple x videos contained more sex scenes than the adult videos, although the number of these scenes decreased over time. The triple x videos also contained sex scenes that were considerably more positive than the scenes in the adult videos. That is, the participants were there by mutual consent and appeared to be enjoying the activity. This latter finding was contrary to the expectation that the triple x videos would contain the most dehumanized depictions of human behaviour.

Distinctions between the two types of videos are consequently difficult to make. While both types of videos do contain scenes of sexual aggression, violence and domination are not predominant themes. Rather, mechanical sexual relations, i.e. an absence of affection, love or passion and a concentration on the pure mechanics of sex between two adults of the opposite sex were by far the most common portrayals. None of the films involved children and only one percent and two percent of the adult and triple x films respectively involved those who were apparently teenagers. Further, the adult videos contained more scenes of aggression and particularly physical aggression than the triple x.

The incompleteness of the available research makes it difficult to reach any conclusions about the content of pornographic material. Certainly, there are depictions which the vast majority of Canadians would find completely unacceptable. These depictions appear, however, to be in a minority. About the majority of the depictions, there would be much more debate. The trends in the content of pornographic material are also hard to detect and equally difficult to interpret. The material is changing, but whether for the better or the worse is, as we have remarked, a matter of judgment.

5. Pornography and Harms

The concerns about the increased availability of pornography, its use by a wider range of people and the nature of current pornographic material, come together at the point of discussing the impact or harms that may be associated with pornography.

The debate about the harmful consequences of pornography is perhaps one of the most contentious and difficult debates of our time.[22] People hold very strong views about the harm that pornography causes. They argue that pornography is to be deplored simply for portraying people in an inhuman way or because it invites consumers of pornography to imitate the inhuman behaviour portrayed. In the latter instance, it is argued, non-consumers of pornography, especially women and children, are often victims of the consumers who want to act out the fantasies they see in pornographic material. Further, the argument runs, we are all victimized to the extent that a society which condones the portrayal of people in such degrading and inhuman ways is a society whose values are, at the very least, questionable. The exploitation of one group of people for the gratification and entertainment of another and for the gratification of the more extreme sexual desires of men is surely not consistent with the type or quality of society we would like to see and develop.

Against these arguments, it is maintained that pornography has not been demonstrably and systematically linked to individual, group or social harms. Until such a linkage is demonstrated and supported by reasonable evidence, the dangers of invoking strict control of the material or of censorship, outweigh the potential, but unproven, harmful impacts of pornographic material. It is suggested that those who consume pornography are, like consumers of other mass media, only too well aware of the fantasy involved in pornography. Thus pornography does not cause or encourage people to act in inhuman ways. Indeed, the argument is also made that the material has a cathartic effect, allowing individuals to vent their anger and hostility vicariously. To the extent that such is the case, then pornography is not only harmless but actually beneficial to individuals and society.

It has also been suggested that the prevalent fascination with pornography is a reflection of our unease with ourselves as sexual beings. The past 20 years has seen the culmination of significant change in the sexual mores of large numbers of people within Canadian society. This has by no means been an easy transition or one with which everyone agrees, and the debate over the causes and consequences of pornography in many ways typifies the fundamental disagreements and disputes over sexual behaviour and values.

For some, pornography is merely an aberration associated with an opening up of a formerly repressed and little understood area of our lives. This line of reasoning suggests that pornography will disappear as we move to a more complete and thorough understanding of our sexuality. In its place we will see an increase in erotic literature, the portrayal of sexual activities which are mutually pleasurable and represent the exercise of real choice by each of the partners. In the meantime, the dangers associated with attempting to censor the content of the mass media are greater than the supposed harms that result from the availability of pornography.

For others, the pornography which is available today is so abhorrent and harmful that immediate action is needed to prevent or curtail access to it.

Governments are called upon to pass legislation which would allow for the effective control of what is seen to be extremely offensive and harmful material.

Our concern has been to determine whether or not all the available evidence would lead us to support one of these views rather than the other in the debate about the impacts of pornography. Although certain aspects of the issue are more amenable to empirical study than others, we recognize that academic researchers have been for some time now addressing the question of the impacts of pornography, and in particular, the harms which might be associated with its availability and use.

We have noticed, however, in the course of the public hearings, two distinct schools of thought about what research data must show in order to justify legislative action on pornography.

Those who see freedom of speech as the highest value argue that the data must demonstrate that concrete harm to individuals is caused by pornography, in order to support controls on it. They reject the idea that controls can be justified by a showing of some generalized harm, or by showing (or arguing) that pornography impairs the realization of other social values. Thus, they reject the contention of the conservatives that controls can be justified because pornography fosters disintegration of the moral values of society, the place of the family, and the sanctity of marital sexual relations. They also reject the contention of feminists that controls on pornography can be justified because pornography impedes the realization of equality for women and diminishes their humanity.

The advocates of free speech as the highest social value thus take a distinct position on what research should demonstrate. They also are firm about how they think the harm should be demonstrated. Their expectations are that before legislative action can be justified, there must be a clear or definite showing of the link between pornography and measurable harm to individuals. When measured against these two standards, the existing research, not surprisingly, falls short. There has been considerable research on the pornography harms issue, but most of it has occurred in the last 15 years, inspired at least in part by the publication of the U.S. Commission on Obscenity and Pornography[23] and the tremendous controversy it generated. As we elaborate below, this research has, as yet, given us few firm conclusions about what actual harms can be attributed to pornography. Clearly, to satisfy those who adhere to what we have previously described as the liberal philosophical view, the research must become more systematic and co-ordinated.

Let us now consider a quite different point of departure for regarding the work of pornography researchers. The basis for this other view is not the guarantee of freedom of expression which is now embodied in section 2(b) of the *Charter of Rights*. Rather it is the guarantee of equality which is found in sections 15 and 28. In particular, the point is made that these two provisions

guarantee to women equality with men, including the right to the equal protection and the equal benefit of the law.

Proponents of this view argue that pornography undermines this guarantee, by portraying women as less than human, demeaned, and subordinate. They cite the impairment of the guarantee of equality as itself a harm done by pornography, reasoning that a society which accepts and fosters the portrayal of women in this fashion cannot in fact be committed to the realization of their equality. The more the pornographic message is tolerated, by, for example, refusals to penalize its most odious expressions or to control its dissemination, the longer will our efforts to realize equality be delayed.

Those who choose the equality guarantee as their point of departure approach the question of what the data should show to justify legislative intervention in quite a different way than do those who reason from the freedom of speech premise. They point out that those who seek to assert the freedom to voice virulent anti-egalitarian sentiments or purvey such images should be called upon to show that the messages do not harm the equality principle. They say that the data on pornography to date have demonstrated no beneficial effects of pornography: given that it cannot be shown to be useful, and does convey a demeaning message that inhibits equality, it is deserving of very little constitutional protection. These arguments entail the clear suggestion that the level of constitutional protection afforded to messages that are *prima facie* anti-egalitarian, would increase to the extent that such material could be shown to have a countervailing beneficial purpose.

The proponents of this equality approach are, of course, more tolerant of the existing shortcomings of empirical research about the actual harms to individuals of pornographic material. They point out that the momentum of such research is in the direction of being able to show harms, and that by contrast there is no research documenting the beneficial effects of pornography. Therefore, on balance, there has been some empirical showing which supports the argument in principle.

The differences between these two approaches to the data are quite striking. The egalitarian approach does not require that the whole burden of justifying legislation should fall upon the research data; the libertarian approach does. Moreover, the libertarian approach imposes, in effect, a very high burden of proof before the data will be taken, in the words of section 1 of the *Charter of Rights*, demonstrably to justify incursions on freedom of expression. By contrast, the egalitarian approach regards the issue of harm (and consequently justification for restraint) as resolved at least in part by the theoretical argument, coupled with empirical observation about the nature and impression of pornographic messages. Thus, its expectations about the amount and nature of empirical evidence supporting controls on pornography are not as stringent as those of the libertarians.

It is quite evident, however, that the bulk of the research on pornography has been conducted in order to address the question of harms associated with

exposure to pornography. Studies demonstrating that pornography does not impede women's equality rights, for instance, are as far as we could determine, non-existent. In recasting the question to be studied we are, therefore, opening up a new area to be researched. In the meantime, we must consider the research which is available in order to understand what it says about the impacts of pornography.

Although the Committee was frequently told that research studies clearly demonstrate that harms to society and to individuals were associated with the availability and use of pornography, we have had to conclude, very reluctantly, that the available research is of very limited use in addressing these questions. We want to articulate our position very clearly: the Committee is not prepared to state, *solely on the basis of the evidence and research it has seen*, that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and society. Pornography may, indeed, be a prime factor in each of the undesirable consequences mentioned but, *based solely on the evidence we have considered*, we cannot at this time conclude that such is the case.

This conclusion appears to run counter to what a great many people argued in their briefs to the Committee. Yet it seems to follow from a careful analysis of the research. We consider, however, that it is extremely important to note that this conclusion is drawn, not because the research positively demonstrates the lack of linkages between pornography and anti-social behaviour, or that pornography causes positive outcomes, but because the research is so inadequate and chaotic that no consistent body of information has been established. We know very well that individual studies demonstrate harmful or positive results from the use of pornography. However, overall, the results of the research are contradictory or inconclusive.

There are several reasons why the existing research is so unhelpful in the debate about pornography. Perhaps most fundamentally, the various researchers proceed upon different definitions of pornography. Thus, when one attempts to make comparisons between studies or to draw together the conclusions of several pieces of research, one finds that one is not dealing with a constant phenomenon. Some definitions are so specialized to the experimental situation of which they are part that they have virtually no use in other contexts. Other definitions are so general that they are essentially unusable in everyday situations or when one is attempting to draft legislation which will control those elements which are seen to be undesirable.

Definitions of pornography in the research literature include the portrayal of a whole range of explicit sexual acts, sometimes without any violence involved; sex and violence; violence without sex; and a large number of contextual factors, all of which can affect the definition of the material as pornographic.[24] There is, therefore, no accumulated body of research which deals consistently with the same phenomenon. Rather, we have hundreds of pieces of research each dealing with portrayals of a discrete form of behaviour.

The limitations of the research also arise out of the methodology used in many studies. A great deal of the research relating to pornography has been conducted using the standard experimental designs and techniques of social psychologists. Such studies are typically designed to answer the question "What effect, if any, does the viewing of pornographic material have on the viewer?" The research attempts to provide the answer to questions about the consumption of pornography in general by studying the response of those in the experimental situation, typically male university undergraduates.

All research conducted through such experimental methods confronts two problems. Firstly, can the researchers be sure that the change in the person is indeed caused by the designated stimulus, in this case the viewing of pornography? Secondly, even knowing how the subjects in the experiment reacted, what does this allow us to say about the population in general? There is, we acknowledge, some comfort to be taken from the research methodology. Researchers' confidence about the causes of attitudinal changes increases to the extent that they find people reacting in similar ways as experiments are repeated with new subjects. Similarly, the extrapolation of experimental results to people outside the experiments proceeds with more confidence when the researchers have a good theoretical understanding of why, for instance, people's attitudes may change in the way they do. Once one understands why something is occurring then one is better able to describe what sorts of people may react in a particular way under particular circumstances.

Unfortunately, the research on pornography does not demonstrate a high level of consistency of results between different experimental situations. In addition, attempts to integrate research findings into more systematic explanatory systems are few and far between.

It will also be apparent that the type of research discussed above can address only certain sorts of issues. Thus the research is typically designed to investigate the effects of seeing a considerable amount of pornography in a relatively short time. The effects which are measured are usually changes in attitude that are apparent immediately or a short time after viewing the material. Such research cannot address the effects of consuming pornography over long periods of time, for instance, whether there is a cumulative effect as people read and see pornography over months and years. Nor can it deal adequately with the issue of whether specific attitudes or changes in attitudes are related to subsequent behaviour. Holding a particular attitude may be a prerequisite to acting in a specific way. We know, however, that people do not always act in the way predicted because there are all sorts of other factors which intervene. The relationship between attitudes and behaviour is, after all, not a simple one.

A further issue not readily amenable to research in the laboratory, is that of the impact of pornography on people who may not be considered an "average Canadian adult". Such people may be especially vulnerable to the messages contained in the material. Children fit this category, but it will be obvious that for ethical reasons one cannot expose children to large doses of

pornography for experimental purposes, in case it does indeed adversely affect their attitudes and behaviour. A second category is people who may already be predisposed towards violent sexual behaviour who find in pornography the ideas or legitimation for the acts they wish to perpetrate. Again, these people will not be found in laboratory experiments because of ethical considerations and because typically, we have no way of identifying the potentially violent until they are indeed violent. The effects of pornography on such people, therefore, remain unknown and will have to be investigated by means other than laboratory research, something which is yet to be done on any extensive or systematic basis. The small amount of evidence we have available so far is, again, inconclusive.

There are reports that some children who are sexually abused are required to perform in ways depicted in adult pornography. Similarly, some reports from battered women indicate that their husbands use pornography and that they expect their wives to imitate the behaviour portrayed. Research in these areas is relatively new, and it does not seem that the question of whether pornography is a precipitating factor in the illegal or anti-social behaviour has often been included in the research studies.[25] While we might expect that it will be included in the future, the untangling of what may be causal or predisposing factors versus factors which are present but simply coincidental to the behaviour being studied, will be difficult. The same argument can be made with respect to those convicted of sexual crimes. The question of whether pornography is a factor in their crimes has not been fully studied and requires further attention.[26] As with so many other areas within the pornography debate, we have to conclude that we do not know at this time whether pornography is or is not linked to various forms of behaviour.

The discussion about the relationship between pornography and sex crimes has been long, acrimonious and inconclusive.[27] Most of this debate has focused on the correlation between the increased availability of pornography and the increase in sex crimes, rather than an analysis of the behaviour of sex offenders. Correlational research is fraught with difficulties. As we have indicated earlier in the chapter, describing and documenting the increased availability and use of pornography is no easy task. Given the difficulty of dealing with definitions of sex crimes which change over time, and the problems of the under-reporting of crimes, it is evident that documenting the rise and fall in sex crimes is equally problematic. Any undertaking which depends on putting these two very difficult areas together is obviously going to give very speculative results. In view of this, it is not surprising that most discussions of the issue conclude that the evidence for the supposed relationship between the increase in pornography and the increase in sex crimes, is not conclusive.

As suggested earlier, social-psychological research does not address the issue of long-term use of pornography. In particular, the issue of relatively low levels of exposure or use of the material over long periods of time is not amenable to experimental research. And yet, it is possible that this sort of use is characteristic of most people. Leafing through *Penthouse* or *Hustler* at the

barber's, or watching the occasional adult movie on television, may be as much pornography as many Canadians see. Does this sort of use and the fact that we may be aware of the magazines in the corner grocery, lead us to accept and take for granted the themes portrayed in the material and in so doing, cause subtle shifts in our values and views about human relationships? We do not know. Here again there are enormous difficulties in separating out what value, attitudinal or behavioural changes are occurring and then attempting out of all the experiences people have, to determine whether or not pornography is a significant factor. On the one hand, the mass media are enormously influential in our lives. Advertisers, as a group, spend large amounts of money to try to change aspects of our behaviour. Whether all aspects of our behaviour are equally susceptible to change and whether our values, for example, about human dignity or equality, are also likely to shift as a consequence of seeing certain types of material in the media, are issues in need of study. Yet again, our current information is inconclusive.

Perhaps the most central issue of all which requires attention is that of defining what it is that makes material pornographic. While many studies concentrate on the effects or impacts of pornography, few deal with the question of what pornography is. The question needs careful and systematic consideration because if pornography is indeed in the eye of the beholder, as opposed to being definable in relatively precise and clear terms, then the issue of harm to individuals and society becomes increasingly difficult to address.

As we suggested earlier in the chapter, some issues in the pornography debate are not amenable to the sort of empirical research we have so far been discussing. The issue of harm to the values which we believe should be the foundation of Canadian society is a case in point and of particular importance.

While Canadian society is an amalgam of different cultures and traditions, we believe that the philosophical principles we have discussed in the first part of our report have the strong support of Canadians. These values address the fundamental nature of human beings and the sort of society which we consider generations of Canadians have been striving to achieve: sometimes successfully and sometimes not. Our social, economic and legal programs are directed towards our attaining a society in which these fundamental values are not only supported but actually reflected in the lives our citizens are able to lead. Anything, therefore, which is seen to undermine or work against this possibility has to be considered very carefully. Is the matter in question undermining the values we espouse and, if so, what course of action should be undertaken to stop or overcome the trend?

While the question of support for common fundamental values in Canadian society can be pursued through sensitive and well-designed empirical research, there has been no such research to date. In part, therefore, our statement that the values are supported rests on what we ourselves believe to be the guiding principles of Canadian society, demonstrated through official statements and action over the years and inferred from what people told us at the public hearings.

The second part of the argument, whether pornography undermines or inhibits the achievement of these values is the crux of the matter. The answer depends on how one reconciles conflict between fundamental values like equality on the one hand and freedom of speech on the other.

In the view of the Committee, there are magazines, films and videos produced solely for the purpose of entertainment whose depiction of women in particular, but also, in some cases, men and young people, demeans them, perpetuates lies about aspects of their humanity and denies the validity of their aspirations to be treated as full and equal citizens within the community.

We agree with the Justice and Legal Affairs Committee's statement made in 1978:

> This material is exploitive of women - they are portrayed as passive victims who derive limitless pleasure from inflicted pain, and from subjugation to acts of violence, humiliation and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in minute detail.[28]

Because of the seriousness of the impacts of this sort of pornography on the fundamental values of Canadians, we are prepared to recommend that the *Criminal Code* has an important role to play in defining what material may be available within our society. Where it is not so clear that the material has the impact described above, we are suggesting instead of criminal prohibition more restricted access than is currently the case. Our proposals and the rationale for them are described in detail in the next chapter.

