"**Source:** ***Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*****, Vols. 1 & 2, Government of Canada, 1985. Reproduced with the permission of the Minister of Public Works and Government Services Canada, 2010."**

Chapter 11

Canada Post

The *Canada Post Corporation Act*[1] does not prohibit the use of the mails to distribute pornographic material. Such prohibition is found in section 164 of the *Criminal Code* passed as part of the 1953-54 Code Amendments. The material part of this section is:

> "Everyone commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, ..."

What is deemed to be "obscene" is described in section 159(8) of the *Criminal Code*. The words "indecent, immoral or scurrilous" are nowhere defined in the *Criminal Code*. These words have, however, been given legally enforceable meaning by the Courts and have, in fact, been treated in precisely the same way as the word "obscene". In the leading case of *R.* v. *Popert*[2] the Ontario Court of Appeal, in reversing the trial judge, said:

> "I concede that the term 'immoral' is a word of imprecise meaning and that it may be difficult to apply. However, the problem is not unique. Often the law, whether a product of case law or statute, expresses itself in imprecise terms such as 'reasonable', 'undue', and 'dangerous'. It is through such words that the values of the community find expression in the court-room. It is the function of the courts to work as best they can with the tools in hand. In my view, the learned trial judge was wrong in simply finding no meaning in this word."[3]

The Court also decided that the appropriate test to be applied in interpreting the section was "the community standard of tolerance" and that this test, propounded in cases dealing with obscenity[4], "should (also) be applied in determining whether material is immoral or indecent"[5] and that, "the reference to a community standard imports an objective test into the ascertainment of indecency and immorality ...".[6]

While the *Canada Post Corporation Act* does not prohibit the use of the mails to distribute pornographic material, it does contain sections that provide for a degree of regulation. Section 41(1) of the *Act* provides a comprehensive procedure empowering the Minister responsible for the *Act* to make an order "prohibiting the delivery, without the consent of the Minister, of mail addressed to or posted by" any person that

> the Minister believes on reasonable grounds ... is, by means of mail, committing or attempting to commit an offence, or aiding, abetting, counselling or procuring any other person to commit an offence ... or ... by a means other than mail, aiding, abetting, counselling or procuring any other person to commit an offence by means of mail.

The section contemplates an initial "interim prohibitory order", with the "person affected" entitled to receive a copy of the order and the reasons for it. An appeal can be taken to a board of review. The board is obliged to hold a hearing and to make recommendations to the Minister.

The Minister apparently retains the discretion (regardless of the recommendations of the Board of Review) to either revoke the interim order or declare it to be a final prohibitory order. A final prohibitory order remains in effect until revoked by the Minister if "satisfied that a person affected will not use mail for any of the purposes described in subsection (1)."

The volume of mail is such that detection is clearly an enormous problem. Postal authorities are not entitled to open deliverable letters simply on suspicion. The practice the Post Office has chosen to adopt in administering the provisions of its *Act* is simply to react to complaints. No pro-active procedures are apparently in effect.

Once a complaint has been received, an affidavit is apparently obtained from the complainant verifying that the material has indeed been received through the mail. It seems that most of the current offensive material appears to have originated in the United States, although authorities have begun to notice that some of the material seems to have been produced in Canada.

Legal advice is taken on the complaint and an interim prohibitory order may be issued by the Minister on the recommendation of the chairman of the board of Canada Post Corporation.

We are not aware of how many such interim prohibitory orders have been made.

We were told that very few appeals are taken from interim prohibitory orders. We were also told that, since 1975, only 34 *final* prohibitory orders have been made against persons or corporations sending mail.

The following is a breakdown according to country of origin of the persons or corporations named in these orders:

United States	16
Denmark	6
Sweden	5
Holland	1
Canada	6

Thirty-one of the final prohibitory orders remain in effect. The three orders that have been revoked all apply to Canadians.

As a result of our discussions with Post Office officials we conclude:

1. That the interception of pornographic material in the domestic mail has been given no administrative priority;
2. That the Post Office recognizes no particular need to either assume an investigatory role or to initiate any action to attempt to better control distribution of pornographic material through the domestic mail. It appears that the present policy of acting only on complaints will be continued;
3. That there is no effective co-ordination involving the Post Office and law enforcement officials to better control the distribution of pornographic material through the domestic mail.

Footnotes

[1] *Canada Post Corporation Act*, S.C. 1980-81-82-83, c.54.

[2] (1981), 58 C.C.C. (2d) 505 (Ont. C.A.).

[3] *Ibid.*, at 508-509 per Zuber J.A.

[4] *R.* v. *Penthouse International Ltd. et al* (1979), 96 D.L.R. (3d) 735 (Ont. C.A.). *R.* v. *Prairie Schooner News Ltd. and Powers* (1970), 75 W.W.R. 585 (Man. C.A.).

[5] *Ibid.*, at 510.

[6] *Ibid.*, at 508.

Chapter 12

Broadcasting and Communications

1. The Broadcasting Act

The Act defines broadcasting as, "any radiocommunication in which the transmissions are intended for direct reception by the general public."[1]

The *Act* then provides a broadcasting policy for Canada and the mechanisms to implement that policy. It also establishes the legal framework within which radio and television undertakings are operated throughout Canada.

The Act is in three parts. The first part declares a specific broadcast policy. The second part relates to the Canadian Radio-Television and Telecommunications Commission (CRTC). The third part concerns the Canadian Broadcasting Corporation (CBC).

For our purposes, the relevant portions of part I of the broadcasting policy are:

Section 3: It is hereby declared that...

(b) the Canadian broadcasting system should be effectively owned and controlled by Canadians to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

(c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast, but the right of freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;

(d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by such broadcaster should be of high standard, using predominantly Canadian creative and other resources.

The *Act* defines "broadcasting undertaking" as including, "a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network

operation, located in whole or in part within Canada or on a ship or aircraft registered in Canada".[2]

The *Act* makes a distinction between "the Canadian broadcasting *system*" in section 3(b) and (c) and "a national broadcasting *service*". The system comprises both "public and private elements". The service is declared to be "a corporation established by Parliament for the purpose" and is to be "predominantly Canadian in content and character".[3] The national broadcasting service is, of course, the CBC. The *Act* declares that the CBC should:

> (i) be a balanced service of information, enlightenment and entertainment for people of different ages, interest and tastes covering the whole range of programming in fair proportion,
>
> (ii) be extended to all parts of Canada, as public funds become available,
>
> (iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and
>
> (iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity;[4]

In 1975, separate legislation was passed concerning the Canadian Radio-Television and Telecommunications Commission.[5] The provisions of this *Act* are largely procedural. The substantive objects and the powers of the Commission are still to be found in Section 15 of the *Broadcasting Act* and are as follows:

> Subject to ... directions to the Commission from time to time by the Governor in Council under the authority of this *Act*, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this *Act*.

The powers of the Commission include prescribing classes of broadcasting licence, making regulations applicable to all licensees on such matters as standards of programs, conditions for the broadcasting of network programs and the operation of stations as part of a network.[6]

The Commission has nine full-time members and ten part-time members appointed by the Governor in Council.[7] From the ranks of the full-time members, the Governor in Council designates a chairman and two vice-chairmen of the Commission.[8] The nine full-time members constitute an Executive Committee,[9] whose powers include issuing and renewing broadcasting licences and imposing or amending such conditions of licence as are deemed appropriate.[10] While the Executive Committee can issue or renew a licence, only the full Commission can revoke a licence.[11]

The Commission is obliged to hold a public hearing in connection with either the issuing of a broadcasting licence or its revocation or suspension.[12] The Executive Committee, if it is satisfied that it is in the "public interest" to do so, may decide to hold a public hearing in connection with the amending of a broadcasting licence or "a complaint by a person with respect to any matter

within the powers of the Commission".[13] The Commission has the powers, rights and privileges of a superior court of record in respect of public hearings and can, for example, require the attendance of witnesses, the production and inspection of documents and property and the enforcement of its orders.[14]

The Commission can make its own rules, "respecting the procedure for making applications, representations and complaints and the conduct of its hearings and business".[15]

The *Act* provides for appeals from the actions taken by the Commission. Any decision or order that relates to the issue, amendment, renewal, revocation or suspension of a broadcasting licence can be appealed to the Federal Court of Appeal. The appeal is, however, limited to questions of law or jurisdiction.[16]

There is also an appeal to the Governor in Council. But the appeal is limited to the issue, amendment or renewal of a broadcasting licence. The Cabinet has 60 days from the date of such issue, amendment or renewal to decide whether to refer the matter back to the Commission for recommendation and hearing.[17]

The Commission must then hold a hearing and reconsider the matter, and may either rescind its earlier decision, issue a licence on the same or different conditions to any other person, or confirm its earlier decision with or without alterations.[18] If the earlier decision is confirmed, then the Cabinet still retains the power to set aside the confirmation order.[19] If the Commission issues a licence on different conditions or to someone else, then this action would appear to be subject to a further appeal to the Cabinet.

In summary, the Cabinet has the ultimate power to overturn a decision made by the Commission concerning the issue, amendment or renewal of a broadcasting licence. At the moment, the Cabinet has apparently no power to ultimately decide on matters of licence suspension or revocation. The Commission's exclusive jurisdiction in this area is subject only to an appeal to the Federal Court of Appeal based on questions of law or jurisdiction.

The Commission is obliged to hold a hearing and satisfy itself that the licensee has violated or failed to comply with any conditions of the licence before that licence can be revoked or suspended. Where the Commission finds that there has been such a failure or violation it must report its findings and recommendations to the Minister of Communications who must, in turn, lay the report before Parliament.[20] The report to the Minister and ultimately to Parliament, appears to be for information only.

The Commission has the general requirement to report annually to the Minister and to Parliament on its activities.[21]

On December 20, 1984, Bill C-20, *An Act to amend the Canadian Radio-Television and Telecommunications Commission Act, the Broadcasting Act and the Radio Act*, was given first reading in the House of Commons. Second

reading took place on February 14, 1985. The *Act* contains significant amendments that will be referred to in the course of the discussion leading to our recommendations.

2. The Canadian Radio-Television and Telecommunications Commission

During our public hearings we received many comments about the CRTC. Details of the comments appear in Section I, Chapter 5. The concern most frequently expressed was the alleged failure of the Commission to supervise program content generally and particularly with respect to pay television. We were also told that the Commission should control programming available by means of satellite antenna. Some complained that the Commission did not have an adequate appreciation of the concerns parents have about the content of programs that could be seen by their children. There was also an allegation that the Commission was not prepared to take any or any effective action to prevent offensive program content.

Our Committee met with the Chairman and some of the members of the Commission as well as with the Commission's staff. We discussed relevant aspects of the Commission's work and there have been a variety of subsequent consultations. In view of some of the comments made at our public hearings, we think it is important to record that the Commission has been completely co-operative and forthcoming in the course of our contact with it. We are satisfied that the Commission has no desire for isolation or aloofness on the subject of program content and regulation; indeed, quite the contrary. The Commission follows a practice of publicizing its proposed policy and operational changes and of inviting public response. Its record of organizing and achieving public involvement, both at the level of written response and public hearings is, in our view, impressive.

There are now more than 3,000 licensees in Canada holding licences for AM and FM radio broadcasting, as well as television stations, cable systems and pay television. The Commission currently employs a total of 432 employees. The Commission takes about 3,000 decisions every year and while some of the decisions are routine, others require lengthy and careful examination. The important public hearing and accountability requirements contained in its legislative mandate require the Commission to move with deliberate speed. We think the Commission's present resources are being fully utilized.

As will be apparent in the course of the discussion that follows, the Commission has taken several important initiatives with respect to program content and the administration of its mandate.

It must be understood at the outset that the Commission does not and cannot perform the role of a censor. The scheme of the existing legislation does not provide for any pre-clearance of material. The role of the Commission is to

review programming after the fact. The policy of the *Broadcasting Act* states clearly in section 3 that responsibility for program content rests with the licensee. The Commission's potential power in the area of program content is limited to passing appropriate Regulations, attaching conditions of licence in the first instance, revising conditions of licence and reviewing actual performance during the term of the licence, if necessary, and always on an application for renewal.

The view that the Commission has no jurisdiction to act as a censor was expressed by the Federal Court in *National Indian Brotherhood* v. *Juneau*.[22] The Court said:

> Reading the Act as a whole..., I find it difficult to conclude that Parliament intended to or did give the Commission the authority to act as a censor of programs to be broadcast or televised. If this had been intended, surely provision would have been made somewhere in the Act giving the Commission authority to order an individual station or a network, as the case may be, to make changes in a program deemed by the Commission, after an inquiry, to be offensive or to refrain from broadcasting same. Instead of that, it appears that its only control over the nature of programs is by use of its power to revoke, suspend or fail to renew the licence of the offending station.

We are quite definitely of the view that the legislative mandate of the Commission should not be essentially changed in order to turn it into a censor board. Even if we were philosophically convinced that the Commission should act as a censor, we have difficulty imagining how it could then possibly expect to review all of the programming currently being broadcast in Canada. The administrative costs and complications would be enormous. Just as important, in our view, the results would stultify rather than encourage appropriate creative broadcasting expression.

We are satisfied that there are many more effective ways for the Commission to deal with program content.

The CRTC's legislative scheme provides the Commission with at least four possible ways to deal with programs that are either contrary to law or sexually abusive:

(a) by attaching program standards and conditions to a broadcast licence

(b) by Regulation

(c) by requiring broadcasters to self-regulate

(d) by criminal sanctions under the *Criminal Code* or the *Broadcasting Act*.

2.1 Conditions of Licence

It was urged upon us at the public hearings that the CRTC should impose on a broadcasting licence, conditions concerning program content both with respect to pornography and sex-role stereotyping. As we have already mentioned, the Commission has the ability under section 17 (1)(a) and (b) of

the *Broadcasting Act* to issue, amend or renew licences subject to conditions that it "deems appropriate for the implementation of the broadcasting policy enunciated in Section 3" of the *Act*. The current relevant portions of Section 3 are set out above.

It is important to note that the conditions that are attached must be "related to the circumstances of the licensee". The material parts of Section 17 read as follows (emphasis added)

> Section 17 (1) In furtherance of the objects of the Commission, the...Commission, may
>
> (a) issue broadcasting licences for such terms ... and subject to *such conditions related to the circumstances of the licensee*
> (i) as the Executive Committee deems appropriate *for the implementation of the broadcasting policy enunciated in Section 3,...*
>
> (b) *upon application by a licensee*, amend any conditions of a broadcasting licence issued to him;
>
> (c) issue renewals of broadcasting licences ... as the Executive Committee considers reasonable and subject to the conditions to which the renewed licences were previously subject or *to such other conditions as comply with paragraph (a).*

The emphasized portions serve to illustrate two important aspects of the section: firstly, an amendment to licence conditions can arise only on an application by the licensee and not at the initiative of the Commission; and secondly, that the conditions of licence must be related to the particular circumstances of the licensee.

Where the Commission has decided to impose conditions of licence, its practice has been to carefully cater to the licensee's particular environment and to make the conditions very specific, so that compliance can be easily and clearly measured.

The question has been asked, "Why can't compliance with the terms of the *Act* and Regulations be made a condition of licences?" The answer appears to be that to do so would be to place licensees in a position of double jeopardy where breach of the *Act* or Regulations could be not only an offence under the *Act*, but also result in loss or suspension of licence, without the appropriateness of the separate consequences being examined separately.

The question has also been asked, "Why can't program standards be made conditions of licence?" The answer is that conditions of licence have to be "related to the circumstances of the licensee" as well as "appropriate for the implementation of the broadcast policy in Section 3". The present policy provisions for Section 3 do not contain any declarations about program content or standards beyond what is contained in sub-section (d). Therefore, it is uncertain whether the Commission can now impose actual program standards as conditions of licence.

However, Bill C-20, referred to earlier, would amend Section 3 by adding the following to the broadcasting policy contained in the *Act*:

(C.1) the programming provided by the Canadian broadcasting system should respect and promote the equality and dignity of all individuals, groups or classes of individuals, regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In proposing this amendment, the government has accepted the June, 1984 recommmendation of the Parliamentary Subcommittee on Sexually Abusive Broadcasting.

Speaking to the Bill in the House of Commons, the Minister of Communications said:

> Part II of the Bill provides for a new policy objective that will become part of Section 3 of the Broadcasting Act. This objective concerns programming of an abusive nature, and its purpose is to define the CRTC's responsibility in this respect. It will be an incentive for broadcasters to be increasingly aware of the problem.[23]

Should the above amendment become law, it would appear that the Commission will then be able to impose conditions of licence relating to the standard of programming described in the proposed (C.1).

However, the imposition of such conditions could only arise "subject to such conditions related to the circumstances of the licensee".[24] It is difficult to know how the Commission could impose such a general programming condition of licence in the absence of any specific reasons relating to a particular licensee. As the Chairman of the CRTC said in an appearance before the Sub-Committee of the Standing Committee on Communications and Culture on May 9, 1984:

> In the ... areas of ... conditions of licence ... the CRTC could further address the problem of sexually abusive programming. The CRTC could, if it considered such a measure necessary in a particular case, indicate for example to that licensee that as a condition of its licence it must observe some guidelines concerning sexually abusive programming. It must be remembered, however, that a new condition of licence cannot be imposed on an existing licensee, except at the time of licence renewal.[25]

In the result, the proposed amendment adds a new and salutory policy objective to the *Broadcasting Act* which, in appropriate particular cases, could be made a condition of licence.

2.2 Regulations

As we have mentioned, under Section 16 of the *Broadcasting Act* the CRTC may make Regulations "in furtherance of its objects". Under the existing legislation the Commission may make Regulations applicable to *all* licensees and relating to a variety of matters, including "standards of program" and "such other matters as it deems necessary for the furtherance of its objects".[26]

Some years ago, the Commission made Regulations in this area applying to all public broadcast licensees. The Regulations for AM and FM radio licensees provided the following as part of regulations 5 and 6 respectively:

(1) No station or network operator shall broadcast
  (a) anything contrary to law;
  (b) any abusive comment on any race or religion;
  (c) any obscene, indecent or profane language.[27]

The Regulations for television licensees provided in part:

6 (1) No station or network operator shall broadcast
  (a) anything contrary to law;
  (b) any abusive comment or abusive pictorial representation on any race, religion or creed;
  (c) any obscene, indecent or profane language or pictorial representation.[28]

The ability of the Commission to pass such Regulations has been challenged in prosecutions for their alleged breach. In 1977, the Saskatchewan Magistrate's Court found that a radio broadcast containing a poem and comments on the poem about the Pakistani race were abusive, but concluded that the Regulation did not reasonably fall under Sections 3 and 16 of the *Act* and was, therefore, beyond the power of the Commission to enact.[29]

This decision was reversed in the Saskatchewan Court of Appeal. The Court held that the Magistrate erred in holding that Regulation 5(1)(b) of the Radio A.M. Broadcasting Regulations was beyond the authority of Section 3 and 16 of the *Broadcasting Act*. The Court, however, gave no reasons for its decision.

The question was considered and apparently resolved in favour of the Commission's power by the Supreme Court of Canada in 1978.[30] A case arose when a radio station broadcast a telephone interview without the consent of the person interviewed. The station was charged with a breach of Regulation 5(1)(k) which provides:

5 (1) No station or network operator shall broadcast...
  (k) Any telephone interview or conversation, or part thereof, with any person unless
    (i) the person's oral or written consent to the interview or conversation being broadcast was obtained prior to such broadcast, or
    (ii) the person telephoned the station for the purpose of participating in a broadcast.

The lower courts were divided on the questions of firstly, whether the Regulation was beyond the power of the Commission to enact and secondly, the nature of the Commission's power to regulate programming.

In deciding that the Commission had the power to enact the Regulation, the majority of the judges in the Supreme Court of Canada found that:

> ...the validity of any Regulation enacted in reliance upon Section 16 must be tested by determining whether the Regulation deals with a class of subject referred to in Section 3 of the statute and that in doing so the Court looks at the Regulation objectively.[31]

The Court agreed with the following comment made by one of the judges who had heard the case in the Ontario Court of Appeal:

> It is obvious from the broad language of the Act that Parliament intended to give to the Commission the wide latitude with respect to the making of Regulations to implement the policy and objects for which the Commission was created.[32]

The Supreme Court concluded that:

> ... whether we consider that the impugned Regulation will implement a policy or not is irrelevant so long as we determine objectively that it is upon a class of subject referred to in Section 3.[33]

The Court decided that the Regulation fell within the class of subjects mentioned in Section 3(b) (the broadcasting system should "strengthen the cultural, political, social and economic fabric of Canada"), and Section 3(d) (programming should "provide reasonably balanced opportunity for the expression of the differing views on matters of public concern" and "should be of high standard"), and held that:

> ... the Commission might well have concluded that the broadcasting station could not provide "reasonably balanced opportunity for the expression of differing views" unless it granted confidentiality to the person interviewed.[34]

On the further question of the Commission's power to regulate programming, the Court disagreed with the view expressed by one of the judges in the Ontario Court of Appeal that, in effect, the broadcast policy in Section 3 of the *Act* that programming be of high standard should be confined to the actual words that go out over the air in a specific program. The Court adopted instead the view of Mr. Justice Brooke in the Ontario Court of Appeal:

> In my view the purpose of the impugned Regulation is to prohibit an undesirable broadcasting technique, one which does not reflect the high standard of programming which the Commission must, by Regulation of licensees, endeavour to maintain.[35]

The Court went on to say:

> That 'an undesirable broadcasting technique' may well affect the high standard of programming is, I think, self-evident. ... the word 'programming' extends to more than the mere words that go out over the air but the total process of gathering, assembling and putting out the programs generally which is covered by the requirement of the high standard of programming. The Commission might well have concluded that the enactment of Section 5(k) was necessary to prevent development of programming which was the opposite of "high standard".[36]

The Court held that the Regulation could also be passed under the general power given to the Commission under Section 16(1)(b)(ix) as being "necessary for the furtherance of its objects".

This rather painstaking review of the decision of the Supreme Court of Canada has been necessary in order to appreciate the length and breadth of the Commission's power to make Regulations and in order to understand how enforceable may be new Regulations recently passed by the Commission.

On October 2, 1984, after two years of publishing and amending its proposals and obtaining public comment, the Commission enacted its first complete pay television Regulations and the following Regulations concerning abusive radio and television programming, in substitution for the Regulations previously in effect:

> Regulation 5(1)(b) (A.M. Broadcasting)[37] and Regulation 6(1)(b) (F.M. Broadcasting):[38]
>
> Any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> The equivalent in the new Regulation for Television Broadcasting is:[39]
>
> 6(1)(b): Any abusive comment or abusive pictorial representation which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> The new Regulations for Pay Television Broadcasting[40] are as follows:
>
> 6. A licensee shall not distribute in its programming any abusive comment or abusive pictorial representation that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 7. Where a program to be distributed by a licensee is not suitable for an audience other than an adult audience by reason of its subject matter or treatment thereof, or any characteristic thereof, including its depiction of violence, nudity or explicit sexual conduct, or by reason of coarse language or other content likely to be offensive to some viewers, the licensee shall so advise by providing an appropriate indication thereof at the beginning, and in all promotion of the programming.

We note that when the Commission first published its proposals for pay television Regulations in November, 1982, the proposals did not contain the Regulations that are set out above. These Regulations were first proposed in July, 1984, because of, as the chairman has put it:

> ...the concerns [that were] raised by many groups, individuals, and organizations with regard to the need to include in [the] Regulations a prohibition against abusive programming on the basis of gender.

While the Regulations against abusive comment or representation are the same for pay television as they are for radio and television broadcasting, there is otherwise a qualitative difference between them. The latter Regulations still prohibit the broadcast of "anything contrary to law" (5(1)(a) and 6(i)(a)) and "any obscene, indecent or profane language pictorial representation" (5(1)(c) and 6(i)(c)). The pay television Regulations contain no such provisions.

The pay television Regulation 7 set forth above is unique to pay television and is not found in the Regulations for other television or radio broadcasting. The policy of Regulation 7 is to allow material for an adult audience to be shown providing a warning is given, rather than to prohibit the kind of representations that would be proscribed in the public media.

In terms of the enforceability of the new Regulations, it is important to remember that Bill C-20 will amend the class of subjects referred to in section 3 by adding paragraph c.1 (*supra*). Should the amendment be enacted, there would seem to be little doubt about the validity and enforceability of the new Regulations.

As the chairman of the CRTC said in a statement to the Sub-Committee of the Standing Committee on Communications and Culture on May 9, 1984:

> With regard to amendments to the *Broadcasting Act*, we are aware that the [then] Minister of Communications may take to Cabinet a proposal to amend section 3 to include gender as a group protected from abusive programming. Should the new proposal become law, it would have the effect of giving the Commission a more precise jurisdictional basis, first, to make or amend Regulations prohibiting abusive programming, and second, to press broadcasters with respect to their responsibilities in this area at licence renewal time.[41]

A very significant aspect of the amendment is the requirement that the programming provided by the Canadian broadcast system should not only respect but *promote* equality and dignity. It remains to be seen how the Commission will ensure the promotion of equality and dignity in the system.

2.3 Self-Regulation

The Commission has been active in its examination of sex-role stereotyping in broadcasting. The task force established by the CRTC published its report, *Images of Women*, in the fall of 1982. The Task Force was composed of members of the public, the advertising and the broadcasting industries and representatives of the CBC and the CRTC. The recommendations of the Task Force were that the methods of dealing with sex-role stereotyping should be self-regulation with public accountability. The two-year period of self-regulation ended in the Fall of 1984. During this period the Commission did the following:

> (i) the report, *Images of Women*, was widely circulated;
>
> (ii) the self-regulatory committees of the industry and the CBC were required to submit three reports to outline measures taken to deal with sexual stereotyping. The reports described what steps had been taken for processing complaints, for self-education on the problem and actions to comply with guidelines;
>
> (iii) every broadcaster in Canada was required in the Fall of 1984 to submit an individual report on what action had been taken to deal with the problem at their station;

(iv) communications from the public on sexual stereotyping and pornography were tabulated and analyzed by the Commission. Over 15,000 such letters had been received by the Commission;

(v) a research company, Erin Research Inc. has been asked by the Commission to analyze program content and to measure compliance to industry guidelines concerning sexual stereotyping. The Company's work will also include monitoring pay television for sex-role stereotyping in commissioned programming and violence in acquired programming.

It is expected that the report of Erin Research Inc. will be received by the Commission in the Spring of 1985. The Commission has indicated that it will then publish a paper containing the results and will sponsor public discussions on the issues.

On January 17, 1985 the Commission announced that it had accepted the final version of Programming Standards and Practices prepared by the pay television licensees. The final version of the Standards and Practices emerged after public comment on the original version published in February, 1984 and after a meeting between the Commission and the licensees. The pay television licensees have established an industry committee to implement the guidelines and to deal with complaints. The Commission will receive periodic reports on complaints and will review the Standards and Practices in early 1986.

It seems clear that the Commission has decided that self-regulation by the industry will be the best method of ensuring compliance with Pay Television Regulation 7.

The Standards and Practices acknowledge that the pay television licensees "have a responsibility to ensure that the programming they provide is of high quality and meets general community standards within the context of a discretionary service". All programs are to be rated, no x-rated films will be shown and all material will be fully screened prior to airing. The following additional aspects of the Standards and Practices are worth noting:

4. *Basis of Discretion*

The discretion of programming personnel will be exercised responsibly and in good taste. In particular, no material will be selected that is

(a) contrary to law, including the *Broadcasting Act* and CRTC Regulations; or

(b) offensive to general community standards.

"Community standards" will necessarily change over time and therefore will be subject to continuing review and evaluation. Pay television licensees will not select programming that would go beyond an "R-rating" or its equivalent.

Under the section referred to as "Classification and Cautionary Warnings", the Standards and Practices provide for the publication and distribution of a program guide to advise of the classifications of programming. There is also provision for a cautionary warning on-the-air at the beginning of programs. The following classifications will be used:

First Choice and Superchannel:

G: Suitable for viewing by a general audience of all ages;

PG: Parental Guidance suggested. Some material may not be suitable for children;

A: Parents are strongly cautioned that some material may be unsuitable for children and young teenagers. Discretion is advised;

R: Contains material that is recommended for adult viewing only.

Super Ecran: Tous-for all
14 and over
18 and over.

There are provisions requiring licensees to "exercise particular care" with respect to programming during family viewing periods and requiring licensees to schedule sexually explicit and/or violent material in the late evening or early morning hours only. These guidelines are to be reviewed by the Commission after one year for "adequacy".

2.4 Criminal Sanctions

The sanctions contained in the *Criminal Code* and the *Broadcasting Act* are available to the Commission and law enforcement authorities as a further method of dealing with program content.

Although Section 159(1) and 159(2)(a) of the *Criminal Code* contain provisions that could result in a prosecution being brought against a radio or television broadcaster for publishing, distributing, circulating or exposing to public view any obscene picture or phonograph record, it is much more likely that criminal proceedings would be taken under the *Broadcasting Act*.

It contains significant criminal sanctions. Licensees who violate the provisions of any Regulation applicable to their licence commit an offence under the *Act*, punishable on summary conviction by a fine not exceeding $25,000 for a first offence and $50,000 for each subsequent offence.[42] Anyone who operates a broadcasting undertaking as part of a network and breaches conditions of licence, or who carries on a broadcasting undertaking without a valid or subsisting licence, is guilty of an offence and is liable on summary conviction to a fine not exceeding $1,000 for each day that the offence continues.[43]

Where there has been an alleged breach of Regulation, the Commission's practise has been to proceed according to the seriousness of the allegation. If the matter is very serious, the Commission will start its own proceedings to put the broadcasting licence at risk.

If the matter is less serious, the Commission will have the licensee prosecuted for an offence under the *Act*.

It should be noted that the charge that could result from a breach of a condition of licence is only available in the case of a licensee operating as part of a network.

2.5 Complaints Procedure

Because the Commission has neither the resources nor the legislative mandate to closely and consistently monitor on-air programming, it depends on members of the public to bring to its attention incidents which may offend the *Broadcasting Act* or Regulations.

Typically, the Commission receives complaints from individuals, groups, competitors of a licensee and sometimes from governments. The Commission's policy upon receipt of a complaint is to immediately advise the licensee of its contents. The licensee is invited to respond to the substance of the complaint. About 80% of the complaints are resolved by the licensee agreeing with the substance of the complaint and making the necessary adjustment in its operations.

In the remainder of the cases, the Commission will advise the complainant of the licensee's response and do what it appropriately can to resolve the matter based on an understanding of the respective positions. Licensees are obliged to keep a recording of all broadcasts for at least 30 days. If a complaint concerns program content, either generally or specifically, the Commission can ask a licensee to provide the appropriate tape.

The Commission adopts a range of actions to handle complaints: it may require the licensee to attend a special meeting to discuss the complaint, or, if the issue does not appear to be urgent, it may decide that the substance of the complaint should be discussed on the next planned and regular occasion when the Commission meets with the licensee.

The Commission may, if the Executive Committee is convinced that it is in the public interest to do so, hold a public hearing in connection with a complaint.[44]

The Commission can also simply proceed to have the licensee charged with an offence under the *Broadcasting Act* for either a breach of the Regulations or the conditions of licence.

The Commission has, in fact, held infrequent public hearings as a result of complaints about its licensees. The public does, however, have a variety of opportunities to advise the Commission about its reaction to the conduct of licensees.

The CRTC has been active in holding hearings in various parts of Canada. These hearings obviously have predetermined agendas, but the Commission has been prepared to hear as additions to its agenda, special representations from members of the public concerning the performance of licensees in the area. The

Commission has also said it is eager to receive any written comments from members of the public on any issue involving the broadcasting system generally or any issue involving specific licensees.

At the time a licence is renewed, the public can intervene to oppose the renewal or to seek to impose conditions of licence or requirements on the licensee. At the present time, the Commission cannot issue licences for more than five years.[45] Under the proposals contained in Bill C-20 the maximum licence period will increase to seven years.[46] So, it must be said that the opportunity for the public to comment about a licensee's performance at licence renewal hearings will lessen if the amendment passes and the Commission acts on the amendment.

The Commission must hold a public hearing if it has in mind the revocation or suspension of licence.

The Commission has never actually ordered the suspension of a licence. It has, however, ordered the revocation of licences for breach of conditions of licence. The Commission has yet to revoke a licence on the basis of program content, but it has issued a variety of "public notices" spelling out its views on a host of matters, such as fairness in news reporting, the "right to respond" and the need to be free of "demeaning comments [and] incitement to violence toward any identifiable group".

It must be remembered by those who think the Commission has not acted harshly enough in imposing sanctions on licensees, that to suspend or cancel a broadcast licence has the result of withdrawing service to an innocent audience. It is, therefore, understandable that the Commission has decided to regulate in an atmosphere designed to process complaints quickly and to carefully monitor a licensee's responses to complaints before the situation becomes acute. There is nothing to suggest, however, that the Commission will not impose ultimate sanctions if faced with continuing breaches of its Regulations or conditions of licence.

3. The Reception and Distribution of Satellite Signals

While the CRTC regulates the Canadian broadcasting system, it cannot regulate broadcasting or telecommunication signals emanating from outside Canada. There are many thousands of satellite dishes in Canada that receive signals transmitted from other countries throughout the world. The reception of satellite programming is particularly important in remote parts of Northern Canada where conventional broadcasting service is not available. It is estimated that at least 1,000 satellite channels will be available to be received in Canada by 1986.

Pornographic material is transmitted by satellite signal. The signals are received directly and by and large are not scrambled and unscrambled from satellite. The Committee heard of instances where pornographic material was

seen by unsupervised children at unpredictable hours of the broadcast day. We were also told of pornographic programming providing recreational entertainment in remote work places.

We have no comprehensive idea of the full extent to which pornographic material is available by satellite. We do know, however, that it is available and that it is subject to no form of present control or regulation. Obviously, any initiative taken by Canada will have to be at least bilateral and more appropriately multilateral.

Canada and the United States reached agreement in November, 1972 on the provision of telecommunication services by carriers who operate domestic satellite systems in the two countries and updated the agreement by the exchange of diplomatic letters on August 24, 1982. However, no such agreement has been reached regarding broadcast programming. Indeed, the recent exchange of diplomatic letters confirms that nothing in them, shall

> derogate from the authority of [the] respective governments and regulatory authorities to authorize and regulate the reception and distribution in their own country of radio and television programming services originating in the other country and carried on a fixed satellite service.

Given the concerns we have heard expressed by those who have had experience with the pornographic programming available by satellite reception, it is surprising that there has not been an official expression of similar concern between Canada and the United States about such transborder program content.

There is an important distinction to be made between the *reception* of a satellite signal and the *distribution or redistribution* of that same signal. At the moment, the CRTC has no jurisdiction in either area.

As far as we are aware, based on information given to us at the public hearings and from the CRTC, it appears that there are two typical situations in which individuals and companies receive broadcast signals by satellite dish or antenna and then either redistribute or distribute the same signal: firstly, those who redistribute the signal by cable network to subscribers, and secondly, hotels, apartment buildings or condominiums which receive the signal and distribute it within their premises.

The provisions of Bill C-20 would give the CRTC the power to licence and regulate the first situation but not the second.

To accomplish this result, Bill C-20 adds to section 2 of the *Broadcasting Act* a section that provides that any person who,

> ...transmits or distributes by means of telecommunication, otherwise than solely as a telecommunication common carrier and whether or not for any consideration, any programming received by radio-communication is deemed to be carrying on a broadcasting undertaking.[47]

When Bill C-20 was introduced, the Minister of Communications asked the CRTC to assist the Department and the Government in the implementa-

tion of its policy approach. The CRTC has responded by establishing a Task Force to examine and make recommendations on the distribution in underserved Canadian communities of satellite-received broadcasting services. It was expected that the Task Force's work would be completed by mid-February, 1985 and that its report would be received shortly thereafter.

In asking for the Commission's assistance, the Minister made the following point:

> In order to preserve the integrity of the broadcasting system, the continued distribution of unauthorized American specialty services, without payment to the program originators, cannot be permitted.[48]

The suggestion implicit in the comment is the investigation of some system that would require the originator's consent before a program could be received by satellite antenna. In this connection, the Chairman of the CRTC made the following answer when asked by a Member of Parliament what recommendations he had with respect to suitable international controls or regulation of satellite broadcasting:

> ...to answer your question I will probably have to look at a broader picture than only the question of pornography on satellites. I would think — and it is my personal view...the best thing that could happen to protect the artists, to make sure we do not have pornography available everywhere in Canada, or everywhere in the world — I do not think an international agreement would be easy to reach on that. I think the only means would be to try to convince people that they have some interest in scrambling their signal. If the owners of those signals were convinced of that, that they should scramble their signal, you would have a chance to control who gets it and who does not get it. I think it would probably be a more practical way of controlling that.
>
> I would imagine a lot of countries would resist the idea of trying to put some kind of limitation on what could be on their satellites. They are not all organized as we are here, and their [regulatory bodies] do not all have the same kind of responsibility that we have here with the CRTC.
>
> But I think if you look at the copyright problem, if you look at the commercialization of those services, you will find enough justification there to sell the idea that those services — that all services on satellites should be scrambled in one way or the other. It could be a very sophisticated means, or it could be a more simple one, but if we could get that, I think it would solve a lot of these problems, including the question of pornography.

The approach suggested by the Chairman of the CRTC has practical validity. If the originators of the signals can be convinced to scramble their signals, only subscribers with descramblers will be able to receive them. Such a system could be reinforced by the domestic law making it an offence to receive a signal that has not been purchased or which has been obtained without the consent of the originator.

The important question of whether the program content transmitted by satellite should be controlled remains open along with the questions of who should exercise control and under what circumstances.

4. Bill C-20

A significant aspect of the proposed amendments to the *Canadian Radio-Television and Telecommunications Act* in Bill C-20 is the expanded power it will give to the Governor in Council to provide "direction" to the CRTC.

The Minister of Communications said in the House in the course of introducing the Bill:

> Part I of the bill amends the CRTC Act to enable the Governor in Council to give binding policy directions. Those directions would be laid before Parliament and it would have the opportunity to take them under advisement before they are formally put into effect.
>
> Although the 1968 legislation setting up the CRTC did not generally grant that power to the government, I think it is necessary today to specify that the government and not the CRTC should develop the broadcasting and telecommunications policies. That position is supported by the provinces, the industry and the Commission itself. Moreover, it was ratified by the Lambert Commission and one of its specific recommendations was as follows:
>
> > The constituent act of Independent Deciding and Advisory Bodies contain provisions allowing for policy directives from the Governor in Council.
>
> This principle was also supported in 1980 by a special parliamentary committee of the House of Commons on Regulatory Reform as follows:
>
> > — that Cabinet can issue binding policy directives...to the Canadian Radio-Television and Telecommunications Commission.
>
> The relation between the government and the Commission has been under review for many years. If there is an aspect of the review that public debate has brought out, it is that the government should be responsible for the drawing up of policy and that the CRTC should be in charge of its implementation within the legislative framework set up by Parliament. The division of powers between the government and the Canadian Radio-Television and Telecommunications Commission reflects the democratic principle that the government alone is entitled to develop the main policies of the country because of its accountability to the electorate through Parliament.
>
> The government having the power to give formal directions to the CRTC, will implement its policy in the telecommunication and broadcasting areas. If it did not have that power, it could have no influence on the development of policy and consequently could not be called to account. As in the present legislation, it could only react after the fact and ask for reconsideration of specific decisions made by the CRTC.[49]

At the present time, the Governor in Council may give directions to the Commission only with respect to any conditions of licence to the CBC (section 17(3)), requiring all licensees to broadcast a program deemed to be of urgent importance to some or all Canadians (section 18(2)), or the maximum number and reservation of channels or frequencies within a designated geographical area, or the actual classes of applicants to whom licences may be issued, amended or renewed (section 22(1)(a)).