6. Views About Pornography

Data from the National Population Survey indicate that Canadians have widely differing views of what they would term acceptable or unacceptable material. In part, each view rests on the content of the material but it also depends heavily on who might be watching or seeing the material and the way in which the material is presented. Many Canadians appear relatively conservative in terms of the material they define as unacceptable, in allowing access to the material and in the methods they support for controlling the material. These opinions are not, however, by any means unanimous and just as one finds Canadians who would like a very restrictive regime with regard to sexually explicit materials, so there are other Canadians who contend that individuals should be free to produce, distribute and use such materials, unless others are demonstrably harmed in the process.

The following table gives an overview of the respondents' feelings about the acceptability of certain types of material.

Table 3[29]

Level of Acceptability
Towards Sexually Explicit Material

	Extent of Agreement		
Statement	Agree	Neither	Disagree
All sexually explict material for adult entertainment is obscene	31%	23%	42%
Sex magazines are unacceptable in our society	45	18	35
Use of sexually explicit materials by adults is unacceptable	32	20	43
Everyone has the right to view sexually explicit material as long as it is done in private	66	15	16
Everyone has the right to produce sexually explicit materials so long as it does not hurt anyone	32	15	50

Overall, one has to conclude that Canadians are quite evenly divided in their opinions of what is acceptable and unacceptable. There is, however, stronger support for the view that people have a right to *see* sexually explicit material than they have the right to *produce* it. Table 3 gives us only a very broad view of the material which is acceptable or unacceptable. Not surprisingly, the acceptability of material depends on its specific content and the potential audience. Whether the material is available in magazines, on film or on television has little impact on the level of acceptance although there is support for specific action related to each of the media. In terms of content, respondents rated material which contained sex and violence most unacceptable, followed by homosexual intercourse, heterosexual intercourse and one or more nude men. Material containing one or more nude women was rated the most acceptable. While respondents thought viewing by themselves or other adults as reasonably acceptable, they were strongly oppposed to children being allowed to view the material.[30]

A majority of the respondents think that pornography is a problem in Canada (59%), although not as significant a problem as other social and economic issues. Indeed, only 1% of the respondents indicated that pornography is a major problem. Nevertheless, people hold very decided views about the harms associated with the use of pornography. That the viewing of violent sexual material leads people to commit acts of violence is believed by 69% of the respondents, and 48% of respondents believe that people imitate in real life the scenes they see in the violent sexual material. In addition, respondents were of the opinion that sexually explicit magazines are degrading to women (67%) and more degrading to women than men (66%).[31]

As may be expected, respondents' views on the control of pornographic material vary in accordance with their level of acceptance of such material.[32] While most people (59%) thought that the government had to take the lead role in controlling sexually explicit material, this view was held most strongly by those who found the material particularly unacceptable. Conversely, those who are more accepting of the material tend to favour personal or family

discretion. There is, however, a strong sentiment, held by two-thirds of the respondents, that the police and censor boards should have more power to deal with sexually explicit material.

Respondents generally favour greater control by authorities when the material is considered to be more extreme, for example, violent sexual scenes. Some 38% of respondents suggest that magazines containing sexual violence should be banned. Thirty-one percent suggest that such films should not be allowed on television at times when children and juveniles are likely to be part of the audience and a further 25% would ban the material altogether from this medium. Similar responses are found in relation to films in movie theatres, with 36% of the respondents suggesting that such movies be banned entirely. Only when works in art galleries are considered do the respondents opt clearly for less restrictive measures and prefer family discretion. The following table summarizes responses to different types of material in the media. While indicating a preference for more control over the material being exercised, it is also apparent that respondents want to limit the access of children to such material and feel that warnings about the nature of the material should be given. Responses to the question of control and access to pornography are shown in Table 4.

Given the diversity of opinion on many aspects of the issue, it is apparent that any recommendations on the control and accessiblity of pornography will be controversial. Although nearly three-quarters of the respondents thought it very important that action be taken to deal with violent sexual material and material to which children might have access, consensus over how exactly to deal with these two issues does not exist at this time.

Table 4[33]
Actions to Deal with Sexually Explicit Scenes in Different Media

Scene and Media	Nothing/ Personal or Family Discretion	Remove Offensive Parts	Forbid Presentation Access/ Selling to Children	Advertise It May Offend	Fine or Jail Producer	Ban Such Material	No Answer
Violent sexual scenes shown in magazines	9%	14%	13%	13%	4%	38%	9%
Sexual intercourse between two adults of the same sex in entertainment magazines	13	9	18	13	4	35	8
Entertainment magazines, which could be sold at a local store or newsstand, which include pictures of nude men	19	7	34	11	3	19	7
Late night entertainment programs showing sexual intercourse between a man and women	31	11	—	27	3	19	9
Entertainment programs on TV which show nude adults at hours when children might be watching	13	9	31	12	2	25	8
Unrestricted entertainment movies which show nude adults	24	12	19	12	2	12	19
Theatres restricted to adults which show sex associated with violence	12	13	11	16	3	36	9
Sexually explicit paintings in an art gallery	49	5	10	17	1	11	7

Footnotes

[1] Jayewardene, Juliani and Talbot, *Prostitution and Pornography in Selected Countries*; W.P.P.P.#4; Kiedrowski, and van Dijk, *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden*, W.P.P.P.#1, Sansfaçon, *Agreements and Conventions of the United Nations With Respect to Pornography and Prostitution*, W.P.P.P.#3, Sansfaçon, *Pornography and Prostitution in the United States*, W.P.P.P.#2; Taylor, *The Development of Law and Debate in the United Kingdom in Respect of Pornography and Obscenity*, W.P.P.P.#14.

[2] Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity*, W.P.P.P.#16.

[3] Kaite, *A Survey of Canadian Distributors of Pornographic Material*, W.P.P.P.#17.

[4] Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia*, W.P.P.P.#15.

[5] El Komos, *Canadian Newspapers Coverage of Pornography and Prostitution*, 1978-83, W.P.P.P.#5.

[6] Peat Marwick and Partners, *National Population Study of Pornography and Prostitution*, W.P.P.P.#6.

[7] McKay and Dolff, *The Impact of Pornography: An Analysis of Research And Summary of Findings*; W.P.P.P.#13.

[8] Badgley Report Vol. II.

[9] Williams Report.

[10] See for instance: B. Heinrich, *Extent of Child Pornography in Texas*, Texas Legislature House Select Committee on Child Pornography, Austen, Texas, 1978, and L. Lederer (Ed.), *Take Back the Night: Women on Pornography*, (New York, Morrow, 1980).

[11] See Badgley Report, Vol. II, Chap.54, at 1243-1268, for a discussion of the availability of pornography.

[12] Peat Marwick & Partners, *op. cit.* at III.23-26.

[13] Badgley Report, Vol. II, Chap. 54.

[14] Peat Marwick & Partners, *op. cit.* at III.15-23 for discussion of use patterns and the material seen.

[15] *Ibid*, Exhibit 38.

[16] McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings*, W.P.P.P.# at 31-36 for a discussion of pornographic materials.

[17] Badgley Report, Vol. II, Chap.53, at 1213-1241.

[18] N. Malamuth and B. Spinner, "A longitudinal content analysis of sexual violence in the best-selling erotic magazines", *Journal of Sex Research*, 16 (1980) at 226-237.

[19] P.E. Dietz, "Pornographic Imagery and Prevalence of Paraphilia", *American Journal of Psychiatry*, 139 (1982) at 1493-1495.

[20] D.E. Palmer, "Pornographic Comics: A Content Analysis," *Journal of Sex Research*, 15 (1979) at 285-298.

[21] Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia*, W.P.P.P.#15.

[22] See for example: T. McCormack, "Feminism, censorship, and sadomasochistic pornography", *Studies in Communications*, 1 (1980) at 37-61; and "Passionate Protests. Feminists and Censorship", *Canadian Forum*, 697 (March 1980); McKay and Dolff, *The Impact of Pornography: An Analyisis of Research and Summary of Findings* W.P.P.P.#13 at 8-15.

[23] Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography*, U.S. Government Printing Office, Washington, D.C., 1970.

[24] McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings* W.P.P.P.#13 at 15-22 and 83-85.

[25] M. Cini, *Causes of Wife Assault, a Review of the Literature*, Department of Justice, Ottawa, 1984. (Draft report).

[26] See for instance M. Ragault, *Pornography and Violent Sexual Offenders, A Preliminary Research Report*, Department of Justice, Ottawa, 1983. (Unpublished report).

[27] See the discussion in The Williams Report, Chap.6, paras. 22-59.

[28] House of Commons Standing Committee on Justice and Legal Affairs, *Report on Pornography*, (1978) Proceedings No. 18.

[29] Peat Marwick, *op. cit.* Exhibit 27.

[30] *Ibid.*, at III.2 - 8.

[31] *Ibid.*, at III.9 - 15.

[32] *Ibid.*, at III.28 - 39.

[33] *Ibid.*, Exhibit 49.

Section II

Pornography and the Law

Summary

In this part of the Report we review the history of the law on pornography in Canada. In fact, because the term "pornography" has never been mentioned in our *Criminal Code* and it has never been defined in Canadian law, the discussion has to do with how our courts have struggled with what have been called "Canada's obscenity laws".

We first examine how the original common law test of obscenity was imported into our law from England and was subsequently replaced by the present statutory definition of "obscene".

We go on to discuss all the relevant existing sections of the *Criminal Code*. For convenience they are discussed under two headings, *Pornographic Materials* and *Pornographic Performances*. We review the utility of the present legislative scheme and the important interpretations given to many of the sections by our courts.

There have been various proposals for reform in our obscenity laws since the last major statutory revision of the *Code* in this area in 1959. We review the more significant of these proposals.

After a discussion of the implications of the *Charter of Rights and Freedoms* on the question of pornography, we then review the pertinent provisions of other federal legislation: Canada Customs, the Postal Service and Broadcasting and Telecommunications.

Finally, the last three chapters of this Section respectively study how human rights legislation, film classification and censorship, and municipal law affect the issue of pornography.

Chapter 7

The Criminal Code Provisions

1. The Meaning of Obscene

The first general statutory prohibition of obscenity was contained in section 179 of the first *Criminal Code* enacted in 1892.[1] Under this section it was an indictable offence to knowingly and without lawful excuse publicly sell obscene material or expose obscene material for public sale or to public view. The section did not include a definition of the term "obscene" and in order to apply the section the courts were forced to devise their own legal standard.

They did so by adopting the so-called *Hicklin* test devised by Chief Justice Cockburn in 1868 in *R.* v. *Hicklin*.[2] That test asked:

> whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall.[3]

and so began the difficult exercise of employing judicial interpretation to remedy statutory inadequacy.

Not surprisingly, the *Hicklin* test was subjected to severe criticism, not only from commentators who were interested in the state of the law, but also by judges of succeeding generations who attempted to apply it.

Chief among the criticisms were these:

(a) The test is flawed, firstly, because the phrase, "a tendency to deprave and corrupt" is unclear and secondly, because it is subjective: a judge or jury must infer the "tendency to deprave and corrupt" from the material itself without the aid of expert evidence of the actual impact of the material on those who encounter it;[4]

(b) The test is based on the tendency of the material to corrupt the most vulnerable individuals such as youths or abnormal adults and, therefore, places an unwarranted restriction upon the materials available to normal adults;[5]

(c) The creator's purpose and the literary, artistic or scientific value of the material is irrelevant. Furthermore, material may be found to be obscene on the basis of isolated passages rather than a consideration of the work as a whole.[6]

In spite of these criticisms, the courts were left to struggle with the *Hicklin* test for 67 years without benefit of any more precise statutory definition. It was not until 1959 that the *Criminal Code* was amended to provide a definition of the word "obscene"[7], which by then appeared in several different provisions of the *Code*. The section is now 159(8) of the *Code* and it provides:

> 159(8) For the purposes of this Act any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

It is apparent that this amendment was intended to provide a statutory definition of the word "obscene" wherever that word is used in the *Criminal Code*, at least in the context of "publications".

As we will see when we examine other sections of the *Code*, words such as "immoral", "disgusting", "indecent" and "scurrilous" are also used as constitutive elements of offences in this area, sometimes on their own and sometimes in conjunction with other terms, including "obscene". Experience has shown, however, that it is the concept of obscenity that provides the governing standard.

The new statutory definition of "obscene" presented some new problems for the courts. It was immediately necessary to determine what effect the section had on the *Hicklin* test. Did it replace it or complement it?

It was clear from statements made by the Minister of Justice when the legislation was introduced that the new statutory definition was not intended to replace the common law test. It was said that it was introduced in order to create an alternative test, which the government believed would be more effective in the prosecution of some of the new publications that had started to appear on newsstands. However, as some critics noted at the time, the government's intention to establish what was really to be a dual test of obscenity was certainly not clearly expressed in the new section.[8]

In the first cases heard after the enactment of the new definition, the courts declared that the *Hicklin* test continued to exist alongside the new statutory test.[9] However, this brief period of judicial agreement ended the first time the point was considered by the Supreme Court of Canada, in *R. v. Brodie, Dansky and Rubin*.[10]

By a majority of five to four the court held that D.H. Lawrence's novel, *Lady Chatterley's Lover*, was not obscene. Four judges found that the *Hicklin* test should no longer be applied to publications,[11] two judges held that it should continue to apply,[12] two judges expressly refrained from deciding the issue,[13] and one judge expressed no opinion but applied only the new statutory test.[14]

In the aftermath of the *Brodie* case and the failure of a majority of the Supreme Court to decide the status of the *Hicklin* test, it was left to the lower courts to resolve the question as best they could. They chose predominantly to apply only the statutory definition of obscenity.[15]

The confusion surrounding the *Hicklin* test was resolved to some considerable extent by the Supreme Court of Canada in its 1977 decision in *R.* v. *Dechow*.[19] The court had to decide whether the *Hicklin* test or section 159(8) should be applied in deciding whether certain sex aids were obscene. The majority of the court found that section 159(8) was the sole test of obscenity in relation to what the section referred to as a "publication". The majority gave a fairly sweeping definition to the term "publication" and found that the sex devices in question were publications because the accused had made their character "publicly known" and had issued them for public sale.

The minority held that section 159(8) was an exhaustive definition of obscenity where exploitation of sex was concerned, regardless of whether or not a "publication" was involved.

The practical result of the *Dechow* decision is that if a test of obscenity is to be applied other than the definition contained in section 159(8), the charge would have to involve either something falling outside the sweeping definition of "publication", or something that does not involve the exploitation of sex.

It seems clear, therefore, that only a few cases would not be governed exclusively by the statutory test contained in section 159(8).

We come now to consider the substantive meaning of the statutory test. It has been in force for 26 years and has been subjected to intensive and extensive judicial analysis. The courts have done their best to overcome the almost impossible task of giving contemporary meaning to abstract statutory provisions, while at the same time coping with the doctrine that precedent should be observed so that the application of the law will be predictable.

As might be expected, the criteria developed in the early cases to give flesh to the bare words of section 159(8) have been refined over time and some have even been abandoned. There is a host of decided cases and while extensive reference to the evolution of the various criteria is of interest to legal scholars, we shall, for the sake of brevity, attempt to provide as concise a statement as possible of the criteria presently being used.

Since the first treatment of section 159(8) by the Supreme Court of Canada in *R.* v. *Brodie* in 1962, the test of obscenity has been divided into two major elements:

(1) Whether a *dominant characteristic* of the representation amounts to exploitation of sex or of sex and crime, horror, cruelty or violence.

(2) Whether this exploitation is *undue* in the sense that it exceeds the contemporary Canadian community standard of tolerance.

For some time there was great uncertainty over whether the artistic purpose, artistic merit or scientific value of the material formed separate elements in the section 159(8) test, and, if so, how they were to be balanced against the two major elements. However, as will be seen, it seems now to be

reasonably well established that the factors of purpose, merit and value are to be incorporated into each of the two major elements and are not to be independently weighed and balanced against them. This is the case even though, as we shall see, section 159(3) makes provision for a public good defence which itself involves an inquiry into factors such as these.