The amendments are, therefore, very significant and will likely have a fundamental effect on the Commission's work. Of course, because the Commission's objects have always been to implement broadcast policy as expressed in section 3 of the *Broadcast Act*, Parliament has always had the power to determine the CRTC's policy direction. But the effect of the proposed amendments will be to give to the Cabinet the specific power to give binding policy directions. The only exception is with respect to "the issuance of a broadcasting licence to a particular person or the amendment or renewal of a particular broadcasting licence" (section 1 adding section 14.2 to the *CRTC Act*). The Commission's power remains exclusive in this sensitive area.

The Bill provides that the Minister shall consult with the Executive Committee of the CRTC, "with respect to the nature and subject matter of the direction or notice" (section 1 adding section 14.5 to the *CRTC Act*) and the Cabinet direction must be laid before Parliament, "unless the direction requires only that the Commission hold hearings or make reports on any matter" (section 1 adding section 14.4 to the *CRTC Act*). The Commission cannot act on any direction until 30 days after the direction has been laid before both Houses of Parliament (section 1 adding section 14.2 to the *CRTC Act*).

There can be no doubt that under the amendments, virtually all aspects of the Commissions's work are potentially the subject of Cabinet direction. Given the requirement that directions must be laid before Parliament, it is clear that the regulation provided by the CRTC will come under increased public scrutiny. It may well be that, as a result, the policies pursued by the Commission will be more responsive to the public mood and more easily changed. In the terms of program content, it remains to be seen whether, over time, the new technique of issuing policy directions will succeed.

The Cabinet could conceivably direct the Commission with respect to the conditions of licence, the substance of program content regulations, and even the suspension or revocation of a licence. It will be for the Cabinet and the CRTC to determine how the always delicate balance between the executive branch and the regulating agency is to be effectively managed.

Footnotes

[1] *The Broadcasting Act*, S.C. 1967-8, c.25, s.2.

[2] *Ibid.*

[3] *Ibid.*, s.3(f).

[4] *Ibid.*, s.3(g).

[5] *The Canadian Radio-Television and Telecommunications Commission Act*, S.C. 1975, c.49.

[6] *The Broadcasting Act*, S.C. 1967-8, c.25, s.16.

[7] *Ibid.*, s.5.

[8] *Ibid.*, s.8.

[9] *Ibid.*, s.14.

[10] *Ibid.*, s.17.

[11] *Ibid.*, s.16(1)(c).

[12] *Ibid.*, s.19(1).

[13] *Ibid.*, s.19(2).

[14] *Ibid.*, s.19(7).

[15] *Ibid.*, s.21.

[16] *Ibid.*, ss.26(1) and (5). The appeal can only be brought with leave of the Federal Court of Appeal. Application for leave must be made within one month of the making of the decision under appeal.

[17] *Ibid.*, s.23(1).

[18] *Ibid.*, s.23(3).

[19] *Ibid.*, s.23(4).

[20] *Ibid.*, s.24.

[21] *Ibid.*, s.31.

[22] (1971), F.C.R. 498, at 513.

[23] House of Commons, Hansard; 31 Jan. 1985, at 1848.

[24] *The Broadcasting Act*, S.C. 1967-8, c.25, s.17(1)(2).

[25] Transcript of Minutes of Proceedings, at 4-6.

[26] The *Broadcasting Act*, S.C. 1967-8, c.25, ss. 16(1)(b)(i), 16(1)(b)(ix).

[27] CRC, Vol. IV, c.379, at 2559 (Regulation 5) and CRC, Vol. IV, c.380, at 2582 (Regulation 6).

[28] CRC, Vol. IV, c.381, at 2606.

[29] *R.* v. *Buffalo Broadcasting Co. Ltd.* (1977), 36 C.P.R. (2d) 170 (Sask. Prov. Ct.).

[30] *R.* v. *C.K.O.Y.* (1978), 90 D.L.R. (3d)1 (S.C.C.).

[31] *Ibid.*, at 9.

[32] *Ibid.*, quoting from Evans, J.A., 70 D.L.R. (3d) 662, at 667.

[33] *Ibid.*,

[34] *Ibid.*, at 10.

[35] *Ibid.*, quoting from Brooke J.A., 70 D.L.R. 662, at 672.

[36] *Ibid.*,

[37] SOR/84-786.

[38] SOR/84-787.

[39] SOR/84-788.

[40] SOR/84-797.

[41] Transcript of Minutes of Proceedings, at 417.

[42] *The Broadcasting Act*, S.C. 1967-8, c.25, s.29(1).

[43] *Ibid.*, s.29(3).

[44] *Ibid.*, *The Broadcasting Act*, S.C. 1967-8, c.25, s.19(2)(c).

[45] *Ibid.*, s.17.

[46] Bill C-20, 30th Parl., 3rd Sess., 1977, Part II, s.5.

[47] *Ibid.*, s.2.

[48] Excerpts from a letter released by the Department of Communications to the CRTC on December 20, 1984.

[49] House of Commons, Hansard: 31 Jan. 1985, at 1847.

Chapter 13

Human Rights

There now exists in Canadian human rights legislation and jurisprudence some attempt to deal with pornography as a human rights or "hate propaganda" issue.

Most *Codes* contain prohibitions against discrimination in employment or in access to services or facilities available to the public. Human rights jurisprudence has developed to the point of holding that the creation in the workplace of an atmosphere of harassment based, say, on race is a form of discrimination.[1]

The same jurisprudence was extended to sexual harassment.[2] Now, in some *Codes*, there are explicit formulations of a prohibition against racial or sexual harrassment. An excellent example of this type of provision is that found in the *Canadian Human Rights Act*.[3] Section 13.1 of that *Act* provides:

> (1) It is a discriminatory practice,
>
> (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
>
> (b) in the provision of commercial premises or residential accommodation, or
>
> (c) in matters related to employment,
>
> to harass an individual on a prohibited ground of discrimination.
>
> (2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

Accordingly, complaints by women that pornography is an oppressive presence in their place of employment could be investigated by human rights commissions either as a complaint of sex discrimination on the "atmosphere of harassment" principle, or, under specific rules about sexual harassment where these are available. Indeed, many employers and unions may now be addressing the issue of pornography in the workplace as part of sexual harassment policies developed in response to human rights legislation. In the 1984 decision of the Canadian Human Rights Tribunal dealing with allegations of sex-based discrimination by Canadian National Railways, specific mention was made of

the success of the in-house policy on sexual harassment in clearing up women's complaints about pornography in the workplace.[5]

There have been no reported cases dealing with pornography as discrimination in the educational setting or in public facilities. However, it seems that the jurisprudence developing the idea that pornography can create a discriminatory atmosphere may be applicable in this sphere too. The presence of pornographic materials in a store to which the public has access may, arguably, create a different access to that facility for women and for men. It may be that such a distinction could give rise to a successful complaint. The same reasoning might also extend to educational facilities.

We consider it desirable for human rights commissions themselves to review this issue, and to formulate the same kinds of guidelines with respect to sexual harassment in services and facilities as many of them have with regard to sexual harassment in employment.

The *Saskatchewan Human Rights Code*[6] provides in subsection 14(1) that:

> 14. (1) No person shall publish or display or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.

In 1980 a complaint was filed with the Saskatchewan Human Rights Commission against the University of Saskatchewan Engineering Students' Society, alleging that an issue of the student publication *Red Eye* contained representations of women which ridiculed, belittled and otherwise affronted the dignity of women in Saskatchewan. Investigation by the Commission led to such allegations being brought against other issues of the paper. In March, 1984, a Board appointed to hear the complaints ruled that violations of the *Code* had occurred.[7]

The Board concluded after reviewing the newspapers that the form which the "ridicule" took "frequently involved material containing the allegedly humorous description or depiction of the violent destruction of women's bodies through intercourse".[8] The manner in which women were "belittled" and had their dignity affronted because of their sex was found to involve material suggesting women in educational institutions are less than human; that they are inferior human beings; that they are there to gratify male sexual desires; that they have no independent motivation or capacity to participate in social and intellectual activity. Women were found to have been belittled by being

represented as mere objects, and to have been affronted by the trivializing and deriving of humour from material which promotes sexual violence and the objectification of women.

A defence based on freedom of speech was relied on in the *Red Eye* case. Subsection 14(2) of the *Code* provides that nothing in subsection 14(1) restricts the right to freedom of speech under law upon any subject.

The Board recognized the need to reconcile two competing social interests. One of these is freedom of expression, the other equality. Both are entrenched in the *Charter of Rights*, in sections 2 and 15, respectively. In trying to balance these interests, the Board took as its point of departure the judgment of the Supreme Court of Canada in *Re Alberta Legislation*.[9] Most particularly, it cited the observations of Mr. Justice Duff of that judgment that:

> The right of public discussion is of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means to quote the words of Lord Wright in *James* v. *Commonwealth of Australia* "freedom governed by-law".[10]

Although it recognized that subsection 14(1) does not prohibit every type of insult to a protected class, and affirmed that great caution must be used before making any determination abridging the free expression of others, the Board concluded that where no redeeming social interest is evident the freedom of expression may be abridged. Where representations infringe upon the rights of others, such as their egalitarian rights, the Board concluded that the right to freedom of speech could be curtailed without infringing Constitutional rights.

The Board gives this exposition of the rationale for its decision, and for the legislation itself:

> This material promotes a consistent image of women as less than human. Once a protected class, in this case women, is represented as a less than equal member of the human family with impunity the grave evil exists that they may be treated as such. Material of the kind in these newspapers serves to perpetuate a social climate discriminatory to women who are already targets of manifold discrimination and horrible violence. No social interest is served by tolerating the free expression of such material.[11]

The Board also made the point, often raised in briefs to this Committee, that there would be no doubt that a violation of subsection 14(1) had occured if race, rather than sex, formed the nexus of the class against whom the offending material was directed.[12]

The Saskatchewan *Human Rights Code* provision is notable because it addresses material which exposes to hatred, ridicules, belittles or otherwise affronts the dignity of any person, group or class of persons. It is thus the broadest of the existing provisions. Interestingly, the complaint in the *Red Eye* case did not allege that the newspaper exposes women to hatred, although the remarks of the Board of Inquiry might have been fitting even if this more serious offence had been alleged.

Human rights legislation at the federal level, and in Manitoba, addresses the narrower issue of hate messages. *The Canadian Human Rights Act* provides, in section 13, that:

> (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> (2) Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.
>
> (3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of telecommunication undertaking owned or operated by that person are used by other persons for the transmission of such matter.

In section 2 of the *Manitoba Human Rights Act,*[13] we find the following provision:

> (1) No person shall
>
> (a) publish, display, transmit or broadcast, or cause to be published, displayed, transmitted or broadcast; or
>
> (b) permit to be published, displayed, broadcast or transmitted to the public, on lands or premises, in a newspaper, through television or radio or telephone, or by means of any other medium which he owns or controls;
>
> any notice sign, symbol, emblem or other representation
>
> (c) indicating discrimination or intention to discriminate against a person; or
>
> (d) exposing or tending to expose a person to hatred;
>
> because of the race, nationality, religion, colour, sex, marital status, physical or mental handicap, age, source of income, family status, ethnic or national origin of that person.

Interestingly, these provisions in the human rights legislation of Canada, Manitoba and Saskatchewan protect against exposure to hatred on a substantial number of grounds, including "sex". By contrast, the hate message provisions of the *Criminal Code*, found in sections 281.1 and 281.2, protect identifiable groups distinguished only by colour, race, religion or ethnic origin.

Two jurisdictions confer rights of action on groups or members of groups in the case of incitement to hatred or similar harms. The Manitoba *Defamation Act*[14] provides in subsection 19(1) that:

> (1) The publication of a libel against a race or religious creed likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, or professing the religious

creed, to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action.

The action may be brought against the person responsible for the authorship, publication, or circulation of the libel. Subsection 19(4) provides that no more than one action shall be brought in respect of the same libel.

The British Columbia *Civil Rights Protection Act, 1981*,[15] confers fairly extensive rights to sue for remedies against persons who commit a prohibited act.

In subsection 1(1) of the *Act*, "prohibited act" is defined as:

> any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting
>
> (a) hatred or contempt of a person or class of persons, or
>
> (b) the superiority or inferiority of a person or class of persons in comparison with another or others,
>
> on the basis of colour, race, ethnic origin or place of origin.

The *Act* provides in subsection 1(2) that a prohibited act is a civil wrong (tort) that can be the subject of a claim by a person or class of person against whom the prohibited act was directed, without the necessity of the complainant proving that any actual damage was suffered. Section 3 of the *Act* allows the Court to award damages and an injunction in appropriate cases.

The *Act* also provides that the Attorney General may intervene in an action under section 1. A person bringing such an action is required to serve the Attorney General with notice of the action, presumably to permit him or her to decide whether to intervene.

This legislation was passed in 1981, after a problem had arisen in the province concerning the activities of the Ku Klux Klan. A *Report Arising out of the Activities of The Ku Klux Klan in British Columbia* prepared in 1981 by lawyer John McAlpine, Q.C., had recommended amendment of the British Columbia *Human Rights Code* to permit the Human Rights Commission to handle complaints of hate messages. Interestingly, the report specifically stated that they were not recommending legislation to encompass messages based on sex or marital status. The reason for refraining from such a recommendation was quite specific: Mr. McAlpine's appointment arose as a consequence of a concern of minority groups with the Klan message on the basis of race, religion and ethnic origin. He identified these forms of discrimination as "actual and threatening" and thus warranting remedial legislation.[16] The Report recognized, however, that there might be a need to expand the protection in the future should the messages of the Klan reach out to encompass other groups.

Although the form of legislative action which eventually was proceeded with in British Columbia differed from that recommended in the McAlpine Report, this glimpse of Mr. McAlpine's reasoning for specifying that these particular grounds alone be protected is an interesting one. Consider that the

amendments which introduced section 13 of the *Canadian Human Rights Act* came in response to anxiety about the activites of an anti-Zionist producer of telephone hate messages in Toronto, and that the provisions of the *Criminal Code* themselves were enacted following concern over hate propaganda being disseminated about particular religious and racial groups. Upon such consideration, one sees that the possible relevance of such provisions to hate messages involving other groups, like women, was not uppermost in the minds of the proponents of this legislation. Arising out of an immediate situation, it dealt only with that situation. There has not, to our knowledge, been a principled discusssion, and rejection, of the idea of extending this legislation to protect against messages aimed at women.

There have, however, been general considerations in recent years of measures directed against hate messages. In 1984, a report on *Group Defamation* prepared for the Attorney General of Ontario by Patrick Lawlor, proposed that the Ontario *Human Rights Code* be amended to permit a remedy for persons and groups who are exposed to hatred. Mr. Lawlor chose the *Human Rights Code* as the repository for this remedy because he considered that its tenor and temper best accords with the nature of the evil to be remedied, which he described as psychic and spiritual blows, no less traumatic because relatively intangible.[17] The Ontario goverment has not proceeded with any amendment to the *Code* in this area.

Equality Now!, the Report of the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, released in 1984, addressed a number of recommendations to the question of remedies for hate messages. One of the central features of these recommendations was a push for improvement of the existing *Criminal Code* provisions about hate messages. However, the Committee also made a number of suggestions for improvements and extensions of human rights treatment of this problem.

The Committee proposed in Recommendation 38 that the *Canadian Human Rights Act* be amended to allow the Canadian Human Rights Commission to deal with hate propoganda. The Committee referred to this approach as "more timely and less cumbersome" than some other methods of dealing with hate literature, particularly than the *Criminal Code* route. The Committee pointed out that Commission handling of complaints means that the need of the complainant for a lawyer, and "other legal requirements involved in an ordinary prosecution", will be eliminated.[18]

Interestingly, however, the Committee also records the complaints of witnesses before it that once a complaint has been lodged with the Human Rights Commission, they lose control of how it is processed. This, according to the witnesses, often results in lengthy delays between the filing of the complaint and its final resolution. Accordingly, Recommendation 43 of the Committee urges the federal and provincial governments to amend their anti-discrimination laws to allow a complainant the option of instituting civil litigation against a discriminator rather than making a complaint to Human Rights Commission.[19]

Neither the Lawlor Report nor *Equality Now!* addresses the issue of hate messages against women, or, specifically, pornography. It appears to us as if the interest in using hate message remedies to address pornography arose well after the interest in hate literature protections against racial and religious minorities had been put on the social agenda. The interest in the human rights, or hate literature, approach to pornography has in great measure arisen from the work of two American thinkers, Catharine MacKinnon and Andrea Dworkin. This work has generated considerable enthusiasm in Canada, and was referred to often by persons appearing at the public hearings. In Section IV, Chapter 25, we examine the implications of this approach for Canadian law, and discuss the extent to which we believe it should be adopted.

Footnotes

[1] In *Simms* v. *Ford of Canada* 4 June 1980 (Ontario Human Rights Code Board of Inquiry), unreported, Professor Krever, as he then was, wrote that "discriminate" includes making the employee's working conditions different from those under which other employees work. He stated that to permit a black employee in a plant where the majority of the employees are white to be humiliated repeatedly by insulting language relating to his colour would be to require him to work under unfavourable conditions which do not apply to white employees.

[2] Arbitrator Owen Shime in *Re Bell and Korczak* (1980), 27 L.A.C. (2d) 227 (Ontario) gave, at 229, a statement of the rationale for the rule against sexual harassment. Widely accepted by other arbitrators, this observation was that "the forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender-based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender-based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment." Arbitrator Katherine Swinton in *Re C.U.P.E. and O.P.E.I.U. Local 491* (1982), 4 L.A.C. (3d) 385 described, at 399, "conditions of work" harassment. As developed by Catharine MacKinnon, this concept means that the work environment becomes unpleasant or unbearable because of a pattern of insults and hostility to women, which is intolerable to the victim. The negative work environment may be the result of either the victim's refusal of a sexual advance, or the attitude of supervisors and co-workers to women.

[3] *Canadian Human Rights Act*, S.C. 1976-77, c.33, as amended by S.C. 1977-78, c.22, s.5; S.C. 1980-81, c.54, Schedule; S.C. 1980-81-82, c.111, Schedule IV, s.2; S.C. 1980-81-82-83, c.143; and S.C. 1983-84, c.21, ss. 73 and 74.

[4] Enacted by S.C. 1980-81-82-83, c.143, s.7.

[5] *Action Travail des Femmes* v. *Canadian National; Canadian Human Rights Commission, Intervenant*, TD 10/84 (August 22, 1984), at 131.

[6] R.S.S. 1978, c. S-24.1, as amended.

[7] *Saskatchewan Human Rights Commission* v. *The Engineering Students' Society, University of Saskatchewan et al*, March 7, 1984 (Red Eye Decision).

[8] *Red Eye Decision*, at 49.

[9] [1938] S.C.R. 100.

[10] Quoted in: *Red Eye Decision* at 25.

[11] *Ibid.*, at 51-52.

[12] *Ibid.*, at 23.

[13] S.M. 1974, c.65.

[14] R.S.M. 1970, c.60.

[15] S.B.C. 1981, c.12.

[16] John D. McAlpine, *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia* (April 30, 1981), at 61.

[17] Patrick Lawlor, *Group Defamation* (1984), para. 6 at 72.

[18] Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!* (1984, Supply and Services Canada, Ottawa) at 72.

[19] *Ibid.*, at 72.

Chapter 14

Film Classification and Censorship

1. Introduction

We have not undertaken either extensive or intensive studies of classification and censor board practices in Canada, because the major focus of our mandate is on the federal level of government. However, the questions of the scope of provincial activity in the regulation of films, and the appropriate stance of the federal criminal law, are closely related to one another. Witnesses at our public hearings commented, often unhappily, about the activities of classification and censor boards, or what was sometimes seen as the lack of activity of such boards.

We have accordingly analyzed the legislation and regulations governing provincial classification and censorship of films, and reviewed the empirical information on selected board activities presented by the Badgley Committee,[1] and by Professor Neil Boyd as part of the Department of Justice research program on pornography and prostitution.[2] We have also had the opportunity to meet with Mary Brown, Director of the Ontario Film Review Board, Mary Louise McCausland, Film Classification Director of British Columbia, and the Director and some members of the Québec Bureau de Surveillance du Cinéma. While the details we have gathered are by no means exhaustive, we think that we have been able to form a clear enough impression of provincial activity to appreciate its significance to any overall effort to deal with offensive material.

The provinces of Nova Scotia, New Brunswick, Québec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia have legislation providing for regulation of films which are being shown publicly.[3] Some of these schemes apply as well to videotapes which are being shown publicly.[4] Ontario and Nova Scotia have recently included sale and rental of videotapes for private consumption in their regulatory schemes.[5] Newfoundland has passed legislation providing for a film censorship board but the board has not been established;[6] Newfoundland adopts the rules of the New Brunswick Film Classification Board. So, too, does Prince Edward Island.[7]

The Northwest Territories and the Yukon do not have film classification boards. Although the arrangement to do so is relatively informal, these

jurisdictions usually look to the rulings of the Alberta and British Columbia boards, respectively. Sometimes, the rulings of other boards will also be canvassed by Northwest Territories officials.[8]

Typically, provincial legislation providing for film classification establishes an authority to which all films intended for exhibition in the province must be submitted. Theatre owners are forbidden from exhibiting a film which has not been reviewed and classified, and from altering a film after it has been reviewed and classified. Similarly, in most jurisdictions, there is a prohibition against an operator altering a classification once it has been bestowed by the board.

2. Banning or Prohibiting Films

Most of the provincial legislation in this field authorizes the film boards to prohibit as well as to regulate the display of films in the province. The legislation of Nova Scotia, New Brunswick, Ontario, Alberta, Saskatchewan and British Columbia includes this power to prohibit showing of a film.[9] In a case involving the Nova Scotia Board of Censors, predecessor to the present Amusements Regulation Board, the Supreme Court of Canada held in a five to four decision that the provinces do have the constitutional authority to permit these authorities to prohibit exhibition of films.[10]

In most of the provinces which feature a power to prohibit the showing of films, the legislation does not contain any standards upon which the reviewing authority is to make the decision whether to ban the film. The exception is Ontario. Subsection 35(2) of the *Theatres Act*, enacted in 1984,[11] provides that the Ontario Film Review Board may refuse to approve a film for distribution or exhibition in Ontario "in accordance with the criteria prescribed in the Regulations". Subsection 35(3) adds that the Board may make its approval conditional on the film being exhibited on specified dates in designated locations only.

In the Ontario Regulation, it is provided that after viewing a film, the Board may refuse to approve it for exhibition or distribution in Ontario where the film contains:

(a) a graphic or prolonged scene of violence, torture, crime, cruelty, horror or human degradation;

(b) the depiction of the physical abuse or humiliation of human beings for purposes of sexual gratification or as pleasing to the victim;

(c) a scene where a person who is or is intended to represent a person under the age of 16 years appears,

(i) nude or partially nude in a sexually suggestive context, or

(ii) in a scene of explicit sexual activity;

(d) the explicit and gratuitous depiction of urination, defecation or vomiting;

(e) the explicit depiction of sexual activity;

(f) a scene depicting indignities to the human body in an explicit manner;

(g) a scene where there is undue emphasis on human genital organs; or

(h) a scene where an animal has been abused in the making of the film.[12]

Sexual activity means acts, whether real or simulated, of intercourse or masturbation, and includes the depiction of genital, anal or oral-genital connection between human beings or human beings and animals, and anal or genital connection between human beings by means of objects.[13]

Subsection 21(1) of the new Regulation states that in exercising its authority to prohibit the exhibition of films, the Board shall consider the film in its entirety and take into account the general character and integrity of the film.

These features of the Ontario legislation were introduced following a successful challenge to the former provisions under the *Canadian Charter of Rights and Freedoms*.[14] Subsection 3(2)(a) of the *Theatres Act* had simply provided that the Board of Censors, as it was then known, had power to censor any film, and subsection 3(2)(b) provided that, subject to the regulations, it could approve, prohibit, or regulate the exhibition of any film in Ontario. There were no regulations setting out what would cause a film to be banned in the province, although the Board had published informal guidelines stating its criteria. The Ontario Court of Appeal held that the power to censor and prohibit was a restriction on the right of freedom of expression guaranteed by the *Charter of Rights*. The guidelines, not being embodied in law at all, would not assist the Board in establishing that the restriction on the *Charter* right was, as required by section 1 of the *Charter*, a "reasonable limit prescribed by law."

The Ontario decision may well have implications for those other provinces that permit the banning of a film in the province without specifying the grounds on which it will be banned.

Two provinces do not permit the banning of films. In Manitoba, the film classification board is authorized only to classify films.[15] The Bureau de Surveillance du Cinéma of Québec is given no express power to prohibit the showing of films.[16]

3. Cutting Films

Much of the provincial legislation affecting film classification also permits the reviewing authority to make cuts in films which are submitted for review. In Ontario and Saskatchewan, the board is empowered to remove from the film, any portion that it does not approve of for exhibition or distribution, when authorized to do so by the person submitting the film for approval.[17] A similar proviso exists in British Columbia, but there, the removal of the offending portion is explicitly said to be as a condition of approval of the film for showing.[18]

The Nova Scotia Amusements Regulation Board is given wide powers to authorize the use of any film with "such changes as it may direct".[19] Similar broad power is conferred on the Alberta Board of Censors, which may eliminate any subtitles, words, or scenes that it considers objectionable before the issue of a certificate for the exhibition of the film.[20] We understand, however, from the research of the Badgley Committee, that the Board does not exercise this power to cut films.[21] The New Brunswick Film Classification Board has this wide power in a slightly different guise. It indicates to would-be exhibitors the changes to be made in order to meet the approval of the Board.[22] The act of cutting is thus done by the exhibitor, but the Board's power to insist on cuts is no less broad than in the cases where the board itself cuts, with or without the approval of the exhibitor.

In keeping with its authority only to classify, the Manitoba Film Classification Board has no power to cut films, or to require that they be cut. The Québec Bureau de Surveillance du Cinéma does not possess any explicit power to cut films. It is our understanding that persons wishing to show films in Québec, will sometimes find themselves going back to the copyright holder to request that changes or deletions be made to the film, so that it can be approved for showing in the province. This situation arises because it is forbidden to exhibit a film in the province without a visa from the Director. The visa may be withheld until a version of the film suitable for showing is presented.

It would appear as if the power to cut films is not subject to any standards contained in provincial legislation. In Ontario, the new legislation articulates the standards to be applied when considering whether a film should be prohibited and these same standards may apply to deletions. However, it is not immediately obvious from the Regulation that they do. The omission from the legislation or regulations of standards upon which decisions about cutting shall be made seems to open this aspect of the provincial schemes to the same charge of limiting freedom of expression otherwise than by law.

4. Practices of Selected Boards

Professor Neil Boyd studied the practices of four Canadian boards with respect to prohibiting films from being exhibited, namely those in British Columbia, Ontario, Québec, and Nova Scotia. Included in his review was information about provincial policies on banning films and on the issue of deletions from films. Interestingly, the four boards differed among themselves on the amount of information provided to the public about refusals of permission to exhibit, and about elimination of scenes. Both British Columbia and Ontario publish reports of cuts requested; Nova Scotia and Québec do not. In the case of Québec, the non-publication of such a report is attributed to the review process itself. A film may be refused more than once as part of the overall process of negotiation between distributor and board leading to eventual approval for exhibition. It is considered meaningless to publish statistics of the overall number of refusals, which will not distinguish outright refusals from those which are part of the bargaining.[23]

The standards employed to assess suitability of a film vary from province to province. In Ontario, the Director stated in the 1982-83 annual report of the Theatres Branch that very graphic or prolonged scenes of violence, torture, bloodletting, explicit portrayal of sexual violence, explicit portrayal of sexual activity, undue or prolonged emphasis on genitalia and ill treatment of animals, would normally be considered to contravene community standards. Elimination of such scenes would be requested before exhibition of the film.[24] These items of concern are now, for the most part, embodied in the 1985 Regulation under the *Theatres Act*. One of the Board's major concerns is sexuality and children;[25] its banning of *Pretty Baby* and requirements of cuts to *The Tin Drum* have been centres of controversy in recent years.

In Nova Scotia, the rejection of a film may occur when there is no real story but prolonged explicit portrayal of sexual activity, sexual exploitation of children, undue and prolonged scenes of violence, torture, bloodletting, ill treatment of animals, and undue or prolonged emphasis on genitalia.[26]

In British Columbia, the key variables for film review are penetration, ejaculation and violence. Interestingly, explicit scenes of both fellatio and cunnilingus are permitted by the Board, but scenes involving penetration or ejaculation are prohibited.[27]

Québec authorities regard explicit sexuality between consenting adults as acceptable or tolerable. Unlike British Columbia, Québec allows presentation of films containing penetration or ejaculation. Sexuality, per se, is not a target for elimination, but images of sexual violence are.[28] In recognition of the pluralistic and changing nature of society, the Bureau does not keep in place specific and inflexible criteria. However, it is guided by two principles: judgment is not passed on films according to their themes, but upon the manner in which they are treated; and respect is given to the goals of protecting minors and maintaining freedom of choice for persons 18 years of age or older.[29]

The Manitoba Film Classification Board does not cut or prohibit films. In that province, a film will be given a "Restricted Adult" classification if it contains depictions of any of the following: oral sex, fellatio, buggery, cunnilingus, penetration, bestiality, masturbation, ejaculation, actual portrayal of child pornography, graphic portrayal of genital close-ups, or extreme acts of violence with sexual activity.[30]

It is interesting to note how the different boards, proceeding from these varying points of view, respond to a particular film. The Louis Malle film *Pretty Baby*, starring Brooke Shields in an account of a 12 year old prostitute, was approved in British Columbia, Nova Scotia and Québec, but not in Ontario. The National Film Board of Canada film, *Not a Love Story*, a documentary on sexual exploitation in pornography that has been a strong force in mobilizing anti-pornography sentiment in Canada, was approved for showing in Québec, and exempted from review in British Columbia. In Ontario and Nova Scotia, however, it was not approved for commercial showing. In

these two provinces, it was licensed for educational purposes only.[31] The film *Caligula* also received diverse treatment in Canadian jurisdictions. The American version of the film was shown with cuts in Québec, and without cuts in British Columbia. The British version was approved without cuts in Alberta, Manitoba, Saskatchewan, and New Brunswick, and with cuts in Ontario. In Nova Scotia, the Board refused to approve the British version, with cuts, that had been shown in Ontario.[32]

5. Classifying Films

In addition to the jurisdiction to prohibit and to cut films, provincial authorities also exercise a power to review and classify films. Each film shown in the province must be classified, and the classification must be displayed at the theatre and in advertising related to the film. It is apparent from an examination of the classification systems of the various provinces, that the aim of such systems is to keep children and young people from seeing that which is considered unsuitable for their age and maturity. The classification approach as a whole, as well as some particular aspects of it, makes it clear that the success of classification depends on the involvement of parents or other adults responsible for children.

Some provincial regimes include in the legislation not only a list of the various classifications which apply in the province, but also a description of the scope of the various classifications. The Ontario *Theatres Act* sets out in a new subsection 3(8), enacted in 1984, the four categories used in Ontario, with the nature of each.[33] The "Family" classification is given to films which are appropriate for viewing by a person of any age. "Parental Guidance" is to indicate that in the Board's opinion every parent should exercise discretion in permitting a child to view the film. "Adult Accompaniment" is for films to be restricted to persons 14 years of age or older, or to persons younger than 14 who are accompanied by an adult. "Restricted" films are those restricted to persons 18 years of age or older.

The British Columbia *Motion Picture Act* sets out the classifications with a description of each: "General" (suitable for all persons), "Adult" (unsuitable for or of no interest to a person under the age of 18) and "Restricted" (suitable only for a person 18 years of age or over).[34] The British Columbia Film Classification Board is also experimenting with a fourth classification which is referred to as "14 years". The effect of this classification is that no one under 14 can be admitted to the movie unless accompanied by an adult.

Manitoba is the only other jurisdiction where the statute itself contains information about not only the classifications, but also the basis upon which they may be arrived at. Subsection 23(2) of the *Amusements Act* provides that the Film Classification Board shall classify any film or slide which in its opinion is unsuitable for viewing by children or by a family by reason of sex, nudity, violence, foul language or other reason, in such a manner that the film or slide shall be restricted to viewing only by persons 18 years of age or over.[35]

The Regulations then elaborate upon the classification scheme, which involves five headings. "General" denotes acceptable for all audiences, without consideration of age, and "Mature" means suitable only for adults or mature young people because of theme, content or treatment that might require more mature judgment by viewers. No age limit is attached to the "Mature" category, but the Regulation provides that an element of this classification is that parents would exercise discretion in deciding whether to let young people see the film. Films classified as "Adult Parental Guidance" are not to be shown to persons under the age of 18 unless accompanied by a parent, or adult guardian, because of theme, content, or treatment. "Restricted Adult" films are those which shall not be viewed by persons under 18 because of theme, content or treatment.[36]

The Alberta *Amusements Act* provides for the making of Regulations classifying films as "family pictures" or "pictures for universal exhibition" or for any other system of division.[37] The system contained in the Regulations features four categories of film. "General" and "Parental Guidance" are those suitable for all ages, "Mature" films are those which persons under 14 cannot see unless accompanied by an adult, and "Restricted Adult" films are those restricted to persons over the age of 18.[38]

The *Theatres and Cinematographs Act* of Saskatchewan requires that the Film Classification Board classify all films presented to it as "General", "Adult", "Restricted Adult" or "Special X",[39] but neither the *Act* nor the Regulations give any indication of the basis on which that classifying is to be done. Classifications in Nova Scotia are "General", "Adult" and "Restricted". These three are set out in the Regulations,[40] rather than the *Act*, and there is no indication in either the *Act* or the Regulations as to how they will be applied. The same three categories of Restricted, Adult, and General appear to apply in New Brunswick,[41] but no specific provision is made to this effect in either the *Act* or the Regulations.

There is, overall, considerable similarity in the basic approach of the classification systems. All feature a General category, suitable for all viewers, and a Restricted category to which only those 18 or over will be admitted. Another commonly used dividing line is the age of 14; some systems contain a category of films in respect of which parental guidance or adult accompaniment is required for those under 14.

Although the outline of the classification schemes is similar from province to province, there is considerable variation in legislative treatment of the classification system. Some provinces include the basic outlines of the scheme right in the legislation, or in a combination of legislation and regulations, while others have very sketchy information about the classification system in their legislation and regulations. In all cases, we expect that the day-to-day administration of the scheme will be a lot more complicated than is revealed in the Acts and Regulations. How people get information about the criteria which the classification authorities are using thus becomes an important question, just as it is in the case of prohibition and cutting of films. Not only the would-be

exhibitor of films, but also citizens interested in particular decisions or in the process as a whole, may have a difficult time finding out what is going on.

6. Display of Classification Information

The legislation of most provinces requires that the classification given to a film by the board be displayed. These display requirements may encompass both a requirement to state the classification in advertisements for the film, and a requirement to show the classification at the entrance to the theatre. Some jurisdictions require only one or other of these methods. The legislation of two jurisdictions goes further in this effort to alert the public to the sort of material which they can expect to see inside the theatre.

The *Theatres and Cinematographs Regulations* of Saskatchewan require that in addition to classifying a film, the Film Classification Board shall determine whether the public should be warned of potentially offensive scenes, language or violence contained in any film.[42] The Board has the power to require that both the warning and the classification be included in advertising for the film and displayed at the theatre.[43]

Apart from legislation, there may be other methods used by provincial authorities to convey warnings, or information, to prospective audiences. The Ontario Board, for example, has a system of notations (i.e. "Foul language") which it attaches to films, and these appear in the advertising for such films. There does not appear to be any explicit legal authority for this practice.

7. Entrance Restrictions

The classification system is one major way in which provincial legislation attempts to keep children and young persons from material deemed inappropriate for them. The system works in conjunction with parental initiatives, providing information which the parent or other responsible adult may use to assess and influence the viewing habits of the young person.

There are, in the legislation, attempts to influence this behaviour more directly. The New Brunswick Regulation provides that a child under 10 is not permitted to attend any theatre or place of amusement except on Saturdays and statutory holiday matinees, unless accompanied by an adult. A child apparently under the age of 16 is not permitted to attend any such place after seven o'clock in the evening or during school hours, unless accompanied by an adult.[44] This prohibition, which does not depend on the type of film being exhibited, seems aimed at the conduct of the child in the same way as school truancy legislation may be. A somewhat similar provision in the Ontario legislation states that no film shall be exhibited in a theatre where a person under the age of 12 years, not accompanied by a person at least 16 years of age, is permitted to attend, unless there is in the theatre a uniformed attendant 18 years of age or older.[45]

These two provisions are the only ones along these lines which we find in provincial censorship legislation. Much more common are entrance restrictions which relate to the classification system. These may be directed toward the theatre operator, forbidding him or her to permit the entry of, say, someone under the age of 18 to a restricted performance. Or, they may be directed toward the young person directly. The *Motion Picture Act* of British Columbia provides an example of a prohibition directed to both child and adult; it provides in subsection 8(3) that unless accompanied by a parent or other responsible adult, no person under 18 shall attend or be permitted to attend a restricted film.[46]

In the case of these restrictions on entry, as in the classification systems themselves, the role of the parent or other responsible adult is recognized. A child or young person may sometimes be refused admission to a restricted performance altogether (as is the case in Saskatchewan),[47] but on the other hand, as in the British Columbia example, may be refused admission only if unaccompanied.[48] The same holds true with entry restrictions on even younger people. The Regulations of Nova Scotia prohibit a theatre owner from admitting to an "Adult" film any person under 14, unless the person is accompanied by someone 19 years of age or over.[49]

8. Advertising Controls

All of the provincial legislation relating to film censorship or review, except that of New Brunswick, requires that advertising for a particular movie also be approved by the board.

In a few jurisdictions, the legislation itself contains the standards which are to govern consideration of advertising material. The *Theatres and Cinematographs Act* of Saskatchewan, for example, prohibits any advertisement that:

> (a) gives details of a criminal action or depicts criminals as admirable or heroic characters;
>
> (b) is immoral or obscene or suggests lewdness or indecency;
>
> (c) offers evil suggestions to the minds of young people or children; or
>
> (d) is for any other reason injurious to public morals or opposed to the public welfare.[50]

The standards enunciated in the Manitoba and Alberta legislation appear, not in connection with the Board's prior review of advertisements, but rather in connection with powers conferred by the *Act* to seize and destroy materials that offend. The Manitoba *Amusements Act* allows the Film Classification Board to instruct a peace officer or inspector to remove from all public places any advertisement of an immoral, obscene, or indecent nature, or which depicts any murder, robbery, or criminal assault, or the killing of any person.[51] The Alberta *Amusements Act* permits the making of regulations permitting seizure and destruction of advertisements that are indecent or have an immoral, degrading or objectionable tendency.[52] No such regulations have been made.

A number of questions are raised by these provisions about control of advertising. Almost all have broad powers of prior restraint, and there are very few jurisdictions where there is any indication at all of the standards which will be applied in exercising those powers. The seizure provisions do not explicitly provide for any sort of hearing before the seizure and destruction of the material. These aspects of the advertising regulation provisions, raise in our minds the question of whether these could be said to be a reasonable limit imposed by law on the freedom of expression guaranteed by the *Charter of Rights*. Also at issue may well be the Charter's guarantee in section 8 against unlawful search and seizure.

9. Overview

Even this brief survey of film regulation in Canada shows what diversity of approach there exists, both with regard to the substance of the standards applied and the ensuing results, and also with regard to the degree of public accessibility of these standards. It is useful to remember that the constitutional foundation for film regulation by the provinces relies in part at least on this local diversity. Mr. Justice Ritchie of the Supreme Court of Canada stated in the *McNeil* case that in a country as vast and diverse as Canada, where tastes and standards may vary from one area to another, the determination of what is and what is not acceptable on moral grounds for public exhibition, may be viewed as a matter of a "local and private nature in a Province" and therefore within provincial competence under the *Constitution Act, 1867*.[53]

Although it may be desirable to recognize local diversity, however, this recognition leads to problems. The boundaries between the provinces are open: there are no Customs or other barriers between them. Modern technology permits the production of numerous videotapes from another tape or from a film. The combination of these two factors will permit circulation of a film, by means of videotapes for private viewing, in a province where it was not cleared for commercial showing.

Witnesses at our hearings expressed concern about this development. The potential impact of the phenomenon can be appreciated when one considers that provincial boards review many more films imported from other countries, than films produced in Canada.

10. Regulation of Videotapes

Public exhibition of videotapes is dealt with in a number of jurisdictions in the same way as public exhibition of film. In these provinces, the relevant Act or Regulation defines "film" in such a way as to include videotape, thus extending to this medium all of the provisions governing public exhibition of conventional film.[54]

However, in two jurisdictions, the regulatory scheme has been extended beyond public exhibition of videotapes to encompass sale and rental of tapes for private consumption. In both of these provinces, this has been accomplished by making changes to the regulations dealing with "film exchanges".

The first jurisdiction to bring videotapes under regulation was Nova Scotia. A regulation passed in February 1984 defined "film exchange" as including retail outlets which sell, lease, lend, exchange or distribute film to the public.[55] Film was defined as including videocassette, videodisc and videotape. The regulation requires that a film exchange obtain a licence from the Amusements Regulation Board before it can sell, lease, lend, exchange or distribute any film. The fee for the licence is very small.

A number of rules govern the activities of a film exchange. An exchange is required to mark every videofilm with the classification which the Board has given to the film; both the actual container of the film and any used for display purposes must bear a sticker with the appropriate designation, whether "General", "Adult" or "Restricted". Where the film has not been classified by the Board, a sticker bearing the word "Unclassified" must be affixed. The exchange must indicate in all advertising of a film or video the classification which the Board has given, or that the film is unclassified. The appropriate designation is also required to appear on every list of videofilms that is made available to customers.

The Regulations contain a prohibition against selling, leasing, lending, exchanging or distributing to any person under 18 a film classified as "Restricted".

One of the major problems with any scheme of video regulation is, of course, whether to require board clearance of each of the thousands of videos likely to be in circulation in a province at any given time. These Nova Scotia regulations on film exchanges appear to assume that not all the tapes will be seen by the board, because they include the "unclassified" category. This is a departure from the rules which apply to the commercial film exchanges which supply films to movie theatres. Section 18 of Regulation 130/82 under the Nova Scotia *Theatres and Amusements Act* provides that no film exchange shall sell, lease or exchange any film unless a certificate of the Board has been issued in respect of it. A film circulated without a certificate may be confiscated. One assumes that sheer practicality may have dictated the distinction.

Many tapes now in circulation are probably not reproductions of films which were shown in the province; there will thus be no certificate in respect of the work on the tape. It would be very difficult to call them all back in for certification. The same difficulty arises in respect of tapes entering the province for which no commercial showing is sought. The task of reviewing and classifying each of these would be enormous. The labelling requirements, and the requirements to show in advertising and on customer lists whether or not a tape is of a classified work, seem useful ways of dealing with the inevitable

problem of unclassified works. One wonders, however, why the Regulations seem to permit sale or lease of an unclassified video to a person under 18, when at least some of these unclassified tapes may well be on a par with those in the "Restricted" class.

The province of Ontario introduced a video regulation scheme with the 1984 amendment of the *Theatres Act*. The definition of "film exchange" in the *Act* was changed to "the business of distributing film", with "distribute" being defined to include distribute for direct or indirect gain, rent, lease and sell.[56] The Regulation under the *Theatres Act* was changed to introduce the concept of a "film exchange-retail". This is a film exchange that does not distribute film for the purposes of exhibition.[57] Before the changes to the *Act* and Regulations, this type of exchange was totally exempt from the requirements of the *Act* and Regulations. Now, however, the film exchange-retail is required to possess a licence and is subject to certain of the requirements of the *Act*. However, a film exchange-retail is not subject to subsection 35(1) of the amended *Theatres Act*, which provides that before the exhibition or distribution in Ontario of a film, an application for approval to exhibit or distribute and for classification of the film shall be made to the Board.[58]

The film exchange-retail amendments to the regulation having been made in early 1985, we are not in a position to comment on their operation. Obviously, observers will follow with interest the course of this experiment in video regulation, as they will comparable efforts in Nova Scotia and the United Kingdom.

Footnotes

[1] Badgley Report, Vol. II, at 1109 ff.

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

[3] Nova Scotia: *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, as amended by S.N.S. 1972, c.54. N.S. Reg. 97/78 as amended by N.S. Reg. 36/81; N.S. Reg. 96/81; N.S. Reg. 130/82; N.S. Reg. 16/83; N.S. Reg 48/83, and Regulations Respecting Film Exchanges, February 21, 1984.

New Brunswick: *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c.T-5, as amended by S.N.B. 1977, c. M-11.1; S.N.B. 1978, c. D-11.2; S.N.B. 1979, c.41; S.N.B. 1979, c.71; S.N.B. 1980, c.32. *General Regulation - Theatres, Cinematographs and Amusements Act* (N.B. Reb. 84-249).

Québec: *An Act Respecting the Cinema*, R.S.Q. 1977, c. C-18. *Cinema Act*, S.Q. 1983 assented to June 23, 1983, but not yet proclaimed. There is also a *Regulation Concerning The Bureau de Surveillance du Cinéma* passed under the *Cinema Act*, R.S.Q. 1964, c.55.

Ontario: *Theatres Act*, R.S.O. 1980, c.498, as amended by S.O. 1984, c.56. Regulation 931, R.R.O. 1980, as amended by O. Reg 29/82, O. Reg. 56/85 and O. Reg. 61/85.

Manitoba: *The Amusements Act*, R.S.M. 1970 c. A70 as amended by S.M. 1970, c.96, s.5; S.M. 1972, c.6, s.28-29; S.M. 1972, c.35; S.M. 1972, c.74; S.M. 1974, c.14; S.M. 1974, c.64, s.29; S.M. 1975, c.42, s.2; S.M. 1975, c.63; S.M. 1978, c.49, s.6; S.M. 1979, c.28, s.2. M.R. 49/75, as amended by M.R. 103/76; M.R. 65/78; M.R. 2/79; M.R. 115/80; M.R. 111/82.

Saskatchewan: *The Theatres and Cinematographs Act*, R.S.S. 1978, c.T-11. *The Theatres and Cinematographs Regulations*, O.C. 1873/81.

Alberta: *Amusements Act*, R.S.A. 1980, c.A-41. Alta. Reg. 72/57, as amended by Alta. Reg. 261/82; Alta. Reg. 8/83.

British Columbia: *Motion Picture Act*, R.S.B.C. 1979, c.284, as amended by S.B.C. 1981, c.20, ss.48-9. B.C. Reg. 221/70, as amended by B.C. Reg. 92/79; B.C. Reg. 358/79; B.C. Reg 459/81.

[4] See, for example, the British Columbia *Motion Picture Act*, R.S.B.C. 1979, c.284, s.1; the Alberta *Amusements Act*, R.S.A. 1980, c.A-41, s.1(c); the Saskatchewan *Theatres and Cinematographs Act*, R.S.S. 1978, c.T-11, s.2(c); Manitoba *Amusements Act*, R.S.M. 1970, c.A70, as amended, s.2(f); Ontario *Theatres Act*, R.S.O. 1980, c.498, as amended, s.1(d).

[5] In Nova Scotia, the *Regulations Respecting Film Exchanges*, creating a licensing regime for video retailers, were approved by the Lieutenant Governor in Council on February 21, 1984. Amendments to the Ontario *Theatres Act*, effected by S.O. 1984, c.56, opened the way to including video retailers within the Ontario scheme, and Ontario Regulations 56/85 and 61/85 were passed pursuant to the amended legislation.

[6] *The Censoring of Moving Pictures Act*, R.S. Nfld. 1970, c.30.

[7] Badgley Report, Vol. II, at 1109.

[8] *Ibid.*, at 1110.

[9] See Nova Scotia *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, s.2(1)(g); New Brunswick *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c. T-5, s.32(g); Ontario *Theatres Act*, s.3(5)(a) as enacted by S.O. 1984, c.56, s.3; Alberta *Amusements Act*, R.S.A. 1980, c.A-41; B.C. *Motion Picture Act*, R.S.B.C. 1979, c.284, s.4(c).

[10] *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1.

[11] By S.O. 1984, c.56, s.13.

[12] Section 21(2), added to Regulation 931 of R.R.O. 1980 by O. Reg 56/85, s.2.

[13] Section 21(3), added to Regulation 931 of R.R.O. 1980 by O. Reg 56/85, s.2.

[14] *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984) 5 D.L.R. (4th) 766 (Ont. C.A.), affirming 147 D.L.R. (3d) 58 (Ont. H.C.-Div. Ct.).

[15] Manitoba *Amusements Act*, s.22(3), as enacted by S.M. 1972, c.74, s.4.

[16] *An Act Respecting the Cinema*, R.S.Q. 1977, c. C-18, s.16 ff. and *Cinema Act*, S.Q. 1983, c-37, s.76 ff.

[17] See s.3(5)(b) of the Ontario *Theatres Act*, as enacted by S.O. 1984, c.56, s.3; Saskatchewan *Theatres and Cinematographs Act*, R.S.S. 1978, c. T-11, s. 7(3)(b).

[18] *Motion Picture Act*, R.S.B.C. 1979, c.284, c.4(b).

[19] Nova Scotia *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, s.17(1).

[20] Alta. Reg. 72/57 as amended, s.18(1).

[21] Badgley Report, Vol. II, at 1115.

[22] New Brunswick *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c. T-5, s.25(1).

[23] Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and Criminal Control of Obscenity*, W.P.P.P. #16 at 51-54.

[24] Ontario, Ministry of Consumer and Commercial Relations, Theatres Branch Annual Report 1982-1983, at 15, cited in Boyd, *op. cit.* at 48.

[25] Boyd, *op. cit.* at 49.

[26] Amusements Regulation Board, *Classification Parameters*, quoted in Boyd, *op. cit.* at 50.

[27] Boyd, *op. cit.* at 49-50.

[28] *Ibid.*, at 51-52.

[29] Badgley Report, Vol. II, at 1115.

[30] *Amusement Act* R.S.M. 1970 as amended.

[31] Boyd, *op. cit.* at 55.

[32] Badgley Report, Vol. II, at 1115.

[33] Subsections 3(7) and 3(8) enacted by S.O. 1984, c.56, s.3.

[34] R.S.B.C. 1979, c.284, s.8(1).

[35] As enacted by S.M. 1972, c.74, s.4.

[36] Manitoba Regulation 49/75, ss. 2 to 6 inclusive.

[37] R.S.A. 1980, c. A-41, s.23(m)(i).

[38] Alta. Reg. 261/82, s.19.

[39] R.S.S. 1978, c. T-11, s.7(3)(c).

[40] In N.S. Reg. 129/82, s.17(2).

[41] Subsection 25(7) of the *General Regulation - Theatres, Cinematographs and Amusements Act*, 84-249 uses these three categories to refer to trailers, but we could not find a provision specifically applying them to feature films.

[42] Subsection 18(1) of Order in Council 1873/81.

[43] Subsection 18(2) of Order in Council 1873/81.

[44] R.S.N.B. 1973, c. T-5, s.14(1)

[45] Subsection 20(2) of the *Theatres Act*, enacted by S.O. 1984, c.56, s.10.

[46] R.S.B.C. 1979, c.284, s.8(3).

[47] *Theatres and Cinematographs Act*, R.S.S. 1978, c. T-11, s.15(b).

[48] *Motion Picture Act*, R.S.B.C. 1979, c.284, s.8(3).

[49] N.S. Reg. 129/82, s.21(b).

[50] R.S.S. 1978, c. T-11, s.13(1).

[51] R.S.M. 1970, c.A70, s.24(1).

[52] R.S.A. 1980, c. A-41, s.23(n).

[53] (1978), 84 D.L.R. (3d) 1, at 28.

[54] See note 4.

[55] See note 5.

[56] See s.1(ba) added to the *Theatres Act* by S.O. 1984, c.56, s.1(2) and the amendment to s.1(f) enacted by S.O. 1984, c.56, s.1(3).

[57] See O. Reg. 61/85, s.1, adding a new s.1(ca) to s.1 of Regulation 931, R.R.O. 1980.

[58] See the amendment to s.2(3) of Regulation 931, effected by O.Reg. 61/85, s.2.

Chapter 15

Control and Regulation of Pornography by Municipal Law

As has been pointed out in Part I, municipalities in Canada have authority to regulate and control a wide range of activities. They are subject to only three constraints: the *Charter of Rights and Freedoms*; the division of powers within the Canadian Constitution; and the fact that municipalities' powers are assigned to them by provincial legislatures. Municipalities have the power to license and otherwise regulate businesses, and to zone land use within their boundaries. Their powers also extend to control of the highways and other public places within their jurisdiction and to the control of nuisances.

Although municipalities have authority to make by-laws regulating and governing trades, they cannot use this power to make it unlawful to carry out legal business activities.[1] This position was recently confirmed in *City of Prince George* v. *Payne*[2] where the Supreme Court of Canada held that the city of Prince George could not use the power to refuse a business licence to prohibit any "sex shop" from opening there. There is a suggestion in that decision, however, that zoning by-laws could have been used to prevent the location of "sex boutiques" within the city. The city of Vancouver recently took this approach and passed a by-law preventing businesses retailing "sex orientated products" from locating within the city. That by-law has been successfully challenged on the grounds of vagueness but not on the legitimacy of the use of the zoning power to prevent the location of such establishments within Vancouver.[3]

Canadian municipalities have endeavoured, particularly in recent years, to use their powers to enact regulatory and zoning by-laws to control the activities of establishments engaged in what might be described as the "sex trade", in particular, "adult entertainment parlours", and the display of so-called "adult materials". Although some of these by-laws have been struck down, it seems that in every case, that has been the result of a finding that the specific

enactment is overly vague or encroaches on the federal power over criminal law. There is nothing in these cases to indicate that a carefully worded by-law, which is clearly regulatory in purpose, will be struck down. Indeed, there is every reason to suggest that it will be upheld.

The designation "adult entertainment parlour" is principally, but not exclusively, a creature of the *Municipal Act*[4] of Ontario in which Section 222 allows municipalities to regulate such establishments. The definition used in that section is very broad and includes premises featuring striptease shows, nude or semi-nude waitresses, sex shops and businesses offering adult materials, including books and magazines, which "appeal to, or are designed to appeal to, erotic or sexual appetites or inclinations".[5]

Some Ontario municipalities regulate adult entertainment parlours through licensing regulations which deal with the type of business they can conduct, hours of business, advertising, etc., and impose heavy licence fees. Some municipalities also use zoning regulations to strictly control where such businesses can locate. For example, the city of North York allows adult entertainment parlours only in industrial areas and at least 500 metres away from residential areas.[6] In a recent decision of the Ontario Provincial Court,[7] a zoning by-law confirming the location of adult entertainment parlours in the city of Oshawa was upheld. Such by-laws are, however, subject to general provisions regarding zoning, for example, the approval of the Municipal Board in Ontario, and the need for a public hearing in British Columbia.

Regulatory by-laws *governing* adult entertainment parlours have been subject to several challenges. They have been challenged on the ground that, in effect, they regulate obscenity, which is a matter for the federal authorities under the criminal law. In *Sharlmark Hotels Ltd.* v. *Metropolitan Toronto*[8] the Ontario Divisional Court upheld Toronto's by-laws dealing with adult entertainment parlours as being regulatory in nature and not trespassing on the criminal law power. More recently, the Toronto "G-String" by-law requiring dancers to have an opaque covering over their pubic area was upheld in *Koumoudouros* v. *Metropolitan Toronto,*[9] and a British Columbia court upheld a by-law which prohibited in licensed establishments "entertainment" involving the use or display of any person whose genitals can be seen.[10]

By contrast in *Nordee Investments Ltd.* v. *The City of Burlington,*[11] a by-law which attempted to regulate nudity in eating establishments, was struck down by the Ontario Court of Appeal.

The court held that the by-law was, in effect, an attempt to prohibit in Burlington any form of activity, including dancing, where any part of the breast or buttock is exposed. It held that the by-law went beyond regulation, was inconsistent with the *Criminal Code* and hence not within the power of the municipality to enact. The court was concerned with the wide scope of the by-law and interpreted it as being applicable even to ballet dancers performing in a theatre where beverages were available during intermission. The Court distinguished the earlier decision in the *Sharlmark Hotels* case on the basis

that there the by-law dealt *only* with adult entertainment parlours. In conclusion, the court found that a municipality cannot:

> under the guise of regulating all establishments where food and drink is prepared or made available, enact a standard with regard to nudity that is in conflict with that set out in the *Criminal Code*. Such a by-law, under the pretext of regulating a wide variety of establishments, denies defences available under the *Code* and creates a form of censorship that may vary from community to community.

In summary, genuinely regulatory by-laws with well defined and specific terms are likely to be upheld. However, those like the Burlington by-law which can be read in a broad manner and viewed as an attempt to impose a stricter standard than that imposed by the *Criminal Code*, are unlikely to survive challenge. They will be struck down as, in effect, an attempt to prohibit the activities by a municipal government lacking the power to pass criminal law.

Municipalities have dealt with the matter of the display of "adult material" in various ways. Their major objective appears to be to prevent offensive material being displayed where children may be exposed to it. Several municipalities have had success in this area by asking retailers to voluntarily place such material behind opaque covers at a certain height above the ground, for example, the Ontario municipalities of Guelph and Brockville. Others have resorted to by-laws and enforcement. Municipalities in Québec have been particularly active in this regard, enacting numerous by-laws dealing with the display of erotic objects and literature. Most require magazines and books to be placed over five feet off the ground and displayed behind an opaque screen so that only the title is visible.[12]

Some municipalities have apparently had the problem solved for them by citizens' initiative. In British Columbia, the municipality of Delta found that the problem was solved when parents threatened to impose economic sanctions on stores that openly displayed such materials. Other municipalities across the country have found that when customers systematically deny their custom to businesses that refuse to restrict sexually explicit material, positive results usually follow.

A less orthodox solution was alluded to by the City Clerk of Port Coquitlam in this letter to the Committee of April 26, 1984:

> The one problem that did arise in Port Coquitlam concerned the distribution of what were alleged to be pornographic video tapes and this was quickly solved when an extremist group firebombed the store which shortly thereafter shut its doors.

In Ontario, the City of Hamilton attempted to control the display of adult reading materials by requiring that a seller first obtain a licence under the adult entertainment parlour licensing provisions, and then comply with height and cover regulations concerning their display. The by-law was struck down by the Court of Appeal in *Hamilton Independent Variety & Confectionary Stores* v. *City of Hamilton*[13] as being vague and, therefore, void for uncertainty. The Court held that the wording "appealing or designed to appeal to erotic or

sexual appetites or inclinations" was not adequate to allow a retailer to decide whether he needed a licence or not.

In a more recent decision of the Divisional Court in Ontario,[14] a similar Toronto by-law, which imposed an obligation to obtain a licence if one wished to sell material which:

> (i) portrays or depicts by means of photography or drawing or otherwise, female breasts, any person's pubic, perineal and preanal areas and buttocks, and
>
> (ii) appeals to, or is designed to appeal to, erotic and sexual appetites and inclinations

was also struck down for vagueness. However, the judge felt bound to discuss the constitutionality of the provision and declared the enabling section of the *Municipal Act*[15] beyond the power of the province to enact, so far as it attempted to deal with the distribution of books and magazines. In reaching this decision, the judge referred to the penalties that could be imposed on a seller who failed to obtain a licence and to the fact that the by-law did not regulate all booksellers.

The court's comments with respect to the vagueness of the by-law follow logically from the finding of the Court of Appeal in the *Hamilton* case. Doubts may be raised, however, about the judge's comments on the issue of the power of the province to enact the by-law. It is generally accepted in other authorities that municipalities can regulate businesses by special and more demanding regimes not applicable to businesses generally. What this case seems to be saying is that within a particular category of business, a by-law cannot discriminate between different types of operators. It remains to be seen whether this refinement will receive broader judicial support.

It does appear that in other provinces, municipalities have successfully controlled the display of these items under their general power to regulate businesses, without specific enabling legislation similar to that found in the *Municipal Act* of Ontario. For example, the city of Vancouver recently enacted a by-law which requires the operation of any business, trade or occupation which sells adult publications, to display such material behind an opaque screen 47 inches above the ground.[16]

Despite the element of uncertainty left by the most recent decision in Ontario, municipalities do have the power to regulate the display of pornography, as long as the by-law is sufficiently precise and detailed and the effect of the regulation is not to prohibit the sale or use of the material. The latter objective can, it seems, be achieved by a properly framed zoning by-law. The only question mark relates to whether a by-law which attempts to specially regulate a minority of a larger group of outlets, is within the power of the municipalities.

Although the degree of uncertainty about the powers of municipalities in this regard is limited, the fact that any uncertainty exists has made some

municipalities very reluctant to introduce regulations. This reluctance has been accentuated by the considerable cost involved in responding to a challenge of the validity of by-laws in the courts. The Courts have proved to be expensive laboratories for the testing of municipal by-laws.

Footnotes

[1] *City of Toronto* v. *Virgo*, [1896] A.C. 88 (P.C., Canada).

[2] *City of Prince George* v. *Payne* (1977), 2 D.L.R. (3rd) 1 (S.C.C.).

[3] In *Red Hot Video* v. *City of Vancouver* (1984), 5 D.L.R. (4th) 61 (B.C.S.C.) the by-law was upheld, but has recently been struck down by the Court of Appeal on the ground of vagueness in a short interim oral judgment.

[4] *Municipal Act*, R.S.O. 1970, C. 236.

[5] *Ibid.*, s. 222(9).

[6] City of North York, By-Law 27901.

[7] *R.* v. *507638 Ontario Ltd. and 505141 Ontario Ltd.* 1984 unreported (Ont.Prov.Ct.).

[8] *Sharlmark Hotel Ltd.* v. *Metro Toronto* (1981), 121 D.L.R. (3rd) 415 (Ont.Div.Ct.).

[9] *Koumoudouros* v. *Metro Toronto* (1984), 6 D.L.R. (4th) 523 (Ont.Div.Ct.).

[10] *City of Port Alberni* v. *Hotel Barclay Ltd.* 3 Jan. 1984 unreported (B.C. Prov. Ct.).

[11] *Nordee Investments Ltd.* v. *City of Burlington*, July 25, 1984 unreported (Ontario Court of Appeal).

[12] See e.g. City of Hull By-law 1737; City of Lachine By-law 2333; City of Mount Royal By-law 1153; City of Pointe Claire By-law 2228.

[13] *Hamilton Independent Variety & Confectionary Stores* v. *City of Hamilton* (1983), 137 D.L.R. (3rd) 499 (Ont.C.A.).

[14] *Information Retailers Association of Metropolitan Toronto* 15 Oct, 1984 unreported (Ont.Div.Ct.).

[15] Municipal Act, R.S.O. 1970, c.236.

[16] Vancouver by-law 1984.

Section III

Legal and Social Reactions to Pornography in other Countries

Summary

Research was conducted for or by the Committee into the legal approaches and social attitudes to pornography in several countries with social and cultural traditions similar to those of Canada. In the first chapter of this section, we consider the experience of the United States. We then proceed in Chapter 17 to a discussion of three Commonwealth jurisdictions, England and Wales, Australia and New Zealand. In Chapter 18 we move to consideration of the law and social reaction in five continental European countries. The review of the experiences of these countries is not exhaustive, but we think there is sufficient detail to provide some useful information or reactions to pornography elsewhere as a way of examining the possible range of options for Canada.

There are very few international Agreements and Conventions dealing with what are referred to as "obscene" writings and representations. In 1983, the Economic and Social Council of the United Nations passed a resolution which essentially recommended that member states legislate domestically to curb production and trade of pornography, and to impose severe penalties where children are involved. A description of these international initiatives and Canada's record of adherence to them is discussed in Chapter 44 of Part IV.

Chapter 16

The United States

The United States, like Canada, is a federal state. However, unlike Canada, jurisdiction over criminal law in the United States rests with the state governments. Each of the 50 states is therefore free to enact its own set of criminal prohibitions to deal with pornography.

There are, however, several federal enactments dealing with such matters as sending pornographic material through the mails, importing pornography and transporting pornography across interstate boundaries. They are prohibitory in nature. Operating along side this legislation is a large body of regulatory legislation that controls pornography through means other than the threat of criminal sanction. Most of this legislation has been passed by municipalities.

Despite the fact that there is a tremendous amount of legislation in the United States aimed at it, pornography is freely available in that country. The major reason for this apparent inconsistency arises because of the interpretation that has been given to the guarantee of "freedom of speech" in the First Amendment to the American Constitution. The Supreme Court of the United States has decided that most of what can be called pornography is protected by the First Amendment. In fact, it is only the really "hard-core" pornographic material that satisfies the stringent test of obscenity set down by the court in the 1973 case of *Miller* v. *California*[1] that is denied that protection. The test asks:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes sexual conduct in a particularly offensive manner; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

All three of these questions need to be answered in the affirmative for the material to lose the protection of the First Amendment.

The *Miller* decision also held that there is no need to fix the "community" whose standards are to be applied as the *national* community. States are,

therefore, free to select a more limited community if they wish. At the same time, the Supreme Court has made it clear that the "average person" who applies those standards is the average *adult* person, not the average child.[2]

The upshot of this landmark decision has been that much of what is commonly considered pornographic is protected from regulation by both the state and federal governments. The protection from regulation is not, however, absolute. The need to regulate must be shown to be "compelling". On this basis, the Supreme Court has upheld both a municipal ordinance restricting the areas in which theatres showing "adult" movies could locate[3] and state legislation prohibiting the sale of certain books and magazines to children.[4] And, in a recent case, *New York* v. *Ferber*[5], the Supreme Court upheld state legislation prohibiting the dissemination of material which showed children engaged in sexual conduct. In the Court's view, child pornography was a distinct category of speech that, like obscene speech, was beyond the reach of the protection afforded by the First Amendment.

It is still possible, therefore, for the state and federal governments in the United States to legislate against pornographic material that does not meet the *Miller* test. By and large, however, state governments have preferred not to legislate against such material except for special provisions designed to protect children. In fact, over 40 states have expressly incorporated the *Miller* test into their criminal codes, although the language used in the legislation is not always identical. The kinds of sexual conduct referred to in the second branch of the test as well as the size of the community whose standards are to be used, can vary from state to state. Despite these differences, there is a high degree of uniformity in the legislation enacted by the various states.

The *Miller* test has also been used in many of the state and municipal enactments that take a public nuisance approach to the control of pornography. These enactments are based on the principle that activities that are injurious to the public health, safety or morals amount to a public nuisance and are subject to abatement by prohibitory injunction. Obscene materials are declared to constitute a public nuisance and provision is made for the bringing of civil actions to prevent stores from continuing to sell such materials.[6]

Legislation at the federal level in the United States seldom incorporates the *Miller* test. The prohibitions contained in this legislation tend to be formulated in terms of words like "obscene", "profane", "lewd", "lascivious", "filthy", "indecent" or some combination thereof, with no definitions being given for them. Into this category fall the prohibitions against sending offensive matter through the mails,[7] sending or transporting such matter in interstate commerce,[8] using offensive language on the radio[9] and importing offensive matter into the country.[10]

Federal legislation dealing with child pornography also fails to incorporate the *Miller* test. The prohibition here is directed against "visual depictions" of "sexually explicit conduct" involving children, with no reference at all to any qualitative standard.[11] In fact, the only federal legislation that does incorporate

the *Miller* test of obscenity appears to be a bill not yet enacted that deals with the use of obscene language and images on radio, television and cable television.[12]

The absence of express reference in federal legislation to the language of the *Miller* test does not appear to have rendered that legislation unconstitutional.[13] Indeed, the courts appear to have been willing to read the test into the legislation. As a result, the *Miller* test does affect federal legislation. The only exception is legislation directed at child pornography, which, as we saw earlier in the discussion of the *Ferber* case, is a distinct category of unprotected speech for First Amendment purposes.

The First Amendment is not the only source of constraints on legislative power in the area of pornography. The right of privacy (which the United States Supreme Court has said can be implied from the American *Bill of Rights*) has been held to be a bar to making the mere possession of obscene material a crime.[14] This has not been a significant constraint on legislative power, however. The Supreme Court has decided that the right of privacy cannot be used to prevent governments from prohibiting the various ways in which people might attempt to take obscene material into their private possession. Hence, the Supreme Court has upheld as valid legislation prohibiting the carriage of obscene material in one's luggage on an airplane,[15] as well as legislation prohibiting the receipt of obscene materials through the mails.[16]

Enforcement of the laws against pornography has proven difficult in the United States. One of the major reasons has been that it is not very clear what material is caught by the variety of laws. Another problem has been the tremendous volume of material in circulation in the country. Still another has been a shortage of regulatory and enforcement personnel. As a result of these problems, enforcement efforts have been concentrated in the areas of child pornography and the involvement in the pornography industry of organized crime. Little tends to be done about adult pornography. In some cities, like New York, the police will act only if a complaint from the public is received.

One of the interesting discoveries made by the Committee's researchers is that, in spite of the enforcement problems just alluded to, the City of Cincinnati in Ohio claims to have done away with pornography. There the "battle against pornography" has been waged, it appears, not by criminal prosecutions but by civil actions. The actions are based on the kind of public nuisance statutes mentioned earlier. The successful actions have resulted in pornography outlets simply being closed down.

To our knowledge there is no govermental involvement in the United States in the censorship and classification of films for public viewing. The classification of films is performed by a body established by the film industry itself. The major reason for the lack of governmental involvement in this area is, once again, the First Amendment and the fact that the United States Supreme Court has shown little sympathy for "prior restraints" on speech.

Needless to say, existing legislation and enforcement techniques and priorities are seen as unsatisfactory by some Americans. Much opposition has been voiced by some conservatives, who, through organizations established for the purpose, are active lobbyists at both levels of government for tighter control over pornography. Feminists, too, are campaigning for a tougher approach in this area. Two of the leading feminists, Catharine MacKinnon and Andrea Dworkin, have proposed a "human rights approach" to deal with pornography. The details of this approach are discussed in a later chapter of this report, but the basic theme is that pornography is seen as a form of discrimination against women. Women are, therefore, given the right to claim damages to compensate them for the harm such discrimination causes. Thus far, however, the only city to enact this approach by city ordinance has had the legislation struck down as being in violation of the First Amendment.[17]

Footnotes

[1] 413 U.S. 15 (1973).

[2] *Pinkus* v. *U.S.* 436 U.S. 293 (1978).

[3] *Young* v. *American Mini Theatres Inc.* 427 U.S. 50 (1976).

[4] *Ginzburg* v. *U.S.* 390 U.S. 629 (1968).

[5] 458 U.S. 1113 (1982).

[6] These enactments are discussed by Judge Borins in his recent decision in *R* v. *Nicols* (27 Nov. 1984, unreported (Ont. Co. Ct.).

[7] 18 U.S.C., s. 1461 and 18 U.S.C., s. 1463.

[8] 18 U.S.C., s. 1462 and 18 U.S.C., s. 1465.

[9] 18 U.S.C., s. 1464.

[10] 19 U.S.C., s. 1305.

[11] *The Child Protection Act*, 18 U.S.C., ss. 2251-2255.

[12] The statute, called the *Cable-Porn and Dial-Porn Control Act*, would amend 18 U.S.C., s. 1464.

[13] See, for example, *Hamling* v. *U.S.* 418 U.S. 87 (1974) and *U.S.* v. *Reidel* 402 U.S. 351 (1971).

[14] *Stanley* v. *Georgia* 394 U.S. 557 (1969).

[15] *U.S.* v. *Orito* 413 U.S. 139 (1973).

[16] *U.S.* v. *Reidel*, *supra*, note 13.

[17] *American Booksellers Assoc. Inc.* v. *Mayor of the City of Indianapolis* No.IP84-791C (Dist. Indiana Nov. 19, 1984).

Chapter 17

Commonwealth Countries

1. England and Wales

The subject of pornography is dealt with in England and Wales in a variety of different statutes. The trend in recent years has been towards greater state involvement.

The major piece of British legislation is the *Obscene Publications Act 1959*.[1] The *Act* was prompted in part by the fact that the common law offence of obscene libel was being used against what many Britons thought was "serious literature". The *Act* replaced the common law test of "obscenity" developed by Chief Justice Cockburn in 1868 in *R. v. Hicklin*.[2] It will be recalled that that test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". The new statutory test was whether the effect of the material in question is, "if taken as a whole, such as to tend to deprave and corrupt those who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it".[3]

There are two major differences between these two tests. One is that the *Hicklin* test isolated the allegedly obscene parts of a work and examined them without reference to the whole, while the statutory test requires that any part must be viewed in the context of the entire work. In addition, under the *Hicklin* test, the measuring stick was the effect the material might have on the most vulnerable people within society, regardless of whether they would actually come into possession of the material. The statutory test is specifically directed to those people who are likely to encounter the material.

The *Obscene Publications Act 1959* also added, in section 4, the defence of "public good", giving the accused an opportunity to show that the material was "in the interests of science, literature, art or learning, or of other objects of general concern". The *Act* expressly provides that expert evidence is admissible to establish the defence.

The offences created by the *Obscene Publications Act 1959* are (1) publishing, whether for gain or not, an obscene article; and (2) having an

obscene article for publication or gain. The term "publish" is defined to include all forms of distribution, including giving and lending, and offering to sell or rent. The word "article" is defined to include written and pictorial material, sound recordings, objects and films.[4]

An important feature of the 1959 *Act* is the forfeiture provision, section 3. That provision is virtually identical to section 160 of our *Criminal Code*. It authorizes the issuance of warrants entitling peace officers to seize material believed to be obscene. The material is then the subject of a further hearing where the Crown seeks to establish that the material is obscene. A finding that it is obscene does not result in the owner or person in possession of it being convicted. Rather, as in the case of our section 160, the material is simply forfeited to the Crown.

The provisions of section 3 were criticized in the 1979 report by the Williams Committee on Obscenity and Film Censorship for the absence of any provision giving the right to have the show cause hearing held before a jury. This omission was seen to be particularly important because experience had shown that in prosecutions under section 2 of the *Act*, in which the accused can elect to go before a jury, juries had been less willing to convict than judges.[5] The Williams Committee also expressed concern about the fact that section 3 allows the state to detain goods for a period of time without the goods having been found to be obscene.[6]

Although the test of obscenity focuses on whether the material has a tendency to deprave and corrupt those people who are likely to encounter it, experience has shown that the focus in cases arising under the *Act* has often been on whether or not the material offends general community standards of what is acceptable. The presumption appears to have been made that, if the material does offend these standards, it will have the necessary damaging effects on those who read or view it.[7]

It would seem, therefore, that, in much the same way as the test of obscenity in our own section 159(8) has been rewritten by our courts to introduce the element of community standards, the test in the 1959 *Act* has likewise been rewritten by the courts in England.

The "public good" defence has been a matter of considerable controversy in England. While there is much sympathy for the view that works of real literary or artistic merit should not be caught by the *Act*, difficulty has been found with the notion that a work that can deprave and corrupt some people can also be for the good of others or the public generally. Problems have also arisen in the application of the defence. Its open-ended nature has resulted in some cases in experts being called to testify as to the therapeutic value of reading or seeing pornography (although the House of Lords eventually ruled such evidence to be improper).[8] There have also been suggestions that the "public good" element is to be considered alongside the obscenity element in deciding whether the material in question meets or exceeds the community standards of acceptability.

The importation of pornographic material is governed by Customs legislation.[9] This legislation prohibits the importation of material that is "indecent or obscene". This term has been taken to impose a higher standard than that imposed by the *Obscene Publications Act 1959*, with the result that material that cannot be imported may nevertheless be produced and distributed domestically. In this regard, it is also to be noted that the Customs legislation makes no provision for a public good defence.

This same "indecent or obscene" test is used in postal legislation to prohibit the use of the mails to distribute pornographic material.[10] It appears, however, that this prohibition is very seldom enforced in respect of domestic mail because of the difficulty of discovering the contents of letters and packages. Mail coming in from outside the country is, of course, subject to Customs regulations which provide that mail can be opened for examination by Customs officials.

Obscene performances of plays were brought under statutory control by the *Theatres Act 1968*.[11] That law prohibits, with a few exceptions, the giving of an obscene performance of a play, whether in public or private and whether for gain or not. The prohibition is limited to those who direct or otherwise control or produce the performance; performers themselves are not covered. The same test of obscenity is used here as is used in the *Obscene Publications Act 1959* and the legislation provides for a "public good" defence. It would appear that the Act is used very seldom.

Special legislation concerning children was enacted in 1978.[12] This legislation is designed to prevent persons taking and distributing "indecent" photographs of children under 16. On a charge of distributing such photographs, the accused is entitled to be acquitted if he can show he had a "legitimate reason" for distributing them or that he did not know, and had no cause to suspect, that they were "indecent". The term "indecent" is nowhere defined in the *Act*. It would appear, however, that it imports a lower standard than the term "obscene" as that term is defined in the *Obscene Publications Act 1959*.

Prior to 1981, indecent public displays were governed by the *Vagrancy Acts* of 1824 and 1834.[13] These enactments prohibited the public display of any obscene print, picture or "other indecent exhibition". In 1981 the British Parliament enacted the *Indecent Displays (Control) Act 1981*[14] which created the new offence of displaying "indecent matter ... in or so as to be visible from any public place". The term "public place" is defined to exclude both places that charge an entrance fee for the purpose of viewing the display and shops that have an "adequate warning" about what they have on display. It is made clear that neither of the exclusions will apply if persons under 18 are permitted entry. Again the term "indecent" is left undefined. It is provided, however, that in determining whether any displayed matter is indecent, "account shall be taken of the effect of juxtaposing one thing with another."