The first of the major elements has proven to be relatively uncontroversial. The court must determine what are the dominant characteristics of the material. It has been decided that if the material has more than one dominant characteristic it is only necessary for the Crown to prove that the exploitation of sex constitutes one such characteristic. To make such a determination, the material is examined as a whole with each part considered in context. It is also necessary for the court to examine the literary or artistic merit of the material. The courts have held that in determining the merit of the material, it is desirable, but not essential, that there be expert evidence.[17]

Finally, the theme or artist's purpose must be determined and the court must decide whether the sexual episodes play a legitimate role in the development of that theme or purpose. Are the episodes justified by what has been called the "internal necessities" of the theme?[18]

However, this element of the section 159(8) test now appears to be of very little practical importance. In virtually all recent obscenity cases it has been beyond doubt that a dominant characteristic of the material in question is the exploitation of sex and, in fact, the issue has generally been conceded by the accused.[19]

The more contentious element of the section 159(8) test is whether the Crown can prove beyond a reasonable doubt that the exploitation under the section is *undue*. Some observers have said that the term "undue exploitation" is a contradiction in terms and that no exploitation can reasonably be considered to be *due*. In any event, the standard of legal interpretation was first set out by Mr. Justice Judson in delivering the majority judgment in *R.* v. *Brodie*:

> Surely the choice of courses is clear cut. Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion and even that must be subject to some influence from contemporary standards - or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think the second is the better choice.[20]

Therefore, the result is not to be based on a subjective personal opinion but rather on objective standards of the contemporary community. But the concept of contemporary community standards has proved to be very elusive. In what remains to this day probably the leading judgment on the community standards test, Mr. Justice Freedman's dissent in *R.* v. *Dominion News & Gifts (1962) Ltd.*,[21] it was said that such standards:

> are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered.[22]

In that judgment Mr. Justice Freedman also held that the "community" whose standards are involved in this country is the entire Canadian community, not simply the local community where the material has been found or where the prosecution takes place.[23]

Finally, Mr. Justice Freedman held that, in giving effect to section 159(8), the courts had to be sensitive to the fact that community standards were subject to the evolution of ideas and values.[24]

It must be remembered that the standards are of community *tolerance* as distinct from community *preference*. The court must decide whether, by contemporary Canadian community standards, the material is tolerable in the sense that the general average of community thinking would have no objection to the material being read or seen by those members of the community who may wish to read or see it. The question is not whether the material is an affront to personal standards, but whether the standards of the community would tolerate the publication being viewed.[25]

In determining the standards of tolerance, reference is made to several different factors, including artistic or literary merit, the purpose for which the material is being viewed or read and the context in which it is being viewed or read. A higher level of tolerance is assigned to material that possesses artistic or literary merit,[26] or is to be used for scientific or educational purposes.[27] There is also greater tolerance for material that is restricted to adults, or to a particular segment of the community, such as writers or artists, than there is for material that is generally available or publicly displayed.[28]

In assessing the purpose or the value of the material, the work is to be taken as a whole, and it is not appropriate to isolate for analysis only those parts which seem offensive. Some materials, however, especially magazines, may have no single theme and in these cases each page can be looked at more or less in isolation.[29]

If the community standards of tolerance test can be formulated with reasonable precision, it is still notoriously difficult to apply. His Honour Judge Borins of the County Court of Ontario had this to say in *R.* v. *Doug Rankine Co.*:

> [It] is a very difficult judgment to make in a community of 24,000,000 people who inhabit the second largest country in the world consisting of 3,831,012 square miles. No doubt very different levels of tolerance exist in small communities such as Goose Bay in Labrador, Dawson City in the Yukon and Nobleton in Ontario, and the large metropolitan centres of Montréal, Toronto and Vancouver. As well, Canada is a pluralistic society and different parts of that society will have different points of view. Yet it remains the task of the trier of fact, who is assumed to have his finger on the 'pornographic pulse' of the nation, to assess objectively whether or not the contemporary Canadian community will tolerate ... [the material] before the court.[30]

One of the reasons the test is so difficult to apply is that there is no onus on the Crown to prove the community standards of tolerance and in many

cases the court must determine the issue without the aid of evidence. Moreover, even when evidence of community standards is admitted, the judge is free to reject it and apply what, in the light of his own experience, he regards as the contemporary standards of the Canadian community.[31]

Although expert evidence on community standards is admissible, the weight given to it varies markedly from case to case and this variation cannot be attributed even primarily to the differing expertise of the witnesses. In general, the greatest weight is given to the evidence of witnesses such as provincial film censors, who are engaged full time in the task of judging community standards.[32] However, in a number of cases the evidence of these experts has been dismissed virtually without comment.[33] Other courts have given considerable weight to the testimony of such experts as city aldermen[34] and professors of health, education and psychology.[35]

There is simply no consistency in the cases as to who qualifies as a reliable expert on community standards, and what weight should be given to their evidence.

In addition to expert evidence, the courts have also considered various other kinds of evidence regarding community standards such as the actual rulings of provincial censor boards and Canada Customs officials,[36] examples of other material which is generally available in the community,[37] and surveys of public opinion.[38] Unfortunately, it is not clear precisely how much weight has actually been given to this evidence in cases where it has been considered.

Given the difficulties involved in the application of the community standards test, it is not surprising that there has not been any real consistency of results. There are, of course, a few things which everyone appears to agree cannot be tolerated. For example, the courts seem to agree that material which portrays incest,[39] juveniles engaged in sex,[40] or acts of severe cruelty or violence in combination with sex,[41] exceeds community standards, at least unless the material has significant artistic merit or a philosophical purpose.[42]

There now appears to be growing support, as well, for the proposition that material that "degrades" or "dehumanizes" one or more of the participants in the sexual activity that is portrayed, exceeds community standards of tolerance. For example, in *R.* v. *Doug Rankine Co.*, Judge Borins stated:

> films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance.[43]

This view was taken a step further in the recent judgments in *R.* v. *Ramsingh*[44] and *R.* v. *Wagner*.[45] In both of these cases, the judges held that material that "degraded" or "dehumanized" any of the participants would exceed community standards even in the absence of cruelty or violence.

It is apparent, however, that terms like "degrading" and "dehumanizing" are themselves extremely vague. Even if the proposition that "degrading" or

"dehumanizing" material was obscene were to take firm hold in Canadian law, one would still expect to find conflicting decisions.

The differences of opinion in this area are particularly apparent in cases involving material containing nothing more than explicit sex. According to the judges in the three cases just cited, material of this kind should be held not to exceed community standards of tolerance. As Judge Borins put it in the *Rankine* case,

> Contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse, ... scenes of group sex, lesbianism, fellatio, cunnilingus and oral sex.[46]

In *Re Luscher*, however, the judge found that a magazine "concerned with the sexual activity of a man and a woman from foreplay to orgasm" exceeded community standards even though the actions portrayed were "in no way unnatural or unlawful and, indeed ... are a common part of the lives of Canadian men and women".[47] And in a New Brunswick case, the trial judge found that community standards were exceeded by magazines which he described as follows:

> The magazines are most explicit and depict sexual conduct, not merely nudity. The conduct shows lesbianism, homosexuality and heterosexuality. Male and female genitalia are explicitly photographed.... There were no pictures depicting sex and 'the subject crime, horror, cruelty or violence' as set out in s. 159(8). The pictures appear to be of adults consenting to the sexual acts of other(s).[48]

Another striking example of inconsistency is found in two cases involving sex aids. A Nova Scotia County Court judge held in one case that lubricants, devices, prosthetics and novelties sold by a sex shop exceeded community standards of tolerance. In contrast, an Ontario County Court judge only three years before had concluded that similar products were not only tolerable, but in the public interest.[49]

The application of the community standards test has also produced inconsistent results in cases involving live performances. Some judges have found that the community standards of tolerance are exceeded when the whole of a person's body is exposed.[50] Others have found that complete exposure unaccompanied by suggestive touching, expressions or gyrations does not exceed community standards,[51] but that when the performance does include suggestive touching and gestures, it does exceed community standards.[52] Still others have found that the performance of a completely nude couple engaged in simulated sexual acts does not exceed community standards.[53]

Taking everything together, it is not difficult to agree with one judge who observed recently that:

> The lack of unanimity in the decisions of the courts in obscenity cases suggests that the Canadian contemporary community standard may very well be a very elusive, not readily discernible, and ill defined standard.[54]

We turn now to a consideration of the specific offences contained in the *Criminal Code*. For convenience, we have organized these offences under two headings, *Pornographic Materials* and *Pornographic Performances*.

2. Pornographic Materials

2.1 Section 159(1)(a) and (2)(a) —Publishing, Distributing and Selling

> 159. (1) Every one commits an offence who
>
> (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever....
>
> (2) Every one commits an offence who knowingly, without lawful justification or excuse,
>
> (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever....
>
> (6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, ... or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

These two offences, which are the major offences in this area, distinguish between two classes of persons, those who *produce or distribute* obscene material and those who *sell* obscene material. It is necessary for the Crown to prove that the accused actually knew the material was obscene in order to convict him of *selling* it. Proof of actual knowledge is unnecessary in order to convict someone for *producing or distributing* the material.

This important distinction is reinforced by subsection (6) which records that ignorance of the nature or presence of the obscene material is no defence to a charge under subsection (1) of producing or distributing the material. By implication, ignorance of such matters is a defence to a charge under subsection (2) of selling the material.

In general, it appears that section 159(1)(a) applies to the manufacture and wholesale distribution of obscene materials while section 159(2)(a) applies to retail sales.[55] This is consistent with what the courts consider to have been the purpose in making a distinction between the seller and the distributor. It is assumed that manufacturers have knowledge of the product they create and that distributors can and should know what they are wholesaling to retailers. It has been argued that the retail seller cannot reasonably be expected to know the actual contents of the variety of materials he has for sale.[56]

It has followed from this reasoning that a retailer who handles primarily obscene materials and not simply a "scattered few" may properly be classified as a distributor and charged under section 159(1)(a).[57]

It should be noted, however, that the courts have found that the two provisions are not mutually exclusive, and that a person who sells may also be a person who distributes and vice versa. The Ontario Court of Appeal has held that, "if a person has in his possession obscene matter for the purpose of distribution, [it does not matter] whether the means of distribution be sale, consignment for sale, free distribution or otherwise".[58]

It is of current interest to note that *rentals* have been held to be a form of distribution or circulation and not of sale. Hence video cassette rentals would appear to fall under section 159(1)(a).[59]

By contrast, the presentation of films alleged to be obscene has traditionally led to a charge under either section 159(2)(a) (exposing to public view) or section 163 (presenting an obscene performance or representation).

As a rule, it is incumbent on the Crown in criminal cases to prove knowledge or *mens rea* in order to obtain a conviction. That requirement can, however, be expressly excluded. By virtue of section 159(6), such an exclusion is contained in section 159(1)(a) for those charged with the manufacture or distribution of obscene material. In all of the other sections of the *Code* governing obscene materials, however, the Crown must prove that the accused knew the nature and content of the obscene representation.

This does not mean that the Crown must prove that the accused possessed the legal knowledge that the representation was obscene: that would turn the accused into the judge of his own guilt. It is sufficient if he is proved to have known, or to have been wilfully blind to, the subject matter of the representation.[60]

Furthermore, it is not incumbent on the Crown to show that the accused had actually viewed the material. It is sufficient to show that the accused knew the general nature of the material, that is, that he knew that the dominant characteristic of the material was the exploitation of sex. This knowledge may be inferred from all of the evidence. For example, evidence of the circumstances under which the material was displayed, or evidence that the accused had been warned about the nature of the material, may be sufficient to prove knowledge.[61]

However, where the accused has not actually viewed that material, it is impossible to state precisely what evidence would constitute sufficient proof of knowledge. For example, it has been held that where the accused could not read English, the mere fact that the police had on one occasion seized a large number of books under section 160 on the ground that they believed them to be obscene, and on a second occasion warned the accused that some of his books may be obscene, was insufficient to prove that the accused knew or was wilfully blind to the nature of yet another book in his store.[62] Similarly it has been held that where the accused had not read the book, the fact that he displayed it under a sign "Banned in Michigan" and beside a newspaper clipping with the headline "O'Hara's Book Naughty", was insufficient to prove knowledge or wilful blindness.[63]

It appears, therefore, that in those cases in which the accused has not actually viewed the material, the burden on the Crown to adduce sufficient evidence to prove knowledge is not easily satisfied.

For there to be an offence under section 159(2)(a), in addition to requiring proof of knowledge the relevant act must be done "without lawful justification or excuse". Where the Crown proceeds summarily, the burden of proof has been held (somewhat surprisingly) to rest on the accused to prove by a preponderance of evidence that he had a lawful excuse.[64] When the Crown proceeds by way of indictment, it is clear that the onus rests upon the Crown to prove beyond a reasonable doubt the *absence* of a lawful excuse. However, where the facts do not disclose the lawful excuse, and the accused fails to raise the issue and at least adduce some evidence, the trial judge is entitled to infer that there is no lawful excuse. The Crown is not obliged to canvass every conceivable justification that could be advanced on behalf of the accused.[65]

It is not clear, however, what constitutes a "lawful justification or excuse". For example, the case law at the present time is unclear as to whether or not approval by provincial censorship authorities will suffice. In *R.* v. *McFall,*[66] it was held that such approval did not provide the lawful excuse. The issue has been argued in the Supreme Court of Canada very recently in *R.* v. *Town Cinema Theatres (1975) Ltd.*[67] and judgment is still reserved.

A further example of the present confusion arose in an Ontario case where the accused's honest belief that the materials were not obscene did not constitute a lawful excuse, even though the belief was based on the knowledge that the obscenity charges against the same poster had been dismissed in another Canadian jurisdiction.[68]

While section 159 prohibits the possession of obscene material for the purpose of publication, distribution, circulation, sale or exposing to public view, it does not prohibit the possession of obscene material for private use. While *private* possession is not prohibited, the situation becomes less clear if a person shows his obscene materials to others. In *R.* v. *Rioux,*[69] the accused owned some obscene films which he showed on three occasions to a group of some ten persons. The Supreme Court of Canada acquitted the accused, finding that showing obscene pictures to a friend or projecting an obscene film in one's own home is not in itself a crime. It was held to constitute neither circulation (under section 159(1)(a)) nor exposure to public view (under section 159(2)(a)) of obscene materials.

Similarly, if obscene films are shown in a community hall exclusively to invited friends and relatives, the situation is tantamount to a showing to a private gathering in one's own home and is not prohibited by section 159.[70]

However, if only a few people, who are neither friends nor invited guests of the accused, pay to attend a showing of obscene films at what is otherwise a private party, it ceases to be a private showing and is prohibited by section 159.[71]

While it is not illegal to possess obscene material for private use, it may be illegal to *make* obscene material even for exclusively private use. In *Re Hawkshaw and the Queen,*[72] the accused submitted to a developing laboratory a role of film containing a picture of four persons, one of whom was performing fellatio on a 17 year-old boy. Although the Ontario Court of Appeal accepted that the accused intended only to use the photograph for private viewing, it found that the meaning of section 159(1)(a) was clear:

> Parliament intended it to be an offence to make or to print an obscene picture, even though it might not be made for the purpose of publication or was not made known to the public.[73]

Accordingly, the accused was committed to stand trial for the offence. The case is presently on appeal to the Supreme Court of Canada.

It is apparent from this review of sections 159(1)(a) and 159(2)(a) that they have given rise to a number of problems. First, there is the fact that the offences overlap with each other. Given the different *mens rea* (guilty intent) requirements of the two offences, this is a problem of some significance. Second, there is the problem of the inconsistent treatment of videos and films, with the former falling under section 159(1)(a) and the latter falling under section 159(2)(a). This, too, is a serious problem, and for the same reason. Third, there is the difficulty in construing and applying the phrase "without lawful justification or excuse" in section 159(2)(a). Any proposals for reform in this area would have to take these problems into account.

2.2 Other Section 159 Offences

> (2) Every one commits an offence who knowingly, without lawful justification or excuse,
>
> (b) publicly exhibits a disgusting object or an indecent show,
>
> (c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or
>
> (d) advertises or publishes an advertisement of any means, instructions, medicine, drugs or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

It is interesting to note that, until 1969, it was also an offence under section 159(2)(c) to advertise articles "intended or represented as a method of preventing conception".

None of these offences appears to be of much importance nowadays. One of the very few reported cases to consider section 159(2)(b) was *R. v. Stewart,*[74] in which the accused had been charged with exhibiting a button with the phrase "Fuck Iron" on it. The court concluded that "disgusting" meant "turning the stomach" or "giving rise to a strong distaste or repugnance" and acquitted the accused.

The dearth of case law on section 159(2)(b) makes it difficult to know whether this provision could be used to control public displays of pornographic magazines. One suspects that the use of the words "object" and "show" would make this difficult. And it is by no means clear that the kinds of displays that people object to would be caught by the term "disgusting".

Neither section 159(2)(c) nor section 159(2)(d) has given rise to any reported cases, at least in its current form. One wonders, in fact, why they continue to exist, particularly section 159(2)(d).

2.3 Section 159(3)(4) and (5) — The Public Good Defence

> 159. (3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.
>
> (4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.
>
> (5) For the purposes of this section the motives of an accused are irrelevant.

Even if the facts would support a conviction under section 159, the accused may invoke section 159(3) and avoid that conviction if he can establish that the acts in question served "the public good" and "did not extend beyond what served the public good". But, as one commentator has noted, this defence is somewhat paradoxical, at least in the context of sections 159(1)(a) and 159(2)(a):

> How can obscenity ever be in the public interest? Obviously something is wrong. Either the public has a perverted sense of what is good for it or the definition of what constitutes obscenity is perverted.[75]

The paradoxical nature of the section 159(3) defence is reflected in the fact that it is rarely invoked; it seems clear that very few representations found to be obscene by modern standards can make any pretence to serving "the public good".

Furthermore, the meaning of the defence is exceedingly obscure. Section 159(5) provides that "the motives of an accused are irrelevant", but that tells us very little. What judicial guidance there is can be found in the decision of Mr. Justice Laidlaw of the Ontario Court of Appeal in *R.* v. *American News Ltd.* where he states:

> Again, what is included in the words 'public good'? Surely it does not mean benefit or advantage to the public of every conceivable kind. I suggest that the limitation of those words ... [is] that which is 'necessary' or advantageous to religion, or morality, the pursuit of science, literature or art, or other objects of general interest. Without such limitation or description the defence is of such a vague, indefinite character as to be almost impracticable both in theory and in practice.[76]

However, a representation does not serve the public good merely because it possesses literary, artistic, or scientific merit. In *R.* v. *Cameron,*[77] the defence argued that a collection of drawings found to be obscene nevertheless possessed substantial artistic merit and, therefore, served the public good by assisting students of art and educating the public in the appreciation of art. While the Ontario Court of Appeal accepted the expert evidence that the pictures possessed some artistic merit, it was not prepared to find that they served "the public good". The court could see no reason why:

> it is either necessary or in the service of the public good so far as the teaching of art is concerned or the education of the public, unduly to exploit the theme of sex as a dominant characteristic in the portrayal of the human figure or figures.[78]

If this interpretation of section 159(3) is correct, it would seem that, regardless of the degree of artistic merit, no obscene picture can serve the public good.