In 1982 an amendment to the *Local Government (Miscellaneous Provisions) Act 1982*[15] gave to local governments broad powers over so-called "sex establishments". One of the powers given to such governments is the power to exclude such businesses entirely from certain areas and districts. The City of Westminster, which had applied considerable pressure on the British Parliament to introduce this legislation, has used its new powers to exclude sex establishments from a large number of areas within London and to set a maximum for the number of licences it will grant in the few areas that remained. The majority of these licences were ultimately allocated to Soho.

The public showing of films is government regulated by a system of licensing *cinemas* rather than a system of censorship or classifying particular *films*.[16] Licences to operate cinemas are issued by local governments which impose as conditions on those licences a number of limitations on the kinds of films that can be shown. These conditions can vary from place to place, although a significant number of local governments adopt the list of "model conditions" prepared by the British Home Office.

Failure to observe these conditions, either by showing movies that are deemed unsuitable or by showing them to children when they are only suitable for adults, puts the licence at risk. The local government has the authority to determine what is and what is not suitable for viewing by the public or by a particular segment of the public. Many local governments, however, simply defer to the directions and classifications made by the British Board of Film Censors, a non-governmental body formed by members of the film trade.

The most recent legislative enactment in England and Wales is the new *Video Recordings Act 1984*[17] which has instituted a regime of very tight controls over the sale and rental of video recordings. The statute was prompted by concern about the easy access children had to the sexually explicit and violent videos available in video stores. The *Act* requires that, with a couple of minor exceptions, all videos be reviewed and classified or, if necessary, banned prior to distribution to the public. Heavy fines can be imposed on those who fail to have their videos reviewed, as well as on those who defy the rulings of the authority charged with the responsibility of doing the reviewing. That authority, it is interesting to note, will be the British Board of Film Censors.

Pressure for tougher laws on pornography in Britain has come in large part from conservative moralists, and in particular the redoubtable Mrs. Mary Whitehouse and her National Viewers and Listeners Association (NVALA). Their campaign has been assisted by the support of such establishment figures as Lord Longford, the author of a 1972 report on pornography. The women's movement, which the report of the Williams Committee described as basically uninterested in the issue of obscenity during the late 1970's, has begun to show its concern more recently. Undoubtedly influenced by feminist opinion in the United States, concerned British women have engaged increasingly in political campaigning against pornography. Some have even taken to direct action by defacing "sexual establishments", "sitting in" at the offices of the "gutter press" and participating in solidarity marches.

2. Australia

Australia is a federal state where the legislative jurisdiction with respect to pornography is divided between the central Parliament and the six state legislatures. The state legislatures have the power to enact criminal law and to regulate intrastate commerce. The majority of the legislation in the area of pornography is, therefore, to be found at the state level.

As will be seen, Australia has adopted a markedly different approach to the control of pornography than that adopted in Canada. They have opted for a legal regime based on pro-active censorship rather than on reactive punishment.

The importation of pornographic material is controlled at the federal level. *The Customs Act 1901*[18] empowers the Governor General to prohibit the importation of goods into Australia by regulation. Two sets of regulations have been enacted pursuant to this power, the *Customs (Prohibited Imports) Regulations*[19] and the *Customs (Cinematograph Films) Regulations*.[20] The former set of regulations is directed primarily at books and magazines while the latter is directed at films.

Until recently, the *Customs (Prohibited Imports) Regulations* prohibited material that was "indecent" or "obscene", "unduly emphasized matters of sex" or was "likely to encourage depravity". These terms tended to be read together and were taken to impose a "community standards of decency" test. This test was applied strictly by the courts, with the result that, in one case, Gore Vidal's book *Myra Breckenridge* was banned.[21] In 1973, shortly after this case, the Department of Customs and Excise issued a memorandum to its field officers advising them that a new policy was to be adopted with respect to pornographic material. That policy was, in effect, to relax controls and to concentrate on prohibited goods other than pornography. The change in policy was said to have been based on the view that the state should interfere as little as possible in what adults in Australia read or viewed.

In 1984, following a study of the role of Customs in the state of New South Wales,[22] the *Customs (Prohibited Goods) Regulations* were amended to bring them more into line with the Department's new policy. In place of terms like "indecent" and "obscene" are found references to child pornography, bestiality and violence (including sexual violence). These prohibitions are directed at pictorial depictions only and, in the case of the first two, apply only where the depictions are "likely to cause offence to a reasonable adult person".

The importation of films is controlled by the *Customs (Cinematograph Films) Regulations*. These regulations have undergone considerable change over the years but the basic structure appears to have remained intact. That structure calls for films coming into Australia to be viewed by the Commonwealth Film Censorship Board prior to being released to the importer. That body has the power both to ban films and to classify them. As of 1983, the regulations required the Board to ban films that were "indecent or obscene",

films that were "likely to be injurious to morality or to encourage or incite to crime" and films that "depict any matter, the exhibition of which is undesirable in the public interest". It would appear that, as in the case of printed material, far less has been kept out of the country than the rather restrictive language of the regulations would suggest should have been. The policy in this area is said to be under review.

As might be expected, state legislation varies from state to state. There are, however, a number of common features to the regimes the states have established to deal with pornography. The most significant of these, and the most interesting from a comparative point of view, is the classification and censorship of *all* pornographic material that is designed for public distribution. Representative of the kind of scheme the states have established is that in place in New South Wales. *The Indecent Articles and Classified Publications Act, 1975*[23] (N.S.W.) calls for the appointment of "classification officers" and for the establishment of a Publications Classification Board. The classification officers are public servants but the members of the Publications Classification Board are appointed from the public. The *Act* stipulates that the Board must include at least one man and one woman as well as one lawyer and one expert in literature, art, medicine or science. As few as five and as many as seven persons can sit on the Board at any one time.

Review of a particular publication can be initiated either by the Minister responsible for the *Act* or by any person involved in the publication's distribution. The publication is first examined by a classification officer. An appeal can be taken from the decision of the classification officer to the Board.

The decisions open to the classification officer and the Board are (1) to authorize the unrestricted distribution of the publication; (2) to restrict the distribution of the publication to persons 18 or over; (3) to restrict the distribution of the publication to under-the-counter sales to persons 18 or over who make an unsolicited personal request for it; and (4) to ban the distribution of the publication.

The only material which is subject to a total ban is child pornography, which is defined as material which depicts a child engaged in an activity of a sexual nature or in the presence of another person who is so engaged. The definition of "child" covers persons under 16, persons who appear to be under 16 and persons represented to be under 16.

In determining whether or not to restrict the distribution of a particular publication, the classification officers and the Board are required to consider "the manner in which and the extent to which, the publication relates to or depicts matters of sex, drug addiction, horror, crime, cruelty or violence".

The rulings of both the classification officers and the Board are published in the official Gazette. Publication in the Gazette is considered to put everyone in the state on notice as to the manner in which a particular publication is to be distributed or, in the case of child pornography, that no distribution is permitted.

Publications subject to restricted distribution can be sold only if they are completely wrapped in opaque wrapping and if they are marked either "R" (which applies to the first restricted category) or "Direct Sale" (which applies to the second restricted category). There are further restrictions on the display and advertising of such publications.

In order to provide sanctions to the regulatory regime, provision is made for various offences. These include distributing material otherwise than in accordance with the decision of the classification officer or the Board, as the case may be, and distributing "indecent" material that has not been classified. The term "indecent", which is not defined in the *Act*, has been interpreted to mean inconsistent with the contemporary standards of decency of the ordinary Australian.[24] Literary, artistic, medical or scientific value is a factor in the determination of whether something is "indecent", and evidence can be called on this question.

Not all of the state schemes in this area operate in precisely the same way as the New South Wales scheme operates. In Queensland, for example, the tribunal established by the legislation has no power to classify; material is either banned altogether or permitted. In Western Australia, the tribunal has advisory powers only; the power to restrict or ban resides with a Minister of the Crown. In South Australia, the tribunal is required to "have due regard to the views of the Minister". In spite of these and other differences, however, it is apparent that the practice of government controlled censorship of pornographic material has taken firm hold in Australia.

Another interesting feature of the control of pornography in Australia is the extent to which governments there have attempted to co-operate with each other. Some state censoring bodies are expressly encouraged in the legislation creating them to rely on the decisions of other state or national censoring bodies. In the area of film censorship this co-operation has extended to the point of state governments delegating their power to the Commonwealth Film Censorship Board.

In recent years, much effort has been expended in an attempt to establish a uniform scheme for the censorship and classification of both films and videos. Agreement on the scheme, which would have resulted in very little being banned, appeared to have been reached in early 1984. Eventually, Queensland, probably the most conservative of the states, opted to go its own way.

One of the products of the co-operation between governments in this area has been the enactment in the Australian Capital Territory of the *Classification of Publications Ordinance 1984*.[25] This legislation was intended to be the model for the state governments, particularly insofar as the control of videos was concerned. It applies to locally produced as well as imported material that is sold, rented or displayed in the Australian Capital Territory. It provides for compulsory review of such material with appropriate classification markings for consumer guidance. The emphasis is on protecting children and persons who are liable to be offended by material that has been thrust upon them.

Under the scheme, which bears a close resemblance to that in place in New South Wales, printed matter is subject to one of four classifications, including "unrestricted" and "banned".

Films and videos are subject to one of five classifications, one of which is "X" for "hard-core" content.

Child pornography and material that incites to terrorism is banned. Other material that is to be banned deals with matters of sex, drugs, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that offends against the standards of morality, decency and propriety generally accepted by reasonable adult persons.

Whether or not this "model legislation" will be adopted by the state legislatures remains to be seen. The Queensland government has already indicated that it will not adopt it, and has moved to introduce a more restrictive scheme to deal with videos. It is apparent that in Australia as in most countries, consensus on what to do about pornography is difficult to achieve.

3. New Zealand

Pornography in New Zealand is controlled by the operation of four statutes, the *Indecent Publications Act 1963*,[26] the *Customs Act 1966*,[27] the *Films Act 1983*[28] and the *Crimes Act 1961*.[29]

The most important of these appears to be the *Indecent Publications Act 1963*, which governs the production and distribution within New Zealand of "indecent" printed material and sound recordings.

At the time it was introduced, the *Indecent Publications Act 1963* represented a significant break with the past in the control of pornography in New Zealand. The statute it replaced, the *Indecent Publications Act 1910*,[30] had been prohibitory in thrust, with jurisdiction over the offences it created residing in the ordinary courts. The 1963 *Act* rejected that approach in favour of a more regulatory approach, with jurisdiction being transferred to an administrative tribunal.

The functions of that tribunal, which is called the Indecent Publications Tribunal, are defined in section 10 of the *Act* as follows:

(a) to determine the character of any book or sound recording submitted to it for classification;

(b) to classify books and sound recordings submitted to it as indecent, or not indecent in the hands or persons below a specified age, or indecent unless circulation is restricted;

(c) to hear and determine any question relating to the character of a book or sound recording referred to it by a court in any civil or criminal proceedings, and to report its finding to the Court.

The jurisdiction of the Indecent Publications Tribunal can be invoked as of right by government officials such as the Comptroller of Customs and the Secretary of Justice, and by any other persons with leave. Interestingly, the courts are required to refer to the Tribunal any question of "indecency" that might arise before them under other legislation in a criminal or civil proceeding.

The term "indecent" is defined in the interpretation section of the *Act* to mean "dealing with sex, horror, crime, cruelty or violence in a manner which is injurious to the public good". Section 11 lists six different factors that the Tribunal is to take into account in deciding whether or not a particular book or sound recording is indecent. These factors are:

(a) the dominant effect of the book or sound recording as a whole;

(b) the literary or artistic merit, or the medical, legal, political, social or scientific character or importance of the book or recording;

(c) the class and age of persons to, or amongst whom, the publication will be distributed;

(d) the price at which the book or sound recording is sold;

(e) whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether any other person could benefit from such activities;

(f) whether the item displays an honest purpose, or whether its content is merely camouflage designed to render acceptable indecent parts of the material.

Over the years the Tribunal has generated a considerable body of case law, thereby providing guidance as to the standards the Tribunal has applied and will apply.

Those standards appear, when compared with those applied in North American courts, to be quite conservative. The Tribunal has repeatedly distinguished between "serious literary works" and "the mass of cheap cynically commercialized periodical and paperback pornography". Many of the magazines that are considered standard fare in a North American newsstand have been ruled "indecent". The *Act* recognizes, however, that standards can change over time. As a result, material that has been ruled "indecent" can be referred back to the Tribunal for reconsideration after three years have elapsed. There is, therefore, an element of what has been called "community standards" in the decision-making process.

The *Act* contains two offence-creating provisions. Section 21 lists several offences, including such acts as selling, possessing for the purposes of sale, producing and exhibiting for gain an "indecent" book or sound recording, where it is no defence that the accused had no knowledge or reasonable cause to believe that the matter was of an indecent nature. Section 22 lists a number of offences where the Crown must prove that the accused had knowledge or reasonable cause to believe that the matter in question was indecent. It is then for the defence to prove that the act of the accused "had no immoral or mischievous tendency". The acts caught by this section include those covered by section 21 and public displays of indecent matter. Jurisdiction over all these offences remains with the ordinary courts.

The Indecent Publications Tribunal appears to have become an accepted component of the government's attempt to control pornography in New Zealand. It has been said that the appointment of the Rt. Hon. Sir Kenneth Gresson, a distinguished lawyer and former First President of the New Zealand Court of Appeal, as the first chairman, was instrumental in giving the Tribunal a degree of instant legitimacy.

The Tribunal has, however, received criticism from some quarters. A "moral majority" group, the Society for the Promotion of Community Standards, has virulently attacked many of the Tribunal's more liberal classifications. Some observers have suggested that many decisions betray the Tribunal's "bourgeois", liberal origins.[31] Works of literary merit by authors of critical standing have been kept free from governmental interference, while sexual materials "without artistic merit" have been ruled indecent. Some suggest that this has created a different standard of indecency for the non-professional, non-academic, semi-literate classes, presumably on the assumption that their rational powers are weaker and that a consequently greater tendency to corrupt them is present. Geoffrey Robertson, in his book *Obscenity*,[32] attacked the absence of the right to appeal to a jury and the political nature of appointments to the Tribunal. There has been some criticism to the same effect from within New Zealand.

Importation of pornography is controlled by section 48(1) of the *Customs Act 1966*,[33] which refers to "all documents within the meaning of the *Indecent Publications Act 1963* that are indecent within the meaning of that *Act*, and all other indecent or obscene articles". The question of whether a particular document is "indecent within the meaning of that *Act*" is ultimately for the Indecent Publications Tribunal to decide. Its jurisdiction in this regard can be invoked either by the Comptroller of Customs or on a reference from the courts following notice of objection to a seizure from the importer. Persons convicted under section 48(1) are liable to a fine of up to three times the market value of the goods to which the offence relates.

The *Films Act 1983*[34] governs film censorship in New Zealand. All films, save scientific and sports films, that are intended for public exhibition must be presented for examination to the Chief Censor's office. Section 15 of the *Act* empowers the Chief Censor to approve a film for general exhibition to the public or for restricted exhibition to certain classes of persons or on specified occasions. The Chief Censor can order the "cutting" of films and authorize the re-examination of a previously uncut unapproved film.

Films are to be refused a certificate of approval if they are "likely to be injurious to the public good". Section 13 of the *Act* outlines the factors to be considered by the censor to determine whether a film contravenes this standard. These factors resemble very closely those set out in section 11 of the *Indecent Publications Act, 1963*.

There are two features of this statute which deserve special mention. One is the power it grants to the Minister of Internal Affairs to withdraw a film

from public exhibition after approval by the Chief Censor if the film is creating widespread concern or is apparently injurious to the general public or any class of the general public. The other is its establishment of a Film Trade Board to act as a watch dog over the film industry. Members of the Board are appointed from various consumer and industry interests. The primary role of this body is to establish and maintain high standards in the industry and in service to the public.

Control of pornographic material not caught by either the *Indecent Publications Act 1963* or the *Films Act 1983* is achieved through the *Crimes Act 1961*.[35] Section 124 of that *Act* creates three distinct offences, one relating to indecent models or objects and two relating to indecent shows or performances. The former cannot be sold or otherwise distributed to the public while the latter cannot be either presented to the public or presented for gain. It is a defence under section 124 to show that the public good was served.

The term "indecent" is not defined in the *Crimes Act 1961*. Until fairly recently, the *Hicklin* test appeared to be the preferred approach to applying this term. But, in 1973, the New Zealand Court of Appeal opted for what it called a "plain meaning approach".[36] The court did not define precisely what test this approach entails. However, the decision suggests that the court was of the view that the test should be comparatively restrictive.

Footnotes

[1] 7 & 8 Eliz. 2, c. 66, (1959).

[2] (1868), L.R. 3 Q.B. 360.

[3] *Obscene Publications Act*, 7 & 8 Eliz. 2, c.66 (1959) s.1(1).

[4] *Ibid.*, s. 1(2).

[5] Williams Report

[6] *Ibid.*, at 14-15.

[7] *Ibid.*, at 11.

[8] *D.P.P.* v. *Jordan*, [1976] 3 All E.R. 775 (H.L.).

[9] *Customs Consolidation Act*, 39-40 Vict., c. 35, (1876).

[10] *Post Office Act*, 1 & 2 Eliz. 2, c.36 (1953).

[11] 1968, c.54.

[12] *Protection of Children Act*, 1978, c. 37.

[13] 3 G. 4, c. 40 and 5 G. 4., c. 83.

[14] 1981, c. 42.

[15] 1982, c. 30.

[16] See the discussion of this in the Williams Report, at 22-34.

[17] 1984 (U.K.)

[18] 1901, No. 6. (Aust.).

[19] 1956, No. 90 (Aust. S.R.).

[20] 1956, No. 94 (Aust. S.R.).

[21] *Altman* v. *Forbes* (1970), 91 W.N. (N.S.W.) 84 (Dist. Ct.).

[22] F.J. Mahony, *Review of Customs Administration and Procedure in New South Wales* (1983).

[23] 1975, No. 32 (N.S.W.) See also the *Objectionable Literature Act 1954*, No. 2 (Qsld); the *Classification of Publications Act 1974*, No. 23 (S. Aust.); the *Police Offences (Offensive Publications) Act 1973*, No. 8443 (Vict); and the *Indecent Publications Amendment Act 1974*, No. 39, (W. Aust).

[24] *Crowe* v. *Graham* (1968), 41 A.L.J.R. 402 (N.S.W. C.A.).

[25] 1984, (A.C.T. Ord.).

[26] 1963, No. 22, (N.Z.).

[27] 1966, No. 19, (N.Z.).

[28] 1983, No. 130, (N.Z.).

[29] 1961, No. 43, (N.Z.).

[30] 1910, No. 19, (N.Z.).

[31] See, for example, S. Levine, "The Indecent Publications Tribunal - Some Political Observations" (1974) 3 *Otago Law Rev.* 228.

[32] (London: Weidenfelt and Nicholson, 1979.)

[33] 1966, No. 19, (N.Z.).

[34] 1983, No. 130, (N.Z.).

[35] 1961, No. 43, (N.Z.).

[36] *R. v. Dunn*, [1973] 2 N.Z.L.R. 481 (N.Z.C.A.).

Chapter 18

Continental European Countries

1. Introduction

The research on pornography in western Europe concentrated on the experience of five countries: France, West Germany, Denmark, The Netherlands and Sweden. Considerable formal variation exists amongst the various methods of control used in the five countries. These range from fairly extensive criminal law and censorship provisions in France, to an almost of total absence of legal restraint in Denmark. But, even while some of the countries of Continental Europe appear to have a restrictive legal regime, enforcement is often lax. Therefore, in order to capture an accurate impression of the current view of pornography in the countries of continental Europe, it is necessary to examine not only the law but how it is enforced.[1]

2. France

In France, with a highly centralized system of government, control of pornography is achieved through an interlocking system of criminal law and regulatory regimes. On its face, the French legislation appears to be quite restrictive. In practice, however, it appears that the state is prepared to leave considerable room to individual choice.

The major criminal provision in the area of pornography is section 283 of the *Penal Code*. This provision had its origin in the original *Penal Code* of 1810, and embodies the test "outrageous to public morals". It covers not only a broad range of acts (including manufacturing or possessing for sale, distribution, lease, display or exposition, importing or exporting, exposing to public view, selling and distributing) but also a broad range of material (including films, printed matter, sound recordings and photographs).

The term "outrageous to public morals" has been held to be wider in scope than "obscene". In fact, the Supreme Court has held that, in principle, anything which excites sexual feelings *can* be considered to be "outrageous to public morals". However, the Supreme Court has made it clear that not everything that excites sexual feelings will be so considered.

The test currently applied is whether the material contravenes "generally accepted standards of decency in such a way as to provoke the indignation and condemnation of the public". In determining what these standards are, courts are to take into account "all manifestations of the public's opinion, and particularly the opinions expressed by groups of concerned citizens".

Some sense of what French courts consider the reach of the section to be is provided by two decisions involving adult "sex shops". In each it was held that no offence had been committed. In the first (decided in 1972) the Besançon Court of Appeal took into account such factors as the denial of access to minors, the lack of public display of merchandise and a statement by the government that such establishments were not in breach of the section. A similar approach was taken by the Court of Appeal of Reims in 1977. The court noted that "the existence of such businesses is now accepted by the public at large".

Two special procedural rules in relation to section 283 prosecutions should be noted. The first is that, before he can commence a prosecution in respect of a book that prints the names of both the author and the publisher, the prosecutor must consult with a special committee made up of representatives from the Association of Writers and the National Union of Associations for Family Affairs. That committee's opinions are not, however, binding. The second special rule permits the Association of Writers to seek review of a book 20 years after a finding has been made that it contravenes section 283. It appears that some of Baudelaire's works have profited from this rule.

Section 280 of the *Penal Code* prohibits all acts in public that "outrage the norms of decency". The meaning of this term remains somewhat unclear. There is some support in court decisions for the view that this section proscribes live performances in which sexual parts are exposed or obscene gestures are made. At the same time, there seems to be a high degree of tolerance on the part of prosecutorial authorities for at least some such performances.

Only two other general *Code* provisions deserve mention. One proscribes both public oral presentations that outrage good morals and the public advertisement of licentious activities. The other prohibits the public display of indecent pictures and posters.

In addition to the general provisions of the *Penal Code*, France has special legislation relating to children and pornography. First enacted in 1949, the legislation provides for the establishment of a Special Committee for the Surveillance and Control of Publications Designed to Protect the Young. As its name implies, the Committee is charged with the responsibility of reviewing material designed for children. It has the power to prohibit certain publications on the ground that they "present debauchery in a favourable light". It can also make recommendations to the Minister of the Interior, who is empowered to ban publications of any kind that are "dangerous for the young on account of their licentious or pornographic character or the place given to crime or violence".

Films in France are controlled by a combination of section 283 of the *Penal Code*, film classification legislation and a special set of fiscal provisions. The film classification legislation gives the Minister of Information authority over the public showing of films. In the exercise of his censorship and classification powers, he is assisted by a Special Commission for the Control of Films. This body, which has advisory powers only, is made up of representatives from several different ministries, the film industry and other interested groups. In 1975, the Council of State, the highest administrative court in the country, directed the Minister to ensure that, in the exercise of his powers, he gave due weight to freedom of expression. It is generally felt that this direction has resulted in a relaxation of the exercise by the Minister of his broad censorship powers.

An interesting feature of this film classification system is the power given to local mayors to ban particular films. This power is limited, however, and can only be used when opposition to a film is particularly vocal.

Special fiscal legislation dealing with the film industry was introduced in 1975. The legislation is aimed at both pornographic films and films which can be said to incite violence. It calls for a heavy tax on the importation of such films and a higher value added tax on the sale within France of such films and on the admission charge levied by cinemas showing them. There is also a special tax on profits made from such films.

Pornographic films caught by the 1975 legislation have been held by the Supreme Court not to be proscribed by section 283. The 1975 legislation was said to have given immunity to such films insofar as the *Penal Code* is concerned. It appears, however, that this does not mean that *all* films are immune from prosecution under section 283. Films containing particularly detailed depictions of acts of violence and sexual perversions have been held still to fall within the purview of that provision.

Considerable public pressure developed in France calling for the regulation of video recordings. Representations were made to the government that videos had become particular vehicles for pornography. In 1983, the French Parliament made the 1975 film legislation applicable to pornographic videos but did not provide for a system of regulating the material. As a result, videos have been left outside the scope of the regulatory scheme established to deal with publicly shown films.

One additional feature of the French law on pornography that deserves note is section 289 of the *Penal Code*. That provision authorizes organizations of private citizens to participate as parties in prosecutions brought under sections 283 and 284 provided they are first approved by the government. It appears, however, that few groups have made use of this provision.

3. West Germany

In West Germany legislative power is shared between the federal parliament (the Bundesrat) and 10 state governments. Power over criminal law is given to both levels of government, with federal legislation prevailing in the case of conflict. Our analysis focuses on the federal legislation.

The current penal law in the area of pornography was enacted in 1973. A product of compromise between libertarians and moral conservatives, the law is based on a distinction between "soft" and "hard-core" pornography. The offences in relation to the former are found in section 184(1) and (2), and include:

(a) offering it to a person under 18;

(b) displaying it in public;

(c) mailing it to persons who have not solicited it;

(d) exporting it;

(e) presenting it in films in public places where a charge of admission is levied;

(f) presenting it on television and radio.

Offences in relation to "hard-core" pornography, which includes material portraying explicit violence, the sexual abuse of children and bestiality, are limited to the production and distribution of such material. These offences are found in section 184(3).

West German courts have had considerable difficulty interpreting the language of these provisions, particularly the terms used to define "soft-core" and "hard-core" material. The current test of "soft-core" pornography turns on whether or not the material in question gives prominence to sexual acts in a particularly offensive way and with all other aspects of human relations being ignored. If the material does so, then the court goes on to decide whether or not it is aimed exclusively or predominantly at a "lustful interest in sexuality". In applying this test, the courts have made it clear that the portrayal or description of sex organs and sexual acts, including intercourse, will not in and of itself contravene the law.

Insofar as "hard-core" pornography is concerned, the courts have tended not to give broad scope to the offences contained in the *Penal Code*. Some depictions of sexual acts by a child and of children in obscene postures have even been held to fall outside the scope of section 184(3).

The offences created by section 184 are supplemented by a special provision of the *Penal Code* that proscribes the production, display and distribution of violent pornography. This term is defined to include "materials

which depict acts of violence being committed against humans in a cruel or otherwise inhumane way and thereby glorify or treat as harmless such acts...." It appears that the courts have been reluctant to convict persons under this provision, however, and the section is seen as having little effect.

As in the case of France, West Germany has enacted special legislation to deal with pornography concerning children. *The Law on the Protection of the Young in Public Places* includes a prohibition against the public presentation of films that are likely to be detrimental to the physical, moral and social fitness of the young. That law also authorizes state authorities to classify films as appropriate for certain age groups (under 6, under 12, under 16 and under 18).

Legislation enacted in 1965 takes the protection of children one step further by empowering a body called the Board of Censorship to put written publications and other materials considered harmful to the young on a special list and thereby prohibit their distribution to persons under 18. The test applied involves determining whether the material in question endangers the moral development of the young. Of particular concern are publications that are "indecent" or incite to acts of violence, crime or racism.

The Law on Commercial Activities stipulates that "sex clubs" offering live sex and "peep" shows are required to obtain a licence from the appropriate municipal authorities. Moreover, the law provides that such licences are not to be issued if the performance given will contravene positive law or morality. In a recent decision, the Federal Court of Administrative Law held that no licences should be issued to clubs offering peep shows. Such shows were said to be an affront to human dignity, in part because of the dehumanizing role played in them by women.

Pornography appears not to be an issue currently causing public debate in West Germany. Women's groups are said to be divided on the position women should be taking on the matter. Some groups call for much tighter control over pornography, particularly the violent pornography featured in some videos. Other groups are concerned that tighter controls will further the interests of moral conservatives and lead to the enactment of legislation that is not in the long term interests of women.

The German government has recently indicated a willingness to tighten up the law in two areas: the protection of children from harmful material and violent pornography. With respect to the former, it is proposed that videos be brought within the regulatory structure already in place for publicly shown films under the *Law on the Protection of the Young in Public Places*. With respect to the latter, it is proposed that the requirement that the publication in question glorify or treat as harmless the violence portrayed or described, be dropped.

4. Denmark

In Denmark legislative power is reposed in the national Parliament. Since 1967 Denmark has been engaged in a process of decriminalizing pornography. Supporters of this process think that the decriminalization of pornography has not only had no harmful effects on Danish society, but has indeed had significant beneficial effects. Other groups dispute this thesis and have expressed dissatisfaction with the evolving state of the law.

Prior to 1967, the basic *Penal Code* provision on pornography, section 234, made it an offence (a) to provide persons under 18 with obscene writings, pictures or objects; (b) to publish or distribute, or import for purposes of distribution, obscene writings, pictures or objects; (c) to arrange or give public addresses, performances or exhibitions of an obscene character; and (d) for gain, to publish or distribute, or import for purposes of distribution, writings or pictures which, although not obscene, had as their purpose commercial speculation in sensuality. Experience showed that convictions were seldom obtained under this section 234. When, in 1965, a Danish translation of *Fanny Hill* was found by the country's Supreme Court not to be "obscene", the Minister of Justice directed a body called The Permanent Penal Law Committee to investigate the area of obscenity and to make recommendations for reform of the law.

The main recommendation made by the Permanent Penal Law Committee was to delete reference to the word "writings" in section 234. This recommendation was accepted by the Danish Parliament and, by a vote of 159 to 13, section 234 was amended accordingly.

Two years later, in 1969, the Danish Parliament took the further step of decriminalizing the publication, distribution, and importation for the purposes of distribution of obscene pictures and objects as well as the arranging and giving of addresses, performances and exhibitions of an obscene character. The other general offence, relating to commercial speculation in sensuality, was also repealed. According to one observer, these additional steps were taken because the predicted beneficial effects of the 1967 amendment, in particular, the diminution of interest in written pornography, had in fact been realized.

In the result, section 234 of the *Penal Code* was limited in scope to protecting children from pornographic material. Even within this sphere, the trend has been in favour of decriminalization. The new section 234 made it an offence to "sell indecent pictures or objects to a person under 16 years of age". Not only had the age limit been reduced (from 18 to 16), the provision was limited to pictures and objects (leaving out writings) and to the *sale* of indecent pictures and objects (leaving out lending, renting, showing, etc.). The term "indecent", which replaced the term "obscene", appears not to be much more restrictive than its predecessor. In order to be "indecent", a picture or object must contain detailed and strongly offensive depictions of sexual topics which cannot be justified by artistic merit or scientific or educational purpose.

The *Penal Code* contains other provisions relating to children and pornography. Section 235, which was introduced in 1980, makes it an offence for anyone, for a commercial purpose, to sell or otherwise distribute, or with intent to do so, produce or procure, "indecent photographs or the like" of children. This is a provision designed to protect children from exploitation by the pornography industry. While such exploitation is itself proscribed in other *Code* sections, police have found it difficult to enforce these sections. The rationale of section 235 is reflected in the fact that it is limited in scope to commercial traffic in photographs. The judgment has presumably been made that there is little if any exploitation of children in the production of non-photographic material. The legislators have also apparently decided that the non-commercial traffic in photographic material is not an appropriate subject for legislation.

The final provision of the *Penal Code* to be mentioned is section 232, which proscribes the violation, "through gross indecency", of "the public sense of decency". This provision is understood to cover such acts as sending, showing or reading pornographic material to unconsenting adults or to children.

The object of protecting the unwilling viewer of pornography is furthered by provisions of the Standard Police Regulations. These regulations, which were enacted at the same time the major revisions were being made to the *Penal Code*, proscribe the public display and distribution of writings and pictures of an offensive character and the distribution of such writings and pictures to the homes of those who have not solicited them. The mailing of obscene material to persons who have not solicited it, is made an offence by Denmark's postal laws.

Legislative reform in the area of film censorship has paralleled that in the area of penal law. Prior to 1969, Denmark's Board of Film Censors had powers similar to those currently exercised by provincial film classification boards in Canada. In that year, new legislation was enacted which eliminated all control over the kinds of films available to adult viewers. Films that were to be shown to children were still subject to control, however, with some films being off limits to children under 16 and others being off limits to children under 12.

A further relaxation of state control over this area occurred in 1972. Previously, licences to operate public cinemas were difficult to get and could be withdrawn if high standards of service to the public were not maintained. In 1972, the legislation was amended to make it easier both to obtain and to keep such licences.

There appears to be no legislation governing the medium of television in Denmark. Films and other shows that are unsuitable for children tend to be shown late at night with appropriate warnings about their content. Videotapes intended for private use are also free from state censorship. A committee set up to examine the question, recommended in 1983 that the state not step in to control videotapes. Instead, it recommended that a tribunal issue lists of videos

that children should be encouraged to view, with the lists being posted in libraries and other places to which the public has ready access.

Experience thus far would suggest that those involved in the pornography industry in Denmark are abiding by the rules and regulations. For example, no one has yet been prosecuted under the new (1980) provision of the *Penal Code* relating to the commercial distribution of child pornography. It is said that child pornography disappeared from circulation as soon as it became clear that the new provision would be enacted. Similarly, the public display of pornographic material is said to have dropped off dramatically since the Police Regulations of 1969 were enforced with vigour in the early 1970's.

Polls conducted in Denmark in the late 1960's suggest that a majority of citizens supported the decriminalization of pornography that the Danish government embarked upon. Today, opposition to the lack of control over pornography is coming from feminist organizations and individuals, but the opposition appears to be less vigorous than that currently found in Canada. Calls for dramatic changes in the law appear to be few and far between. Emphasis is placed instead on balancing the degrading images contained in mainstream pornography with images of warmth and eroticism between equals.

5. The Netherlands

In The Netherlands pornography does not appear to be a major concern. What legislative reform there has been in the area in recent years has loosened rather than tightened the reins of state control. The decisions of the courts appear to be consistent with the political trend.

The major penal provision relating to pornography is section 240 of the *Penal Code*. That section, which had its origin in the *Code* of 1911, proscribes the distribution, display or exportation of any written or pictorial material or object that "offends the norms of decency". It also contains a more restrictive provision governing the distribution and display of pornographic material to persons under 18. This latter provision is complemented by section 451 which prohibits the distribution or display of material which is likely to arouse the sexual feelings of a person under 18. Finally, section 239 prohibits all acts performed in public or before a non-consenting audience that "outrage the norms of decency".

Legislation on film censorship was liberalized in 1977. The new law makes no provision for the censorship of films that are shown on television or in adult cinemas. The showing of films to persons under 16 is prohibited unless approval is first received from the National Board of Film Censorship. Approval is given unless the Board is satisfied that young people could be harmed by viewing the film in question.

Local control over pornography is virtually non-existent. This is apparently attributable to the protection accorded freedom of expression in the

Dutch Constitution. Such local control as does exist, is limited to regulations relating to the public display of objects such as sex aids.

On their face, terms like "offensive to norms of decency" and "outrage against norms of decency" would appear to be very restrictive. The judicial interpretation given by the courts is, however, quite permissive. In 1978, in what is considered to be the leading recent decision on the matter, the High Court held that the showing of *Deep Throat* in a cinema that contained warnings about the film's content did not offend section 240. The reasoning in this decision has left many observers with the impression that all that remains to be caught by the law is the public display of pornography and the distribution of pornography to minors.

In 1979 a bill was introduced in Parliament on the basis of recommendations made to the Minister of Justice by a special advisory committee in 1972. Those recommendations, which are said to have had considerable effect on the courts' approach to pornography, entailed limiting the role of the *Penal Code* to proscribing (a) the distribution and display of pictures and objects that "offend the norms of decency" to persons who had not consented to their distribution or display; (b) the distribution to children under 16 of pictures or objects "whose presentation to a minor can be considered harmful"; and (c) the performance of indecent acts in public or in places accessible to minors.

This bill has not yet been passed, however, primarily due to strenuous opposition to it from feminist groups. The opposition has been led by the Council for the Emancipation of Women, an official government body, and by an organization called Women Against Pornography.

Public opinion polls would appear to support a limited role for the state in the regulation of pornography, in keeping with the provisions of the 1979 bill. In a 1981 study conducted by The Netherlands Foundation for Statistical Research, it was discovered that the availability of pornography was rated the least pressing of twenty different social problems. Only three percent of those surveyed considered pornography to be a topic of interest for the population at large.

6. Sweden

Sweden has a reputation as a country that has taken a permissive approach to pornography. During the 1970's that reputation was well deserved, since there was then minimal state involvement. Recent developments suggest, however, that that reputation may no longer be deserved.

The general *Penal Code* provisions relating to pornography came into force in 1970. Section 11 of Chapter 16 makes it an offence for anyone in a public place to "exhibit pornographic pictures by means of displays or other similar procedure in a manner which is likely to offend the public". A similar

prohibition exists against sending through the mail or otherwise furnishing pornographic pictures to a person without that person's consent.

It will be noted that these proscriptions are limited to pornographic pictures. Written material is, therefore, not caught by them. However, pictures are understood to include sculptures and films.

The definition of "pornographic" currently in use includes the portrayal of explicit sexual conduct in a provocative manner where such portrayal lacks scientific or artistic value. The test is said to be purely objective in nature, with the "author's" intentions being irrelevant.

The protection of children from pornography is also dealt with in Chapter 16 of the *Penal Code*. Section 12 of that chapter makes it an offence for anyone to distribute to a child or young person a writing, picture or film, the content of which puts at risk his or her moral development. It is also made an offence to distribute pornographic material in a "concentrated" manner to children or young persons. An interesting feature of these offences is the absence in them of any age limit. It is said that the government preferred not to fix any limit because of the differing levels of maturity of young persons. It is contemplated that certain groups of young persons, for example, young men serving in the military, will not be protected by these provisions.

New legislation designed to protect children was introduced into the *Penal Code* in 1979. The new section 10(a) of Chapter 16 makes it an offence for anyone either to portray a child in a pornographic picture with the intent of distributing it or to distribute such a picture of a child. The term "pornographic" here is understood to have a somewhat broader meaning than it has in Section 11 of Chapter 16 and may catch pictures of children in a particular position or making particular gestures. Again, no age limit is prescribed.

Two recent enactments concern live performances and the dissemination of films and videos that feature excessive violence. Pornographic live performances in a place to which the public has ready access are now proscribed. So, too, is the commercial distribution of films and videos that contain explicit or prolonged portrayals of persons being subjected to brutal and sadistic violence. This latter prohibition is buttressed by a special provision dealing with the commercial distribution to children under 15 of films and videos featuring detailed and realistic portrayals of violence, or threats of violence, against adults and animals.

Apart from these criminal prohibitions on films, Sweden has special legislation to control the viewing of films in public cinemas. The National Bureau of Cinemas is empowered to ban films on several grounds, one of which is that the film "can have a brutalizing or otherwise detrimental effect or incite to crime". It is apparent that this would not catch films that are merely sexually explicit. It is understood that the Bureau will only interfere in cases of films that contain sadistic pornography or portrayals of extreme violence and even then only where the scenes in question are unnecessary for the film's development or otherwise without artistic justification.

With respect to films for children (here defined to mean those 14 and under), the Bureau is empowered to limit viewing to children under 7, children between 7 and 11 and children between 12 and 14. The test to be applied is whether the film would have a negative psychological effect on children within these age groups.

Recent statistics indicate that very few convictions are obtained under the *Penal Code* provisions in this area. For example, in respect of section 11 of Chapter 16, the statistics show five convictions in 1971, seven in 1972, five in 1973, none in 1974, one in 1975, and one in 1976. In the view of some observers, this low conviction rate is attributable to potential offenders heeding the warnings of law enforcement officers.

A recent report of a special committee of the Swedish Parliament is less sanguine and is of the view that offences under this provision were common, but, for one reason or another, were not being prosecuted.

In the same report, the special committee (known, significantly, as the Committee for the Freedom of Speech) came to the conclusion that no new legislation was required in the area of pornography. While concerned about the possible harmful effects of pornography, especially on children and the way they view human relations, the committee expressed the opinion that the criminal law was not an effective tool with which to deal with these effects. Rather, efforts to change people's attitudes by positive means had to be undertaken. One recommendation the committee did make was to eliminate the censorship of films intended for adults. Whether this recommendation will be accepted, and the recent trend towards greater state involvement thereby reversed, remains to be seen.

Footnotes

[1] The discussion of the approach to pornography in each of these five countries is based on a study commissioned by the Department of Justice. It is entitled *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden* and was prepared by J.S. Kiedrowski and J.M. van Dijk. The study does not contain many footnotes. For that reason the discussion in this Chapter has not been footnoted.

Chapter 19

Conclusions

The overall impression from this survey is that there is a great diversity of approaches to pornography in the countries surveyed. In the first place the pendulum has swung in the direction of liberality much further in some countries, (The Netherlands, Denmark and Sweden), than in others, (England and Wales, Australia, New Zealand, France and West Germany). Secondly, constitutional considerations have made a difference. The United States, which in other areas of the control of morality, for example prostitution, has enacted quite draconian legal provisions, has been much more circumspect about obscenity and pornography. This caution stems directly from the entrenchment of freedom of expression in the First Amendment to the Constitution. The Netherlands seem to have been affected by similar constitutional concerns about the abridgement of freedom of expression.

Geographic and demographic realities may also have made a difference. Both Australia and New Zealand, which are geographically remote and to which access is more easily controlled than in the case of the other countries, have found it feasible to develop pro-active censorship regimes to vet not only film material, but also magazines and books. While some of the other jurisdictions have systems of film censorship and classification, and several have implemented or are contemplating pro-active control of videos, there has been no attempt to develop the comprehensive, preventative legal regimes of the antipodes.

Does the survey reveal any obvious trends? In the first place, although there is, as noted above, a significant gap in liberalization of the law between The Netherlands, Denmark, Sweden and the United States on the one hand, and England and Wales, Australia, New Zealand, France and West Germany on the other, it is apparent that in all the jurisdictions, with the possible exception of New Zealand, there has been definite movement towards a less restrictive approach to sexually explicit material. This has been achieved by legislative and regulatory amendments, as in Australia and West Germany, or through prosecutorial discretion or judicial interpretation, as in England and Wales and France. To some extent at least, a distinction has developed between pornographic material which is violent, abusive and degrading on the one hand, and that which is merely sexually explicit on the other, with the former attracting the legal sanctions, or at least stiffer legal sanctions than the latter.

A second discernible trend, except in The Netherlands and Denmark, is the growing concern of legislators about child pornography. Even countries like Sweden, which took significant steps in the 1960's and 1970's to remove criminal law proscriptions on the production, distribution and sale of pornography, and the United States in which adult pornography is only sporadically attacked, have enacted special legislation or provisions for the protection of children from pornography. The more conservative jurisdictions, especially England and Wales, France and West Germany, either have introduced new provisions on children or propose to do so.

A third and complementary trend to the second is the emergence of a concern about videos. The growth of video technology and of the market for VCRs has produced something of a communications revolution by opening up access to a whole new range of visual material for use in the home. The perceived danger is that children will have virtually uncontrolled access to pornographic and violent images. As a result, a number of the countries surveyed have introduced special legislation which seeks to regulate the distribution, sale and rental of videos, typically utilizing the models of film censorship or classification. Steps along these lines have been taken or are contemplated in England and Wales, several Australian jurisdictions, France, West Germany and Sweden.

In conclusion, the overall picture seems to be one of systems struggling to balance, within the law, a recognition that social attitudes towards sex and sexuality have changed in the direction of greater tolerance of visual representations of a wide range of sexual activity on the one hand, and on the other, that relaxed attitudes have encouraged some in the pornography industry to glorify and profit from the portrayal of violence and degradation, especially of women, and the sexual exploitation of children. The process of reform is being complicated by technological breakthroughs, such as the home video explosion. Insofar as the focus in proscribing or regulating pornography has been to specify that it is the particularly odious forms of pornography which should attract legal sanctions or restraint, it can be said that the trend in the law has been towards defining the ambit of obscenity and pornography with greater precision and particularity than in the past. Again this change is one which is evident in both legislative formulations and the greater care which judges show in characterizing what it is that they find objectionable.

Section IV

Recommendations on Pornography

Chapter 20

The Criminal Code

1. Introduction

In making recommendations about changes in the *Criminal Code* we have drawn together all of the components of the work we have undertaken on pornography. Thus our recommendations flow from the guiding principles which we set forth in Part I, and are reflective of the current situation with respect to the availability and use of pornographic material, the harms which we feel are associated with this material and our views on the proper role of the criminal law in the area.

As we pointed out in Part I, Chapter 2 of the report, the traditional liberal view of the power of the state to limit the freedom of an individual is that the state can only act when the exercise of that person's freedom results in direct, demonstrable harm to others. By contrast the conservative view is that it is legitimate for the state to intervene to prohibit conduct in order to protect and affirm traditional moral values, even if there is no proven harm caused by the conduct to others. Mainline feminist opinion takes the middle ground that the state is justified in curbing the freedom of an individual where his conduct, while not necessarily causative of direct, demonstrable harm to others and regardless of whether or not it offends traditional moral values, does or threatens social harm in the sense that it undermines or subverts important social values and policies. In particular feminists see the equality of the sexes in political, economic, and social matters as so fundamental to the life and fabric of this country that action by the state both to promote and protect it are entirely warranted.

In our recommendations on changes to the *Criminal Code* relating to adult pornography we have applied a definition of harm which embraces not only direct, demonstrable harm to an individual, but also an element of social harm. In essence we see two forms of harm flowing from pornography. The first is the offence which it does to members of the public who are involuntarily subjected to it. The second is the broader social harm which it causes by undermining the right to equality which is set out in section 15 of the *Charter of Rights and Freedoms*.

The first of the two harms we argue should be handled by *Criminal Code* provisions which penalize failure to take steps to protect members of the public from involuntary encounter with pornographic material. The objective here is to encourage control and regulation rather than to proscribe. The second, we feel, requires direct proscription of certain forms of pornographic representations. Conscious of the concern that when the law moves beyond the prohibition of conduct which causes direct, demonstrable harm, there is a danger of excessive intrusion by the state into the lives of individuals, we have focussed on the most extreme forms of pornography. These in our minds clearly subvert the equality rights in the *Charter* and more generally the right of all individuals to be treated with respect and dignity. Moreover, they can be stated with sufficient precision to provide direction to those who have to gauge their actions according to the dictates of the law, and to the law enforcers so that undesirable interferences with freedom of expression are minimized.

We appreciate that our proscriptions will not satisfy everyone. Those of conservative mind will consider us too libertarian in our view that the bulk of pornography should be regulated rather than banned. Some feminists too may feel that we have circumscribed the pornography which is to be prohibited too narrowly. Liberals for their part may find our movement outside the traditional boundaries of harm untenable. It is our belief that, given the complexities of this area, and the conflict of philosophies to which it gives rise, our approach represents a rational, fair and realistic balancing of the interests involved, and a significant advance over the present state of the law.

2. Terminology

We were often told during the public hearings that a useful starting point for the reform of the law relating to pornography would be to remove the term obscenity from the *Criminal Code*. Along with obscenity would go the heading of the part of the *Code* in which it appears: "Offences Tending to Corrupt Morals".

Those who pressed for the removal of the term "obscenity" did so primarily because of their perception that sexual immorality was not really the essence of the offence in the pornographic material available today. Rather, in one way or another, the material is demeaning and degrading to women, to members of minority groups who may be portrayed in a distorted way, and ultimately to men, who are often depicted as soulless aggressors.

For some advocates of the change in terminology, the issue is not as ideologically significant. They are motivated by various reasons, ranging from a desire to signal a new approach, to a dislike of existing obscenity jurisprudence.

We agree with the suggestion that the term "obscenity" has outlived its usefulness. As we have discussed at some length in chapter 4, entitled "What is Pornography?", the fact that the dictionary definition of "obscenity"

transcends the legal definition in the *Criminal Code*, and that the imprecise terms of section 159(8) have produced more confusion than light mean that the word has little to offer as a term of legal art. Moreover, we think that the heading, with its emphasis on the corruption of morals reflects an outdated concern, one which deflects attention from the real nature of the problem which the criminal law should be addressing, the denial of human dignity.

Recommendation 1

The term "obscenity" should no longer be used in the Criminal Code, and the heading "Offences Tending to Corrupt Morals" should also be removed.

We have already stated that we do not plan to make the term "pornography" central to the definitions in our proposed amendments. It is simply too elusive to provide the precision needed in the criminal law. However, we do not consider it worthwhile to eschew the term altogether. It does convey an idea about the material we are seeking to control and an entirely new term is not only difficult to find but may not be as accurate. Accordingly, we use the term pornography in our proposed sections, although we have been sparing in that use. The most obvious use is that in the various headings we have given to proposed sections. We see as quite acceptable the use of the term pornography in this way, because any elasticity in the title is limited by the specific terms of the section or subsection. Moreover, in the title, it serves as a useful indicator of the shift in approach from a traditional moral concern with obscenity, to our more functional social concern with pornography.

The term "pornography" appears rarely in the draft sections. In a few sections, we use the term "visual pornographic material", which is defined in quite particular terms to minimize discretion or subjective considerations. This definition is the only place in the draft provisions which actually features the term "pornography".

Recommendation 2

New criminal offences relating to "pornography" should be created, with care being exercised to ensure that the definition of the prohibited conduct, material or thing is very precise.

3. Violent and Degrading Material

In discussing the meaning of the word obscenity, in Chapter 4, Section II, we made the point that there is some material which would be considered obscene, but which would not be considered pornographic. Violent material which has no sexual connotations, and disgusting material, are the two large categories of material which might well not be caught by a "pornography" approach. We note with some interest, of course, that although common understanding might include the explicitly or extremely violent within the term obscene, because it causes revulsion, the present criminal law does not prohibit material featuring only violence.

The mandate of the Committee was to study the effect and make recommendations with respect to the material that has some sexual content. At the present time the *Criminal Code* considers potentially "obscene" material in which sex and one of a number of other items is present, namely, crime, horror, cruelty or violence. As we have reviewed the material which is available and listened to people across the country, the issue of whether violence in and of itself can be so offensive or harmful that some restrictions on it are needed arose quite frequently.

Virtually everyone who raised the issue thought that violence on its own can indeed be obscene. In fact, some people who raised the issue believed that violence in the media was more of a problem than explicit sexual portrayals. The term "obscene" used in the *Criminal Code*, could, in our opinion, easily include more than just sexual material, although as we have indicated it does not currently do so. We did consider whether the retention of the term obscene would be preferable because it could allow for offensive non-sexual material to be caught. We decided, however, that we would not recommend such a course of action because it would be building yet more meaning into a term which is already highly problematic. Our focus has been on pornographic material and we propose significant changes to the way in which the *Code* deals with such material. We have not examined in any detail the problems associated with violent material that has no sexual content. Nevertheless, having given some attention to the matter, we are of the opinion that the government should give consideration to establishing a section in the *Code* which would deal with violent material in a manner similar to the one we are proposing for sexual material. We realize that a sanction against violence is potentially far-reaching and intrusive and careful study is necessary before changes to the law can be recommended.

Recommendation 3

> **The federal government should give immediate consideration to studying carefully the introduction of criminal sanctions against the production or sale or distribution of material containing representations of violence without sex.**

There is at least one offence in the present *Code* which does relate to disgust: subsection 159(2)(b) prohibits the public exhibition of a "disgusting object". In our view, little that is necessary for the protection of basic values would be lost by removing altogether the penalties against material that is disgusting, provided that the criminal law regime we are recommending is in place. We have reached this conclusion because we have tried to address in our proposed sections the real harms which we think were aimed at by the prohibition against such material, like the public display of sex aids. In particular we have replaced the prohibition on the public exhibition of disgusting objects, with a section aimed at preventing access (by way of sale or display) by children to devices intended for use as sex aids. This is found in the part of the report relating to children.

Recommendation 4

There should be no sanctions introduced respecting material that is 'disgusting' even though our proposed repeal of section 159 would remove the existing offence relating to a disgusting object.

4. What to Control?

It was apparent at the public hearings that many people thought that the portrayals of women and children in the media generally were distorted and false depictions. We were frequently reminded that women are often seen in limited and mindless roles in television programs, as overwhelmingly concerned (to the exclusion of other interests) with marriage in popular paperback series, and as people whose sexuality can be used to sell virtually any commodity. On this view, pornography is one variant of a pervasive and dominant theme that runs through all the media, albeit a more extreme variant than some others. The argument has been raised, however, that pornography may be less harmful than the everyday, run-of-the-mill depictions in the media which we so often take for granted. This view stems from the belief that, as widespread as pornography is, the mainstream media touch the lives of virtually every single Canadian whether man, woman or child. Therefore, to seek to control what is probably a small percentage of the false depictions and leave out of the picture the vast majority of them is inconsistent and most certainly not going to achieve the result which we are ultimately seeking, that is, a reduction or elimination of such depictions.

While the Committee has every sympathy for this view, we do not believe that the elimination of false depictions of women can be achieved through *Criminal Code* provisions. What is required is re-orientation of the values and priorities of the media. This is not something that can be addressed through criminal law. Given the sheer volume of material which would be involved, criminal sanctions would not be effective and more likely to bring the law into disrepute than to solve the problem.

Moreover, broad based support is lacking at this time for the view that the content of the media is in need of the sort of re-orientation we have heard suggested. Certainly, many women's organizations see this as an important issue, one to which they are continually and effectively drawing people's attention. Similarly, religious and ethnic associations have been concerned about how they are portrayed in the media. But the efforts of these groups, especially women's goups, are quite recent in origin and have not, we think, been accepted into our everyday assumptions about the media and its content. That we are moving in the direction of accepting them is seen by the adoption of new content guidelines by the CRTC and amendments to the *Broadcasting Act*. However, these changes have not been accomplished simply for the asking, but have involved long and intensive lobbying and negotiations between interested groups, governments and the media.

We are, therefore, in need of extensive educational and informational programs to address the concern that some have about general media content and its portrayal of people. The use of the criminal law is neither an appropriate nor a practicable means for counteracting such a pervasive problem. That is not to say that legal strategies are inappropriate. Given the existence of regulations governing the media, it is certainly legitimate in our view to use the regulatory process to address these issues. Indeed, the Committee makes a series of recommendations relating to the control exercised by the CRTC over programming which are designed to combat sexist messages in the broadcast media.

The question then becomes whether or not there is any material which is so extreme or harmful in its depictions that it is qualitatively different from the general content and for that reason deserves to be treated differently. In essence, is there any material which should be subject to criminal sanction if it is produced, sold or displayed, for example? Canada, along with other western countries has so far answered "yes" to this question.

As we have already noted, we are convinced that some material of a sexual nature can be so damaging to individuals and society that it must be the subject of the criminal sanction. The crux of the issue, of course, is to define the precise nature of the material which should be prohibited or regulated in such a way as to include only the specific sorts of things which are harmful. Our ability to do this depends on our understanding of what it is about the material which causes the damage.

It is, in our view, a significant social fact that many people are offended by some kinds of material. They would not choose to view it, if given a choice, and they are offended or upset when they cannot avoid seeing it. These feelings of offence and disgust can, in our estimation, justify restraints on the display of pornography, although we do not think that these sentiments would justify criminalization of, say, producing the material. The feelings of embarrassment of individuals, no matter how many, are not a proper basis for a substantial curb on freedom of speech.

How far should the boundaries of control be extended beyond restraints on display of offensive material? As our analysis of pornography in Canada today, in Chapter 6 of Section I demonstrates, we do not have consistent and conclusive research data to tell us about all the effects of pornography and in particular whether direct, demonstrable harm is caused, and we cannot be drawn too far into surmise or speculation. Our approach is characterized by acceptance of the egalitarian argument that impairment of a fundamental social value can properly be regarded as a "harm" meriting legislative control.

Proceeding from this point of departure, we have developed a three-tier analysis of pornographic material. The first tier is material which we would subject to a criminal sanction, with no defences based on artistic merit, educational or scientific purpose. The penalties for the offence are strong. In this tier we place the following: a visual representation of a person under 18

years of age participating in explicit sexual conduct and material which advocates, encourages, condones or presents as normal the sexual abuse of children; and visual pornographic material which was produced in such a way that actual physical harm is caused to the participant or participants.

The case with respect to these forms of pornography has been made very fully in the part of the Report dealing with children and we do not intend to repeat it here.

With respect to the remaining category, there are, in our view, two reasons for prohibiting visual material in the production of which actual physical harm was caused to the person or persons depicted. The first and obvious one is to protect those who participate in the production of visual pornographic material from physical harm. It is likely, of course, that in the case of material produced ouside Canada the acts that would result in such harm being caused would themselves be caught by the criminal law of the country in which they were committed. With domestically produced material, other provisions in the *Criminal Code*, for example those relating to assault, might be applicable, especially if no consent to the physical harm was evident. Be that as it may, it seemed to us, as it seemed to the Williams Committee, to be appropriate to provide this additional deterrent to the causing of such harm. We know that the relations between the producers of violent pornography and the actors in it are often such that there is little or no respect for the rights and physical welfare of the latter. Clearly, if the commercial dealings in material of this kind could be stopped, the reason for producing it would disappear.

The second reason for prohibiting this material lies in the message that most, if not all, of it conveys. That message is that it is acceptable to cause physical harm in the context of sexual relations. Whether or not it can be demonstrated empirically that this message is absorbed by the viewer, and acted upon, we believe that it is appropriate to use the criminal law to prohibit its dissemination. The social harm which is caused by the undermining of human dignity and the challenge to the equality of women is as stark here as it is with mere representations of physical harm. We elaborate on this facet of harm in our discussion of tier two material below.

We do not anticipate that this provision will often be activated. We doubt that the causation of actual physical harm is a widespread problem in the production of pornography. Moreover, there are obvious problems of proving that harm was actually caused. However, it will be available for dealing with the occasional outrageous case.

Far more pervasive is the material in which physical harm or abuse is represented in simulated depictions. This material which we consider offends equality rights and the more general right to respect for human dignity is dealt with in the second tier and is labelled "Sexually Violent and Degrading Pornography". Unlike the material in tier one, that in the second tier is subject

to the defences of genuine educational or scientific purpose, and artistic merit. The rationale for allowing defences is set out below in our discussion of the new formulation of section 159 of the *Criminal Code*.

We consider it important to comment at some length on why we have included this second tier, and the character of the harm which we feel justifies the intrusion of the criminal law at this point. As we stated in the introduction to this chapter we have concluded that the legitimate ambit of the criminal law extends beyond the causation of demonstrable, tangible harm to an individual or individuals. While recognizing the concern which liberals have that to extend the reach of the criminal law further is to open the door to abuse and possibly tyranny, we believe that there are values and policies which are so important to the welfare of Canada that they are worth protecting in their own right, even by criminal sanctions. This position which we have adopted seems to us to accord with the view taken by both the Law Reform Commission of Canada and the Department of Justice in their studies on the purposes of the criminal law.[1] As we have noted in our discussion of the role of criminal law in Part I, Chapter 2, the two studies see the criminal law as having both the prevention and penalizing of harm to the individual and the protection of social values as legitimate objectives.

More importantly, we believe that the *Charter of Rights and Freedoms* expressly recognizes that certain social values and policies, in particular equality "before and under the law" and "equal protection and equal benefit of the law" are entitled to both constitutional affirmation and protection, and take their place alongside the traditionally protected freedoms such as freedom of conscience, religion, thought, belief, opinion and expression. In our minds there are two possible legal consequences which flow from this recognition accorded to equality rights. In the first place it may be argued that the effect of section 15 of the *Charter* is to limit the ambit of freedom of expression in section 2(b) to exclude forms of expression which offend equality rights. The alternative position one can take is that the combined effect of section 15 and section 1 which comtemplates reasonable limitations on the rights and freedoms set out in the *Charter* is to validate reasonable legal constraints, including those of the criminal law, on the exercise of rights and freedoms by individuals or groups which adversely effect or threaten the rights in section 15.

While observations on the effect of the *Charter* are in many respects still speculative, we note that the position which we have taken does have judicial support in the careful judgement of Mr. Justice Quigley of the Alberta Court of Queen's Bench in *R. v. Keegstra*,[2] a decision to which we have already referred to in Part II, Chapter 8, where we discuss the general impact of the *Charter* in relation to the issue of pornography. Mr. Justice Quigley in addressing the issue of whether section 281.2(2) of the *Criminal Code* (wilfully promoting hatred against any group by communicating statements) was an infringement of "freedom of expression" under section 2(b) of the *Charter* made the following remarks:

> Section 15 of the *Charter* guarantees a right which rationally flows from our affirmation that men remain free only when freedom is founded upon respect for moral and spiritual values. We have recognized that Canadians have a moral sense, that is a sense of what is good and what is evil. Section 15 also manifests in the concrete as opposed to the abstract, our affirmation that each human person has dignity and worth...[3]

> In my view, the wilful promotion of hatred under the circumstances which fall within section 281.2(2) of the *Criminal Code* of Canada clearly contradicts the principles which recognize the dignity and worth of the members of identifiable groups, singly and collectively; it contradicts the recognition of moral and spiritual values which impels us to assert and protect the dignity of each member of our society; and it negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination.[4]

The judge concluded that section 2(b) of the *Charter* did not contemplate "an absolute freedom permitting an unbridled right of speech or expression". Furthermore, if he was wrong in this view, he found that section 1 provided a basis for balancing that freedom against the furtherance and protection of desirable social policies and values with which it conflicted in certain contexts. After carefully assessing the rationality and proportionality of the *Criminal Code* provision, and comparing it with the laws and customs of other free and democratic societies, he concluded that the "promoting hatred" provision in the *Code* constituted a reasonable limitation on freedom of expression.

We agree with the views and sentiments expressed in Mr. Justice Quigley's judgement, and we believe that they have application in the present context. In the same way that freedom of expression may not extend to statements wilfully promoting hatred, or be outbalanced by the need to protect the equality rights of others, so the same conclusions can be reached in the case of certain forms of pornographic representations. We believe this to be so in particular in those cases in which the pornographic representation depicts a particular group, typically women, as less than human, and their mistreatment as a legitimate subject of sexual stimulation, typically male. We observe that section 15 of the *Charter*, insofar as it addresses the equality rights of women, represents the culmination of a long and agonizing process whereby Canadian society has come to accept and to commit itself to the policies and values associated with equal treatment of the sexes in the political, economic and social spheres. This has been reflected in both legislative and policy strategies to improve the position of women in employment, education, within the social welfare system and within the family unit. Indeed, it is a set of policies and values to which the present government has given its unqualified support in recent policy announcements relating to equal opportunity in employment. In our opinion the most hateful forms of pornography are subversive of policies and values favouring equality. While it may be difficult to characterize the representations as amounting to the promotion of hatred, they do contain a clear message that half of the Canadian population are entitled to nothing better than violent, sexual abuse, all in the cause of the supposed sexual and psychic welfare of the other half. They do so in a context, that of sexual relations, in which a combination of a desire to dominate and emotion can pose

significant dangers to the female partner. As we pointed out in Part I, Chapter 2, we recognize the importance of sexuality to a person's status as an adult, and the need to respect that facet of the physical and psychic welfare of each individual. However, we also believe that there are necessary limits to how that sexuality is manifested. In our view the limits of tolerance are reached when domination and violence infect the relationship. While it is not proven that representations and depictions of sexual violence pose the same threat to the welfare of women as the conduct itself, we are of the view that they lower the status of women and thus contravene their right to equality. In fact they strike at the very root of the policies and values of Canadian society, which, as Mr. Justice Quigley observed, are premised on the dignity and worth of all its members.

We recognize that sexually violent and degrading pornography is not limited in its focus to the abuse of women. There is some material produced in which similar conduct is depicted in a homosexual context. It may be difficult to bring these representations within the ambit of section 15 of the *Charter*. However, we are of the view that while that may be true, the material nevertheless offends the value of respect for human dignity of which Mr. Justice Quigley spoke in *Keegstra* and which is obviously broader in its scope than section 15. Accordingly, we think that a proscription against it of the type we suggest can be justified as a reasonable limitation on freedom of expression and thus saved by section 1 of the *Charter*.

Having taken this stand we are of course aware of the limitations of the criminal law in promoting and protecting values, especially where there is no or only speculative harm being caused. Moreover, we know that the criminal law can be a blunt and inappropriate instrument for working social change. We are, however, confident that with careful attention being paid to the material which we see as destructive of the social consensus which we refer to above, and the clear articulation of the conduct which we think should be proscribed, a valid statement of criminal law can be made, which not only sets out with clarity the limits of what is acceptable and unacceptable in Canadian society in terms of pornography, but also which can be enforced effectively without creating unwarranted curbs on freedom of expression.

Although it is mainly violent and sexually abusive material which we have focused on in framing our second tier recommendations for amendment of the *Criminal Code*, we have also thought it appropriate to apply the criminal law to representations which, while they do not offend the equality provisions of the *Charter* do depict conduct, such as incest, bestiality or necrophilia, which is considered socially repellent and personally degrading. We find it difficult to see how representations of such conduct would be protected by freedom of expression. Even if that freedom was extended that far, we believe that the concern to uphold social values, which is evident both in deepseated revulsion to this type of behaviours, and in its criminality, justify reasonable limitation of the freedom in terms of section 1 of the *Charter*.

Having stated the Committee's views in respect to sexually violent material, we do acknowledge that our rationale for including some material, within the purview of the *Criminal Code* will not be universally acceptable. Some people will still argue that we need a stronger and more direct relationship between the use of pornography and identifiable harms to particular individuals. In addition, there will be a more general concern about how the legislation might read. It is obviously important that the legislation not inadvertently encompass material that lacks the harmful effects of the material at which the legislation is aimed.

It was this latter problem that led the Committee to recommend that sexually violent and degrading material be prohibited and to state as clearly as possible what we mean by those terms. We have consciously rejected the use of broad terminology which would leave the characterization of the material to a test, such as the present test of community standards of tolerance.

The community standards test has been soundly criticized by everyone who has been affected by decisions made under it. Most of the criticism is directed at the impossibility of knowing what the Canadian (i.e. national) community standard is. It has been pointed out by judges, and demonstrated by other judgements, that the standard is subject to regional variation. Moreover, the standard changes over time so that publishers, for example, can only guess at what the standard is in any given year. Furthermore, while a changing standard has some value to it in that it ensures that the law does not become completely out of tune with current realities, it does give rise to what some people at the public hearings referred to as "creeping gradualism." (In the minds of some it was not so much creeping as galloping.) That is, the most extreme material which is allowed becomes the standard against which everything else is measured. The technique of publishers, therefore, who do not want any restraints on what they can produce is to constantly push the boundary of what is considered to be outside the law.

A further criticism of this test is that it lacks a principled foundation. Simply because a majority of Canadians are said to tolerate or not tolerate something tells us nothing about their reasons for doing so and hence gives us no opportunity to decide whether they are indeed valid. It is our view that decisions in respect to criminal charges should be made on the basis of clearly articulated principles and not on the basis of majoritarian impulses.

Much of the material which people brought to the attention of the Committee was presented as material which degrades women. While we have argued that some pornographic material is harmful to our fundamental values, and in this sense we have concurred with those who see it as denying women equal status with men, we have nevertheless not used the term "degrading" in our proposed amendments to the *Criminal Code*. The term appears as a heading to the material which we believe is the most subversive of social values. In this sense it is an appropriate heading for the section since it highlights what we consider to be the problem with the material. We have not, however, used the term in our specific recommendations because we consider it to be too

imprecise and too broad in its connotations. As we have argued, much of what appears as mainstream pornograhy could be characterized as degrading to women. We do not want to run the risk of our definitions being cast so broadly that they are struck down by the courts on the ground of vagueness or because they catch too much. Furthermore, the use of the term "degrading" would result in a more subjective element being introduced into the assessment of the material. The variable scope ascribed to the term "degrading" during the public hearings, and the occasional but worrying challenges made to literary works which treat sexual relationships openly and sensitively illustrate the difficulties which exist with interpreting such a term. We have tried as far as possible in framing our recommendations to minimize the opportunities for subjective judgements. Our approach here, as elsewhere, has been to state what depictions or descriptions are unacceptable as precisely and clearly as we can.

The third tier of materials is one which we do not consider merits criminal sanction, except in very narrow circumstances. This third tier consists of "visual pornographic material", defined as material in which is depicted vaginal, oral or anal intercourse, masturbation, touching of the breasts or genital parts of the body, or the lewd exhibition of the genitals. Although the language of the definition is broad enough to include both explicit material involving children and sexually violent pornography, we wish to make it clear that in our view, neither of these kinds of materials falls within tier three. These two forms of materials fall into tier one and tier two respectively.

In drafting this provision, we have been mindful of the difficulties of trying to devise a comprehensive list of activities, the depiction of which is to be controlled. These difficulties led the Williams Committee to recommend, instead of a list, a test of offensiveness, which turned on the sensibilities of the "reasonable person". We have concluded that such a flexible test would be more problematic in its operations than the use of a list. The latter is likely to provide clearer guidance on the type of material which is caught. While our list may require further refinement, we are inclined to believe that it is adequate to the task of characterizing tier three material.

It will be noted that we have employed the term "lewd" to describe certain of the representations in the definition. We do this because we wish to make it clear that it is not all representations of the breasts or genitals which should be caught by this definition. It is obviously important to distinguish a poster centre fold of *Playboy* which should be caught as tier three material, and a poster of Michaelangelos' *David* which should not. The use of the adjective "lewd" is designed to allow the law to discriminate between what is patently offensive when displayed in public and what is not.

We think that the only problem which merits the application of the criminal law in connection with tier three material, is that of display. Accordingly, we have proposed criminal penalties for displaying the material without a warning in premises to which the public has access, as well as the restrictions on sale to and access by children which is included in the children's part of this report. We believe that the provisions provide the necessary

safeguards against involuntary offence and the exploitation of children without curtailing freedom of expression.

Although we have devised this three-tier approach primarily to guide our thinking on the criminal law, we believe that it also serves to rationalize, as well, the relation between the federal and the provincial spheres. In our view, the proper approach is for the provinces to concentrate their regulatory efforts on the tier three material. We would hope to see a regime in which, apart from the recommended display offences, tier three material is entirely regulated by the province. The main question with respect to this material is availability, so that its potential to create offence to adults or do harm to children will be contained. Provincial film regulation schemes and municipal display by-laws seem particularly well suited to this role.

We have agreed in Chapter 14 on film classification and censorship that film and video material which does not fall within the proscription we have recommended in the *Criminal Code*, should be subject to classification rather than censorship. Accordingly, in the case of film or video material which falls within tier three the application of a classification or rating system, with attendant warnings and entrance restrictions, would seem to us the most satisfactory way of dealing with the display problem. In the case of hard copy material, especially magazines, we believe that municipal regulation requiring warnings, barriers, or opaque covers is an appropriate method of responding. Provincial law and municipal by-laws of the type mentioned above would also have application to tier two material which is protected by the defences of genuine educational or scientific purpose or artistic merit.

Recommendation 5

Controls on pornographic material should be organized on the basis of a three-tier system. The most serious criminal sanctions would apply to material in the first tier, including a visual representation of a person under 18 years of age, participating in explicit sexual conduct, which is defined as any conduct in which vaginal, oral or anal intercourse, masturbation, sexually violent behaviour, bestiality, incest, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals is depicted. Also included in tier one is material which advocates, encourages, condones, or presents as normal the sexual abuse of children, and material which was made or produced in such a way that actual physical harm was caused to the person or persons depicted.

Less onerous criminal sanctions would apply to material in the second tier. Defences of artistic merit and educational or scientific purpose would be available. The second tier consists of any matter or performance which depicts or describes sexually violent behaviour, bestiality, incest or necrophilia. Sexually violent behaviour includes sexual assault, and physical harm depicted for the apparent purpose of causing sexual gratification or stimulation to the viewer, including murder, assault or bondage of another person or persons, or self-infliction of physical harm.

Material or productions in the third tier would attract criminal sanctions only when displayed to or performed before the public without a warning as to their nature or sold or made accessible to people under 18. Unsolicited mail incorporating such material is also included. In tier three is visual pornograhic material or performances in which are depicted vaginal, oral, or

anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body or the lewd exhibition of the genitals, but no portrayal of a person under 18 or sexually violent pornography is included.

Recommendation 6

The provinces and the municipalities should play a major role in regulation of the visual pornographic representations that are not prohibited by the Criminal Code through film classification, display by-laws and other similar means. The provinces should not, however, attempt to control such representations by means of prior restraint.

5. Offences Relating to Pornographic Material

5.1 Section 159

The basis upon which we have constructed this replacement for section 159 has been discussed in the first part of this chapter, and so we will not repeat it here. However, we do wish to highlight certain features of the proposed legislation.

The first thing to note is the terminology we have used. We have tried for the most part to be specific in our choice of terminology, avoiding the use of vague words such as "degrading". As a result, we have drafted our offences in terms of descriptions of certain kinds of acts. The offences in relation to tier two material, for example, contain a list of acts like incest, bestiality and necrophilia. These acts are, in and of themselves, criminal offences. The term "sexually violent behaviour", which also appears in the list, is defined to include "physical harm depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer". This general part of the definition recognizes that the element of context has an important role to play in determining whether portrayals of physical harm are wrongful. More especially, it embraces the combination of violence and sexual conduct, and violence and sexual stimulation which we consider to be so destructive of the dignity and worth of human beings in general, and women in particular. To supplement the general formulation, we have given specific examples, like murder, and self-inflicted harm. All of the elements of this list except for self-inflicted harm are, once again, crimes. We include self-inflicted harm because it is typically portrayed in a context which makes it appear that the actor, usually a woman, enjoys and deserves the pain. This we see as just as objectionable as the representation of physical violence by others, which suggest the legitimacy of such conduct, and worse still, its acceptance by the victim. By thus staying close to what is itself criminal in formulating our definition, we hope to avoid making it so broad that it would catch images which, while perhaps objectionable, should not be criminalized. We wish to note in this connection the two definitions of "visual pornographic material" which appear in the proposed section. One of them, which applies in the case of section 159(1), reflects both the sexually explicit and the sexually violent. However, when we come to define "visual pornographic material" in dealing with the offence of displaying tier three material, we have removed from the

definition the phrases sexually violent behaviour, necrophilia, incest and bestiality. We also specify that this class of representations does not include pornographic representations of children, material advocating the sexual abuse of children, or material in which it appears that harm was done to the participants.

In drafting the offences to deal with tier one and tier two material, we have maintained the distinction now made in section 159 of the *Code* between those who produce and distribute prohibited material and those who are involved in the retail trade in such material. In our view, a distinction along these lines is appropriate in this area for two reasons. First, it allows for recognition to be given in the *Code* to the fact that producers and distributors of material of this kind are in a better position to know its content than are retailers. Recognition of this fact, which is now reflected in section 159(6) (i.e. that ignorance of the nature or presence of the material is no defence) we have embodied in both a new section 159(5) and a new section 159(6). The former is a slightly revised version of the existing 159(6); it provides that it is no defence for a producer or distributor to show that he was ignorant of the character of the "matter or thing" in question. The latter makes provision for a "due diligence" defence for retailers.

The "due diligence" defence is intended to protect the responsible merchant who tried to review the materials coming into his establishment, and to comply with the law. We realize that merchants are not going to be able to interpret in every case what is and is not within the section. However, the fact that they have tried will be of help in the event of a prosecution. The conduct we wish to deter is that of the merchant who accepts without question any material provided by a distributor, and pays no attention to those whose rights are adversely affected by it.

The second reason for distinguishing between producers and distributors on the one hand, and retailers on the other, lies in the need to ensure that the punishment fits the crime. In our view, the production and distribution of prohibited material has to be treated more harshly than the retail trade in it. It is well known that it is in the production and distribution of this material that the real profits are made, and the penalties for such activities must be severe if the law is to have any significant deterrent effect.

In proposing that this distinction is to be continued, the Committee has not forgotten that the Ontario Court of Appeal has held that the existing section 159(1)(a) and section 159(2)(a) overlap to some extent.[5] It is clear that, to the extent that these two offences do overlap, the purposes underlying the distinction are defeated. We have attempted to deal with this problem both by making it clear that the rental of prohibited material is caught by the retailing offence and by removing the word "circulates" from the producing and distributing offence. We are not overly confident, however, that these changes will succeed in overcoming the Ontatio Court of Appeal's decision. It may be, therefore, that further changes to the language used in these sections will be necessary.

It will be noted that in our formulation of section 159(2), Sexually Violent and Degrading Pornography, we have included the defences of genuine educational or scientific purpose, and artistic merit. It is important that we state our reasons for these exceptions which are contained in section 159(2)(d) and (c).

The defence of genuine educational a scientific purpose reflects our belief that in certain contexts the production, distribution and sale of this material may be quite legitimate. While descriptions of incestuous relationships of the sort described in some entertainment magazines are clearly not tolerable very detailed descriptions of incestuous relations, perhaps with explicit photographs of the physical harm done to a young victim of incest by an adult, are entirely appropriate within a medical setting or the training of professionals who work with families in trouble. Here the material is acceptable or unacceptable not on the basis of what it describes or depicts but on the basis of its purpose. However, materials produced for genuine educational or scientific purposes may be sold for less noble reasons. We have provided for this contingency by relating the defence in the case of retailers both to the original purpose of the material and the purpose of its sale.

Some people will argue that there can be no such thing as an artistic defence of material which is sexually violent. Because the depiction meets some academic or elitist concept of artistic does not make it any more acceptable. While we have sympathy with this view we consider it essential to provide for such a defence in order properly to balance the competing rights of equality and freedom of speech. Both of these are entrenched in the *Charter* and clearly the law cannot be used to support one to the total exclusion of the other. Artistic and literary endeavours are a vital component of our society and as such have to be protected and encouraged. That they sometimes raise uncomfortable questions, treat controversial topics and present unpopular views is to be expected. It would not be acceptable to us to say that the matters dealt with in the second tier cannot be presented in artistic works. Indeed, to say so would be to put a significant range of artistic and literay material dating back to antiquity at risk. We wonder, for example, how these two ancient Greek classics, "Oedipus Rex" and "Electra", and the work of the Roman historian Suetonius would fare without such a defence. In some cases the need to protect freedom of expression must predominate.