In *R.* v. *Delorme,*[79] the Québec Court of Appeal similarly rejected the defence of public good after finding the book *Histoire d' Or* to be obscene. The court accepted the expert testimony that the book possessed literary and scientific value. However, the court reasoned that this value could only serve to benefit psychologists and sexologists and that the distribution of the book was not limited to these individuals. It was distributed to members of the general public who, according to the court, would be incapable of discussing the symbolic and psychological meaning of the book. Thus, despite its scientific and literary value, it could not be said to serve the public good. Of course, had the distribution of the book been limited to sexologists and psychologists, there would likely have been a finding that the book was not obscene and hence there would have been no need to consider section 159(3).

The only reported case in which the defence of public good has been successful is *R.* v. *Sutherland, Amitay and Bowie.*[80] In that case the court held that "it serves the public good to make available to those persons that so desire aids so that they may enjoy or further enjoy legitimate sexual acts and sexual harmony".[81] However, it should be noted that the finding on this point was unnecessary as the judge had already found that the sexual aids and devices were not obscene.

It would appear, therefore, that the section 159(3) defence of public good is of little importance. Its meaning is extremely obscure and with the modern view of obscenity it is unlikely that any material found to be obscene could be said to serve the public good.

2.4 Section 160 — Warrant of Seizure

> 160. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene ... shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be obscene ... may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is obscene ... it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene ... it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XVIII and sections 601 to 624 apply *mutatis mutandis* (completely and without exception).

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or contained in that province under section 159 with respect to those or other copies of the same publication without the consent of the Attorney General.

(8) In this section

"court" means

(a) in the Province of Quebec, the provincial court, the court of the sessions of the peace, the municipal court of Montreal and the municipal court of Quebec;

(a.1) in the Provinces of New Brunswick, Alberta and Saskatchewan, the Court of Queen's Bench;

(b) in the Province of Prince Edward Island, the Supreme Court; or

(c) in any other province, a county or district court.

"judge" means a judge of a court.

This important section permits proceedings to be taken against material without laying charges against anyone. It provides for a two-stage procedure. The first stage involves an application which, if successful, results in a warrant being issued to seize the material in question. It is to be noted that, in making the application, the person swearing the information must state that there are reasonable grounds for believing that the material in question is being kept for sale or distribution. It is not enough simply to state that there are reasonable grounds for believing that the material is obscene. It is clear, therefore, that section 160 is aimed at commercial dealings in obscene material.

The second stage involves a summons being issued to the occupier of the premises from which the goods were seized. The occupier as well as the owner and the author of the material are entitled to appear in court and be heard on the question of whether the seized material is obscene and, therefore, to be forfeited to the Crown.

While subsection 2 states that the occupier must "show cause" at the second stage hearing, it has been decided that the onus is on the Crown to prove obscenity (as defined in section 159(8)) beyond a reasonable doubt.[82] It is also clear that no sanction can be imposed personally upon the occupier if he fails to attend the second stage hearing.[83] In order to reduce the possibility of double jeopardy, subsection (7) records that once an order is made declaring the material to be obscene and forfeited to the Crown, no proceedings under section 159 against an individual can be instituted or continued with respect to the same publication.

A review of the cases shows that in the 1960s it was commonplace for the Crown to proceed against material under section 160. So far as we have been able to tell, the section is virtually in complete disuse at the moment. The reasons we have been given by some law enforcement officials are that their resources are limited and they can, therefore, contemplate proceeding against only the "worst" of the material and that in these cases, proceedings against the individual distributors or sellers seem more appropriate and more likely to deter others than proceeding against the material itself. We have also been told that the section creates administrative problems resulting from storage and supervision of the seized material. There have been recent judicial suggestions that the section be better utilized by the authorities.[84] We will consider these suggestions when we come to discuss proposals for reform.

Although the point does not appear to have been argued, some courts appear to have accepted that the section can be used by a private citizen seeking to control the commercial exploitation of obscene material. There is certainly nothing in the language of the section to suggest that a private citizen lacks standing to come to court seeking that a warrant be issued in what we have described as the first stage proceeding. If the judge hearing the private citizen's application issues a warrant, it is uncertain whether any Attorney General would be entitled to usurp the private citizen's initiative by staying the proceedings. So far as we have been able to tell, the point has not yet arisen.

2.5 Section 161 — Tied Sales

> 161. Every one commits an offence who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may be obscene....

This section came into the *Code* in 1959, at the same time that section 159(8) was introduced. At our public hearings we were told about complaints by retailers of magazines and periodicals that the very practice prohibited by

the section was in fact occurring. However, we received no such complaint directly from a retailer. We have been unable to discover any reported cases on the section and are unaware of any recent prosecutions.

2.6 Section 162 — Restriction of Publication of Reports of Judicial Proceedings

162. (1) A proprietor, editor, master printer or publisher commits an offence who prints or publishes

(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation or restitution of conjugal rights, any particulars other than
(i) the names, addresses and occupations of the parties and witnesses,
(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given,
(iii) submissions on a point of law arising in the course of the proceedings, and the decision of the court in connection therewith, and
(iv) the summoning up of the judge, the finding of the jury and the judgment of the court and the observations that are made by the judge in giving judgment.

(2) Nothing in paragraph (1)(b) affects the operation of paragraph (1)(a).

(3) No proceedings for an offence under this section shall be commenced without the consent of the Attorney General.

(4) This section does not apply to the person who

(a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;

(b) prints or publishes a notice or report pursuant to directions of a court; or

(c) prints or publishes any matter
(i) in a volume or part of a *bona fide* series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or
(ii) in a publication of a technical character that is *bona fide* intended for circulation among members of the legal or medical professions.

This rather curious provision was originally enacted in 1938,[85] carried over with some changes into the 1953-54 *Code*,[86] and reproduced verbatim in the present *Code* renumbered as section 162. There appear to have been no cases decided under section 162 or its predecessors.[87]

No discussion accompanied the enactment of the 1938 provisions. In the House of Commons, all that was said was that the section:

> ... is a reproduction of the English law with respect to the publication of details and reports of judicial proceedings which may be calculated to injure public morals.[88]

In the Senate, the only comments were that the section was similar to the British provisions, that it was a "padlock law" and that it was directed against "yellow journalism".[89]

In an attempt to find out precisely what section 162 is aimed at, we examined the origins of the parent English legislation. The *British Judicial Proceedings (Regulation of Reports) Act, 1926*[90] was introduced in the British Parliament in four consecutive sessions, beginning in 1923. Each time there was debate.[91]

The 1926 debates of the House of Commons are particularly informative.[92] It was noted that concern over the publication of "objectionable" reports had been voiced at an early date by Queen Victoria herself:

> On 26th December 1859, her late Majesty Queen Victoria wrote as follows to Lord Chancellor Campbell:
>
> The Queen wishes to ask the Lord Chancellor whether no steps can be taken to prevent the present publication of proceedings before the new Divorce Court. These cases, which must necessarily increase when the new law becomes more and more known, fill now almost daily a large portion of the newspapers, and are of so scandalous a character that it makes it almost impossible for a paper to be trusted in the hands of a young lady or boy.[93]

The Queen's concern was evidently shared by the 1926 Parliament. The legislation was meant to be applied to the suggestive sexual details likely to come out in divorce proceedings. Those details, it was felt, would be published by some journals in order to increase their circulation. It was thought that such publication would lead to a deterioration of public morals. One Parliamentarian said:

> There are, however, certain journals which it is needless to specify who deliberately exploit for gain, reports of judicial proceedings of an unsavoury character. It is a horrible traffic. One can scarcely imagine a more horrible traffic.[94]

The objectionable reports were said to be constituted by "... a mass of detail, more suggestive than actually indecent ...."[95]

There was extensive debate on the merits of the proposed legislation, especially regarding the conflicting interests of freedom of the press and protection of public morals.[96] One particularly interesting argument *against* the legislation was that the prospect of publication of the intimate details of one's sexual misconduct would serve as a deterrent to the kind of behaviour that could result in divorce proceedings.[97] To that it was answered that the fear of publication would probably not deter anyone.[98]

The *Act* was said to be based upon previous legislation[99] and it was anticipated that the courts would employ the test in *R.* v. *Hicklin*[100] as to what was to be considered a threat to public morals.

We were able to find only one reported case under the British legislation. That is *Duchess of Argyll* v. *Duke of Argyll.*[101] However, the case is of only marginal interest; it deals with the rights of parties to a divorce proceeding to seek an injunction against the publishing of details of the proceeding.

2.7 Section 164 — Mailing Obscene Matter

> 164. Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection 162(4).

In the chapter of this Report dealing with Canada Post we discuss the interpretation that has been given by the courts to this section. It should be observed, however, that the words "indecent, immoral or scurrilous" are not defined in the *Code* or in any other Canadian statute.

3. Pornographic Performances

While there are a number of sections in the *Code* governing pornographic acts or performances,[102] sections 163 and 170 are the most important.

3.1 Section 163 — Immoral Theatrical Performance

> 163. (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.
>
> (2) Every one commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

The term "theatre" is defined in section 138 of the *Code* as follows:

> theatre includes any place that is open to the public where entertainments are given, whether or not any charge is made for admission.

The question of whether the definition of "obscene" in section 159(8) is to be imported into section 163 has been answered by the courts on the basis of the medium in question. In 1973 the British Columbia Court of Appeal in *R.* v. *Small*[103] decided that the definition in section 159(8) related only to books and did not apply to live theatrical performances. The majority of the court concluded that the word "obscene" should be given a meaning that amalgamates the dictionary meaning, the *Hicklin* test and the dissenting judgment of Mr. Justice Freedman in *R.* v. *Dominion News & Gifts (1962) Ltd.*[104]

However, the Court of Queen's Bench in Alberta has held that the section 159(8) definition does apply when the entertainment is a movie and, therefore,

a "publication" within the meaning of that section.[105] The trial decision was affirmed by the Alberta Court of Appeal and, as we have already mentioned,[106] judgment has been reserved by the Supreme Court of Canada.

The section also raises the question of the appropriate meaning to be given to the words "immoral" and "indecent", in the absence of a statutory definition.

The Supreme Court of Canada has held that simply because a performance is done in the nude does not make it "immoral" within the meaning of the section, and the fact that being nude in a public place is an offence under section 170 is irrelevant to a charge under section 163.[107]

In another case, decided in 1982, the Ontario Court of Appeal decided that the trial judge had been wrong in deciding that " 'immorality' is of a lesser degree of seriousness than 'indecency' or 'obscenity' ".[108] However, the court agreed with the trial judge that the test was one of community standards of tolerance and that the following factors should be taken into account in applying that test:

> (1) the locale of the performance; (2) the forewarning of the public of the nature of the performance; (3) the condition of admission; and (4) the size and nature and the extent of the reception of the audience to the particular performance and to similar performances[109] ...;

The court also thought that the accused's purpose in giving the performance should be considered.[110]

Inasmuch as leave to appeal this decision to the Supreme Court of Canada was refused, we can treat the test as being settled. What remains unclear is whether the test is precisely the same as the community standards test applied by the courts in interpreting section 159(8). Put another way, does the community standard of tolerance concerning "immorality" and "indecency" differ in any way from the community standard of tolerance with respect to "obscenity"?

3.2 Section 170 — Nudity

> 170. (1) Every one who, without lawful excuse,
>
> (a) is nude in a public place, or
>
> (b) is nude and exposed to public view while on private property, whether or not the property is his own,
>
> is guilty of an offence punishable on summary conviction.
>
> (2) For the purposes of this section a person is nude who is so clad as to offend against public decency or order.
>
> (3) No proceedings shall be commenced under this section without the consent of the Attorney General.

The section raises at least three questions immediately. First, can a charge be brought under it in respect of a theatrical performance, notwithstanding the separate offence created by section 163(2)?

Second, is there a difference between being nude and being naked? Subsection (2) indicates that whether a person is nude depends on whether he or she is "so clad as to offend against public decency or order". For a while there was some confusion as to whether a person who had no clothes on in a public place could commit the offence simply by being naked.

Third, what will constitute a "lawful excuse" under the section?

All three questions were addressed by the Supreme Court of Canada in 1978 when the court unanimously decided in *R.* v. *Verrette*[111] that:

(a) A charge may properly be brought under section 170 in theatrical performance cases notwithstanding the separate offence created by section 163(2) of appearing as a performer in an immoral, indecent, or obscene performance in a theatre.

(b) A dancer performing completely unclad in a public place contravenes section 170 in the absence of lawful excuse, and there is no additional requirement that the nudity offend against public decency or order. However, the performance of a dance in a public place by a dancer who is not completely unclothed contravenes section 170 only if the performer is so clad as to offend against public decency or order.

(c) A "legitimate theatrical performance" or "escaping from a house on fire" or "running from a rapist", or "modelling in a lecture hall for art students" may constitute a lawful excuse for nudity.

There is also, of course, the question of what test is to be applied to cases of partial nudity. According to the Ontario Court of Appeal, this test is to be the same as that employed in cases arising under section 163.[112] In other words, the test of what offends "public decency" in subsection (2) is the community standard of tolerance for the actions of the accused in the particular circumstances of the performance.

Thus we are left with rather a curious situation. If the accused is completely nude in a public place without lawful excuse, and the Attorney General consents to proceedings under section 170, the accused will be convicted. However, if the accused is partially clad, there is no guarantee of conviction under section 170, since it must be shown that the partial nudity offends the community standard of tolerance. As might be expected, this unusual situation has led to rather unusual behaviour. "Exotic dancers", while sequentially exposing every part of their bodies, are careful always to retain some small piece of clothing so as to avoid being completely nude. As one would expect, this has given rise to much argument in the cases about what exactly constitutes complete nudity. Will any speck of clothing suffice, or must the coverage be reasonably substantial? In *R.* v. *McCutcheon*[113] the Quebec Court of Appeal held that an "exotic dancer" who wore a "thin transparent veil attached at the neck" was not completely nude. Similarly, in *R.* v. *Szunejko,*[114] an Ontario case, an "exotic dancer" wearing a see-through

negligee which was open in the front was found not to be completely nude. However, in *R. v. Diaz*,[115] another Ontario case, an "exotic dancer" wearing only a brassiere open at the front was found to be completely nude. The judge in that case reasoned that nudity should be determined by considering what parts of the body are exposed and what percentage of the body is exposed. He concluded that where all the private parts are exposed and, at the same time, 99.99% of the body, a person is completely nude.

4. Penalties

Under section 165, the Crown is empowered to commence proceedings either by indictment or summarily in the case of prosecutions under sections 159, 161, 162, 163 and 164. The Crown can only proceed summarily in the case of prosecutions under section 170.

An accused who is convicted on indictment is liable to imprisonment for two years. A fine may be imposed in lieu of or in addition to a term of imprisonment.[116] An accused who is convicted summarily is liable to imprisonment for six months. Again, a fine may be imposed in lieu of or in addition to a term of imprisonment. That fine cannot, however, exceed $500.[117]

The Committee was unable to discover any reliable statistics on the relative frequency of the Crown proceeding by way of indictment rather than summarily in those cases where it had a choice. The Committee's impression is, however, that most prosecutions are proceeded with summarily.

Reliable statistics on the punishments imposed in this area are also unavailable. Terms of imprisonment appear to be imposed very seldom, however. The usual punishment is a fine and, because of the preference of the Crown to proceed summarily, the fines tend to be very small. On occasion, however, a significant fine of several thousand dollars is imposed.

5. Past Proposals for Reform

Past proposals for the reform of the *Criminal Code* provisions in this area have come from many different sources and have taken many different forms. The proposals made by private individuals and organizations are discussed elsewhere in this report and will not be examined here. The focus here is on the proposals that have been made by public officials and bodies. These proposals are found in bills introduced in the House of Commons but not passed, the Report on Pornography submitted to the House of Commons in 1978 by the Standing Committee on Justice and Legal Affairs, a paper published by the Law Reform Commission of Canada, and a suggestion emanating from the Bench.

The last decade has seen some forty bills introduced into the House of Commons on the matter of pornography. The majority of these proposed

amendments of one form or another to the *Criminal Code*. The only such bills that were enacted into law concerned the definition of the word "court" in section 160.[118] Of the others, all but four were private members' bills. It is not surprising that these bills were not enacted into law, for it is an unusual occurrence when a private member succeeds in getting a bill through the House. One of the government-sponsored bills is currently before the House, so it may yet become law.[119] Why the other three government-sponsored bills were not enacted into law is unclear.[120] One presumes it was simply a matter of government priorities.

The general purpose of both the private members' bills and those with government support has been to tighten the grip of the *Criminal Code* on pornography. A large number of the bills were designed to ensure that children were accorded better protection from pornography. These bills are discussed in the part of this report that deals with children and will not be examined here.

Other objectives reflected in these bills include increasing the penalties in this area,[121] ensuring that material in respect of which convictions are registered under provisions like sections 159 and 164 is forfeited to the Crown,[122] eliminating the use of opinion evidence on community standards,[123] and providing better protection against public displays of pornography.[124] As well, suggestions have been made for revisions to section 159(8).[125] Some of these suggestions reflect an American influence since they include quite detailed descriptions of the kinds of sexual activities that are not to be described or depicted.[126]

The most recent proposal with respect to section 159(8) is found in Bill C-19 of 1984.[127] An omnibus *Criminal Code* amendment bill sponsored by then Minister of Justice, Mr. Mark MacGuigan, it would have repealed the existing section 159(8) and replaced it with the following:

> 159 (8) For the purposes of this Act, any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any one or more of the following subjects, namely, sex, violence, crime, horror or cruelty through degrading representations of a male or female person or in any other manner.