We note in passing that the Committee has considered two different approaches to artistic works that might fall within the ambit of our second tier. On the one hand, it can be argued that because the work in question is, indeed, artistic, its message is different from, for example, the message in a similar depiction or description in an "adult entertainment" magazine. The fact that it is art, on this view, transforms the depiction or description into something which is no longer harmful. On the other hand, it might be said that both the artistic work and the adult magazine contain an equally harmful message but that in the former case the genre is of sufficient importance that we will nevertheless protect it. While the Committee has adopted this latter view, it should be noted that the question of whether works of art can be pornographic

or whether those terms are mutually exclusive has been the subject of considerable discussion in academic literature.

We recognize, of course, that these defences, especially that of artistic merit, introduce a subjective element into the determination of what is pornographic for the purposes of the criminal law. Given our concern to strike a balance between the protection of equality rights, and freedom of expression, we cannot see how that can be avoided. Moreover, we are of the view that decision makers with the benefit of the evidence of expert witnesses will have less of a problem distinguishing what is artistic from what is not than they do with applying the present slippery test of what is obscene. Instead of trying to define the answer to the broader question of what the Canadian community would consider tolerable, they will have to reach a determination of artistic worth by considering the producer or maker's purpose, together with its status within the artistic or literary community. While this will no doubt be a challenging task, we think that it will be a manageable one. The process of decision making is certainly assisted by section 159(2)(h) which establishes the contexts in which the impugned material is to be judged and differentiates them depending upon whether the material is part of a more extensive production or story, or merely a detached segment.

We have included within section 159(2)(c) a display provision relating to Sexually Violent and Degrading Pornography. We think it important to distinguish this method of dealing with proscribed pornographic material from its sale and rental, in particular because it is necessary to provide for material which falls within the exceptions allowed by section 159(2)(d) and (e). It would obviously not make sense for material which, were it not for its purpose or character, would be proscribed, to be displayed openly and without regulation.

It will be noted that in relation to both exempted sexually violent and degrading material by section 159(2)(g) and tier three material by section 159(3)(b) we have stipulated that no one shall be convicted of the offences where an adequate warning notice has been located where it can be seen by those entering the premises or part of the premises which contain pornographic material. The Committee considered whether an exemption should be included for museums, art galleries and the like. Some of its members felt a little disconcerted by the realization that establishments like the Royal Ontario Museum, for instance, might be required to post warning notices because of concern about the possibility of pornography lurking within their walls. Attempts to draft such an exemption floundered on the issue of how to ensure that the exemption would only be available to legitimate establishments of this type. For this reason an exception has not been included.

The penalties provided in the draft section are intended to reflect our view of the seriousness of these offences. Many of them are higher than the penalty now provided for breach of section 159. Where possible, we have specified the amount of the fine which can be imposed by a court convicting someone of a summary conviction offence. Subsection 722(1) of the *Code* provides that

where there is no other provision made by law, a fine of $500 or six months imprisonment or both can be imposed for a summary conviction offence. While we have no objection to the six months imprisonment, and reflect that in our sections, we consider that the maximum fine of $500 was far too low. In some cases, we have made that a minimum fine.

Because of the provisions of paragraph 647(b) of the *Code*, we cannot impose these higher penalties upon a corporation convicted of a summary conviction offence. Elsewhere, in Part IV on Children, we recommend that paragraph 647(b) be amended, so as to provide for a higher penalty for a corporation convicted of a summary conviction offence, or to allow the drafter to attach to any particular offence a penalty higher than that set out in paragraph 647(b).

We have, however, provided for a penalty against an officer of a corporation who is implicated in the commission of the offence. We believe this to be essential in making it clear that legal responsibility for the production, distribution, sale, rental or display of this material is both a personal and a corporate responsibility. More particularly it obviates the possibility that the human agents in dealing with the material will try and shield themselves by shifting responsibility to the corporate entity.

Finally, we have incorporated a forfeiture provision in proceedings under section 159(1)(a) and (b) and 159(2)(a) and (b) which allows the Crown to dispose of offensive materials and copies thereof. This power is important, if the full implications of a conviction are to be realized. Without it, it would be all too easy for other distributors or retailers to continue dealing in the material which had produced a conviction, leaving to the Crown the sole recourse of further prosecutions.

Recommendation 7

Section 159 of the Criminal Code should be repealed, and replaced with the following provision:

PORNOGRAPHY CAUSING PHYSICAL HARM

159(1)(a) Everyone who makes, prints, publishes, distributes, or has in his possession for the purposes of publication or distribution, any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted, is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or rent or has in his possession for the purpose of sale or rent any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or

(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $2,000 or to imprisonment for six months or to both.

(c) "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, sexually violent behaviour, bestiality, incest, necrophilia,

masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

SEXUALLY VIOLENT AND DEGRADING PORNOGRAPHY

159(2)(a) Everyone who makes, prints, publishes, distributes or has in his possession for the purposes of publication or distribution any matter or thing which depicts or describes:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest, or
(iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or has in his possession for the purpose of sale or rent any matter or thing which depicts or describes:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest, or
(iv) necrophilia

is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or
(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $1,000 or to imprisonment for six months or to both.

(c) Everyone who displays any matter or thing which depicts or describes:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest; or
(iv) necrophilia

in such a way that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of

(i) an indictable offence and is liable to imprisonment for two years, or
(ii) an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $1000 or to imprisonment for six months or to both.

(d) Nobody shall be convicted of the offence in subsection (2)(a) who can demonstrate that the matter or thing has a genuine educational or scientific purpose.

(e) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing has a genuine educational or scientific purpose, and that he sold, rented, offered to sell or rent or had in his possession for the purpose of sale or rent the matter or thing for a genuine educational or scientific purpose.

(f) Nobody shall be convicted of the offences in subsections (2)(a) and (2)(b) who can demonstrate that the matter or thing is or is part of a work of artistic merit.

(g) Nobody shall be convicted of the offences in subsection (2)(c) who can demonstrate that the matter or thing

(i) has a genuine educational or scientific purpose; or
(ii) is or is part of a work of artistic merit,

and

(iii) was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the display therein,

(h) In determining whether a matter or thing is or is not part of a work of artistic merit the Court shall consider the impugned material in the context of the whole work of which it is a part in the case of a book, film, video recording or broadcast which presents a discrete story. In the case of a magazine or any other composite or segmented work the court shall consider the impugned material in the context of the specific feature of which it is a part.

DISPLAY OF VISUAL PORNOGRAPHIC MATERIAL

159(3)(a) Everyone who displays visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of an offence punishable on summary conviction.

(b) No one shall be convicted of an offence under subsection (1) who can demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the display therein of visual pornographic material.

(c) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals, but does not include any matter or thing prohibited by subsections (1) and (2) of this section.

FORFEITURE OF MATERIAL

159(4) In any proceedings under section 159(1)(a) and (b), 159(2)(a) and (b), and 164, where an accused is found guilty of the offence the court shall order the offending matter or thing or copies thereof forfeited to Her Majesty in the Right of the Province in which proceedings took place, for disposal as the Attorney General may direct.

ABSENCE OF DEFENCE

159(5) It shall not be a defence to a charge under sections 159(1)(a) and 159(2)(a) that the accused was ignorant of the character of the matter or thing in respect of which the charge was laid.

DUE DILIGENCE DEFENCE

159(6) Nobody shall be convicted of the offences in sections 159(1)(b) and 159(2)(b) who can demonstrate that he used due diligence to ensure that there were no representations in the matter or thing which he sold, rented, offered for sale or rent, or had in his possession for purposes of sale or rent, which offended the section.

DIRECTORS

159(7) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

DEFINITIONS

159(8) For purposes of this section, "sexually violent behaviour" includes

(i) sexual assault,

(ii) physical harm, including murder, assault or bondage of another person or persons, or self-infliction of physical harm, depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer.

5.2 Section 160

Section 160, the forfeiture provision of the *Code*, received little comment either at the public hearings or in the briefs submitted to the Committee. Such comment as there was tended to be general in nature. Some groups thought that section 160 should be repealed because it amounted to a general power to censor. Other groups thought that it should be retained and, in fact, used more often than it is.

The Committee is of the view that section 160 should be retained, at least insofar as tier one and tier two materials are concerned. In other words, taking forfeiture proceedings against the material itself should continue to be an alternative to a criminal charge with respect to material involving children, material advocating or encouraging the sexual abuse of children, pornography produced in such a way as to cause physical harm and sexually aggressive and degrading pornography. It would not be an option with respect to material that is in tier three. The reason for this distinction is explained below.

There are three reasons why we think that a provision like section 160 should remain in the *Criminal Code*. The first is that it provides a speedy way of resolving the question of whether or not material is in fact prohibited. The second is that it allows for that question to be resolved in proceedings in which there is no risk of anyone being convicted of a criminal offence. The third is that it provides private citizens with a useful and effective alternative to a private prosecution in situations in which, for one reason or another, the government has refused to act.

The second and third of these reasons require some explanation. In cases where it is clear that the material in question is prohibited, the Committee is of the view that criminal charges should be laid as quickly as possible. However, we agree with the opinion expressed by Judge Borins in *Regina* v. *Nicols* that, in cases where it is difficult to know whether the material in question is prohibited, there is an element of unfairness in proceeding by way of criminal charges. In those cases, which the committee hopes would be few and far between under the regime it is proposing, section 160 proceedings would be appropriate.

Insofar as the third reason is concerned, our public hearings revealed that there was a great deal of dissatisfaction about the reluctance of law enforcement officials in some provinces to take action against material that some

members of the public considered clearly to be obscene. In the Committee's view, a provision like section 160 should be available to private citizens so that they can act in situations where the government will not. We realize that a power such as this in the hands of private citizens is open to abuse. However, close scrutiny of the information upon oath which forms the basis of the application for a warrant to seize the material, should catch the obvious abuses. If it was deemed necessary, express provision could be made in the section for a power on the part of the Attorney General to stay proceedings in order to catch those abuses which surmounted this initial hurdle.

The Committee's reasoning on this point assumes that section 160, as it now reads, allows private citizens to initiate proceedings under it. As was noted in our discussion of the existing law, the courts appear to have accepted that it does. However, the point does not appear to have been argued and it may be advisable to make it clear that private citizens can invoke the section.

Two additional points about section 160 should be noted. The first is that, although the courts have accepted that the onus is on the Crown under section 160 to prove beyond a reasonable doubt that the material in question is obscene, the language of the provision suggests that the onus is on the other side to prove that it is not obscene. The Committee recommends that the section be amended to make it clear that the onus is on the Crown in such cases.

The second point relates to the use of juries in section 160 cases. At present, section 160 "show cause" hearings are heard by a judge alone. The Committee gave serious consideration to recommending that the party defending the material should be allowed to elect to have the case heard by a judge and jury. The rationale for such a recommendation would have been a desire to minimize the differences in the way in which criminal prosecutions (at least those commenced by indictment) and section 160 cases were handled. In the result, however, the Committee decided against making such a recommendation. Trial of section 160 cases by juries would make proceedings more lengthy and one of the main advantages of the section would be lost.

It will be recalled that the recommendation that section 160 be retained contained the proviso that its application should be limited to prohibited material. The reason for this is that, in the case of regulated material, the concern is with the circumstances of the sale or display, rather than with the material itself. Forfeiture proceedings in respect of such material would seem to make little sense.

Recommendation 8

Section 160 of the Code, allowing forfeiture proceedings to be brought, as an alternative to a criminal charge, should be retained in the Code but its application should be limited to tier one and tier two material.

Recommendation 9

To clarify the law on this point, section 160 should be amended to make it clear that the onus rests on the Crown under this section to prove beyond a reasonable doubt that the material comes within either tier one or tier two.

5.3 Section 161

Recommendation 10

Section 161 of the Code should be amended as follows:

> **161. Everyone 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 offend section 159(1) or section 159(2) of the Code is guilty of an indictable offence and is liable to imprisonment for two years.**

This recommendation really changes little from what the section now provides. At present, the reference is the person's apprehension that the material might be "obscene or a crime comic". The change merely reflects the repeal of section 159 and enactment of the new provisions.

5.4 Section 162

It will be recalled that section 162 deals with the publication of reports of judicial proceedings. The section contains a general prohibition against the publishing of "indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals", as well as a more specific prohibition relating to divorce, judicial separation and nullity proceedings. In respect of the latter kind of proceedings, it is made an offence to publish anything other than names and addresses, concise statements of the charges, defences, legal submissions, the judge's summing up, the jury's findings and the court's decision.

The Committee is of the view that section 162 should be repealed. It most certainly cannot be sustained on the basis of the need to protect public morals. That may have been an adequate rationale in 1926 when the British legislation upon which section 162 was based was enacted. It is not an adequate rationale today. Moreover, it is difficult to see why "indecent matter [and] indecent medical, surgical or physiological details" that find their way into judicial proceedings should be deserving of special treatment in the law.

To the extent that there may be a concern about the privacy and other interests of participants in judicial proceedings, including witnesses, it may be appropriate to empower the judge to make a specific order with respect to the non-publication of certain matters arising during those proceedings. A model for such a provision might well be section 467 of the *Criminal Code*, which empowers a judge to ban the publication of evidence taken at a preliminary hearing. If broader protection for those interests is thought to be necessary, consideration might be given to enacting a provision along the lines of section 246.6(4), which prohibits the publication of the evidence of the sexual activity of a complainant in a sexual assault case.

Whatever the form such a provision would take, its purpose would be to protect the interests of those involved in the judicial proceedings. The provision

would not be based on a concern that the content, pornographic or otherwise, of the information conveyed might be harmful to those who read or see it. For this reason, the provision would not belong in the part of the *Criminal Code* that deals with pornography.

Recommendation 11

Section 162 of the Code should be repealed.

5.5 Section 164

Recommendation 12

Section 164 of the Code should be repealed and replaced by:

MAILING PORNOGRAPHIC MATERIAL

164(1) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:

(a) depicts or describes a person or persons under the age of 18 years engaging in sexual conduct,

(b) advocates, encourages, condones, or presents as normal the sexual abuse of children

is guilty of an indictable offence and liable to imprisonment for ten years.

(2) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:

(a) by virtue of its character gives reason to believe that actual physical harm was caused to the person or persons depicted, or

(b) depicts or describes:

(i) sexually violent behaviour,

(ii) bestiality,

(iii) incest, or

(iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(3) Everyone who makes use of the mails for the purpose of transmitting or delivering unsolicited visual pornographic material to members of the public is guilty af an offence punishable on summary conviction.

(4) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing mailed

(i) has and is being transmitted or delivered for a genuine educational or scientific purpose, or

(ii) is or is part of a work of artistic merit.

(5) It shall not be a defence to a charge under subsections (1) and (2) of this section that the accused is ignorant of the character of the matter or thing in respect of which the charge was laid.

(6) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, violent behaviour, incest, bestiality, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

The new section 164 incorporates the changes made to section 159 and covers all three tiers. As we consider the retailers of tier one and two material

as the equals in the production, distribution chain to the makers, printers, publishers and distributors referred to in section 159 (1)(2) and 159 (2)(a), we have concluded that ignorance of content should similarly not constitute a defence (section 164(5)). Moreover, the same maximum penalty should apply as is prescribed by section 159 (1)(a) and (2)(a).

In tune with our general approach to tier two material we have included the defences of genuine educational and scientific purpose, and artistic merit in section 164(4). It will be noted that in respect of the former the defence relates to both the nature of the material and the purpose of its mailing.

We include an offence of mailing unsolicited visual pornographic material in section 164(3). This is in essence the equivalent of the display provisions in section 159(3). The definition of "visual pornographic" material in section 164(b) has been framed to include "sexually violent behaviour, bestiality, incest or necrophilia", as the offence should embrace not only those materials which fall within tier three, but also those tier two materials which were covered by the defences in section 164(4). Members of the public need, in our opinion, to be protected from unsolicited transmittal of this type of material as they do from tier three material.

5.6 Section 165

Section 165 of the present *Code* establishes the manner of proceeding under, and the penalties for breach of, the *Code* sections dealing with publication, distribution and sale, tied sales, judicial proceedings, theatrical performances and use of the mails. As the sections we recommend have specific penalties attached, repeal of this section is in order.

Recommendation 13

Section 165 of the Criminal Code should be repealed.

6. Offences Relating to Pornographic Performances

6.1 Section 163

We have adopted the same approach to the control of live pornographic performances that we have taken to the control of pornographic material. Hence, the provision which we recommend be included in the *Criminal Code* in the place of the existing section 163 is divided into three different offences, one to deal with live performances that fit the description of tier one material, (section 163(1)) one to deal with live performances that fit the description of tier two material, (section 163(2)) and one to deal with live performances that fit the description of tier three material, (section 163(3)).

It may be thought to be unnecessary in the case of live performances to include an offence for those performances that involve actual physical harm. For, if physical harm is, in fact, caused in such a performance, those responsible for such harm can be dealt with under the assault provisions of the *Criminal Code*. In our view, the justification for including this offence lies in the concern the Committee has that an accused may be able to argue under an assault charge that the performer consented. Given what will sometimes be a very unequal relationship between employer and employee and scant respect on the part of the former for the rights and sensitivities of the latter, this concern is not entirely fanciful. The provision also attempts to ensure that those who put on productions which involve tier two material, but which attract the defence of artistic merit limit themselves to simulation. Over and above the actual harm being caused is of course the odious message which is transmitted by such performances.

With respect to live performances that fit the description of tier two material, there is a defence of artistic merit in section 163(5). Because we are in the realm of public display, however, an accused would be obliged to show not only that the performance had artistic merit, but also that the performance took place in premises containing an adequate warning. Live performances that fit the description of tier three material would be permitted under this proposal, provided they took place behind an adequate warning (section 163(3)). By section 163(4) ignorance of the nature of the performance is no defence to charges under section 163(1) and (2).

We are well aware that these proposals would produce a significant change in the law in this area, since it would mean that "live sex" shows would no longer be criminalized. We did not feel, however, that a criminal prohibition against such shows could be justified under any of the rationales that we have given for the other *Criminal Code* prohibitions we have recommended. Nor, in our view, could any other convincing rationale be found. Given our decision that tier three material should not be proscribed, a prohibition against the equivalent kind of live performance would have to be justified on the basis that live performances have some special quality about them that sets them apart from magazines, books, films and videos. The Williams Committee concluded that the physical presence of those involved in the sexual activity gave live performances a special quality. As they put it in their report, that presence results in a relationship between actual people that gives rise to "the peculiar objectionableness that many find in the idea of the live sex show, and the sense that the kind of voyeurism involved is especially degrading to both audience and performers." On this basis, the Williams committee concluded that live shows featuring actual sexual activity should be prohibited.

The difficulty we have with this line of reasoning is that even if one accepts that the idea of live sex shows may be objectionable to many and that the shows themselves may be degrading to both the performers and the audience, these are inadequate reasons for prohibiting such shows. The fact that people object to a particular activity is, in and of itself, no reason for making it illegal. Neither is the fact that those involved in it, provided they are adults, are degraded (whatever that may mean) by virtue of their involvement.

The fact that "live sex" shows would no longer be prohibited would not, of course, mean that they would not be subject to any regulation at all. We have already recommended that provinces and municipalities should play a major role in the regulation of pornographic material that falls into tiers two and three. We make the same recommendation here with respect to live performances of a sexual character. Both the power to regulate local businesses and the power to zone can and should be used to good effect in this area.

Recommendation 14

Section 163 of the Code should be repealed and replaced by:

LIVE SHOWS

163 (1) Everyone who, being the owner, operator, lessee, or manager, agent or person in charge of a theatre of any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for ten years.

(2) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which

(a) involves actual physical harm being caused to a person participating in the performance, or

(b) represents:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest; or
(iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(3) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents, or gives, or allows to be presented or given therein without appropriate warning a performance in which explicit sexual conduct is depicted is guilty of an offence punishable on summary conviction.

(4) It shall not be a defence to a charge under subsections (1) and (2) that the accused was ignorant of the character of the production.

(5) Nobody shall be convicted of the offence under subsection (2) (b) who can demonstrate that

(i) the performance is or is part of work of artistic merit; and
(ii) the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the performance.

(6) For purposes of subsection 3 it shall be sufficient to establish that an appropriate warning was given that the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominant warning notice advising of the nature of the performance.

(7) For purposes of subsection 3 "explicit sexual conduct" includes vaginal, oral or anal intercourse, masturbation, lewd touching of the

breasts or the genital parts of the body, or the lewd exhibition of the genitals.

Recommendation 15

The provinces and the municipalities should play a major role in regulation of live performances involving sexual activity that are not prohibited by the Criminal Code, through licensing, zoning and other similar means.

6.2 Section 170

Recommendation 16

Section 170 of the Criminal Code should be amended to add the following provision:

This section has no application to a theatre or other place licensed to present live shows

Section 170 penalizes nudity in a public place without lawful excuse. The purpose of this exemption is to ensure that live performances will be proceeded against under section 163 of the *Code*, rather than this provision. As we have seen in our analysis of the present *Criminal Code* provisions on pornography in Chapter 7 of Section II, section 170 has been held to be applicable to theatrical performances notwithstanding the existence of specific offences relating to theatrical performances in section 163. We are of the opinion that to leave it open to the Crown to proceed under section 170 would be to allow an unwarranted departure from the three tier structure which we have developed.

Footnotes

[1] See Law Reform Commission of Canada, *Limits of the Criminal Law, Obscenity: A Test Case*, Ottawa, 1975; Department of Justice, *The Criminal Law in Canadian Society*, Ottawa, 1982.

[2] *R. v. Keegstra*, November 5, 1984 [unreported] (Alta Queen's Bench).

[3] *Ibid*, at 22.

[4] *Ibid*.

[5] *R. v. National News*, 1957, 118 C.C.C. 152 (Ont. Ct. of Appeal).

Chapter 21

Canada Customs

Our recommendations are divided into two categories, legal and administrative.

1. Legal

Recommendation 17

The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into the list of goods prohibited entry into Canada by Schedule C of the Customs Tariff and incorporated by reference into the Customs Act.

We are of the view that our description of proscribed pornographic material in the *Criminal Code* should be incorporated by reference in all other federal legislation which attempts to regulate such material. It will be essential to do so if we are to achieve the kind of concerted and consistent regulatory effort needed to deal with pornographic material. There must be a common understanding of what kind of material should be regulated and controlled.

As we have indicated in the course of our discussion of the Customs legislation in Section II, chapter 9, the existing qualitative words used to describe the character of what pornographic material is to be regulated by Customs, are "immoral or indecent". We want to be careful to point out (as we have in other areas), that while the incorporation of our *Criminal Code* recommendations concerning proscribed pornographic material into Customs legislation will more clearly define the material for those who are asked to classify it, our recommendations deal only with material that contains some kind of sexual activity. They do not extend to those materials which are, for example, violent and/or disgusting, but lacking in any depiction or description of sexual activity. The possibility exists that this kind of material is covered by the present description of "immoral or indecent" in *Tariff* item 99201-1. The short point is that the simple exchange of our criminal law recommendations with respect to pornographic material for the words of the present *Tariff* item, will leave out material that Canadians or their government or their regulators may want to prohibit from entry into Canada.

Recommendation 18

If, in administering the Customs Tariff, it becomes necessary for Customs to formulate descriptions of pornographic material more precisely than do our Criminal Code recommendations, Customs should put such formulations in the form of Regulations rather than internal policy guidelines or memoranda.

In order to better administer the *Tariff*, Customs may wish to formulate more precisely or more comprehensively descriptions of pornographic material. We do not think, however, that such formulation should be put in the form of policy guidelines or interpretive intra-departmental memoranda. We think, instead, that Customs should pass Regulations for posting at all regional offices. The Regulations should also be available to interested members of the public upon the payment of an appropriate fee. In our view, Regulations should be passed only after they have been published as proposals seeking public comment. This practice has been used to advantage by other regulators (notably the Canadian Radio-Television & Telecommunications Commission) as a useful vehicle to obtain public involvement and response.

Regulations can, of course, be amended if practice and experience requires. The fact that the contents of Regulations are public and easily accessible will help to ensure that interested members of the public are informed and appropriate pressure can be brought to amend the Regulations when necessary. The same advantages do not exist with respect to intra-departmental guidelines and memoranda.

Recommendation 19

The Criminal Code should be amended to provide that it be an offence to import into Canada pornographic material proscribed by the Criminal Code.

For the reasons that follow, we have concluded that it should be a criminal offence to import certain kinds of pornographic material. We point out that if our recommendations with respect to inclusion in the *Criminal Code* of various kinds of pornographic material are accepted, the offence of importing should extend only to that material should is proscribed, not the material that is regulated in terms of display and its availability to children.

Under the current regime, an importer of goods who is prepared to seek Customs clearance faces no risk if the goods are declared to be prohibited. The consequences of such a declaration are that the goods are returned to their source or are destroyed if abandoned by the importer.

It is only when an importer brings in goods which he fails to declare that a risk of criminal sanction arises under the *Customs Act* and the *Customs Tariff*.

As we have indicated in the chapters of this Report that describe the sources of pornographic material, it is clear that the vast majority of it comes from outside Canada. Under the present state of the criminal law, there is no real disincentive to the flow of material into Canada. It seems clear that the existing sanctions are, and will continue to be, inadequate to stop this flow.

The parallels between the pornography and the narcotics industries are compelling. The law has acted to attempt to address the problem of narcotics at the point where the material enters the country.[1] The sanction that the criminal law places on the act of importing narcotics has, in the opinion of many law enforcement officials, acted as a deterrent and has done much to stem the tide of narcotics. For some of the same reasons, we have considered the suggestion that the *Criminal Code* be amended to make it an offence to import the worst kinds of pornographic material into Canada.

The first concern that arises in making the importation of pornographic material an offence, is that by doing so we would be putting a premium on the material that is then produced in Canada. It would be a cruel irony if the result of creating the offence of importing pornographic material was to develop a domestic production industry. While we are sure that production would undoubtedly increase in Canada, we think that there are some factors which would confine that increase. Firstly, law enforcement authorities could anticipate the increase and tailor their efforts to respond to it. Pornographic material has caused sufficient concern within the country that producers cannot count on the apathy of either the public or law enforcement officials to insulate them from investigation and detention.

Secondly, the consumers of pornography are used to being able to acquire a product that is technically well produced. We assume that it would, therefore, take considerable investment to match the product that has traditionally been reaching the marketplace in Canada. That investment would, of course, be at risk upon detection.

Additional concerns arise when considering what defences could arise to a charge of importing. For example, should the mere fact of a Customs clearance be a complete defence?

On the basis of what we know of the operations of Canada Customs, it is clear that a huge volume of pornographic material goes undetected. We know that large shipments can be checked only randomly and that the illegal material could easily be secreted within a shipment of other goods. We also know that the largest portion of imported goods is cleared without any inspection whatsoever.

In these circumstances, we think that the simple fact of a Customs clearance should not be a complete defence to a charge of importing. We do think, however, that the fact of Customs clearance should be taken into consideration in order to determine whether the accused had the necessary guilty intent to commit the offence. For example, there is a great difference between the situation where Customs clearance is given under some mistake of failing to detect the material, and the situation where the material is specifically brought to the attention of a Customs officer and wrongly cleared. In the latter situation, the circumstances under which the clearance was sought and received would obviously be helpful in determining the intent of the accused.

Our criminal law provides that where there is a substantive offence, it will also be illegal to attempt to commit the substantive offence. This raises some further concerns about making importing pornography an offence. Should there be a conviction for attempting to import in those cases where a person declares pornographic material and the material is denied entry? Surely not. The attempt to commit the offence would, however, be complete if a person secreted pornographic material or attempted to enter the goods without proper disclosure.

Taking everything into consideration, we conclude that the *Criminal Code* should be amended by making it an offence to import proscribed pornographic material. It would be open to the Crown to proceed by indictment or summary conviction. The maximum penalty should be two years imprisonment.

Recommendation 20

> **Judges should be entitled to consider at the time of sentencing a person convicted of dealing in one manner or another with proscribed pornographic material that the person disclosed to law enforcement officers the source of the material in question.**

In our discussions with Customs and law enforcement officials, it became clear that information about the source of pornographic material is almost impossible to come by. Yet it is obvious that such information would considerably assist in the effort to control the importation and sale of proscribed or prohibited material. As a way around this difficulty, at least partially, it was suggested to us that the law should somehow oblige a person under investigation for dealing in one way or another with pornographic material to reveal the source of that material.

The objective of such an obligation would clearly be a desirable one. However, there is both a philosophical and a practical reason why, in our view, these suggestions cannot be acted upon. On the philosophical level, there is the concern that the imposition of such an obligation would conflict with the fundamental principle of our law, that persons cannot be compelled to make statements that might tend to incriminate them. If the source of the prohibited material was located in another country, identification of that source by either an accused or a convicted person would indicate that they had imported prohibited goods contrary to the *Customs Tariff* (or, if our third recommendation above were implemented, that they had imported prohibited material). While it is possible to provide that the information given could not be used in subsequent proceedings against the persons giving it, that would likely prove to be of little solace to them. On the basis of the information provided, the Crown might well be in a position to uncover other evidence that is admissible against them and convict them on that basis.

On the practical level, there is the obvious concern that the information given might be false or misleading. Or the person may genuinely not know or be able to identify the person from whom the material was obtained.

We believe that the only viable recommendation that we can make on this matter is that judges be encouraged to take into account at time of sentencing, the fact that the accused disclosed the source of the material. Prosecutors and judges alike would have to be careful that the accused did not mislead them, but if the information can be verified or if there is reason to believe that it is accurate, it seems to us appropriate that the accused should benefit to some extent from his willingness to disclose the information.

2. Administrative

The Customs Branch has a complex administrative responsibility. The volume of tariffs, procedures, clearances and sheer paper is enormous. The administration of Customs is further complicated by the fact that it is a national service in a huge country that depends heavily on trade. Canadians are among the most voracious consumers in the world and are proud of their reputation as a sophisticated trading nation. Our demand for goods is consistently high and with it comes corresponding demands on the Customs service.

We do not make these observations as an apology for Customs, but in order to indicate that by the nature of the function they have to perform, Customs is vulnerable to criticism. In one sense, Customs is something of an institutional scapegoat.

Our mandate has not been to conduct an exhaustive study into the administration of the Customs service. Certainly, we have not been able to do so. We have, however, had the chance to meet with Customs officials to ask specific questions about aspects of their service that relate to prohibited goods.

We hope that our suggestions are informed and will not be seen to be gratuitous. Most of our observations and recommendations arise from meeting with Customs officials and observing the process followed by Customs officers.

Recommendation 21

The federal government should give higher priority than it now does to the control of the importation of pornography.

In the discussion of the enforcement of Customs legislation, we noted our impression that the inability of Customs to stem the flow of pornography into Canada was due, in part, to the lack of political will. We were advised that greater emphasis has been given by the federal government to the enforcement of the rules and regulations that apply to automobiles and clothing than to the enforcement of Tariff Item 99201-1.

This ordering of priorities is, in our view, unacceptable. Surely it is more important to prevent the entry into Canada of a number of magazines that offend Tariff Item 99201-1 than it is to ensure that an article of clothing reveals its place of origin.

Ideally, the Committee would like to see additional staff taken on by Customs to improve the level of enforcement of Tariff Item 99201-1. Given the current government's program of restraint in government spending, that may not be realistic, however. If that is the case, then personnel and other resources that are now employed in other areas, should be transferred to those departments that have primary responsibility for the enforcement of Tariff Item 99201-1.

Ineffective enforcement of Customs legislation in this area is of particular concern, given that a very high percentage of the pornographic material available in Canada comes from other countries. Many of the people who appeared before us were clearly frustrated by the lack of success that Customs was, and is, having. The recommendation we make should assist in alleviating at least some of this frustration.

Recommendation 22

The basic 1977 policy guidelines on the interpretation of prohibited goods should be immediately revised to contain more precise and contemporary formulations of characteristics which must be present to make materials "immoral or indecent".

The very language used in the current policy guidelines (which are reproduced in the text) indicates the need for reform. The terms presently used in the guidelines reflect a dated notion of the kind of pornographic material that is widely available for distribution. We are aware that the Customs Branch agrees that the guidelines should be reformed and is in the process of doing so.

It is convenient to repeat here the views we expressed earlier about the advantages of using Regulations to give contemporary meaning to statutory language. The publication of proposals prior to the passage of Regulations will undoubtedly allow Customs to benefit from the public's notion of what Canadians currently think should be prohibited as immoral or indecent.

Recommendation 23

The jurisdiction to clear film and video recordings for importation into Canada should remain with Canada Customs. The jurisdiction to classify film and video recordings for sale or rent or public showing should remain with the provincial film classification boards.

Recommendation 24

Co-operation between Customs and provincial film classification boards should continue in order that the classification of film and video recordings can take place as part of a single, integrated administrative procedure.

Recommendation 25

Film or video recordings referred by Customs to provincial classification boards should remain in the continuous control of both agencies until the classification and clearance process is complete.

In Section II, Chapter 14, we have discussed the various reasons which led us to recommend that jurisdiction to classify film and video recordings should

continue to reside with provincial film classification boards. Some of the reasons have to do with the distinctively Canadian issues of culture and language, and others have to do with the immediacy of a relatively local classification system, when compared with what would likely be seen as the remoteness of a national system.

We think that most Canadians want to be able to hold any classifier to account for the decisions that are made. The reasons a classifier may give are perhaps better appreciated when explained in the specific locality where a film or video recording is actually to be shown or sold.

We think the present system of administrative co-operation between Customs and provincial classification boards should be nurtured and continued, and that it serves a useful purpose for the viewing public, the distributors of film and video recordings and, indeed, for Customs and the classification boards.

In order to prevent the possibility of allowing the entire Customs inspection system to be frustrated by the unauthorized copying of material pending ultimate Customs clearance, we conclude that film and video recordings to be classified should remain in the control of Customs until the clearance process is complete.

Specifically we think that the practice followed in Québec of allowing an importer to have custody of the material for classification should be stopped.

Recommendation 26

The management information services of Customs should be upgraded to provide an adequate central data base and the ancillary systems necessary to capture, store and retrieve information relating to the importation of prohibited material into Canada.

Recommendation 27

Customs should be adequately equipped to fulfill its responsibilities in contributing to the information flow required for an effective interface between the resources of Customs and law enforcement agencies.

As we have indicated in the preceding text, the current information system used by Customs is woefully inadequate. The Customs inspection system is highly decentralized and the information gathered from the system is disparate. Customs lacks even an adequate central data base. The information that does exist is difficult to put into the system and time-consuming to retrieve. Commodity specialists and other Customs officers given the responsibility to clear goods, are daily being asked to make quick and consistent decisions to determine if goods are prohibited by the *Tariff*. At the moment, they are simply not equipped to efficiently do so.

The immediate consequence of this lack of information resources is delay and inconsistency. The ultimate consequence is the inability of Customs to contribute appropriately to the other highly integrated gathering systems being

put in place by law enforcement agencies. If there is to be any really effective overall Customs enforcement in the area of prohibited goods, Customs must immediately acquire dedicated "on-line" information resources. Before Customs can be expected to give needed information to companion agencies such as the RCMP, it must be able to inform itself about its own operations.

Recommendation 28

Customs should investigate the practicality of charging appropriate fees for the filing and hearing of appeals from classification decisions.

As one method of helping to finance the kind of information mechanization that Customs requires, fees could be charged for the filing and processing of appeals. We think the fees should be set at a level that realistically attempts to compensate Customs for the administrative costs it sustains as a result of processing appeals. We do not think that the level of fees should be so unreasonably high as to frustrate the bringing of appeals.

We have no adequate way of knowing the likely cost of collecting such administrative fees. It may be that the costs involved would make our recommendation counter-productive. We simply suggest that Customs investigate the possibility of recovering some of its administrative costs so that more resources could be dedicated to the capital expenditures necessary to better equip the Customs Branch and to perform some of its clerical functions.

Recommendation 29

Customs, as part of a combined project to be undertaken with the Department of Communications and the CRTC, should examine the Customs implications involved in trans-border telecommunication of pornographic material.

None of the members of the Committee has a technical background and we are not equipped to assess the kind of sophisticated technological information that we received from time to time about trans-border telecommunications. We were told that the technology exists to transmit pornographic material by means of telecommunication so that pictorial material could, for example, be transmitted electronically from the United States and be reproduced in Canada. The best analogy we can think of is the telex equipment most people are familiar with.

We do not make this recommendation to promote speculation about state-of-the-art methods to transmit pornographic material, but rather to indicate that this technology appears to be the next generation to the well known telex and telecopier machines many people have in their offices. The transmission of information in the way that has been described could, of course, completely bypass the existing scheme of Customs inspection. One of the challenges Customs faces in the next decade will be to determine how to manage and control material transmitted by technology.

Footnotes

[1] Section 5 of the *Narcotic Control Act*. 1960-61, c.35, provides:

(1) Except as authorized by this *Act* or the regulations, no person shall import into Canada or export from Canada any narcotic.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but not less than seven years.

Chapter 22

Canada Post

Earlier, we reviewed the overlapping and, to some extent, competing jurisdictions of the Customs and Postal services. We have no desire to enter the controversy about what international mail Customs can or should inspect. In any event, the controversy would appear to have been resolved. The agreement that Customs may inspect mail weighing more than 30 grams is awaiting legislative confirmation when the proposed new *Customs Act* is reintroduced in Parliament.

Our recommendation is addressed to the level of co-operation that must necessarily exist between the two services and the RCMP if there is to be an effective overall effort to control prohibited goods sent to Canada by mail. As we have recorded earlier, Customs and the RCMP are exchanging information and now supply information to a common data bank. This quite recent development is really just an extension of the other formal arrangements that have been made with respect to a division of responsibility for investigation and enforcement under the Customs legislation. The relationship between the Customs Branch and the RCMP appears to be comprehensively structured and well managed.

The same cannot be said about the involvement of the Postal service. It appears to have adopted a completely passive role. No priority has been assigned to the investigation of the transport of pornographic material in either the domestic or international mail. It appears that the postal service has been content to allow Customs and the RCMP to assume complete investigatory and preventative roles. The best information that we have is that while the postal service is provided with available compiled data by the RCMP and Customs, the flow of information is entirely one way. This apparent disinterest seems to be unique to Canada. While we have no comprehensive knowledge of the subject, it appears that in both the United States and countries in the Commonwealth there is an integrated co-operative effort involving Customs, the Postal service and the appropriate law enforcement agencies.

Recommendation 30

The Postal service should assign policy and administrative priority to the effective control of distribution of pornographic material by mail. We further

recommend that the postal service actively participate with the RCMP and the Customs service in gathering and exchanging information and data in an effort to better co-ordinate effective investigation and enforcement techniques to control the distribution of pornographic material by mail.

Chapter 23

Broadcasting and Communications

Our recommendations relate to aspects of the policies and procedures followed by the CRTC and to initiatives which Canada should be taking nationally and internationally.