This provision differs from the existing section 159(8) in three important respects. First, it makes it clear that the definition applies to "any matter or thing" and not just to "any publication". Given the decision of the Supreme Court of Canada in *R. v. Dechow*[128] regarding the status of the *Hicklin* test, such a clarification would likely have put that test to rest. In other words, had the revised version of section 159(8) contained in Bill C-19 become law, there would have been nothing left to which the *Hicklin* test could have been applied.

The second important change lies in the removal of the requirement contained in the existing section 159(8) that violence, crime, horror and cruelty be combined with sex in order for them to be considered obscene. This change would obviously have significantly broadened the scope of section 159(8).

The third change of note is the express reference to the notion of degradation. The amended provision would have made explicit what a number of the most recent section 159(8) decisions have held to be implicit,[129] namely, that "undue exploitation" can take the form of "degrading representations" of men or women. Whether it would have been held to have gone further than that and to have *required* that material that contained "degrading representations of a male or female person" be held to be obscene is unclear.

The only proposal in all these bills that would have *relaxed* the grip of the *Criminal Code* on pornography is found in the two most recent government-sponsored bills. That proposal was to make it necessary to obtain the consent of the provincial Attorney General before proceedings could be commenced under section 159 or section 163 in respect of films or videos that were being shown in accordance with provincial film review legislation. This amendment was obviously designed to provide at least some protection from prosecution to those who receive the approval of their provincial film classification board to show a particular film or video.

The Report on Pornography that was submitted to the House of Commons in 1978 by the Standing Committee on Justice and Legal Affairs[130] contained a total of eleven recommendations, six of which called for amendments to the *Criminal Code* and one of which called for new legislation at the provincial and municipal levels. The other four recommendations dealt with enforcement practices. The thrust of all these recommendations mirrored that of the proposals contained in the bills that we have just examined. They were all designed, in other words, to strengthen the law.

The underlying philosophy of the Report is reflected in the following passage:

> The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.[131]

Insofar as the *Criminal Code* is concerned, this philosophy led first to a recommendation that section 159(8) be replaced by a new provision that would incorporate not only a revised general definition of obscene but also a special definition of obscene to deal with child pornography.[132] Insofar as the former is concerned, the language bears a close resemblance to that found in Bill C-19. The only difference is that the concept of degradation constitutes a separate test, that of "undue degradation of the human person", rather than being part and parcel of the "undue exploitation" test. The actual language of the general definition was as follows:

> 159 (8) For the purposes of this Act, a matter or thing shall be deemed to be obscene where ... a dominant characteristic of the matter or thing is the

> undue exploitation of sex, crime, horror, cruelty or violence, or the undue degradation of the human person....[133]

From this recommendation, the Report proceeded to a number of subsidiary recommendations about prosecutions under section 159. It suggested that opinion evidence should not be admissible on the question of community standards[134] and that the Attorney General should be able to override an accused's election regarding mode of trial and request a trial by jury.[135] It also recommended a substantial increase in the penalties for section 159 and for sections 161, 162, 163 and 164.[136] And, finally, it recommended that materials in respect of which a conviction is obtained under sections 159 and 164 be forfeited to the Crown.[137]

The Report contained a separate recommendation to deal with the procurement of children to participate in the production of sexually explicit materials. This recommendation is discussed in the chapters on children.

One final recommendation of note deals with section 160 of the *Code*. The Report suggested that, where a charge was laid under section 159, section 160 should be used to stop the further dissemination of the material in question while the prosecution under section 159 proceeded.[138]

Although none of the recommendations in the Report relating to the *Criminal Code* has given rise to any amendments, some of them did find their way into two of the government-sponsored bills mentioned above. Bill C-21, which was introduced into the House of Commons in November of 1978, borrowed heavily from the Report in respect of its proposals regarding both section 159(8) and increased penalties for offences under section 159. And the slightly revised version of section 159(8) that was proposed in Bill C-19 of 1984 obviously had its roots in the Report's recommendation regarding that provision.

The Law Reform Commission of Canada has published two papers on obscenity and the criminal law. The first of these papers, which appeared in 1972, was authored by Professor Richard Fox and the views expressed in it are his rather than the Commission's.[139] For that reason, it will not be discussed here. (It should be noted, however, that the paper contains a very thorough analysis of the law in Canada as of 1972 and is therefore a very useful research tool).

The second paper published by the Commission appeared in 1975. Entitled *Limits of Criminal Law—Obscenity: A Test Case*,[140] the paper explores the question of the proper scope of criminal law, with obscenity being used as a test case. It is highly theoretical and contains very little discussion of the relevant *Code* provisions. Nevertheless, it does suggest that, in the opinion of the Commission, at least some of those provisions should be removed from the *Code*. It was appropriate, the Commission said, for the criminal law to be used to proscribe what it called "public obscenity" and to protect children.[141] What it called "private obscenity", however, should remain untouched by the

criminal law (although it could be regulated in other ways).[142] Thus, adults should not be prevented by the criminal law from obtaining, and viewing or reading in the privacy of their own homes, obscene material. As the paper put it, "individuals should be free to choose their own lifestyle and society should be free to change".[143] Moreover, according to the Commission, the costs to society of criminalizing "private obscenity", including the loss of liberty and the financial costs, would outweigh the benefits.[144]

The final proposal for reform to be discussed here comes from the Bench. In his clear and thoughtful judgment in *R.* v. *Nicols*,[145] His Honour Judge Borins expressed the view that prosecutions under section 159 should not be sustained unless and until, as he put it, "a section 160 proceeding has placed a tract beyond the pale".[146] In other words, before commencing proceedings under section 159, the Crown should be required to obtain a ruling under section 160 that the material in question is "obscene". The reason for this, according to Judge Borins, lies in the vagueness of the definition of "obscene" in section 159(8). As he put it, "To condemn people to the stigma of a criminal conviction for violating standards they cannot understand, construe and apply is a serious thing to do in a nation which, by its recent *Charter of Rights*, has affirmed its dedication to fair trials and due process".[147]

It is apparent from even this brief discussion that, while there is obviously a good deal of dissatisfaction with the current *Code* provisions in this area, the reasons for the dissatisfaction differ, as do the proposals for reform. It seems clear that those within government are of the view that the law must be broadened in scope and strengthened. The Law Reform Commission of Canada, on the other hand, has suggested that the reach of the *Criminal Code* should be cut back, perhaps even drastically. And His Honour Judge Borins is of the view that the use of the major Code provision in this area, section 159, should be restricted.

Footnotes

[1] S.C. 1892, c.29. The transmission through the post of anything of an "obscene, immoral, indecent, seditious, disloyal, scurrilous or libellous" character had previously been prohibited by s. 72(27) of the *Post Office Act*, S.C. 1875, c.7. This subsection was the antecedent of the present s. 164 of the *Criminal Code*.

[2] (1868), 3 Q.B.D. 360.

[3] *Ibid.*, at 371.

[4] *R.* v. *American News* (1957), 118 C.C.C. 152 (Ont.C.A.) at 154, 157 and 161.

[5] *Ibid.*, at 157-158, but see *R.* v. *Stroll* (1951), 100 C.C.C. 171 (Que. Ct. of Sessions), at 172 and *R.* v. *National News Co.* (1953), 106 C.C.C. 26 (Ont.C.A.).

[6] *R.* v. *American News*, (1957) and *R.* v. *St. Claire* (1913), 21 C.C.C. 350 (Ont.C.A.) but see *Conway* v. *The King*, [1944] 2 D.L.R. 530 (Que.K.B.) and *R.* v. *Stroll* (1951).

[7] S.C. 1959, c.41, s. 11.

[8] W.H. Charles, "Obscene Literature and the Legal Process in Canada" (1966) 44 *Can. Bar Rev.* 243.

[9] *R.* v. *Standard News Distributors Inc.* (1960), 34 C.R. 54 (Que.Mun.Ct.) and *R.* v. *Munster* (1960), 129 C.C.C. 277 (N.S.C.A.).

[10] [1962] S.C.R. 681.

[11] Judson, Abbott and Martland, JJ. for the majority and Kerwin C.J. in dissent.

[12] Ritchie, J. for the majority and Fauteux, J. in dissent.

[13] Cartwright, J. for the majority and Taschereau, J. in dissent.

[14] Locke, J. in dissent.

[15] The cases are collected in Robert E. Lutes, "Obscenity Law in Canada" (1974) 23 *Univ. N.B.L.J.* 30, at 36 and 37.

[16] (1977), 76 D.L.R. (3d) 1. (S.C.C.)

[17] *R.* v. *Brodie* (1962).

[18] *R. v. Odeon Morton Theatres* (1974), 16 C.C.C. (2d) 185 (Man.C.A.).

[19] *R. v. Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53, (Ont.Co.Ct.).

R. v. Nicols 27 Nov. 1984, unreported (Ont.Co.Ct.).

R. v. Wagner, Jan. 1985, unreported (Alta.Q.B.).

[20] *R.* v. *Brodie* (1962), at 716.

[21] (1963) 2 C.C.C. 103. This judgment was adopted in its entirety by the Supreme Court of Canada on the later appeal of the case. See [1964] S.C.R. 251.

[22] *Ibid.*, at 116.

[23] *Ibid.*, at 117.

[24] *Ibid.*, at 116-17.

[25] *R.* v. *Benjamin News* (1978), 6 C.R. (3d) 281 (Que.C.A.) at 285.

[26] *R.* v. *Odeon Morton Theatres Ltd.* (1974).

R. v. *Towne Cinema Theatres (1975) Ltd.*, [1982] 1 W.W.R. 512 (Alta. Q.B.) Affirmed 12 May 1982, unreported (Alta.C.A.). S.C.C. reserved 28 Sept. 1983.

[27] *U. of Manitoba* v. *Deputy Minister of Revenue Canada* (1983), 24 Man. R. (2d) 198 (Man.Co.Ct.).

[28] *R.* v. *Sudbury News Services Ltd.* (1978), 39 C.C.C. (2d) 1 (Ont.C.A.) at 10.

[29] *R.* v. *Penthouse* (1979), 96 D.L.R. (3d) 735 (Ont.C.A.) at 741.

[30] *R.* v. *Doug Rankine Co.* (1983).

[31] *R.* v. *Great West News* 1970, 4 C.C.C. 2d 307 (Man.C.A.) at 315.

R. v. *Popert* (1981), 58 C.C.C. (2d) 505 (Ont.C.A.) at 508.

[32] *R.* v. *Towne Cinema Theatres* (1974).

[33] See, for example, *R.* v. *Daylight Theatre Co. Ltd.* (1973), 17 C.C.C. (2d) 451, (Sask.Dist.Ct.) at 455.

[34] *R.* v. *Doug Rankine Co.* (1983), at 58.

[35] *R.* v. *Minas Music Sales Ltd.* (1982), 109 A.P.R. 473 (N.S.Co.Ct.), *R.* v. *Wagner* (1985).

[36] *R.* v. *Doug Rankine Co.* (1983).

[37] *Re Luscher and Deputy Minister, Revenue Canada* (1983), 149 D.L.R. (3d) 243, (B.C.Co.Ct.) at 247.

[38] *R.* v. *Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251 (Man.C.A.).

[39] *R.* v. *McDougall's Drug Store* (1982), 109 A.P.R. 463 (N.S.Co.Ct.).

R. v. *Cinema International* (1981), 13 Man.R. (2d) 337 (Man.Co.Ct.), affirmed, 13 Man.R. (2d) 335 (Man.C.A.).

[40] *R.* v. *Penthouse* (1979).

[41] *R.* v. *Doug Rankine Co.* (1983).

[42] *R.* v. *Towne Cinema Theatres* (1974).

[43] *R.* v. *Doug Rankine Co.* (1983), at 70.

[44] *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man.Q.B.).

[45] *R.* v. *Wagner* (1985).

[46] *R.* v. *Rankine Co.* (1983) at 70.

[47] *Re Luscher and Deputy Minister, Revenue Canada* (1983), at 245.

[48] *R.* v. *Saint John News Co. Ltd.* (1982), 124 A.P.R. 91 (N.B.Q.B.) at 100.

[49] *R.* v. *Harris* (1977), 43 A.P.R. 104 (N.S.Co.Ct.) and *R.* v. *Sutherland, Amitay and Bowie* (1974), 18 C.C.C. (2d) 117 (Ont.Co.Ct.).

[50] *R.* v. *Sidey* (1980), 52 C.C.C. (2d) 257 (Ont. C.A.).

[51] *R.* V. *Szunejko* (1981), 61 C.C.C. (2d) 359 (Ont. Prov. Ct.) and *R.* v. *Gray* (1982), 65 C.C.C. (2d) 353 (Ont. H.C.).

[52] *R.* v. *Campbell* (1974), 17 C.C.C. 2d 180 (Ont. Co. Ct.).

[53] *R.* v. *Kleppe* (1977), 35 C.C.C. (2d) 168 (Ont. Prov. Ct.).

[54] *R.* v. *Cinema International* (1981), at 342.

[55] *R.* v. *Sudbury News Services Ltd.* (1978).

[56] *R.* v. *Dorosz* (1971), 4 C.C.C. (2d) 203 (Ont.C.A.)

R. v. *Menkin* (1957), 118 C.C.C. 306 (Ont.Prov.Ct.).

[57] *Fraser et al* v. *The Queen*, [1967] 2 C.C.C. 43 (S.C.C.).

R. v. *Yip Men* (1970), 4 C.C.C. 2d 185 (B.C.Co.Ct.).

[58] *R.* v. *National News Co.* (1953), at 28.

[59] *R.* v. *Video Movieshop* (1982), 101 A.P.R. 321 (Nfld.S.C.).

[60] *R.* v. *Cameron*, [1966] 4 C.C.C. 273 (Ont.C.A.).

[61] *R.* v. *McFall* (1975), 26 C.C.C. 181 (B.C.C.A.).

[62] *R.* v. *Lee* (1971), 3 C.C.C. (2d) 306, (B.C.S.C.).

[63] *R.* v. *Video Movieshop* (1982).

[64] *R.* v. *Harris* (1977).

[65] *R.* v. *McFall* (1975).

[66] *Ibid.*

[67] *R.* v. *Odeon Morton Theatres Ltd.* (1974).

[68] *R.* v. *Kiverago* (1973) 11 C.C.C. (2d) 463, (Ont.C.A.).

[69] (1970) 3 C.C.C. 2d 149 (S.C.C.).

[70] *R.* v. *Harrison* (1973) 12 C.C.C. (2d) 26 (Alta.Prov.Ct.)

[71] *R.* v. *Vigue* (1973) 13 C.C.C. (2d) 381 (B.C.Prov.Ct.).

[72] (1982), 69 C.C.C. (2d) 503 (Ont.C.A.).

[73] *Ibid.*, at 510.

[74] (1980) 16 C.R. (3d) 87 (Ont.Prov.Ct.).

[75] R.S. McKay, "The Hicklin Rule and Judicial Censorship" (1958), 36 *Can. Bar. Rev.* 1, at 8.

[76] *R.* v. *American News* (1957), 4 at 166.

[77] *R.* v. *Cameron* (1966).

[78] *Ibid.*, at 289.

[79] (1973) 15 C.C.C. (2d) 350 (Que.C.A.).

[80] *R.* v. *Sutherland et al* (1974).

[81] *Ibid*, at p.124.

[82] *R.* v. *Penthouse Magazine* (1977) 37 C.C.C. (2d) 376 (Ont.Co.Ct.).

[83] *R.* v. *Benjamin News* (1978).

[84] *R.* v. *Nicols* (1983).

[85] *Criminal Code Amendment Act, 1938*, S.C. 1938, c. 44, s. 11

[86] S.C. 1953-54, c. 51, s.151.

[87] There is a Québec case that deals with the constitutional issue of whether a province can enact legislation dealing with the same subject matter as s. 162. See, *Hurrell v. Montréal*, [1963] Qué. P.R. 89 (S.C.).

[88] Hansard 1938, p.4315 (H.C.).

[89] Hansard 1938, p.576 (Sen.).

[90] 16 & 17 Geo. 5, c. 61 (U.K.). Some of the Australian states also copied the English provision. See, e.g., *Judicial Proceedings Reports Act*, 1958, Stats. Victoria 1958, No. 6280. There do not appear to have been any cases decided pursuant to that legislation in the Australian jurisdictions.

[91] 164 H.C. Deb. (U.K.) cols. 248-252, 2659 (1923); 165 H.C. Deb. (U.L.) col. 1155 (1923); 170 H.C. Deb. (U.K.) cols. 1193, 1886 (1924); 181 H.C. Deb. (U.K.) col 1143 (1925); 183 H.C. Deb. (U.K.) cols. 575, 2053 (1925); 184 H.C. Deb. (U.K.) col. 1738 (1925); 62 H.C. Deb. (U.K.) cols. 130-159, 528-547, 680, 687 (1925); 188 H.C. Deb. col. 186 (1925); 191 H.C. Deb. (U.K.) col. 497 (1926); 194 H.C. Deb. (U.K.) cols. 733-815 (1926); 65 H.L. Deb. (U.K. cols. 1591-1611.

[92] 194 H.C. Deb (U.K.)(1926).

[93] *Ibid.*, col. 734.

[94] *Ibid.*, col. 735.

[95] *Ibid.*

[96] *Ibid.*, cols. 733-814.

[97] *Ibid.*, cols. 749-52.

[98] *Ibid.*, col. 734.

[99] For example, *The Law of Libel (Amendment) Act*, 1888, 51-52 Vic., c. 64, s. 3; *Indecent Advertisements Act*, 1889, 52-53 Vic., c. 18; *Obscene Publications Act*, 1857, 20-21 Vic., c. 83.

[100] (1868), 3 Q.B.D. 360.

[101] [1965] 1 All E.R. 611 (Ch.Div.).