Recommendation 31

The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into Regulations passed or to be passed by the CRTC pursuant to the Broadcasting Act with respect to all broadcast media.

We point out that we are referring in this recommendation, only to the pornographic material that is proscribed under tier 1 and tier 2 of our proposed *Criminal Code* amendments and not to the material that is simply limited by display.

This recommendation raises two points, one large and one small. The small point is this: at present, the Regulations for AM and FM Radio Broadcastings, and publicly broadcast television, prohibit the broadcast of "anything contrary to law" and any obscene language or pictorial presentation. Accordingly, the broadcast of any material that violates the *Criminal Code* would constitute a breach of the CRTC's Regulations and could lead to the Commission imposing sanctions. As we have already pointed out, the same prohibitions do not appear in the Pay Television Regulations. In our view, the prohibition must appear in these Regulations if the Commission is to be able to move against a licence in the event of a breach of the criminal law.

Perhaps the reason for the omission has to do with the fact that pay television is a limited specialized subscriber service. Or, perhaps the reason for the omission has a great deal to do with the confused state of Canada's obscenity laws. If it is the former, we can see no valid reason to allow the broadcast of any illegal material on any media. If it is the latter, we think our recommendations with respect to what material will be illegal under the *Code* will help to bring the necessary certainty to the law.

In any event, we are of the view that the pay television Regulations should be amended so as to conform with the Regulations that have been passed with respect to free public radio and television broadcasting.

In the result, pay television broadcasters would face precisely the same consequences as all public broadcasters face if they choose to broadcast illegal material.

The larger point that is raised by this recommendation is that if our proposed *Criminal Code* amendments to proscribe pornographic material are incorporated by reference into the existing broadcast Regulations, the utility of the existing Regulations prohibiting obscene or indecent language or pictorial representation will have to be re-examined. Our recommendations covering proscribed pornographic material apply to material that depicts some kind of sexual activity. Material that is violent or disgusting but which has no sexual aspect to it, is not proscribed by our recommendations. If this material is to be prohibited from broadcast, the Regulations to the Broadcasting Act will have to be appropriately redrawn.

Recommendation 32

Canada should take the initiative to immediately open discussions on the international regulation of both public broadcasting signals and private signals emanating from fixed satellite services.

It would be entirely inconsistent for Canada to regulate pornographic and/or abusive programming domestically and do nothing about the regulation of such programs when they are received in Canada, but originate in another country. We can understand the important principle of national sovereignty and we are convinced, therefore, that any such international regulation will be achieved only as a result of agreement between sovereign countries. The most pressing need is for discussions to begin with the United States. Both countries have experience with comprehensive domestic regulation and both countries must surely understand the urgency for joint action to regulate pornographic program content. Both countries are members of INTELSAT, the global satellite system. We hope that Canada and the United States will jointly sponsor discussion of this issue in that international forum.

Recommendation 33

The CRTC should conduct the appropriate research into and promote appropriate public discussion about technology capable of scrambling and descrambling satellite signals, in order that there can be a measure of practical control over the transmission and reception of satellite signals.

We hope that the international regulation we speak of in our Recommendation 32 will not be too long in coming. However, the issue of the reception of satellite signals that contain pornographic material is too urgent to remain untreated pending an international agreement on regulation. In the meantime, we agree with the private views expressed by the Chairman of the CRTC and quoted earlier. We hope the CRTC will help to facilitate necessary further technological research in this area. The Commission's mandate under the *Broadcasting Act* includes the following power:

> 18.(1) The Executive Committee may undertake, sponsor, promote or assist in research relating to any aspect of broadcasting and in so doing it shall, wherever appropriate, utilize technical, economic and statistical

information and advice from the Corporation or departments or agencies of the Government of Canada.

If it is determined that there is an affordable technological method whereby those who own satellite antennas can prevent the reception of unwanted signals, we are sure the Commission will make that fact well known. We have no doubt, based on the submissions that have been made to us, that a large number of Canadian parents hope that such technology will be available to protect their children from unwanted and intrusive pornographic broadcasting.

Recommendation 34

Upon the issuing or renewal of a broadcast licence, a licensee should be required to post a bond in an appropriate amount to ensure compliance with the Regulations and conditions of licence relating to program content. In the event that a complaint about program content is upheld by the CRTC, the Commission should have the discretion to compensate the complainant for the costs incurred in presenting the complaint, such costs to be paid the licensee and secured by the aforesaid bond.

As we have mentioned, the CRTC cannot and does not monitor all programs either by way of pre-clearance or by way of on-air observation. Concerned members of the public may, therefore, decide that it is in the public interest to have programs monitored. Such an effort may well be required to properly document a complaint to the Commission, particularly if the complaint relates to some systematic behaviour by a licensee.

In our view, a successful complainant should be compensated (not rewarded, but compensated) for the reasonable costs involved in accumulating and presenting the necessary evidence. In addition we think that the reasonable hearing costs of the successful complainant should be paid.

We do not think that these costs should be paid by the public.

We think that the licensee against whom the complaint has succeeded should be obliged to pay the costs of the complaint.

In order to make the proposal work, the Commission must be given the jurisdiction it now lacks, both to award costs and determine their amount. Such jurisdiction can only arise upon amendments being made to the appropriate legislation.

As security for the payment of costs, all licensees could be required by the CRTC to post a bond or equivalent security or other financial instrument at the time a licence is issued or renewed. The posting of such an instrument would prevent the penalty that would clearly arise if a licensee was required to post a cash amount.

In any civil litigation the successful party is entitled to some compensation for costs. In quasi-judicial situations a system of compensation for costs is also well-known. Although the analogy is not perfect, human rights commissions in

Canada have the power to award costs. The various commissions actually provide the facilities and the staff for a complainant to pursue a remedy. If the complainant makes use of these facilities, costs will not be awarded to a successful complainant. If, however, the complainant obtains private counsel, costs may be awarded in the discretion of the tribunal. If the commission is of the view that the complaint was frivolous, it can award costs to a respondent.

In the case of complaints to the CRTC, it might well be argued that the Commission should have the jurisdiction to award costs to a licensee who has been successful in defending a complaint. However, it must be remembered that the Commission has the discretion to decide whether a complaint will proceed and whether there should even be a hearing. In these circumstances, we think that it is sufficient to give the Commission the power and the discretion to award costs only to the complainant.

Chapter 24

Human Rights Approach

1. Introduction

There was considerable interest expressed at the Committee's hearings in treating pornography as a human rights issue. Proponents of this approach did not, for the most part, make detailed proposals about how this might be accomplished in the Canadian context. Their submissions, however, stressed a number of interrelated themes.

The first such theme emerges from the endorsement of the concept of pornography as defined by Helen Longino, Andrea Dworkin and others. Pornography is seen as involving, and may indeed inspire, the hatred of women. It is a powerful part of society's repression of women. As such, it is seen as an evil which limits the full human rights and dignity of women and, correspondingly, as an evil most appropriately attacked by means of the legislation already existing in our society to further human rights and dignity. Hence the call to use human rights legislation, and the enforcement mechanisms of human rights commissions, to attack pornography.

Proponents of the human rights approach cite as the best example of use of this method the by-law drafted by Andrea Dworkin and Catharine MacKinnon. Proposed for the City of Minneapolis and later enacted in Indianapolis, this by-law has a number of features which bear examination.

The by-law explicitly states that pornography is a form of discrimination on the basis of sex. The rationale for this characterization is spelled out in the by-law: pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women; the bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment and almost all other areas.[1] The framers of the by-law, Andrea Dworkin and Catharine MacKinnon, maintain in fact that the influence of pornography over the ages on the men who rule societies has contributed to the development of misogynist (women-hating) social

institutions. Only now, however, that changes in technology and the market have made pornography widespread have we begun to understand its impact.[2]

The Indianapolis by-law articulates one of the city's objectives as "to prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography".[3] The by-law is specifically directed at three distinct activities: trafficking in pornography, coercion into pornographic performances, and forcing pornography on a person.

With regard to trafficking, the by-law provides that the production, sale, exhibit or distribution of pornography is discrimination against women by means of trafficking in pornography, and gives to any woman a cause of action under the by-law "as a woman acting against the subordination of women." Any man or transsexual who alleges injury by pornography in the way women are injured by it is also given a cause of action.[4] The formation of private clubs or associations for purposes of trafficking in pornography is illegal.[5] This cause of action is the most far-reaching in the by-law. The position is that the public availability of the pornography, as defined in the ordinance, is in and of itself a violation of women's rights to equal personhood and citizenship. It would seem that a remedy would be available on the mere showing that the pornography is within the definition in the by-law, without a further showing of damage personal to the complainant.

Any person who is coerced, intimidated or fraudulently induced into performing in pornography is given a cause of action against the maker, seller, exhibitor, or distributor of the pornography for damages, and for the elimination of the products of the performance from public view.[6]

Any person, who has pornography forced on him or her in any place of employment, in education, in a home or in any public place has a cause of action against the perpetrator or institution.[7]

In addition to these three provisions, the by-law confers on any person who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography a cause of action for damages against the perpetrator, maker, distributor, seller, and exhibitor, and for an injunction against further exhibition, distribution or sale of the specific pornography.[8]

The by-law contemplates that the person may assert these causes of action in either of two forums. The municipal Office of Equal Opportunity is empowered to receive a complaint. Once the complaint has been filed, the by-law provides for an investigation, and for an informal conference in an effort to eliminate such practice if there is reasonable ground to believe that a breach has occurred. If the complaint is not resolved informally, the Complaint Adjudication Committee may hold a public hearing. The board may seek judicial enforcement of its decision if a respondent fails to comply with it. Recourse to the courts also arises in another way. The complainant may seek temporary equitable relief through the courts upon the filing of a complaint.

2. The Canadian Context

It is worthy of note that some of those who supported the idea of a civil remedy for pornography appeared to do so as much for procedural reasons as for the substantive ones on which the Indianapolis by-law is based. The Committee received complaints that police or Crown Attorneys were refusing, for various reasons, to bring charges in connection with material considered obscene by citizens. The Crown's decisions not to prosecute are difficult to circumvent. They cannot be reviewed by a court, and may for practical purposes be difficult to reverse by means of political pressure.

There are difficulties in bringing private prosecutions. They may be stayed by the Crown with no opportunity for the person bringing the prosecution to have the Crown's decision to enter a stay legally reviewed. Other cases may require investigative and financial resources beyond the reach of many. The burden on the private prosecutor is the same as the burden imposed upon the Crown, proof of guilt beyond a reasonable doubt.

In a civil action, proceedings are not dependent on the Crown's volition: the parties themselves have control of the matter. The standard of proof is not nearly so high. Instead of proof being established beyond a reasonable doubt, the case need be proven only on a balance of probabilities. It must be acknowledged, however, that those who proceed with civil actions face the need to pay legal bills, not only for their own counsel, but also for the opposing party should the action be unsuccessful. However, it is thought that involvement of human rights commissions where complainants are not required to pay legal costs, may alleviate that particular disadvantage.

Evaluating the usefulness of the civil action approach in the Canadian context thus requires a consideration not only of the important substantive issue raised by its proponents, but also of the features which make it attractive from a procedural point of view.

Before assessing the civil action option from both of these points of view, we review briefly the availability in Canadian law of recourse like that set out in the Indianapolis by-law.

2.1 Canadian Law

In Canadian law, recourse for some of the harms attacked in the Indianapolis by-law may be available, but with two important differences from the by-law. Firstly, the recourse may be somewhat indirect, compared with the straightforward spelling out of remedies in the by-law. Secondly, problems of proof of harm will in many cases be more difficult in Canadian law than is contemplated in the by-law. Some examples are outlined here.

Take, for instance, the relief conferred by the by-law for someone coerced, intimidated or fraudulently induced into performing in pornography. In

Canadian law, it may well be possible for someone in this position to sue for damages for fraudulent misrepresentation, or for defamation. In an appropriate case, the court may be prepared to grant an injunction to stop the publication or distribution of the material complained of. Depending on the circumstances, criminal charges may be brought against the person wrongfully bringing about the participation in pornography.

The Indianapolis by-law, however, contains a number of stipulations withdrawing certain defences to an action for wrongfully involving a person in the production of pornography. Among the possible defences withdrawn are: that the person actually consented to a use of the performance that is changed into pornography; that the person knew that the purpose of the acts or events in question was to make pornography; that the person demonstrated no resistance or appeared to co-operate actively in the photographic sessions or in the sexual events that produced the pornography; and that the person signed a contract, or made statements affirming a willingness to co-operate in the production of pornography.[9] Doubtless it is the withdrawal of these potential defences which makes this aspect of the by-law attractive to its proponents, for each of these defences is open to abuse by an unscrupulous person who is truly manipulating another into appearing in pornography.

The Indianapolis by-law confers on any person who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography, a cause of action for damages against its perpetrator, maker, distributor, seller and exhibitor. It is not unlikely that, even without such a by-law, this type of action might succeed if brought in Canada. The person suffering such damage could bring a civil action. Depending on the facts of the case, the victim could allege either that the infliction of harm was intentional, or that it resulted from negligence on the part of the party being sued. The potential of bringing this type of action was raised during the public hearings. It was pointed out that negligence concepts are now being extended to situations where, for example, a tavern keeper who knew a customer was too drunk for safety but allowed him to depart the premises was held responsible for damages arising when the customer was hit by a car on the side of the road.[10]

The difficulties involved in pursuing an action for damages for harm caused by pornography would be primarily ones of causation and proof. It would have to be established that the injury was caused by the pornography. We have been told during our hearings of two kinds of cases where this might be possible. Workers from shelters for battered women report being told by some clients that their male friends or spouses required them to participate in acts of violence imitating images seen by the men in pornographic magazines. Some cases of violent crimes against women where the perpetrator was found to have a supply of violent pornography were drawn to our attention. In either type of case, assuming that the facts could be proved, it may be possible to bring this type of action.

Of course, a typical defence might allege that a different cause altogether was responsible for the actions; in the case of a psychopathic-type murder, for

example, an accused who had manufactured pornography would likely advance the murderer's mental condition as the direct cause of the crime. The negligence action might face another hurdle, that of establishing that in law, the victim or potential victim of pornography should have been in the contemplation of the defendant. Establishing such a proposition might well involve canvassing in court the substantial experimental literature on the links between pornography and violence discussed in Section I, chapter 6 of this Part.[11]

All in all, however, it can be said that there is little in the Indianapolis by-law itself which would eliminate problems like the foregoing in an action brought pursuant to the by-law. To that extent, it may be said that the position in Canadian law is comparable to that explicitly provided for on this point by the by-law.

A provision of the by-law which has caused great interest in Canada is the action for damages and injunctive relief which may be brought by any woman complaining of trafficking in pornography. The proceeding does not require a showing of actual harm. Upon proof that the material is within the definition of pornography, it is taken that the harm is made out. Thus, it can be said that the by-law confers a private cause of action to restrain or redress a public wrong. The possibility of using human rights procedures in this fashion has prompted considerable interest in Canada.

It should be pointed out at this point that using the private action to redress a public wrong has not, until now, been a prominent feature of Canadian law. It is the Attorney General who must ordinarily sue to redress a public wrong. An individual who seeks to act in this fashion must secure the Attorney General's permission so to proceed, and the Attorney General's decision to grant or withhold such permission will not be reviewed by the courts.[12] Only if the individual has suffered some personal harm above that which has been sustained by members of the public generally can he or she proceed with a private action without official permission.

In fact, it is rare that even the Attorney General will proceed against a public wrong by way of a court action. Ordinarily, the recourse for public wrongs is by way of the criminal law, or a proceeding under the appropriate regulatory statute.

We think that a lot of the interest in the Indianapolis by-law approach really derives from Canadians' dissatisfaction with the administration of the criminal law relating to pornography. The ability of any private citizen to set in motion the legal process was frequently mentioned as an attractive feature of the by-law approach. To the extent that deficiencies in the criminal law, be it administration or substance, have prompted the recommendation to emulate the Indianapolis approach, we prefer to address directly the deficiencies in the criminal law rather than create a new form of civil action to redress a public wrong.

It must be said, however, that not all of the interest in the by-law approach originates with complaints about an unresponsive criminal justice system. As a matter of substance and principle, many proponents of the by-law approach find attractive the argument that pornography is a form of discrimination against women. The degradation of pornography is seen as the kind of affront to human dignity which is properly the subject matter of a human rights complaint. On principle, then, it is argued that the appropriate authority to deal with pornography is that having jurisdiction over human rights. Incidentally, it is noted that human rights enforcement procedures contain the attractive feature of being relatively open to all and inexpensive for the individual.

It is worthwhile to note at this juncture that human rights authorities in Canada are already, to a certain extent, dealing with pornography-related complaints, in ways similar to those contemplated by the Indianapolis by-law.

The by-law, for example, provides that any person who has pornography forced on him or her in any place of employment, in education, in a home or in any public place has a cause of action in court, or before the human rights authorities, against the perpetrator or institution. The complaints of unwilling exposure to pornography in employment, education or a public place may find redress under existing Canadian human rights codes, as we discuss in Section II, Chapter 13.

The decision of the Board of Inquiry in the *Red Eye* case, which we discuss in Chapter 13, and the Saskatchewan legislation under which it was made, are significant for a number of reasons. As the Board itself points out, there is no need under the *Human Rights Code* provision to apply the "community standards" test of obscenity.[13] Nor is there any necessity to demonstrate that the person alleged to have violated the section had an intent to belittle or offend. In these two important respects, the burden facing a complainant is less under the human rights provision than it would be under the *Criminal Code*. The decision itself is significant because of its clear recognition that material like that at issue in the case should be seen as violating the equality rights of women guaranteed by *Charter of Rights*. It is an important step in the development of women's legal and constitutional position to have the equality guarantees recognized as being of equivalent constitutional force to the long recognized freedom of expression guarantee.

An appeal of the *Red Eye* decision has been launched. Whatever may be its outcome, a very useful way of approaching the issue of pornography has now been put on the public agenda. There may be some cause to expect that the constitutional validity of the Saskatchewan provision may be upheld by the Court. Mr. Justice Quigley of the Alberta Court of Queen's Bench ruled in *R. v. Keegstra* that in assessing the validity of s. 281.2 of the *Criminal Code* (dealing with so-called hate propaganda), the Court should consider not only the guarantee of freedom of expression in paragraph 2(b) of the *Charter* but also the guarantee of equality conferred by section 15 and the protection of multicultural rights conferred by section 27.[14] This is the same basic approach

as that taken by the Board of Inquiry. Should this approach be followed by the Saskatchewan Court, the Board's decision may well be upheld.

In light of the position taken by the Court in *Keegstra*, there is some reason, indeed, to hope that a human rights statute like the Saskatchewan one will not suffer, in Canadian constitutional law, the same fate as did the Indianapolis by-law in the United States District Court. In a decision rendered in November, 1984, Judge Sarah Evans Barker declared the Indianapolis by-law to be invalid.[15] Among the major reasons for the decision was the position in American constitutional law that only "obscene" speech falls outside the protection for freedom of expression conferred by the First Amendment. Where laws impinge on speech that is not obscene, the state must show that they serve a compelling state interest, which is equivalent to the interest served by the First Amendment. Otherwise, the law will be unconstitutional.

Judge Barker held that the type of images prohibited in the Indianapolis by-law went beyond the legal definition of obscenity, a concept that is founded on the ideas of sexual prurience. In justification of the incursions into the area of so-called "protected speech", the city argued that the by-law served the compelling interest of protecting women from discrimination. This argument was rejected, largely on the basis of the moderate level of protection which has traditionally been afforded in American constitutional law against gender-based distinctions in law.

In Canadian constitutional law, we suggest, the *Charter of Rights* makes it clear in sections 15 and 28 that equality of women is a strongly protected value. Mr. Justice Quigley's analysis on this point, focusing on section 15 as a counterbalance to section 2, is, in our view, to be preferred in the Canadian context to the reasoning of Judge Barker.

This Committee was urged to recommend that provisions along the lines of the Saskatchewan hate literature provision be included in other Canadian human rights codes. We have considered the recommendation carefully, because we find attractive the rationale underlying the Saskatchewan decision. Pornography is, to our minds, an offence against human dignity and the guarantee of equality.

We have reservations, however, about the appropriateness of including a remedy aimed specifically at pornography solely within the jurisdiction of human rights commissions. These reservations stem in large part from our concerns about the nature of the commissions' process.

Typically, the receipt of a complaint initiates a process of investigation by a Commission. Most human rights commissions have a statutory obligation to attempt conciliation of a complaint before proceeding to the stage of a formal hearing. Until the complaint reaches a formal hearing stage, it can be expected that there will be little or no publicity from the commission about the issues or the progress of the case, since the investigation and conciliation phases are

characterized by obligations of confidentiality. Often, the investigation and conciliation phase will be long. The *Red Eye* complaint, for example, was initiated in July of 1980. It was not until September, 1981 that the Board of Inquiry which would hear the complaint was named. The Board's decision emerged in March, 1984. The offending issues of the *Red Eye* had been published in 1979 and 1981. If the commission takes the view that the complaint should not lead to a public hearing, the complainant has limited recourse.

These disadvantages in the human rights procedure may well be balanced against its perceived advantages to the complainant, namely, that the commission bears the cost of the proceedings, and that anyone by making a complaint can oblige the commission to take some sort of action. One must also bear in mind, however, the negative aspects of even these perceived procedural advantages. Human rights commissions often experience difficulty in receiving enough funding to meet the demands placed upon them. In our view, one must consider carefully the financial implications of adding to commission jurisdiction a ground of complaint that may produce substantial numbers of new cases. Not only the ability to service the new caseload, but also the possible jeopardy to the commission's ability to meet existing demands upon it should be considered.

Given the interest in this issue and this remedy shown in our public hearings, the volume of material which is felt to be offensive, the relative ease of launching a complaint and the dissatisfaction with the responsiveness of existing enforcement authorities, we predict that there may be frequent resort to the human rights jurisdiction. The influx of new cases could have quite serious implications for commission funding. Unfortunately, the current climate of fiscal restraint in government circles has affected human rights commissions and other social agencies. One has little cause to hope that even a wave of anti-pornography popularity could provide enough new revenue to allow both the new and existing caseload to be serviced.

A further difficulty with the commission process has a serious bearing on the suitability of a commission to handle pornography complaints. Human rights commissions cannot give interim relief. They could not, for example, prevent the distribution of a particular publication pending resolution of a complaint, or take other similar steps to meet a crisis in the short-term period while a complaint was being processed. Much pornography about which persons will likely complain is contained in magazines with monthly issues. Thus an offending issue could be widely distributed, to the considerable enrichment of its publisher and wholesaler, long before a resolution of the complaint had been effected. By the time the remedy had been decided upon, the consumers of the original material could well have forgotten it, so that any retraction or apology would be almost totally meaningless. The court's process, on the other hand, offers the possibility that effective pre-trial measures would be available in a proper case, to take the material out of circulation immediately.

Given these concerns, we refrain from urging that provisions like subsection 14(1) of the Saskatchewan *Code* be inserted into all human rights legislation. We do, however, believe that it would be most beneficial for human rights commissions to explore vigorously the application of their existing legislation and jurisprudence to pornography issues. The application of the existing employment jurisprudence to control the presence of pornography in the workplace has already been mentioned. So, too, has the need to develop the same kind of approach in the area of services and facilities. In our view, it is important that commissions become active in putting issues concerning pornography on their existing agendas, but we are not confident that they will be able to handle a large number of complaints basically unrelated to their traditional areas of endeavour. The requirement of handling complaints arising from the large numbers of periodicals with pornographic content, or which people think have pornographic content, would, in our view, seriously overbalance commissions without producing much useful or timely resolution of issues.

Recommendation 35

Human rights commissions should vigorously explore the application of their existing legislation and jurisprudence on pornography issues, including exposure to pornography in the workplace, stores and other facilities. However, we do not recommend that a separate pornography-related offence be added to human rights codes at this time.

We believe that a good alternative to the use of human rights commissions as adjudicators of pornography issues can be brought into existence reasonably expeditiously. We recommend that jurisdictions enact by legislation a civil cause of action focusing on the violation of civil rights inherent in pornography. There now exists in Canadian law at least a partial model for such a cause of action. The *Civil Rights Protection Act, 1981*,[16] of British Columbia, creates a class of "prohibited acts". In subsection 1(1) of the *Act*, "prohibited act" is defined as "any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting:

(a) hatred or contempt of a person or class of persons, or

(b) the superiority or inferiority of a person or class of persons in comparison with another or others,

on the basis of colour, race, ethnic origin or place of origin."

The *Act* provides in subsection 1(2) that a prohibited act is a civil wrong (tort) that can be the subject of a claim by a person or class of persons, without the necessity of the complainant proving that any actual damage was suffered. Section 3 of the *Act* allows the Court to award damages and an injunction in appropriate cases.

It may actually be possible to use this act now as the basis for an action against pornography featuring demeaning racial stereotypes. Examples of such material were presented to the Committee during the public hearings; it is certainly within the bounds of possibility that it could be held to promote

hatred or contempt of a person or class of persons or the inferiority of that person or persons in comparison with another or others.

Recommendation 36

> **Legislation along the lines of the Civil Rights Protection Act, 1981 of British Columbia should be enacted in all Canadian provinces and territories to provide a civil cause of action in the courts in respect of the promotion of hatred by way of pornography, and the existing British Columbia Act itself should be extended to cover the promotion of hatred by way of pornography.**

We are not going to offer here an elaborate draft statute, because we are aware that there may be many ways of effecting this basic purpose. One simple way would be to add "sex" or "gender" to the definition of "prohibited act" in subsection 1(1) of the *Act*. Another proposal that has been made is to add to the *Act*, a definition of pornography which is very close to that found in the Indianapolis by-law,[17] but it may be that others favour a less particular statute.

However the drafting may be done, we are convinced that to enact this sort of legislation would confer a cause of action which has many of the attractive features of the human rights approach. It is an action which does not need the approval of the Crown or Attorney General, and will be controlled by the party suing rather than a human rights commission. It will be conducted in a public forum. It will probably take no longer to prosecute than a human rights complaint, and could take less time. The cause of action reaches the nub of what is offensive about pornography, and the remedies seem flexible. This type of action does not foreclose the prospect of bringing an action for intentional harm or negligence against the purveyor of pornography when a link between pornography and actual harm can be established.

It seems that the most unattractive feature of the *Civil Rights Protection Act* approach is that the costs of the action must be borne by the party and not by the state, as would be the case with a criminal prosecution or a human rights complaint. Individuals confronting a pornography distributor with substantial resources might well be deterred by such a prospect, particularly when it is remembered that a successful defendant might recover a large part of its legal costs from an unsuccessful plaintiff.

In our view, however, this cost consideration should not overbear the recommendation to institute this type of action. The "class action" feature gives some useful possibility of spreading the costs among numbers of persons with similar interests. The availability of injunctive relief means that the object of the lawsuit — restriction of the circulation of a particular periodical, for example — may be achieved without protracted proceedings. Alternatively, the prospect of such relief being obtained might encourage settlements. Negotiations for such settlements would be under the control of the plaintiffs, rather than the human rights commission, and the results of such settlements could be made public so as to serve as a deterrent for other pornographers. Although, then, there are some cost disadvantages in the private action method, we think that on balance this is a desirable option.

We note that the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society proposed in its 1984 report *Equality Now!* that civil actions against discriminators be permitted as an alternative to human rights proceedings.[18] In our view, even if the legislatures should decide that human rights commissions should have an explicit 'pornography' jurisdiction like that in subsection 14(1) of the *Saskatchewan Human Rights Code*, the civil action described above should be available as an alternative. That will ensure that persons or groups with the resources and the inclination to pursue it will have a real choice of forum.

Recommendation 37

Even if legislatures decide to include in human rights codes a specific pornography-related provision, we recommend that the civil cause of action described in Recommendation 36 be provided as an alternative.

Footnotes

[1] An ordinance of the City of Minneapolis Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights, Section 1 (amending Section 139.10 of the ordinance).

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

[3] City — County General Ordinance No. 24, 1984, Section 1, which amends section 16 of the Code of Indianapolis and Marion County. See, in particular, the new s. 16-1(8). (Hereinafter referred to as Indianapolis By-law.)

[4] Indianapolis By-Law, section 1; see the new s. 16(4)(C).

[5] Indianapolis By-Law, section 1; see the new s. 16(4)(B).

[6] Indianapolis By-Law, section 1; see the new s. 16(5).

[7] Indianapolis By-Law, section 1; see the new s. 16(6).

[8] Indianapolis By-Law, section 1; see the new s. 16(7).

[9] Indianapolis By-Law, section 1; see the new s. 16(5)(A).

[10] *Jordan House* v. *Menow and Honsberger* (1973), 38 D.L.R. (3d) 105 (S.C.C.).

[11] Several actions have been brought in the United States by persons seeking to hold a broadcaster responsible in damages for harmful results of actions allegedly inspired by the broadcast. In *Weirum* v. *RKO General, Inc.* 15 Cal.3d 40 (1975), the California Supreme Court upheld a jury finding that a Los Angeles rock radio station was liable for the wrongful death of a motorist killed by two teenagers participating in a contest sponsored by the station. In *Olivia N.* v. *National Broadcasting Co.*, 126 Cal.App.3d 488 (1981) the California Court of Appeals upheld dismissal of a suit on behalf of a young girl who had been raped with a plunger by a group of youngsters emulating a scene shown in a television program. The parents of a 13 year old who accidently hanged himself while trying a stunt he had seen on the Johnny Carson show failed to recover damages in *DeFilippo et al* v. *National Broadcasting Co., Inc. et al.*, 446 A.2d 1036 (1982, Supreme Court of Rhode Island). In all of these cases, the powerful First Amendment protection of freedom of expression caused the court to apply the standard of whether the material had "incited" the conduct, rather than whether the broadcaster had been reckless or negligent.

[12] *Gouriet* v. *A.-G.*, [1978] A.C. 435 (H. L.).

[13] *Saskatchewan Human Rights Commission* v. *The Engineering Student's Society, University of Saskatchewan et al.* 7 Mar. 1984 unreported (*Red Eye Decision*) at 42.

[14] *R.* v. *Keegstra* 5 Nov. 1984 (Red Deer) unreported (pretrial hearing) at 20-23.

[15] *American Booksellers Association Inc., et al.* v. *Hudnut et al.*, No. IP 84-791C (Dist. Indiana Nov. 19, 1984). Judgment of Judge Sarah Evans Barker.

[16] S.B.C. 1981, c.12.

[17] Proposed by the Women's Committee of the Faculty of Law, University of British Columbia.

[18] Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!* (1984, Supply and Services Canada, Ottawa) at 77.

Chapter 25

Hate Literature

We have discussed in the previous chapter the proposals we recei remedy against pornography be provided by way of human rights legi is now the case in the province of Saskatchewan. The basis of this t the belief that pornography inhibits the equality of women, and thei opportunities in economic and political spheres, by inculcating in s idea of women's subordination. Inherent in the idea of pornography a rights issue is the idea that pornography causes, or at least reflects, tendency to hate women. The belief that pornography and the mi society are closely inter-related has given rise to the argument that phy is hate literature against women. Some are sure that this for literature can best be dealt with by means of human rights cor Others advocate stronger measures, namely the amendment of message provisions of the *Criminal Code* so as to include protection characterized by sex or gender.

The provision at the focus of these submissions is section 28 *Criminal Code:*

> (1) Every one who, by communicating statements in any public incites hatred against any identifiable group where such incitement is to lead to a breach of the peace, is guilty of
>
> (a) an indictable offence and is liable to imprisonment for two yea
>
> (b) an offence punishable on summary conviction.
>
> (2) Every one who, by communicating statements, other than in p conversation, wilfully promotes hatred against any identifiable group is of
>
> (a) an indictable offence and is liable to imprisonment for two yea
>
> (b) an offence punishable on summary conviction.

Subsection (2) of this provision has been most particularly applicable to pornography. In section 281.2, and the related sec dealing with the advocacy or promotion of genocide, "identifiable defined as "any section of the public distinguished by colour, race, ethnic origin".[1] Those who say that this section should be amended t pornography propose that "sex" be added to this list.

Section 281.2 was the subject of comment by the Special Parlia Committee on Participation of Visible Minorities in Canadian Socie 1984 report, *Equality Now!*. The Committee recommended that su 281.2(2) be amended so that it is no longer necessary to show that an specifically intended to promote hatred.[2] This recommendation was a by then Justice Minister MacGuigan in June, 1984. He announced word 'wilfully' would be removed from subsection 281.2(2).[3] Most groups who addressed this issue in our hearings also favoured the rer this requirement for specific intent.

Another recommendation of the Special Parliamentary Committ with the defences available to a charge under subsection 281.2(2). At section 281.2(3) of the *Code* provides:

> (3) No person shall be convicted of an offence under subsection (2)
>
> (a) if he establishes that the statements communicated were true;
>
> (b) if, in good faith, he expressed or attempted to establish by argun an opinion upon a religious subject;
>
> (c) if the statements were relevant to any subject of public interest, discussion of which was for the public benefit, and if on reason grounds he believed them to be true; or
>
> (d) if, in good faith, he intended to point out, for the purpose of rem matters producing or tending to produce feelings of hatred tow an identifiable group in Canada.

The Special Parliamentary Committee pointed out that it is now u whether the burden of raising these defences is on the accused at all t whether the Crown must discharge the burden of disproving a Accordingly, it recommended that the *Code* be amended to make it c the burden of raising special defences is on the accused. The Co rejected proposals that the defences set out in paragraphs (b), (c) an subsection 281.2(3) be removed.[4] Justice Minister MacGuigan also agr the Parliamentary Committee's recommendations on the burden of p defence. In June of 1984, he announced that it would be made clear burden is on the accused.[5]

The Special Parliamentary Committee also recommended the de the requirement that the Attorney General consent to a prosecutio subsection 281.2(2).[6] The rationale for doing so was a desire to permi prosecutions of hate literature. The Committee perceived that the sec not given rise to the volume of complaints that had promoted the req for the Attorney General's consent.[7] Justice Minister MacGuigan anno June, 1984 his intention to also accept this recommendation.[8]

We did not receive much comment on the issue of defences to this However, the suggestions for removing the requirement of consent is c with recommendations made to this Committee.

We have given serious consideration to the proposals for using su 281.2(2) where pornography is concerned. There are, in our view, a nu arguments in favour of taking this course.

If one accepts the argument that pornography is an expression of misogyny, then use of the hate propaganda section of the *Code* in this connection is particularly attractive. If the evil seen in pornography is the communication of an untrue message which expresses or propagates hatred against women, it seems logical that this *Code* provision, and not one dealing with sexual morality, should be aimed against it. Indeed, precisely this point was made by the Board of Inquiry considering the application of the Saskatchewan *Human Rights Code* to the Engineering Students' Society publication *Red Eye*. The Board observed that in the existing criminal law, it seems to be circuitous that women have to use the provisions about obscenity to enforce protection from some of the widespread manifestations of hatred focused upon them.[9] The Board considered that the evil of pornography was very similar to the evil aimed at by section 281.2 as it now stands.

We have, of course, recommended an overhaul of the sections which now appear in the *Code* under the heading "Offences Tending to Corrupt Morals", including the replacement of obscenity prohibitions by a comprehensive set of prohibitions. If our recommendations are implemented, then the contrast between the intent of pornography and the terminology and philosophy of the criminal law will not be as great as it is now.

However, the contrast between the hate implicit in pornography and the sexual morality overtones of "obscenity" is not the only reason for proposing to broaden subsection 281.2(2).

Section 281.2 was enacted following the report of the Minister of Justice's Special Committee on Hate Propaganda, 1965-1966. The Chairman of that Committee, Professor Maxwell Cohen, has identified the following passage from the Report's Preface as expressive of the Committee's rationale for proposing the hate propaganda amendments to the *Criminal Code:*

> This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.
>
> An effort is made here to re-examine, therefore, the parameters of permissible argument in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is also a world aware of the perils of falsehood disguised as fact and of conspirators eroding the community's integrity through pretending that conspiracies from elsewhere now justify verbal assaults - the non-facts and the non-truths of prejudice and slander. Hate is as old as man and doubtless as durable. This Report explores what it is that a community can do to lessen some of man's intolerance and to proscribe its gross exploitation.[10]

The nub of the test, then, is whether the message that is sought to be made criminal does "injury to the community itself and to individual members or identifiable groups".

The argument that pornography does indeed do such injury has a number of features. We described in this Report the present state of experimental literature exploring the relationship between pornography and acts or states of mind on the part of its consumers that could be regarded as harmful to women. We have concluded that the research has not proceeded past the inconclusive stage. However, there is another sort of harm altogether which we think should be taken into account when considering the impact of some types of pornography for purposes of the hate literature provision. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equality before and under the law and the equal protection and benefit of the law, without discrimination on the basis of sex. This guarantee is reinforced by the provision in section 28 that the rights referred to in the *Charter* are guaranteed equally to males and females. It is argued that one of the group of community values which is harmed by pornography is the constitutionally entrenched equality of women, in that the message of pornography is that women are inferior and subordinate.

This argument received support in the decision of Mr. Justice Quigley of the Alberta Court of Queen's Bench, in *R.* v. *Keegstra*.[11] It had been argued that section 281.2(2) of the *Code*, under which James Keegstra had been charged, was contrary to the *Charter's* guarantee in paragraph 2(b) of freedom of expression, and could not be characterized as a reasonable limit demonstrably justifiable in a free and democratic society, so as to prove constitutionally permissible. Mr. Justice Quigley took the position that it was appropriate to consider all of the *Charter's* guarantees when determining whether an alleged curb on one of them was justifiable. Against the freedom of expression guarantee he balanced the equality rights conferred by section 15 of the *Charter*, and the proviso in section 27 that in interpreting the *Charter*, Canada's multicultural heritage must be borne in mind. The need to protect these interests would justify the incursion by section 281.2 into freedom of expression.[12]

It seems to us that this balancing of interests is a desirable one. The guarantee of freedom of expression must, in our view, be tempered by the sometimes countervailing demands of the equality guarantee.

This position seems to us to be reinforced by a further consideration emanating from section 15 of the *Charter*. Subsection 15(1) guarantees the equal benefit of the law without discrimination on the basis of sex and a number of other grounds. Section 281.1(4) of the *Code* provides that "identifiable group" for purposes of the provision means a group distinguished by "colour, race, religion or ethnic origin." It is apparent that the "benefit" of section 281.2 is not available to members of groups identified by some other of the enumerated categories in subsection 15(1) of the *Charter*, like sex, age, and disability. It could be maintained, on that basis, that section 281.2 does not go far enough in the protection it provides and, for that reason, is vulnerable to

consitutional challenge. Perhaps a simple failure to include a particular group mentioned in subsection 15(1) might not, in and of itself, render section 281.2 unconstitutional. However, it would be more likely to be found unconstitutional where the excluded group is also the target of the kinds of messages forbidden by the section. The arguments and evidence before this Committee give, in our view, ample evidence that women are the targets of messages promoting hatred against an identifiable group.

It seems to us, then, that if provisions like section 281.2 are to be included in the *Criminal Code*, there are strong arguments on equality principles, stemming from the nature of pornography, in favour of extending the protection of the law to women as an identifiable group.