[102] Two other sections, s. 159(2)(b) and s. 171(1)(b), are relevent in this context, but neither appears to be of much significance. With respect to s. 159(2)(b), which deals with "indecent shows", see *Smith* v. *R.* (1963), 1 C.C.C. 395 (Man.Co.Ct.). With respect to s. 171(1)(b), which prohibits openly exposing an "indecent exhibition" in a public place, see *R.* v. *Boger* (1981), 61 C.C.C. (2d) 355 (Ont.Prov.Ct.).

[103] [1973] 4 W.W.R. 563 (B.C.C.A.).

[104] [1963] 2 C.C.C. 103.

[105] *R.* v. *Towne Cinema Theatres (1975) Ltd.* (1975).

[106] *Ibid.*

[107] *R.* v. *Johnson* (1973), 13 C.C.C. (2d) 402 (S.C.C.).

[108] *R.* v. *MacLean and MacLean No. 2*, (1982), 1 C.C.C. (3d) 412 (Ont. C.A.), at 416.

[109] *Ibid.*, at 414-415.

[110] *Ibid.*, at 415.

[111] (1978), 40 C.C.C. (2d) 273 (S.C.C.).

[112] *R.* v. *Giambalvo* (1982), 70 C.C.C. (2d) 324 (Ont. C.A.). *R.* v. *Gray* (1982).

[113] (1977), 40 C.C.C. (2d) 555 (Que. C.A.).

[114] *R.* v. *Szunejko* (1980).

[115] *R.* v. *Diaz* (1981), 60 C.C.C. (2d) 39 (Ont. Prov. Ct.).

[116] *Criminal Code*, s.646(1).

[117] *Ibid.*, s.722(1).

[118] S.C. 1974-75, c.48, s.25(1) and S.C. 1978-79, c.11, s.10(1).

[119] Bill C-18, 1984, 1st Sess., 33rd Parl. (Minister of Justice).

[120] The three government bills, all of which were omnibus *Criminal Code* amendment bills, were Bill C-21, 1978, 4th Sess., 30th Parl.; Bill C-53, 1981, 1st Sess., 32nd Parl.; and Bill C-19, 1984, 2nd Sess., 32nd Parl. Each was introduced by the Minister of Justice.

[121] Bill C-434, 1978, 3rd Sess., 30th Parl. (Mr. Whiteway) and Bill C-21.

[122] Bill C-206, 1977, 3rd Sess., 30th Parl. (Mr. Epp); Bill C-207, 1977, 3rd Sess., 30th Parl. (Mr. McGrath); Bill C-325, 1977, 3rd Sess., 30th Parl. (Mrs. Appolloni); Bill C-434; Bill C-21; Bill C-53. Bill C-206 has been tabled a total of four times, Bill C-207 a total of eleven times.

[123] Bill C-434, *supra*, note 121.

[124] Bill C-281, 1977, 3rd Sess., 30th Parl. (Mr. Whiteway); Bill C-325, 1977, 3rd Sess., 30th Parl. (Mrs. Appolloni); Bill C-411, 1977, 3rd Sess., 30th Parl. (Mr. Kaplan); The last of these bills has been tabled a total of four times.

[125] Bill C-207; Bill C-434; Bill C-21, *supra*, note 119; and Bill C-673, 1983, 1st Sess., 32nd Parl. (Mr. Kilgour).

[126] See in particular Bill C-673.

[127] See note 120.

[128] (1977), 76 D.L.R. (3d) 1. (S.C.C.).

[129] See text accompanying notes 43, 44 and 45.

[130] House of Commons, Standing Committee on Justice and Legal Affairs, Report on Pornography, Proceeding No. 18, 3rd Sess., 30th Parl., 1977-78 (McGuigan Report).

[131] *Ibid.*, at 18-4.

[132] *Ibid.*, at 18-6.

[133] *Ibid.*

[134] *Ibid.*, at 18-9.

[135] *Ibid.*, at 18-8 and 18-9.

[136] *Ibid.*, at 18-10 and 18-11.

[137] *Ibid.*, at 18-11.

[138] *Ibid.*

[139] See R. Fox, "Obscenity" (1974) 12 *Alta. L. Rev.* 172.

[140] Law Reform Commission of Canada, Working Paper No. 10, 1975.

[141] *Ibid.*, at 48.

[142] *Ibid.*

[143] *Ibid.*

[144] *Ibid.*, at 49.

[145] *R.* v. *Nichols* 27 Nov. 1984, unreported (Ont.Co.Ct.).

[146] *Ibid.*, at 16.

[147] *Ibid.*, at 16-17

Chapter 8

Pornography and the Charter of Rights and Freedoms

Canadian courts have already had the opportunity to consider pornography in the context of the *Charter* so that it is possible to develop at least a tentative picture of the directions in which they seem to be moving.

For the purposes of our discussion, the relevant sections of the *Charter* are sections 1, 2, 7, 8 and 15:

Guarantee of Rights and Freedoms

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by-law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In every one of the challenges that have thus far been brought against legislation in this area, the focus has been on the "freedom of expression" component of section 2(b). These challenges have raised one or more of the following issues in respect of that freedom:

(1) Does the legislation in question constitute a *prima facie* infringement on "freedom of expression"?

(2) If so, is the infringement cast in language so open-ended or vague as to offend either the "prescribed by law" requirement in section 1 or the "principles of fundamental justice" requirement in section 7?

(3) If so, can the infringement be justified in accordance with the requirements of section 1?

Considerable light can be shed on the kinds of constraints the *Charter* imposes in this area by examining how the courts have dealt with each of these issues.

Experience thus far would suggest that most Canadian courts are prepared to acknowledge that legislation that restricts obscene or indecent speech does constitute an infringement on the freedom of expression guaranteed in the *Charter*. More often than not this acknowledgement has been implicit rather than explicit[1] but on occasion it has been explicit.[2] Some courts, however, have not been prepared to acknowledge that the freedom of expression guaranteed by section 2(b) is put at risk by legislation directed at obscene or indecent speech.[3] These courts have opted for the American approach in this area, which, as we will see in a later chapter, involves holding that obscenity is not protected by the First Amendment to their Constitution. The question of which of these two approaches is the correct one will obviously have to await a Supreme Court of Canada ruling before it is finally resolved.

With respect to the requirement that an infringement on freedom of expression be "prescribed by law", the Ontario Court of Appeal has made it clear that the granting to an administrative agency of unbridled powers of censorship over a particular medium will not pass muster.[4] Some limits on those powers must be set and some criteria for their exercise spelled out.

However, no court has yet been prepared to hold that the vagueness inherent in the legislation in this area is sufficiently serious to warrant holding that the limits on freedom of expression embodied in it are unconstitutional. In *Luscher* v. *Deputy Minister, Revenue Canada, Customs and Excise*[5], the judge rejected the argument that the "immoral or indecent" test in Tariff Item 99201-1 of Schedule "C" of the *Customs Tariff* failed to satisfy the "prescribed by law" requirement. And a similar argument in respect of section 159(8) of the *Criminal Code* has now been rejected in at least three cases.[6] It

would appear, therefore, that Canadian courts are prepared to give a good deal of leeway to the legislative draftsman in this area.

Few courts have had occasion to address the third of the three issues listed above, that dealing with the acceptability of the rationale for the limitation on freedom of expression. In some cases, counsel for the challengers have chosen to concede this issue. In others, the issue was not before the court at all. However, in the four cases in which the court has been required to deal with the issue, it has been quick to find that the limitation in question could be justified under section 1.[7]

It is of interest to note that the judge in another case, one in which the issue did not have to be addressed, took a cautiously activist position. In *University of Manitoba* v. *Deputy Minister, Revenue Canada, Customs and Excise*,[8] the judge expressed the view that preventing a university from importing for educational purposes a short film of a male masturbating could not be justified under section 1.

In the *Luscher* case, counsel for the appellant invoked both section 7 and section 8 of the *Charter*, in addition to section 2(b), in his attempt to have Tariff Item 99201-1 declared unconstitutional. It is not clear from the reasons for judgment just what form the section 7 argument took, but it would appear that it was the "liberty" component of section 7 that was relied upon. Whatever form the argument took, it received short shrift from the court. The judge was of the view that what Mr. Luscher was really complaining about was a loss of his property, specifically a magazine, at the border, and he noted that the drafters of the *Charter* had intentionally decided not to include any protection for property rights in Section 7. In other words, he was not prepared to construe the right to "liberty" in section 7 in such a way as to bring within its reach a right to property.

The argument based on section 8 was very straightforward. The contention was that the refusal of the Customs Officer to allow Mr. Luscher to bring his magazine across the border amounted to an "unreasonable seizure" of that magazine. The judge questioned whether or not a "seizure" could properly be said to have taken place in the circumstances, but seemed prepared to assume that it had. The real issue, he said, was whether or not the seizure was "unreasonable". He decided it was not. It was his view that legislation that was designed to prevent what he called "socially offensive material" from coming into Canada satisfied the requirements of section 1.

On the basis of this brief review, it is possible to venture some opinions about the kinds of constraints the *Charter* might impose on legislators attempting to deal with pornography. The discussion that follows is organized in terms of the kinds of arguments that one might expect to be launched against legislation in this area. The opinions that are expressed are, of necessity, very general in nature.

Providing the legislation in this area is reasonably narrowly drawn, we cannot see Canadian courts striking it down on the basis of freedom of

expression. Either our courts will follow the American lead and hold that a certain category of pornographic speech falls outside the scope of section 2(b) of the *Charter* (something which, as noted above, a couple of our courts have already done), or they will uphold the legislation on the basis of section 1. It seems clear that Canadian courts see very little redeeming value in pornographic material. Morever, we sense that our courts are prepared to attach considerable importance to the purposes underlying legislation in this area. This will be especially true if those purposes are formulated in the terms of the need to respond to real social harms such as promoting violence against women and children and encouraging discrimination against women. In this regard, note should be taken of the recent decision in the case of *Regina* v. *Keegstra*.[9] In that case, an argument was made that the hate propaganda section of the *Criminal Code* was unconstitutional because of the effect it had on freedom of expression. In the course of rejecting that argument, the court placed great emphasis on the entrenchment in the *Charter* of the right to equality. It was appropriate, the court said, to limit freedom of expression for the purpose of promoting the goal of equality.

The decision of the Ontario Court of Appeal regarding the need to provide reasonably clear guidelines to a censorship body is obviously an important one. Failure to provide such guidelines will result in the body losing its powers.

Legislative drafters in this area must, of course, be concerned to some extent about arguments based on the doctrine of vagueness. However, experience both in the United States and in Canada would suggest that courts will not require a great deal of precision in the formulation of the legislative standards that are imposed. The courts in both countries seem to acknowledge the difficulty legislators face in this area.

Arguments based on property rights are unlikely to get very far at all. As the *Luscher* case points out, the *Charter* makes no mention of property rights, and it is not going to be easy to persuade a court to read them into some other provision.

If possession of certain material for personal use were to be made an offence, there can be little doubt that a right to privacy challenge would be forthcoming. In order to succeed in such a challenge, it would, or course, be necessary to establish that such a right exists. And that, we are led to believe, would be no easy task. Even if the courts were prepared to accept that such a right exists, and that the offence of possession for personal use infringed upon that right, they might still be prepared to uphold the legislation on the basis of section 1. One suspects that they would require good reasons to be given in support of the need for such an offence, but if, as one could persuasively argue, the harm caused by pornography stems from its impact on the consumer, that might well be sufficient.

We doubt very much that section 15(1) would ever be used by the courts to strike down legislation in the area of pornography. While such legislation will no doubt be found to contain inequalities, in the sense that it will treat

some groups differently than others, these inequalities are unlikely to bother the courts a great deal. Even if it could be argued that the producers, sellers and consumers of pornography constitute a group suffering some form of discrimination, it is doubtful whether the courts would evince any sympathy for them. As the *Keegstra* case suggests, the role that section 15(1) is more likely to play in this area is that of a justification for legislation directed against pornography.

The *Luscher* case indicates that section 8 of the *Charter* is likely to be used by challengers in this area. Although the argument in that particular case was not successful, section 8 has been used to good effect in a number of *Charter* cases thus far. The most important of these is *Southam Inc.* v. *Hunter*,[10] a recent decision of the Supreme Court of Canada. In that case the Court held that, as a general rule, searches and seizures can only be conducted pursuant to warrants issued by an impartial and independent person on the basis of evidence given on oath. This pronouncement has put at risk many existing search and seizure provisions in provincial and federal legislation alike, and drafters of any new legislation will obviously have to be mindful of it.

It is clear that the existing provisions of the *Customs Act* would not meet the standard prescribed by the *Southam* case. It appears, however that searches and seizures conducted pursuant to customs legislation are viewed as a special case, and that the general rule would, therefore, not apply.[11] The likelihood is, therefore, that, provided Customs Officers do not abuse their powers, the existing provisions will satisfy the *Charter*.

To date, despite the background of liberalization of the application of obscenity law in recent decades, the courts have used the *Charter* very carefully. Indeed, the signs are that they are prepared to take seriously the task of balancing individual rights and social concerns, and to pay attention to other community members' rights which are at the root of the broader social concern with pornography.

Footnotes

[1] *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors* (1983), 34 C.R. (3d) 73 (Ont.Div.Ct.), affirmed (1984), 5 D.L.R. (4th) 766 (Ont.C.A.); *University of Manitoba* v. *Deputy Minister, Revenue Canada, Customs & Excise* (1983), 4 D.L.R. (4th) 658 (Man. Co. Ct.); *R.* v. *Red Hot Video* (1984), 11 C.C.C. (3d) 389 (B.C.Co.Ct.) *Re Red Hot Video and City of Vancouver* (1983), 5 D.L.R. (4th) 61 (B.C.S.C.) reversed on other grounds by the B.C.C.A. in short oral reasons given in February, 1985.

[2] *Luscher* v. *Deputy Minister, Revenue Canada, Customs & Excise* (1983), 149 D.L.R. (3d) 243 (B.C.Co.Ct.); *R.* v. *Wagner* (unreported, 16 January 1985, Alta. Q.B.).

[3] See *Koumoudouros* v. *Corporation of the Municipality of Toronto* (1984), 6 D.L.R. (4th) 523 (Ont.Div.Ct.); *Schindler* v. *Deputy Minister, Revenue Canada, Customs and Excise* (unreported, 1983, Ont.Co.Ct.).

[4] *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors*, *supra*, note 1.

[5] Supra, note 2.

[6] *R.* v. *Red Hot Video*, *supra*, note 1; *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man.Q.B.); *R.* v. *Wagner*, *supra*, note 2.

[7] *Luscher* v. *Deputy Minister, Revenue Canada, Customs & Excise*, *supra*, note 2; *Re Red Hot Video and City of Vancouver*, *supra*, note 1; *R.* v. *Ramsingh*, *supra*, note 6; and *R.* v. *Wagner*, supra, note 2.

[8] *Supra*, note 1.

[9] Unreported, 5 Nov. 1984, Alta.Q.B.

[10] (1984), 11 D.L.R. (4th) 641 (S.C.C.).

[11] *R.* v. *Simmons* (1984), 7 D.L.R. (4th) 719 (Ont.C.A.)

Chapter 9

Canada Customs

1. Introduction

There exist a variety of federal legislative provisions that attempt to prohibit or regulate the distribution of what we can conveniently describe as pornographic material. The legislation has both general and particular application.

Various departments of the federal government have such provisions in their enabling legislation. In addition, there are complementary provisions of the *Criminal Code*.

Not only are there different legislative descriptions of what kind of material is affected; the different descriptions are not even defined in the legislation. As a result, the different descriptions have been the subject of conflicting judicial comments and decisions and have, understandably, led to considerable administrative grief.

We have identified three significant service areas where federal legislation is used to attempt to regulate pornographic material. These areas are the Customs, Postal and Broadcasting services.

As we have indicated elsewhere in this Report, the overwhelming majority of pornographic material available in Canada is produced in other countries. The methods we have or can devise to control the importation of such material into this country are, therefore, of obvious importance.

The Customs and the Postal services respectively have responsibility for goods and mail entering Canada. Their jurisdiction, to an extent, overlaps. After describing their independent roles and respective procedures, we will deal with their joint jurisdiction. The Broadcasting service will be dealt with separately.

2. Customs Tariff and Customs Act

Federal Customs legislation is found in two Statutes: the *Customs Act*[1] and *Customs Tariff*[2].

The *Customs Act* contains the substantial powers given to the Customs Branch of Revenue Canada. It also gives decision-making power to Customs officers in a variety of areas and provides a regime for appeals.

The *Customs Tariff* sets out in great detail the various tariffs and the rates of duties of Customs which Canada applies to goods imported from other countries. There are three Schedules to the *Customs Tariff*, Schedule A, "Goods Subject to Duty and Free Goods", Schedule B, "Goods Subject to Drawback for Home Consumption" and Schedule C, "Prohibited Goods".

All goods entering Canada are subject to examination by Customs officers for appropriate classification under the *Customs Tariff*. Under Section 14 of the *Tariff*, it is prohibited to import goods set out in Schedule "C"; these goods include, "books, printed paper, drawings, paintings, prints, photographs or representations of any kind of treasonable or seditious, or of an immoral or indecent character". (Tariff Item 99201-1).

In May 1980, the then Minister of National Revenue gave this general explanation to members of both Houses of Parliament of how Canada Customs administers its legislation in order to deal with pornographic material:

> As with all goods entering the country, importations of items of this nature are subject to examination by Customs officers at the ports of entry for appropriate classification under the *Customs Tariff*. If, in the judgment of the examining officer, the importation constitutes explicit pornography, and is thus of an indecent character, it is classified under tariff item 99201-1 and, therefore, prohibited entry. All doubtful items are forwarded to Ottawa where they are reviewed by departmental officers and, if found to fall under the provisions of the item, they are declared prohibited importations. The decisions are then communicated to the Collector of Customs who, in turn, advises the importer accordingly. The importer is also notified of his statutory right of appeal to the Deputy Minister (section 46 of the Customs Act) for a reclassification of the goods. Should the appeal be denied, the importer can further appeal to the judge of the county or district court as provided by section 50 of the *Customs Act*. The final decision, then, rests with the courts and not Canada Customs.
>
> Canada Customs does not censor importations in the sense of deleting portions of films or magazines, or set age limitations for their viewing or purchase. Rather, the role is one of determining whether specific items are to be classified under tariff item 99201-1.
>
> The criteria used for determining the admissibility of those items considered susceptible to the tariff item are based on the related sections of the *Criminal Code* which deal with "obscene" matters and on court decisions made under the *Criminal Code* and under the *Customs Act*. Since the administration reflects the standards of the community at large, these criteria, which are

national rather than local, have changed over the years and certain magazines which might have been prohibited in the past as indecent are now admitted. To assist examiners in this classification at the port level, guidelines have been issued, ... and, in addition, decisions made by Headquarters are circulated to Customs Regions at two-week intervals.

In order to assist its officers in the field to decide if particular goods are "of an immoral or indecent character" and, therefore, prohibited, the department issued so-called "policy guidelines". These guidelines have not been formally revised since October, 1977 and are as follows:

Policy Guidelines

9. (1) In its formulation of the policy governing the administration of this item the Department is guided by the decisions handed down by the Canadian Courts and by the definition of obscenity contained in Section 159(8) of the *Criminal Code* ... :

(2) For the purpose of assisting field officers in making judgments, the following guidelines are to be followed:

The following material will be dealt with at field level for initial classification and will be prohibited:

(i) illustrated material containing hard-core pornographic pictures which lewdly and explicitly display the male and female sexual organs, sexual intercourse, sexual perversions and such acts, including bestiality.

(ii) Reading material, containing explicit hard-core fictional text dedicated entirely to sexual exploitation and containing no redeeming features. The primary source of material of this character is the paper-back, or so called "pocket" publications.

The following material will be referred to headquarters for initial classification:

(iii) That type of material, the so-called "grey area", with illustrations depicting similar subjects to those described in 9(2)(i) but in a less explicit fashion, with emphasis, however, mainly on sexual activities and apparently designed to appeal in the same way as hard-core pornography. In this category are the pseudo or so-called "Nudist" and "Film" magazines which make pretensions to being bona fide but which include lewd or other pornographic displays.

(iv) Any publication which despite its format or alleged scientific, medical or artistic purpose appears to be in essence an indecent or immoral publication in disguise. ...

(vii) Any publication which appears to advocate, promote or incite hatred against any identifiable group, that is, by colour, race, religion or ethnic origin.

(viii) Any publication concerned with violence which counsels, appears to incite, advises, recommends or persuades persons to commit acts of violence which are prohibited by the *Criminal Code*.

Generally speaking, items which do not fall within the foregoing categories may be allowed to be imported including the so-called "naughty" or "spicy" girlie type magazines where the models are partially clad so that the genitals are not exposed and perversions are not depicted. Cultural and educational publications and bona fide nudist magazines, although illustrated with nude males or females but not including indecent poses or over-emphasis of the sexual organs, are also considered admissible. Non-illustrated fictional

> reading material (or with inoffensive illustrations) which does not fall in the category of hard-core pornography described in 9(2)(ii) should be allowed to be imported. It is thus the policy to prohibit only hard-core material of the latter type and this will be done at the field level. In case of doubt the material may be forwarded to headquarters for guidance.

The fact that the "Policy Guidelines" have not been revised for several years does not mean that the department has treated what is contained in them as immutable. There have been a great number of information bulletins and internal memoranda circulated within the Customs Branch, designed to update information and data both about inspection policy and actual decisions on material.

In describing the process they follow in dealing with pornographic materials, Customs has told us that the material is brought into Canada by visitors, returning residents, magazine and film distributors, research and scientific groups and institutions. All methods of transport are used, including the mail.

While there were only 70 actual seizures of pornographic material in 1983, it must be recorded that seizure is the ultimate procedure taken under the *Act* and that, while no actual records exist, it is well known that there were a large number of both confiscations and voluntary releases.

In dealing with commercial shipments of magazines, the department fosters a system of so-called "voluntary compliance", whereby a distributor can provide Customs with a single copy and obtain an advance ruling on the admissibility of an entire shipment. As one might expect, distributors of large commercial shipments take advantage of the procedure as a saving both in time and expense against the possibility of an ultimate finding that the goods are prohibited.

No administrative or service fee is charged at the time goods are cleared, either in advance or in the ordinary course.

Field officers can decide on the admissibility of material, or they can forward the material to the appropriate regional office. There, an officer referred to as a "commodity specialist" makes the decision based on the department's policy guidelines. The department concedes that not all officers and all regions are applying the policy guidelines in a uniform manner. Clearly this results both from the fact that the guidelines themselves are imprecise and also from the fact that the people making the decisions may have genuine disagreements.

Commodity specialists within the department receive "on the job training". They are usually officers already experienced in the department who take their turn dealing with pornographic material. We understand that the present Minister has asked that a review be undertaken of training programs available to both field officers and commodity specialists.

The task of the regional commodity specialists includes a number of clerical functions, and in the absence of any computer assistance, the entry and retrieval of data is a time-consuming, inefficient, inexact and slow process. In terms of the equipment it has, the department is not only unable to efficiently deal with its work load, but it is also unable, in a timely fashion, to keep itself well informed of its own decisions.

The department agrees and has told us that:

> The capture, storage and retrieval of information relating to attempted importations of immoral or indecent materials are currently inadequate. The system does not provide sufficient information for a complete and accurate data base, which could serve future investigations. The system is being developed to overcome this problem.

The department now issues a monthly list of the material that has been prohibited. The list typically runs to about 80 pages and is updated each month. While each of the Customs officers nationwide does not receive a copy of the list, each has access to the information. As we understand it, however, the Department has no separate computer facilities and competes with other government departments for computer time. The computer information flow appears to be from Ottawa headquarters to the regions. There is no computer information flow from the regions to Ottawa.

As the former Minister indicated in the passage set out earlier, generally describing the Customs process, an importer can appeal a determination classifying goods as being "prohibited" at the time of their entry. The initial appeal is to a Dominion Customs Appraiser and must be taken within 90 days. A subsequent appeal to the Deputy Minister of Revenue Canada must be taken within 90 days. No administration fees are payable with respect to these appeals. An appeal from the Deputy Minister of Revenue Canada lies to either the county or district court depending on the province where the matter arises.

The volume of appeals to the Deputy Minister is considerable. The following table contains the most current data available to us showing the disposition of appeals to the Deputy Minister for the first six months of 1984.

As the figures show, the overwhelming majority of cases arose as a result of material that had been sent through the mail. Of the total 223 appeals, 61 were successful or partially successful.

We do not have any information about the number of cases that went on to appeal in the courts.

If the "Policy Guidelines" and the related documentation we have referred to earlier, have been used by Canada Customs to give effect to goods that are "of an indecent or immoral character", what interpretation have the Courts given to the term?

Generally speaking, the courts have held that the contemporary community standards of tolerance is the test to be applied.[3] However, there

DECISION	PROHIBITED		RELEASED		PARTIALLY RELEASED			
	# of cases	# of items	# of cases	# of items	Total # cases	items	Prohibited items	Released items
DATE				NON-MAIL				
January 84	2	5	—	—	0	0	0	0
February 84	2	9	—	—	0	0	0	0
March 84	2	5	—	—	3	3	2	1
April 84	3	22	—	—	0	0	0	0
May 84	0	0	—	—	1	22	21	1
June 84	2	11	—	—	2	78	74	4
TOTAL	11	52	—	—	6	103	97	6
				MAIL				
January 84	54	196	8	14	22	284	213	71
February 84	25	122	4	6	0	0	0	0
March 84	45	226	5	27	5	23	17	6
April 84	25	87	2	5	3	36	22	14
May 84	38	260	1	1	1	6	5	1
June 84	25	140	2	3	2	31	25	6
TOTAL	212	1,031	22	56	33	380	282	98
				TOTAL				
January 84	56	201	8	14	22	284	213	71
February 84	27	131	4	6	0	0	0	0
March 84	47	231	5	27	8	26	19	7
April 84	28	109	2	5	3	36	22	14
May 84	38	260	1	1	2	28	26	2
June 84	27	151	2	3	4	109	99	10
TOTAL	223	1,083	22	56	39	483	379	104

remains some confusion surrounding the precise nature of this test. For example, in *Priape Engineering et al* v. *Deputy Minister of Revenue Canada*[4] the court expressed the view that, while indecency and immorality suggest a similar standard, this standard might differ from the test for obscenity under section 159(8) of the *Code*, with "obscene" slightly higher on the scale of unacceptability than "immoral or indecent". If this interpretation is correct, it is possible that goods may be prohibited under the *Customs Tariff* which would not be illegal under the *Code*.

On the other hand, there have been cases where goods allowed through Customs have been found to be "obscene" under the *Code*.[5]

These apparently conflicting decisions illustrate the difficulties that are inherent when different legislation uses different words in attempting to deal with what some regard as qualitatively the same material.

A new and further complication in the administration of Customs has arisen as a result of the 1983 decision of the County Court of Manitoba in the *University of Manitoba* v. *Revenue Canada*.[6] The court held that material sought to be imported by the University's medical faculty was not prohibited as being "immoral or indecent" because it had been produced for a *bona fide* medical teaching institution. The result of this decision is that Customs must now, in effect, consider the *use* to which the material is to be put in order to decide whether or not it should be prohibited.

3. Incidental Customs Data

Our discussions with the Deputy Minister of Revenue Canada Customs and Excise and his officials have been comprehensive and very helpful. They have enabled us to put into some perspective the administrative problems that surround controlling the mass of material that enters Canada each year. There are approximately 400 ports of entry and 12 regional administrative Customs offices in Canada, staffed by between 2,500 and 3,000 Customs officers. Eighty million individuals entered Canada in 1983, half were visitors and half were returning Canadians. During the period March 31, 1982 to April 1, 1983, approximately 6.5 million commercial shipments and approximately 13.5 million pieces of mail entered Canada.

While Customs deals with a huge volume of material, it is clear from their experience that only a portion of goods brought into Canada is actually declared.

It is estimated that Customs officers actually inspect the luggage of approximately 7% of those persons entering Canada. Of the commercial shipments processed through Customs at the moment, about 5% of the material is actually examined. We understand that these statistics are a direct function of both time and available resources as well as assigned priority.

The resources of the Customs Branch are, of course, at the disposal of the federal government. Accordingly, Customs' priorities are subject to political will. At various times in the recent past, Customs received instructions to make *Tariff* items involving clothing and automobiles an administrative priority. No special priority has been ordered with respect to pornographic material. Among

other things, the lack of political will has impacted on the treatment Customs has been able to give to the importation of pornographic material.

Canada Customs estimates the current sources of pornographic material in this country are: the United States 85%, Europe 12% and domestic 3%. In their experience, the material comes in the form of books, magazines, pictures, sound recordings, video cassettes, movie films, computer games and television transmissions received by satellite dishes. The material appears to be increasingly explicit and violent. Pornography involving children seems to be well hidden and is not frequently encountered by Customs officers. While the department does not keep statistics on the likely dollar value of the prohibited goods, it agrees that the figure is probably in the tens of millions of dollars annually.

It is estimated that there are now approximately 400,000 privately owned video cassette recorders in Canada. The sales and rental figures for pornographic videotapes are not available, but even adopting the most conservative estimate, there is a ready market. The vast majority of original tapes are produced in the United States. The supply of tapes in the Canadian marketplace must, therefore, either have been imported from the United States or other of the producing countries, or have been copied in Canada from the originals. From what we can tell, the original tapes are not being cleared by Canada Customs. However, the foreign produced material abounds in Canadian video stores.

Red Hot Video is a British Columbia concern with stores in seven cities in that province. It advertises itself as Canada's leading supplier of "adult videotapes" and claims that its features are "uncut and sexually explicit". Its 1984 adult video catalogue lists 295 titles. The Pacific Region of Canada Customs advises us that it has never received an application by Red Hot Video to clear material under the *Customs Tariff*. The source of the company's supplies is apparently unknown, yet it is clear that most, if not all, of their products are produced outside of Canada.

Customs is aware that large quantities of empty tape boxes have been shipped from the United States to destinations in Canada. The empty boxes are themselves not in violation of the *Tariff*. The covers advertise known pornographic titles. The advertised tapes have not been included in the shipments. One of the inferences that can be drawn is that the actual tapes have been relabelled with false titles and have reached Canada undetected. The relabelling of tapes is a common service provided by some American video shops selling to Canadian customers who wish to avoid a Customs declaration.

We have seen evidence that pornographic material is being transmitted via satellite to Canada. There is widespread belief that the material is then re-recorded here for distribution. We, in Canada, have not given much thought to how our existing Customs legislation and administrative procedures can be amended to accommodate the consequences of this technology.

4. Film and Video Material

The present Canadian regime for dealing with imported film material has divided jurisdiction between federal Customs and provincial film classification boards. Customs clears the material into the country and the boards classify it where it is intended for public showing. In other countries, and in some other federal states, Customs has the complete jurisdiction to admit and to classify films. The efficiency of such a system is matched by its obvious consistency.

In the course of our public hearings, there were suggestions that only Canada Customs be given the responsibility for the classification of films as part of its clearance procedure. It was pointed out that the standards of classification boards vary across the country and that not only are the results inconsistent for the viewing public, but distributors face a multiplicity of bureaucracies if they wish to show a film in all parts of Canada.

The current Canadian practice appears to have developed for a variety of reasons. One reason has to do with our Constitution. Parliament has the power to control Customs. Provincial legislatures have the power to regulate local business undertakings, including the public showing of films.[7] It is an open question whether the federal power would extend to having films classified as part of the Customs process, but there is reason to doubt that it would.

Another reason for the existing practice has to do with Canada's cultural and regional diversity. Canada's experience has traditionally been that very little, if anything, can be treated monolithically. The creative expression of our cultural diversity has proceeded along regional and linguistic lines. The classification of films by provincial or regional bodies has been a part of this tradition. We have celebrated our regional diversity in Canada. It is part of what we think unites rather than divides the country and it is difficult to imagine that any proposal to do away with the provincial film classification boards would be viewed as a recommendation for progress.

Just as important, perhaps, is the view that it is not and should not be the role of Customs to act as arbiter of the public taste. It is thought by many that the role of Customs should be confined to a determination of whether goods should be prohibited entry on the basis of a standard that is really little more than an objective formula. Many people believe that to extend the function of Customs to include a determination of what material is publicly acceptable, would be to give it a role it should not have.

A more complete description of the existing various provincial film classification procedures appears in Chapter 14 of this section. Suffice it to say that all the provinces and both territories have either established a classification board or made arrangements to use the services of a provincial board. All films must be classified if they are intended for public showing in a province or territory.

The importer of films for public showing has two hurdles to leap. Firstly, the film must be cleared by Customs and secondly, before it can be shown, the film must be classified. For an importer, there is little point in obtaining Customs clearance if a film is ultimately refused provincial classification.

As a practical response to this dilemma, there has developed a long standing practice of co-operation between Customs and the provincial classifiers. The political nature of the co-operation differs from province to province, however.

In Québec, as previously discussed, a practice has developed over the last 20 years whereby Customs allows importers 60 days in which to have a film approved by the classification board. If the film is approved, then clearance by Customs follows, otherwise the film will be prohibited. One of the aspects of this self-regulating arrangement that has attracted criticism is the fact that the importer is given possession of the film for the purpose of conveying it to the board. The possibility clearly exists that, while the material is out of the control of Customs, it may be copied and then distributed in its original form. It is clear that the technology now exists to copy the material onto video cassettes. We were told that such video cassettes are in wide circulation despite the fact that original versions of the films were rejected by both the classification board and Customs. The existing practice involving the so-called "60 day rule" appears to be a vehicle that can make a nonsense of the whole regime of Customs inspection.

In British Columbia, there is currently a written agreement providing for Customs to forward directly to the classification board films destined for public viewing in theatres, bars or discos. After the board has reviewed and rated the film and made any cuts, it is returned to Customs for appropriate action, namely, release or prohibition or destruction by the importer. An important feature of the arrangement is that the film remains under continuous Customs control. Under the arrangement, Customs does not delegate away its responsibility under the Customs legislation. Customs retains its ultimate jurisdiction to give clearance to a film, but its decision to do so is based on the informed report received from the classification board.

Customs has proposed that a similar formal arrangement be made with the other seven provincial classification boards. It is proposed that the arrangement extend to all so-called "commercial films", i.e. films intended for public viewing, including 8 mm., 16mm. and 35mm. film as well as video cassettes and slides. Customs has indicated that the scope of the proposal will not extend to "recognized movie chains" though the possibility of so extending it is left open.

The procedure contemplated has these significant aspects:

(a) Customs makes an immediate decision on whether the film is intended for public showing;

(b) If the decision is affirmative, the importer is advised that he can either have the film returned to the sender or it can be forwarded to the provincial classification board under Customs control;

(c) If the importer elects to have the film forwarded to the board, it will view and classify the film and contact the importer to explain if any portions must be cut. The cuts will only be made if the importer agrees. If there is agreement, the cut film will then be returned to Customs for release to the importer. If there is not agreement, the film will be exported or destroyed under Customs supervision as the importer wishes;

(d) "Customs will retain the right to view and classify for Customs entry purposes any commercial film and may do so in exceptional circumstances".

We understand that New Brunswick, Ontario and Saskatchewan have joined British Columbia in agreeing with the arrangement and that it will become effective in these provinces on April 1, 1985. The provinces of Nova Scotia, Manitoba and Alberta are still considering the proposal.

In Chapter 14 dealing with film classification, we express our views on the efficacy of the different methods of classification. Regardless of the classification method employed, it is clear that co-operation between Customs and classification boards is both sensible and, on an ongoing basis, essential.

5. Enforcement

Canada Customs has exclusive jurisdiction to interdict goods at its border ports. Earlier in this century the Department of National Revenue, which administers Customs, had its own "Preventive Service" to investigate smugglers and smuggling. In 1932, the Preventive Service was transferred to the Royal Canadian Mounted Police (RCMP), with the Ministry of National Revenue being given responsibility "for the policy to be adopted by the Preventive Service". The Ministry of Justice was given responsibility "for the administration of the personnel of the Preventive Service, and of the duties and interior economy of that service."[8]

There are currently 52 field sections of the RCMP located in various centres across Canada and dedicated to all aspects of Customs enforcement; 214 positions exist in the 52 sections. The members of the force employed in the Customs and Excise sections are experienced officers who receive specialized training in Customs enforcement and whose responsibilities include all aspects of enforcement. Accordingly, none of the officers is exclusively committed to dealing with pornographic material.

The RCMP and Revenue Canada have written agreements that came into force in September 1983, with respect to both Customs prosecution policy and the division of investigative and enforcement responsibilities. Customs has responsibility for investigation and enforcement activity with respect to the

Customs Tariff. The RCMP has responsibility under the agreement for the *Customs Act*, and as the agreement records, for:

> Investigation of suspected smuggling where the goods have been imported into Canada at a place where no Customs office is located, or, the goods have been carried past a Customs office and ... were not included in any shipment formally entered at Customs.

The RCMP is also given responsibility for:

> Investigation of offences which come to the attention of the RCMP as a result of an investigation of other criminal activities which would normally be the responsibility of Customs.

Under the terms of their agreement, co-ordinating committees of both Customs and the RCMP have been established in their respective regions and headquarters.

There are a number of offences created by the *Customs Act*. Among them are smuggling, concealing goods on one's person, making a false statement in a declaration, and keeping or selling goods unlawfully imported. Generally speaking, the present *Act* provides for seizure and forfeiture of the goods, forfeiture of the value of the goods and fines, as well as terms of imprisonment. The first two of these sanctions are usually mandatory. The third is imposed only if a criminal prosecution is launched.

With respect to the fines and terms of imprisonment, a distinction is drawn between cases involving goods with a dutiable value of less than $200 and cases involving goods with a dutiable value of $200 or more. (That is some indication of how old the legislation is.) Penalties are nominal if the goods have a dutiable value of less than $200, and they are not much more severe if the value of the goods equals or exceeds $200.

The importation of prohibited goods results in the goods being forfeited to the Crown. In addition, the importer "shall for such offence incur a penalty not exceeding $200."

Most of the investigatory work done by the RCMP is undertaken by the force as a result of intelligence and information it has received from sources apart from Canada Customs. In this sense, the force's role is pro-active. Only a minor part of its work is reactive in the sense of acting on information received from Canada Customs.

The RCMP represents Canada in Interpol and operates Canada's National Central Bureau which links 135 countries in a system for communicating information likely to assist in preventing and suppressing crime. The National Central Bureau links the world police network with Canada's police forces and law enforcement agencies. Through the Interpol network, information on pornography is collected and disseminated to police forces and law enforcement agencies including Canada Customs.

Customs is a member of the Customs Co-operation Council, an international organization involving some 97 countries through which Customs information is exchanged. Through this mechanism, pertinent information is made available to the RCMP.

6. Computer and Information Services

In 1974, the RCMP established an Automated Intelligence Customs Services System (AICS) in order to provide a data base for Customs related information. Canada Customs commenced using this service in 1975. The system was originally set up to monitor large commodity shipments in an effort to counteract the activities of organized crime and commercial smuggling. As time went on, the RCMP noticed that information about smaller shipments was useful in identifying trends and in collating sources and destinations to assist in the investigation of smuggling activities. The data base was, therefore, expanded.

The AICS system was originally a "batch type" system and information was received from it by paper printout. The information that could be retrieved from the system included composite seizure statistics and information about where commodities had originated and their points of destination.

The report of the Badgley Committee has made recommendations about this information system. The report identified that about two of every five postal detentions made by Canada Customs were not included in the AICS system. Since the Badgley recommendations, Canada Customs has started providing more frequent information to AICS and has begun to provide the system with more details about both the nature and origin of goods in specific shipments.

A new and automated Police Information Retrieval System (PIRS) is now in use. This system, which is owned by the RCMP, originated in British Columbia and is in the process of being expanded to other major centres across the country. The information that is now on the AICS system will be put on the new retrieval system by June of 1985. In November of 1984, the RCMP signed a Memorandum of Understanding with Canada Customs providing for direct input into the system by both sources and agreeing that there would be continuing sharing of information.

PIRS is an "on-line" system and information will be able to be retrieved from it quickly by video screen. Under the existing "batch type" AICS system, a commodity specialist in any Customs office across Canada can access information by telephone either through the regional office or the national headquarters. Information retrieval will be much easier under the new on-line system. The amount of information will be greatly increased to include the following:

1. the route that the commodity took and how it came into Canada, including intermediate ports;

2. how the commodity was concealed;
3. where the commodity came from;
4. destination;
5. the name and address of the sender and receiver;
6. commodity type; and
7. the licence number and the name of the owner of any vehicles, vessels or aircraft involved in the transport of the commodity.

At the present time, the titles of pornographic materials are not included in the data base, nor is it proposed to include this information in the enlarged on-line data base. This is essentially because titles change frequently and regularly, in an apparent attempt to avoid detection.

The information concerning the material will stay in the data base until there has been a ruling on the material by Canada Customs. If it is deemed to be "immoral or indecent", the information about the material will remain on the data base. If it is found not to be "immoral or indecent", then the information about the material will be purged from the data base, unless it has not been declared at the time it was brought into the country and can, therefore, be treated as having been smuggled.

Information which remains on the data base is information about material that has either been found to be in violation of the *Customs Act* or the *Customs Tariff*. Information does not remain in the data base about material that has either been judged not to be in violation of the *Customs Tariff* or been properly declared.

Unless the operation is being conducted partially or totally undercover, the RCMP makes Customs aware of investigations it is undertaking. The results of all investigations are communicated to Customs.

7. Trends and Statistics

In 1983, the RCMP conducted an analysis of information contained in AICS relative to pornography.

For the five-year period 1978-82, a total of 7,770 importations of material deemed "indecent or immoral" were seized and/or detained by Canada Customs and the RCMP under the *Customs Tariff* and the *Customs Act*. Seizures by the RCMP constituted 9% of the total.

These figures *do not* include cases involving pornographic material which was seized under authority of the *Criminal Code* by the RCMP or other Canadian police agencies, or the majority of postal detentions by Canada Customs. However, these figures are considered by the RCMP to be

representative of the illicit trade in pornography. The primary source countries were:

United States	83%
Sweden	6%
Denmark	6%
Other	5%

Within the United States the primary source states were:

California	36%
New York	25%
Connecticut	12%
North Carolina	2%
Florida	1%
Michigan	1%
Other	23%

Los Angeles, California, was the primary source city.

The primary destinations in Canada were:

Alberta	39%
Quebec	24%
Ontario	20%
British Columbia	4%
Other	13%

The above data has been updated for the six-year period from 1979 to 1984. The RCMP alone made 1,297 seizures of pornographic material during this period. The types of pornographic material seized across the country were as follows:

Books	16%
Catalogues	6%
Magazines	28%
Film	21%
Video Cassettes	6%
Assorted	24%

With the new computer systems in place, composite information about investigation enforcement procedures undertaken by the RCMP and Customs will be more comprehensive and complete.

Footnotes

[1] *Customs Act*, R.S.C. 1970, c.58.

[2] *Customs Tariff*, R.S.C. 1970, c.60

[3] *In re Hawkshaw and the Queen* (1982) 69 C.C.C. (2d) 503 (Ont. C.A.); *University of Manitoba* v. *Deputy Minister of Revenue Canada, Customs and Excise* (1983), 24 Man. R. (2d) 198 (Man.Co.Ct.)

[4] (1979) 234 C.R. (3d) 66 (Québec Superior Court)

[5] *Re Han and Deputy Minister of National Revenue for Customs and Excise* (1972) C.C.C. 399 (B.C.C.A.)

Regina v. *29455 Ontario Ltd. et al* (1978) 39 C.C.C. (2d) 352 (Ont. C.A.)

Regina v. *Prairie Schooner News et al* (1970) 1 C.C.C. (2d) 251, 75 W.W.R. 585 (Man. C.A.)

[6] *Supra*, footnote 3.

[7] *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1.

[8] Order in Council, April 16, 1932: P.C. 857.

Chapter 10

International Mail: Joint Jurisdiction of Canada Customs and Canada Post Corporation

Although Customs has the clear jurisdiction to examine all goods entering Canada by *mail*, Canada Post has a monopoly on the carriage of *letters*. The procedure Customs follows in dealing with mail and in dealing with letters is set out in section 40 of the *Canada Post Corporation Act*.[1] With emphasis added, it provides as follows:

> (1) All *mail* from a country other than Canada containing or suspected to contain anything subject to Customs or other import duties or tolls or anything the *importation of which is prohibited* shall be submitted to a Customs officer for examination.
>
> (2) A Customs officer may open any *mail, other than letters*, submitted to him under this section and may
>
> (a) cause *letters* to be opened in his presence by the addressee thereof or a person authorized by the addressee; or
>
> (b) at the option of the addressee, open letters himself with the written permission of the addressee thereof;
>
> and where the addressee of any *letter* cannot be found or where he refused to open the *letter*, the Customs officer shall return the letter to the Corporation and it shall be dealt with as undeliverable mail in accordance with the regulations.
>
> (3) A Customs officer shall deal with all *mail* submitted to him under this section in accordance with the laws relating to Customs and the importation of goods and, subject to such laws, shall deliver such mail to the addressee thereof, on payment of any postage due thereon, or shall return it to the Corporation.
>
> (4) Any non-mailable matter found by a Customs officer in any *mail* made available to him under this section shall be dealt with in accordance with the regulations.

The important distinction between "mail" and "letter" will be referred to later. But first, we will describe the administrative activities involved in Customs inspecting goods that have arrived in Canada by mail.

Canada Post initially receives all international mail at four centres: Montréal, Toronto, Winnipeg and Vancouver. The centres receive mail from specifically identified countries and forward it to Customs at one of twenty-two primary screening centres:

1. Toronto
2. Montréal
3. Vancouver
4. Winnipeg
5. Edmonton
6. Calgary
7. Ottawa
8. Halifax
9. Regina
10. London
11. Saskatoon
12. Victoria
13. Québec City
14. Hamilton
15. Kitchener
16. Moncton
17. Thunder Bay
18. Saint John, N.B.
19. Lethbridge
20. St. John's Nfld.
21. Sudbury
22. North Bay

Customs officers at these centres examine the mail and decide which items they will release and which are to be held for payment of duty or taxes or further investigation. Usually the initial decision of whether to retain the mail in Customs control is made quickly on the basis of an examination of the exterior of the item. Officers make their decision based on a number of factors, including size, sender, country of origin, etc.

Those items released are then processed as part of the regular mail delivery. The items not released and which are addressed to areas not immediately serviced by the 22 primary screening centres are then forwarded by Canada Post to the Customs office serving that area. It will then notify the addressee of the fact that the mail is in Customs control. Customs may, at this stage, open and inspect the mail, but typically it will ask the addressee to open it when it is claimed. The item is then inspected and either released or found to be prohibited. If it is found to be prohibited then the goods are ultimately dealt with in accordance with the laws relating to Customs.

As section 40 requires, a special procedure must be followed by Customs where a letter (as distinct from mail) is involved. Customs cannot open a letter without the written permission of the addressee. If an addressee or someone authorized by him refuses to open a letter, Customs must then return it to the Canada Post Corporation to be dealt with as undeliverable mail. The same result occurs if the addressee cannot be found to give consent to the opening of the letter. The postal Regulations with respect to undeliverable mail require, in most cases, the return of the letter to the country of origin.

For many years the term "letter" was not actually defined in the postal Regulations or legislation. Starting in 1970, Customs operated on the basis that officers were prevented from opening any first class mail regardless of type, size or probable contents until the addressee's permission was obtained.[2] This procedure became unmanageable and was changed in 1978. Instructions were given to Customs officers that "a letter is interpreted to mean any item which would reasonably be assumed to consist of correspondence as its principal content and which is in an envelope".[3]

In 1983, Canada Post Corporation passed a regulation known as the Letter Definition Regulations. Under regulation 2:

> Letter means one or more messages or information in any form, the total mass of which, if any, does not exceed 500g, whether or not enclosed in an envelope that is intended for collection or transmission or delivery to any addressee as one item, but does not include
>
> (a) an item carried incidentally and delivered to the addressee thereof by a sender who is a friend of the addressee; ...
>
> (g) a newspaper, magazine, book, catalogue, ... manuscript ...

As a result of the new Regulation, Canada Customs published a memorandum setting forth new Customs procedures for the examination of goods arriving by mail.[4] The memorandum advised Customs officers in part:

> 6. In accordance with the [Regulation] Customs Inspectors are not to open any mail item except those that are excluded by the definition (e.g. ... a newspaper, magazine, book, catalogue, ... manuscript ...) weighing 500 grams or less without the written permission of the addressee, even though goods or prohibited items are suspected to be contained in the mail item.
>
> 7. In instances where it is determined that the mail item weighs 500 grams or less and it is felt that examination is warranted because the country of origin is prominent in the drug trade, or the addressee is a known smuggler or the subject of an intelligence alert, the mail item is still not be opened except by the addressee, or the addressee's authorized agent, or with the addressee's written permission.
>
> 8. Customs Inspectors may, for purposes of examination, open without the addressee's written permission any mail item weighing in excess of 500 grams.
>
> 9. Customs is committed to maintaining the privacy of personal correspondence and will not tolerate the reading by Customs personnel of any such correspondence found in letter or parcel mail. The term "correspondence" does not include invoices, packing slips, order forms or other business documentation which may be required for Customs purposes.

The memorandum also indicated that the new procedures were "interim" pending expected revisions to the *Customs Act*. In fact, the revisions had been under consideration for several years. The last attempt at new legislation occurred when Bill C-6, the *Customs Act*,[5] was introduced and given first reading in the House of Commons on January 16, 1984.

The portion of the Bill dealing with the issue of the jurisdiction of Customs to inspect goods arriving Canada by mail provided as follows: (emphasis added)

> 92.(1) An officer may...
>
> (b) at any time up to the time of release, examine any *mail* that has been imported and, subject to this section, open or cause to be opened any such *mail* that he suspects on reasonable grounds contains any goods referred to in the *Customs Tariff*, or any goods the importation of which is prohibited, controlled or regulated under any other Act of Parliament, and take samples of anything contained in such mail in reasonable amounts;

The term "mail" is given the meaning contained in section 2 of the *Canada Post Corporation Act*, namely, "mailable matter from the time it is posted to the time it is delivered to the addressee thereof". The term "mailable matter" in the same *Act* is said to mean, "any message, information, funds or goods that may be transmitted by post". (The term "letter" does not appear in the *Act*.)

The power to open mail given by Section 92(1)(b) is limited by sections 92(2) and 92(3), which provide as follows:

> (2) An officer may not open or cause to be opened any *imported mail* that weighs *thirty grams* or less unless the person who sent it has completed and attached to the mail a label in accordance with article 116 of the Universal Postal Convention.
>
> (3) An officer may cause *imported mail* that weighs *thirty grams* or less to be opened in his presence by the person to whom it is addressed or a person authorized by that person.

The label referred to in subsection (2) is affixed by the sender.

The necessary changes to section 40(1) and (2) of the *Canada Post Corporation Act* to accommodate the proposed *Customs Act* would result in the section reading: (the italicized portions are added to the existing section)

> 40.(1) All mail *arriving in Canada* from a *place outside* Canada *that contains* or *is* suspected to contain anything the importation of which is prohibited, controlled or regulated under the *Customs Act* or any other *Act of Parliament* shall be submitted to a Customs officer.
>
> (2) All mail that is submitted to a Customs officer under this section remains, for the purposes of this Act, in the course of post unless it is seized under the *Customs Act*.

The effect of all these changes would be to allow Customs to open all international mail weighing more than 30 grams (1.05 ounces) rather than the weight ceiling of 500 grams (17.5 ounces) that presently exists. Moreover, Customs would be able to open a letter weighing less than 30 grams if it had affixed to it the label referred to in section 92(2).

It is estimated that 85% of all international mail arriving in Canada weighs less than the proposed weight ceiling of the 30 grams. The mail which Customs cannot open in the proposed *Act* would consist of what most people would understand to be a "letter". The mail which Customs can open consists of what most people understand to be packages, parcels and envelopes containing goods.

Bill C-6 died on the Order Paper at the end of June, 1984. It is expected that the Bill will be re-introduced in this session of Parliament. In the meantime, the existing Postal Regulation remains in effect restricting the inspection of international mail by Customs to material weighing more than 500 grams. It should be noted however, that excepted from this restriction are newspapers, magazines, books and catalogues.

Footnotes

[1] S.C. 1980-81-82-83, c.54.

[2] Instructions to Port Officers, April 24, 1970, D4469, Files 8340-3; 8455-4 (Canada Customs).

[3] Instructions to Port Officers, November 8, 1979, revision of D4469.

[4] Memorandum R5-1-2, December 7, 1983.

[5] Bill C-6, An Act respecting Customs (2nd Session, 32nd Parliament, 32 Elizabeth II, 1983-84).