Having said that, however, we must examine still further questions relating to this equality rationale. The first is whether its logic requires a further extension of the hate provision to cover groups distinguished by all the other enumerated characteristics in subsection 15(1) of the *Charter* which do not now appear in section 281.2. If so, what are the implications of such an extension? We note that the hate message sections of the Canadian, Manitoba and Saskatchewan Human Rights Acts all extend the protection to each protected group covered by the legislation.

By the same token, we observe with interest recent amendments to the regulations under the *Broadcasting Act*. It is now forbidden for an AM or FM licensee to broadcast "any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[13] These grounds are the ones specifically enumerated in the equality rights section of the *Canadian Charter of Rights and Freedoms*. The new regulations for television and for pay television broadcasting are similar, extending not only to comment but also "abusive pictorial representation".[14]

The case of pornography involving children provides a useful point of departure to examine these questions. It is certainly the case that not all the children portrayed in the material deplored by presenters of briefs are female children. Accordingly, even a section including as an identifiable group "persons characterized by sex" would fail to protect all those who, on the basis of the argument set out above, would be in need of protection. It would seem, taking this ground alone, that some further bases would have to be added to make the benefit of the section really equal. On the other hand, however, it was not argued before us that pornography involving children was hate literature, in the same way that this point was made concerning pornography involving women. The complaints about child pornography focused largely on its exploitation and corruption of the innocent, and did not argue that this material taught us to hate the young. It might be argued on that basis that the dual rationale for extending the section, namely equality considerations and whether the evil aimed at actually can be described as material promoting hatred, is not present.

Given the nature of the material and submissions we have received in the area of child pornography, we doubt whether the dual rationale for extending the section to persons identifiable by age is present. We would make the same observations with respect to the other protected grounds listed in section 15 of the *Charter*. At this time, we simply have no evidence on which to conclude that hate propaganda with respect to these groups is being disseminated. On the other hand, however, we are aware that the imperatives of the *Charter* are strong ones. We have seen, in the case of the hate message section of the *Canadian Human Rights Act*, the *B.C. Civil Rights Protection Act, 1981*, and sections 281.1 and 281.2 themselves, how responding quite specifically to a particular emergency can result in legislation that can soon be perceived as too narrow.

We have concluded that it would be desirable to expand the definition of identifiable group in section 281.1(4) of the *Code* to include protection for an identifiable group based on sex or gender and we see little cogent reason for refraining from extending it to other groups named in the *Charter*, even if the need may not be immediately obvious. We think, however, that this change must be accompanied by implementation of the three changes recommended in *Equality Now!* and accepted by the Justice Minister of the day in responding to that report: removal of the requirement of wilfulness from the section; removal of the requirement that the Attorney General consent to a prosecution, and classification of the defences.

Recommendation 38

The definition of "identifiable group" in subsection 281.1(4) of the Criminal Code should be broadened to include sex, age, and mental or physical disability, at least insofar as the definition applies to section 281.2 of the Code.

Recommendation 39

The word "wilfully" should be removed from section 281.2(2) of the Code, so as to remove the requirement of specific intent for the offence of promoting hatred against an identifiable group.

Recommendation 40

The requirement in section 281.2(6) that the Attorney General consent to a prosecution under section 281.2(2) should be repealed.

We do not think that removing the requirement of specific intent which is contained in the word "wilfully" will leave section 281.2 unduly broad. Still in place is the requirement of general intent which is an ingredient of every criminal offence. Thus, a person who unwittingly or accidently communicates a message will be spared conviction.

In the area of pornography, a wilfulness requirement would place an almost impossible burden on the prosecutor. The effect of material may be to engender hatred of women, but persons may all too readily establish that this was not done "wilfully". The motive behind the publication may be described as sexual entertainment, or simply profit; even an unattractive motive, other than hatred, would serve to defeat a prosecution where specific intent was required. Such a result is surely not desirable, for it amounts to saying that one might create messages promoting hatred against women, or other groups, as long as that effect is only incidental to the profit motive.

We are mindful that some persons fear that removal of the requirement of the consent of the Attorney General will bring a flood of prosecutions, many of which would be ill-founded. The fear of potential harm to the innocent accused is behind these concerns. A slightly different perception of the issue is the concern that without the requirement of the Attorney General's involvement, important cases which should be won will be bungled by inexperienced complainants, with or without legal advisers. With regard to the first of these concerns, the Report *Equality Now!* notes that there have been fewer than six prosecutions under the hate provisions since their enactment.[15]

We expect that attempts to use the revised section by way of private prosecutions may, indeed, occur frequently during the first period of its being in force. However, once the limitations of the provision are recognized by citizens and lawyers, resort to it may decline. The section, in our view, will indeed cover a very limited range of material, for much that is repellent, or even criminal, may not be considered to be a message of "hate", even in the sense of misogyny. We hope that the other sections we propose to deal with pornography will, as well, reduce the need for persons to resort to private initiative by way of section 281.2.

We also think that extension of subsection 281.2(2) to include the hate messages of pornography may well require another change to the definitions in the section. At present, only "statements" are caught by the provision. Subsection 281.2(7) defines statements as including "words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations". Because the general term "visible representations" may be interpreted along the lines of the specific ones preceding it, namely "gestures" and "signs", we question whether the graphic images of pornography would come within this definition.

Many of the messages that convey hatred of women may be by way of visual representations, or a combination of the visual and written. At the hearing in Québec City, for example, we were shown a tabloid bearing on the front a photograph of a fully dressed woman, on her hands and knees, wearing a heavy leather dog collar and being pulled by a lead. Across the picture were words suggesting that as women are bitches, they should be chained. The combination of the colour photograph of the woman subjugated like an animal, and the words, was most compelling. In one notable instance, no words were used at all. Often drawn to our attention at the public hearings was a cover

from Hustler magazine showing a meat grinder. Protruding from the top were what remained of shapely female legs. Coming out at the other end was red minced meat.

We suggest that the term "visual representations" (or a term like it) be added to the section, to introduce some certainty as to whether a photo or other graphic way of conveying hatred would be included.

Recommendation 41

> **The text of subsection 281.2(2) should be amended to make it clear that graphic representations which promote hatred would be covered by the provision. The subsection could prohibit "publishing statements or visual representations or any combination thereof, other than in private communications" which promote hatred against any identifiable group.**

Given the hope that our other proposed sections, particularly those dealing with sexually agressive pornography, will deal with much of the material which offends, what area then is left to the hate provision? Violent or degrading material which is not sexually explicit may well be reached by a revised section 281.2. Additionally, we note that with respect to prosecutions under section 281.2, there is no defence of artistic merit, education or scientific purpose. The section may thus be regarded as a sort of complement to the provisions we have recommended to deal with "sexually violent and degrading" material, which do provide defences of these sorts.

We think that one of the important reasons for extending the reach of section 281.2 is because of the symbolic value of the extension. The ideas that pornography is a form of hate message about women, and intimately connected with the misogyny of our social institutions, are conceptually very significant. In shifting our thinking on pornogaphy from notions of sexual impropriety to concerns about human dignity and responsibility, these ideas have illuminated, in our view, the real evils of pornography. As they are significant, they merit inclusion and embodiment in the criminal law.

Footnotes

[1] The definition is found at s.281.1(4) of the *Criminal Code*. It is incorporated into s.281.2 by s.281.2(7).

[2] Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!*, (1984, Supply and Services Canada, Ottawa) at 69-70.

[3] Minister of Justice and Attorney General of Canada, News Release: "Justice Minister Proposes Measures Against Hate Propaganda", June 1, 1984, at 1-2.

[4] *Equality Now!*, Recommendation 37, at 71.

[5] Minister of Justice News Release at 2.

[6] *Equality Now!*, Recommendation 37, at 70.

[7] *Ibid., at 69.*

[8] Minister of Justice News Release at 3-4.

[9] *Saskatchewan Human Rights Commission* v. *The Engineering Students' Society, University of Saskatchewan et al.*, 7 Mar. 1984 unreported (Red Eye Decision) at 32.

[10] Maxwell Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy," (1970) 9 *Alta. L. Rev.* 103, at 113.

[11] *R.* v. *Keegstra*, 5 Nov. 1984 (Red Deer) unreported (pretrial hearing).

[12] *R.* v. *Keegstra* (pretrial hearing) at 20-23.

[13] *Radio A.M. Broadcasting Regulations, amendment*, SOR/84-786, schedule, s.1 (amending s.5(1)(b)); *Radio (F.M.) Broadcasting Regulations, amendment*, SOR/84-787, schedule, s.1 (amending s.6(1)(b)).

[14] *Television Broadcasting Regulations, amendment*, SOR/84-788, schedule, s.1 (amending s.6(1)(b)), *Pay Television Regulations*, SOR/84-797, s.6.

[15] *Equality Now!*, Recommendation 35, at 69.

Chapter 26

Film Classification and Censorship

1. National Action

A number of submissions to the Committee suggested that Canada implement a film review and classification system on a national scale. There are several different ways of structuring such a system.

One would be to encourage the various provincial boards to consult with one another to develop uniform standards of acceptability. Then each board operating locally would apply the common standards, and no new body need be set up.

Alternatively, the provinces could set up a national or joint board to which each province would appoint representatives. The Manitoba legislation contemplates such a possibility by providing that Manitoba may co-operate with the governments of other provinces in appointing a joint film classification board of not more than 15 persons, nominated by the provinces. The joint board would classify films or slides to be exhibited in the member provinces.[1]

A third possibility is that the national review function could be an aspect of an expanded and improved Customs service. In Australia, the authority for the federal government to have a censorship board arises from its jurisdiction over Customs, and, by agreement, the states have given to the national board the power which they have to review locally produced films.

We have considered the suggestion that we opt for a national review function, (see Section II, Chapter 14 of the Report) along with each of the ways in which it would be possible to bring it about, and we have decided not to recommend this approach.

It seems to us that review at the provincial level serves a valuable function. We have been impressed by the desire of people to feel that they have access to the review process, and that they can influence its decisions. A national board would be even more remote, in the eyes of some, than the boards now located in the provincial capitals. Over and over again, we were told that standards of acceptability do vary from place to place in Canada. The provincial board can

and should be more sensitive to local taste, albeit within the framework of the national criminal law, than a national board could be. As we discuss elsewhere, we have recommended the deletion from the *Criminal Code* of the "community standards" test which now helps determine whether material is obscene, because we do not think that this element of subjectivity has a role to play in the criminal law. The community does, however, have a useful role in determining what it wants its young people to see, as opposed to determining what is criminal, and we think that that role can be exercised to more effect on a provincial rather than a national basis.

Recommendation 42

Canada should not opt for a national film review system, but rather maintain the existing arrangement whereby review is done on a province by province basis.

2. Problems with Co-ordination of Provincial Regulation

Having rejected the prospect of review on a national scale, however, we must still observe that there are problems affecting a provincially-oriented system which bear looking into. We have noted that some provinces and territories have no local film review authority. In this position are Newfoundland, Prince Edward Island, the Yukon and the Northwest Territories. Although they may consider it suitable to borrow the classifications of others, it seems that absence of legislation may be depriving them of more than a classification function.

The provincial film review legislation, for example, requires that theatre operators observe classifications, advertise them, and post them by the entrance to the theatre for the guidance of patrons. We heard complaints in Whitehorse that local theatres were inconsistent in their practices concerning notification of film classifications. Parents were sometimes unable to determine whether or not a particular movie would be suitable for their children. Some complained, in a similar vein, about non-enforcement of age restrictions on entrances to theatres.

Accordingly, we think that it would be desirable for provinces without film review legislation at present to explore whether they wish to enact it, in whole or in part. Even if they do not have the inclination or the resources to institute review of films, the aspects of the typical film review legislation which might usefully be enacted are those concerning notification of the classifications and entrance restrictions for children.

Recommendation 43

Those provinces and territories which have not implemented a film review system should consider doing so.

Another difficulty which will persist with a provincially-based system of review and classification is the problem that clearance in the most permissive jurisdiction can be, in effect, clearance for national purposes if the films are videotaped and then made available for private as opposed to public usage. It is, in our view, inevitable that entrepreneurs will take advantage of the differences in standards between provinces by using the most permissive jurisdictions as clearing houses for films destined for national distribution as videos. Mail order houses based in these provinces will offer material to a national market.

This problem of the *de facto* national influence of the boards in some jurisdictions in this regard was addressed by many briefs at our public hearings. The boards most often noted in this connection are those of British Columbia and Québec, which take a more tolerant view of some kinds of explicit material than does, say, Ontario. This issue generates considerable frustration and concern, especially among those whose views do not accord with the views of the boards which they perceive to be having this national influence.

We can appreciate the concern that is reflected in these submissions. However, in most jurisdictions, only films or videotapes intended for commercial exhibition are required to be reviewed and these represent a small proportion of the total amount of material in circulation. Videotapes, not films, are the largest aspect of the home viewing market. At this time, videotapes for private use can be imported or produced and sold in most jurisdictions without any contact at all with provincial classification or censor boards. The circulation of the bulk of this video material cannot thus be laid at the door of any censor board, however relaxed may be its views on what is acceptable in films.

Moreover, we note with interest the introduction in some provinces of schemes to regulate sale and rental of videotapes intended for private consumption. This direct attack on the problem of unsupervised circulation of allegedly offensive material may be more effective than any attempt to enforce uniform standards on all boards, or establish a national board.

3. Relationship Between Customs and Film Classification

It seems to us that the real influence bearing on the circulation of offensive material within Canada is that of Customs. It is, after all, through Customs clearance procedures that films and videotapes are imported. One can expect provincial film review authorities to be, if you will, a second filter for videos which are imported only if someone within the province exhibits them commercially or otherwise brings them within the comparatively narrow scope of the film or video classification scheme.

Accordingly, we think that the emphasis in our inquiry about national circulation of offensive material should be at the point of entry: the Customs administration. We are, in regard to pornography as in regard to so many other things, an importing nation. The film review boards, even if co-ordinated on a national level, cannot really be expected to control the adverse effects of importation.

In one respect, however, the link between Customs and film review authorities bears closer examination. As we have said, films or videos intended for commercial showing must be reviewed by provincial authorities. Before they can be reviewed, they must be in the country. To effect their entry, their importers would ordinarily be required to satisfy Customs officials that the films are not "immoral or indecent", under the wording of the present *Customs Tariff*.

There has grown up a practice in some jurisdictions of rolling into one, the Customs determination of acceptability for entry and the provincial film review board's determination of acceptability for showing. There are many reasons for doing this. On a practical level, importers will not want to go to the trouble of bringing a film into the country only to be told some time later that it cannot be shown in the province. In addition, the volume of material passing through Customs is so large that the relief of sharing the review work with another authority may be welcome. On a more fundamental level, many believe that it is not the role of Customs officials to act as the arbiters of public taste. Although to some observers, this view extends to claiming that neither Customs nor the film classification boards should play this role, in others, it merely results in a preference for the provincial authority over the Customs branch.

Whatever its rationale, it is clear that this practice involves deference by the Customs officials to the view of the film review board. Such deference can manifest itself in a number of ways. In Ontario and British Columbia, films being imported go in Customs bond directly to the office of the censor. In Québec, a practice has developed of allowing the importer to take the films from Customs and deliver them to the Bureau de Surveillance. There is no control over what happens to the film on its way from Customs to the office of the Bureau. A period of 60 days is given by Customs to the importer in which to seek clearance of the film from the Bureau. In all these cases, once the film is approved by the provincial censor, it is granted entry to Canada, effective not from the date of the censor's clearance but rather from the date of its initial entry at the Customs port. Customs officials do not consider that they have totally delegated their own powers to the various censor boards, because they still retain, in theory, the power to refuse entry even to a film which has been accepted for exhibition in a province.

We heard numerous complaints about this sort of relationship between Customs and provincial film reviewers. Singled out for special complaint was the 60-day grace period allowed to films entering by way of ports in Québec. It was felt that the unscrupulous could use this period to make videos of the film

which had been put in their custody. Then, even if it did not receive clearance for showing in the province as a film, the videos would nonetheless be circulating. Some witnesses have attributed to this scheme a high proportion of the offensive videotapes which they say are now circulating in Canada. It should be noted, however, that although such procedures may contribute to the circulation of pornographic tapes, a much more likely factor is that Customs only inspects a very small proportion of what actually comes into the country. Nevertheless, we have reservations about the apparent delegation by Customs authorities of their power to assess material entering the country. We are not comforted by their retention of a notional power to refuse or permit admission of a work contrary to the view of the local review board. In practice, we think such an overruling is unlikely to happen.

Our problem with this delegation is that it cuts into the attempt, and the opportunity, to forge national standards in the administration of the *Customs Act* and *Customs Tariff*. However much we may want to recognize the role of local taste in determining who sees what in provincial theatres, we think that there should be common national standards about what comes into the country.

We do not think that Customs officials should defer to the opinion of local boards. While to do so may have been helpful and convenient when the standards used by Customs to determine obscenity, and the level of officers' understanding, were relatively unsophisticated, we prefer that Customs concentrate in developing its own talents in this area. Although to resort to provincial assistance might be tempting given the scant resources available to Customs for the "pornography detail", we think that the focus should move to securing more resources. In our view, only the development of an active and sophisticated Customs will really address the problems of entry into Canada of pornographic material.

We have attempted to discover the details of the 60-day grace period in Québec which so angered some of the witnesses at our public hearings. They are discussed in detail in Section II, Chapter 14. Here, let us observe that, in our view, the more serious problem is the general influx through Customs of material which, because it will not be shown publicly, may never even be legally required to go to a film censor, rather than the possible abuse of the Customs/censorship interface in respect of a small amount of material. Over and above that, however, we have been advised that Customs officials are interested in ending this arrangement. We urge them to do so.

Recommendation 44

Film review boards and Customs authorities should not enter into arrangements whereby local film review boards have de facto control over what enters Canada; we further recommend that the 60-day clearance period allowed by Customs to films entering by way of Québec ports be discontinued.

4. Problems of Substance

We do not intend to comment here in depth on the details of running a provincial film review system. However, a few aspects of provincial regulation do have a bearing on our recommendations.

In devising our approach to pornography, we have proposed a three-tier classification of material. The most offensive material, that involving children or in which harm is suffered by the participants in its production, we would subject to harsh penalties, with no defences based on intent or value being available. The second tier of material is that which is sexually violent and degrading. Here we have recommended a new prohibition with respect to which the accused could defend the material (here a film or video) on the basis that it has artistic merit, or educational or scientific purpose. Material in this category is also subject to restrictions on its public display and on access to it by young people.

The third tier of material is that in respect of which we think there should also be controls on availability and display, but no absolute criminalization. We have restricted the use of the *Criminal Code* in this tier to prohibiting availability of this material to children, and to reducing its visibility and thus its capacity to shock or offend the unwilling consumer or passerby.

Because Customs is unlikely to be able to control the importation of all films and videos, we realize that some films which people would argue are unacceptable, will come into the country. In addition, of course, films that are produced within the country go to the provincial boards without any intermediary review.

Provincial film review boards will, therefore, be required to deal with all films that are presented to them with the purpose of being shown publicly. How they choose to respond to the material may vary, as it presently does among the boards. One approach is simply to classify the films according to the provincial scheme. A second approach involves the banning or cutting of films prior to a classification being designated.

One of the important roles of the state with respect to pornographic material is the protection from offence. We do not think, however, that as a rule, banning is necessary in order to protect people from being offended. We think that the classification systems now in place in the provinces have a major role to play in preventing offence, as do the controls on access to theatres by young people. The requirement of posting and advertising the classifications and the further requirement, in some jurisdictions, of warnings about certain kinds of content, are also in our view effective and desirable ways of helping people avoid the material which they do not want to see.

While we endorse measures like these in general, we do note that there are some difficulties with the working out in practice of these systems. Particularly with respect to classification, we are concerned that the standards upon which

classification is being done do not always appear in the legislation, or even the regulations. We regret this for two reasons.

Firstly, the legislative delineation of standards is a valuable way to protect against improper use of discretion in the administration of a scheme; the rights of exhibitors will be safeguarded when the legislature enunciates standards which must be observed by those administering the law. Secondly, articulation in legislation ensures a certain publicity for the standards, and allows citizens to know what is being done on their behalf. No matter how many pamphlets a board may distribute discussing its classification scheme, the legislative articulation still is the most enduring. A government may wish to include its standards in regulation rather than legislation, because regulations can be more responsive to changing community values. However, in our view, positive results will flow from greater elaboration of the classification standards in law, be it statute or regulation.

We have also observed that the legislation often does not contain any articulation of the standards upon which a board will be prohibiting or cutting films. What we have said above about the advantages of enunciation of standards in law, we reiterate even more forcefully in this connection. The power to prohibit exhibition of films or to cut them is an intrusion on the right of freedom of expression guaranteed by paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*. It must be a reasonable limit, *prescribed by law* and demonstrably justifiable in a free and democratic society, in order to survive constitutional challenge. The case challenging the Ontario *Theatres Act* shows, in our view, that these provisions for prohibiting and cutting films are on an infirm constitutional footing. We think that the provinces will be interested in reviewing them to ensure compliance with the *Charter of Rights*.

Of course, one way of ensuring compliance with the *Charter* is to remove from the provincial boards the power to cut or to ban films. We prefer this approach. If the provincial board is of the view that the film is caught by the prohibitions against first or second tier material, then presumably the board does not need any additional power to prohibit or to cut it. For greater certainty, the statute may provide that the board may decline to classify a film which, in its view, contravenes the *Criminal Code*, but there would be no power to cut, and no power to prohibit the showing of anything not prohibited by the *Criminal Code*. If material is not prohibited by the *Code*, then we believe that it should be shown, at least to those who wish to view it.

Recommendation 45

> **Provincial film review boards should have an explicit statutory mandate to refuse to permit exhibition in the province of films which are contrary to the Criminal Code. Provincial film review boards should not be empowered to prohibit or cut films which are not contrary to the Criminal Code.**

If the provinces decide to maintain the power to prohibit or cut films, then we strongly recommend that the standards upon which these decisions will be made should be embodied in legislation, or at least in regulations.

Recommendation 46

Provincial film review legislation or regulations should contain explicit standards to govern the boards' activities in classifying and, where these powers exist, in prohibiting and cutting films.

5. Advertising Restraints

There exist in provincial legislation, broad powers to control advertising of films. In addition to specific provisions requiring that the classification of a film be shown in advertising material for it, the legislation usually confers a power of prior restraint of advertising on the authority. Advertisements must be submitted to the board, which may approve or disapprove them.

We think that the rationale for this system of prior restraint has a lot to do with the exercise of the prior restraint powers of the boards with regard to film censorship. It would be regarded as inconsistent to go to the trouble of removing a particular scene from the film only to have it appear on the billboards outside the theatre. Interestingly enough, however, Manitoba, a province which does not censor films by way of prior restraint, has not only a power to impose prior restraint on advertising[2] but also a very intrusive power to remove offensive advertising from public places.

Any peace officer or inspector in Manitoba may be authorized by the board to order the removal from all public places of any advertisement relating to any film or slide if the advertisement is of an immoral, obscene or indecent nature or depicts any murder, robbery, criminal assault or the killing of any person. If the licensee of a theatre does not remove the material within 24 hours, then the licence will be cancelled by the Minister. There does not appear to be any right of appeal from an inspector's order.[3]

We are concerned with both the prior restraint of advertising and with broad power like that in the Manitoba statute just described. On the other hand, we think that it is quite reasonable, and entirely consistent with a scheme of classification, to require the theatre owners to include the classification of the film in advertising for it.

It seems to us that prior restraint on advertising is difficult to justify in light of the provision we have made to control display of visual pornographic material, discussed above. This provision would make it an offence punishable on summary conviction to display visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation. In our view, this offence would include display of such material in a theatre or outside it. The defence to the charge would be to demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advertising of the display within.

This sort of control upon the location of the third tier material is, to us, a far less intrusive way of protecting public sensibilities than the imposition of prior restraint.

Recommendation 47

The provinces should not exercise a power of prior restraint over advertising of films; however, the power to require that film classifications be included in an advertisement should be kept.

6. Relationship Between Provincial Film Review Boards and the Criminal Law

The Supreme Court of Canada has stated that there is no constitutional reason why a prosecution cannot be brought under the obscenity provisions of the *Criminal Code* against a film which has been approved by a provincial review board.[4] Under the *Code* as it now stands, the issue is whether approval of a provincial censor board would amount to a defence against a charge under section 159 or section 163 of the *Code*. Section 159(2) prohibits the doing of a number of acts "without lawful justification or excuse", and it is argued that the approval of a censor board should, in law, amount to such a lawful justification. The Canadian Motion Picture Distributors Association made representations to this effect to our Committee.

As we have noted earlier in this Report, Bill C-19, the omnibus Criminal Law Amendment Bill introduced in early 1984, would have recognized the operation of provincial law respecting film classification. With respect to offences under sections 159 and 163 of the *Code* the bill proposed a new section 163.1, which would have required the personal consent of the Attorney General to a prosecution of a film or videotape presented, published or shown in accordance with a rating or classification established pursuant to the law of the province where the film was shown. This provision would not have helped in those provinces without a local film classification system, of course, but the Motion Picture Distributors' Association nonetheless regarded it as an improvement over the previous laws.

We do not include in our proposed amendments any provision of this nature. We recognize that whether they have explicit power to ban films or not, an authority will inevitably make a preliminary determination of whether, in its view, a film offends the *Criminal Code*. Yet, even though this determination about criminality is going to be made, we do not think that it is desirable to elevate the board's judgment to the status of a defence or a discretionary bar to prosecution. If the board's decision were to constitute a full defence, then we would have, in effect, a delegation to provincial authorities of administration of the criminal law sanction. Where the decision of the board is a discretionary bar to prosecution, as in Bill C-19, the delegation is not complete, but the concern remains the same.

True, local prosecutors make decisions about what charges to bring under the *Criminal Code* and that is a form of decentralization, but it is not decentralization that is really the concern here. In our view, the objectives and the outlook of the classification or censor boards, while somewhat congruent to those of the law enforcement authorities, are nonetheless different from them. They are concerned primarily with community tastes, with the making of those kinds of subjective evaluations about what offends which we have sought to remove from the criminal law. We do not think that it would be useful to reintroduce that element into the law, indirectly, by means of reliance on the judgment of classification or censor boards about what breaches the criminal law.

It will be said, of course, that one is relying on the board's assessment of what does not breach the law, rather than on their assessment of what does. Surely, it will be argued, we can be certain that something does not offend the law if it is approved by a board as strict as the Ontario one, for example, and we need not hesitate about conferring immunity from prosecution. Here we meet again the concern about the variation from jurisdiction to jurisdiction in local censor board standards. Some boards may well take a different, and more permissive view, of the criminal threshold than would the local Crown attorney or the court. If a film were passed by such a board, then one might still not wish to insulate it from scrutiny by a court. In such a case, a provision like that in the proposed section 163.1 would produce the unhappy spectacle of the Attorney General and classification or the censor board at loggerheads.

The standards used by Crown attorneys and judges to determine criminality may well, of course, vary from place to place. But the fact of regional variation in the criminal justice system does not mean that we should add yet another system (itself affected by regional variation) to the decision-making process, possibly to conflict with the criminal justice system.

We are prepared to make one exception to this general position, an exception which is made necessary in our view by our recommendation on access of children to visual pornographic material. We have recommended that the *Criminal Code* make it an offence punishable on summary conviction for everyone who is the lessee, manager, agent, or person in charge of a theatre, to present therein to anyone under 18 years of age, any visual pornographic material. This provision could well include the acts of a theatre owner in showing a movie classified in the adult or similar category, for viewing by persons over 14. The film, while not restricted, might nonetheless contain some scenes which would attract the operation of the proposed section.

We have provided a defence to this offence for anyone who can demonstrate that the film or tape has been classified under the rating system for film and video in the province, as acceptable for viewing by those under 18. Thus, the certification of the board would insulate the theatre operator from prosecution.

Here, we are not deferring to the decision of a provincial authority about whether to prohibit a film or not; we are dealing with classification only. Moreover, the material being classified is, we assume, legal according to the *Criminal Code* provisions we have devised. Otherwise, presumably the board would not have classified it at all. So, we are really deferring here to the board's judgment about who should see legal material. We are content to defer in these circumstances.

Recommendation 48

Clearance for exhibition by a provincial authority should not constitute a defence or a discretionary bar to a prosecution under the Criminal Code, with the exception that a film classification permitting a film to be shown to persons under 18 will constitute a defence to a charge of displaying visual pornographic material to a person under 18.

7. Regulation of Video Recordings

There was strong support at the public hearings for review and classification schemes applicable to video recordings sold or rented for private use. The major concern of advocates of this proposal was for young people. Worried about the kinds of violence, degradation and explicit sex which children might be seeing on videotapes, parents and others were concerned that they now have almost no effective way of monitoring children's viewing.

We were told that the covers and advertising of videotapes often do not give accurate clues about the nature of the film. The merchants who rent tapes may not be as vigilant as many would hope in ensuring that young people avoid the worst material. Even where the retailer is watchful, young people may be getting videotapes in the same way that they traditionally got liquor or cigarettes: having an older youth obtain supplies for younger peers.

The ease with which videotapes can be duplicated means that they will be widely and readily accessible. Outlets have proliferated, with videotapes being available anywhere from the large department store to the corner gas station to the specialized video outlet, be it an "adult" video club or neighbourhood family store. Video recorders are now reasonably widely available in private homes across Canada, and home viewing means that consumption of the materials can take place in private. For many young people, this means away from supervision.

At present, only Ontario and Nova Scotia have included distribution of videotapes for private viewing within the provincial classification schemes.[5] Apart from these initiatives, which happened so recently that information about how effective they are was not available to us, there are almost no controls on videotapes intended for private use. Conceivably, of course, importation of videotapes would be subject to Customs regulation, but there was a widespread feeling that this is presently most ineffective. There simply

are not the resources to enforce the *Customs Tariff* thoroughly. The distribution by mail of obscene videotapes would be within the *Criminal Code* and *Canada Post Corporation Act* provisions respecting use of the mails for distribution of pornographic materials, but here again, enforcement is perceived as ineffectual.

We can see some real merit in having a regulatory scheme designed for video recordings that are not shown publicly. We believe that the scheme should include only classification, but not prohibition or cuts. The power to prohibit, in our view, should be no more than a power to prohibit circulation of material offending the *Criminal Code* law, as we have recommended in the case of film classification.

Recommendation 49

> **Each province should establish a system of review and classification for video recordings intended for private use in the province. Under such a system, the review board should be given an explicit statutory mandate to refuse to classify video recordings which are contrary to the Criminal Code but not be empowered to prohibit or cut video recordings which are not contrary to the Criminal Code.**

Both Nova Scotia and Ontario have used the device of the film exchange licence to bring video retailers within the ambit of provincial legislation. Clearly, in our opinion, regulation of videotapes belongs at the provincial level, if done at all, and we see merit in the Ontario and Nova Scotia approach.

There are a number of problems which confront any authority seeking to regulate videotapes. One of the threshold issues is whether and to what extent videotapes should be submitted to a board and classified. At the point of starting up a system, the classification task (of all existing tapes available in retail outlets) would be huge. Even once that bulk had been digested, however, the large number of videotapes in circulation would still make the classification task formidable.

Even though regulation of videotapes is a recent innovation, there are already two different approaches to this problem. The *Video Recordings Act, 1984* of the United Kingdom requires that all videotapes, except for those in certain exempted categories, be presented to the authority in order to be classified. Nova Scotia, on the other hand, recognizes that tapes in an "unclassified" class will be distributed. In many instances, the videotape will be a reproduction of a film which itself has already been classified, and the classification of the original film will apply to the tape. However, not all tapes will be reproductions of classified works. It is clear that the thorough solution, to classify everything, is also the most demanding of resources.

The issue of advertising the classification may well present some technical difficulties. Affixing labels to the cartons and the tapes is possible, but boards may wish to consider whether it is possible or desirable to put some mark on

the actual film of a cleared tape. In the course of our consultations, we lea of the importation into Canada of a large number of empty boxes f particular videotape. No tapes of that title were cleared through Customs. cartons seem to have been destined for underground copies. Unless s symbol of board approval, which is difficult to counterfeit, could be put o tape itself, it would be difficult to control this type of circumvention of a system.

The Nova Scotia plan has a feature which we find quite attractive i context of this problem of advertising. The regulation requires the retail put the classifications on each list of tapes distributed to customers. Su requirement will aid in achieving what must be one of the most impo objectives of this type of scheme: putting into the hands of parents and adults the means of monitoring and guiding the viewing activities of youngsters.

Another issue to be faced by those contemplating establishment of a classification scheme is that of penalties for breach. Presumably, a key ele in the scheme would be a requirement that persons not distribute tapes to for whom the classifications indicate they are not intended. Our survey o provincial censorship legislation shows, however, that any penalties pro for breach of the *Acts* or regulations are quite small. As systems founde prior restraint, and aimed at preventing showings rather than penalizing after the fact, these censorship regimes have not depended for their effica prosecutions.

Yet proliferation of videotapes and the tremendous variety of o where they may be available, coupled with an absence of prior restraint, us to suggest that the issue of penalties should be a serious one to frame any video regulation scheme. The *Video Recordings Act, 1984* of the provides quite substantial penalties. Supplying a video work in respect of w no certificate has been issued will, for example, attract a fine not exce £20,000.[6] Forfeiture of the videotape involved in the offence is also called We think that using stiff penalties for violations of the scheme is preferab using prior restraint.

A further element of a video retailer licensing scheme might usefull considered. If retailers were required to keep a log showing the source, to t of the various tapes which were sent to their stores, then bootleg tapes migl more readily detected. A tape which appeared in stock but in respect of w there was no *bona fide* supplier listed in the log, could well prompt the so inquiries which might disclose not only breaches of the classification sy but also of Customs legislation.[8]

Footnotes

[1] See s. 22(4) of the Manitoba *Amusements Act*, enacted by S.M. 1972, c. 74, s.4.

[2] *Ibid.*, s.22(3)(b).

[3] R.S.M 1970, c. A70, c. 24.

[4] *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1, *per* Ritchie, J. at 24.

[5] The government of British Columbia announced plans to regulate videotapes early this year. The details of those plans have not yet been made public, however.

[6] *Video Recordings Act, 1984*, c. 39 (U.K.) s.15.

[7] *Ibid.*, s.21.

[8] A parallel to this recommendation is the provision in s.103 of the *Criminal Code* requiring firearms merchants to keep a record of transactions and an inventory of firearms.

Section 281.2 was the subject of comment by the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society in its 1984 report, *Equality Now!*. The Committee recommended that subsection 281.2(2) be amended so that it is no longer necessary to show that an accused specifically intended to promote hatred.[2] This recommendation was accepted by then Justice Minister MacGuigan in June, 1984. He announced that the word 'wilfully' would be removed from subsection 281.2(2).[3] Most of the groups who addressed this issue in our hearings also favoured the removal of this requirement for specific intent.

Another recommendation of the Special Parliamentary Committee dealt with the defences available to a charge under subsection 281.2(2). At present, section 281.2(3) of the *Code* provides:

> (3) No person shall be convicted of an offence under subsection (2)
>
> (a) if he establishes that the statements communicated were true;
>
> (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
>
> (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
>
> (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

The Special Parliamentary Committee pointed out that it is now not clear whether the burden of raising these defences is on the accused at all times, or whether the Crown must discharge the burden of disproving a defence. Accordingly, it recommended that the *Code* be amended to make it clear that the burden of raising special defences is on the accused. The Committee rejected proposals that the defences set out in paragraphs (b), (c) and (d) of subsection 281.2(3) be removed.[4] Justice Minister MacGuigan also agreed with the Parliamentary Committee's recommendations on the burden of proving a defence. In June of 1984, he announced that it would be made clear that this burden is on the accused.[5]

The Special Parliamentary Committee also recommended the deletion of the requirement that the Attorney General consent to a prosecution under subsection 281.2(2).[6] The rationale for doing so was a desire to permit private prosecutions of hate literature. The Committee perceived that the section had not given rise to the volume of complaints that had promoted the requirement for the Attorney General's consent.[7] Justice Minister MacGuigan announced in June, 1984 his intention to also accept this recommendation.[8]

We did not receive much comment on the issue of defences to this charge. However, the suggestions for removing the requirement of consent is consistent with recommendations made to this Committee.

We have given serious consideration to the proposals for using subsection 281.2(2) where pornography is concerned. There are, in our view, a number of arguments in favour of taking this course.

If one accepts the argument that pornography is an expression of misogyny, then use of the hate propaganda section of the *Code* in this connection is particularly attractive. If the evil seen in pornography is the communication of an untrue message which expresses or propagates hatred against women, it seems logical that this *Code* provision, and not one dealing with sexual morality, should be aimed against it. Indeed, precisely this point was made by the Board of Inquiry considering the application of the Saskatchewan *Human Rights Code* to the Engineering Students' Society publication *Red Eye*. The Board observed that in the existing criminal law, it seems to be circuitous that women have to use the provisions about obscenity to enforce protection from some of the widespread manifestations of hatred focused upon them.[9] The Board considered that the evil of pornography was very similar to the evil aimed at by section 281.2 as it now stands.

We have, of course, recommended an overhaul of the sections which now appear in the *Code* under the heading "Offences Tending to Corrupt Morals", including the replacement of obscenity prohibitions by a comprehensive set of prohibitions. If our recommendations are implemented, then the contrast between the intent of pornography and the terminology and philosophy of the criminal law will not be as great as it is now.

However, the contrast between the hate implicit in pornography and the sexual morality overtones of "obscenity" is not the only reason for proposing to broaden subsection 281.2(2).

Section 281.2 was enacted following the report of the Minister of Justice's Special Committee on Hate Propaganda, 1965-1966. The Chairman of that Committee, Professor Maxwell Cohen, has identified the following passage from the Report's Preface as expressive of the Committee's rationale for proposing the hate propaganda amendments to the *Criminal Code:*

> This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.
>
> An effort is made here to re-examine, therefore, the parameters of permissible argument in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is also a world aware of the perils of falsehood disguised as fact and of conspirators eroding the community's integrity through pretending that conspiracies from elsewhere now justify verbal assaults - the non-facts and the non-truths of prejudice and slander. Hate is as old as man and doubtless as durable. This Report explores what it is that a community can do to lessen some of man's intolerance and to proscribe its gross exploitation.[10]

The nub of the test, then, is whether the message that is sought to be made criminal does "injury to the community itself and to individual members or identifiable groups".

The argument that pornography does indeed do such injury has a number of features. We described in this Report the present state of experimental literature exploring the relationship between pornography and acts or states of mind on the part of its consumers that could be regarded as harmful to women. We have concluded that the research has not proceeded past the inconclusive stage. However, there is another sort of harm altogether which we think should be taken into account when considering the impact of some types of pornography for purposes of the hate literature provision. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equality before and under the law and the equal protection and benefit of the law, without discrimination on the basis of sex. This guarantee is reinforced by the provision in section 28 that the rights referred to in the *Charter* are guaranteed equally to males and females. It is argued that one of the group of community values which is harmed by pornography is the constitutionally entrenched equality of women, in that the message of pornography is that women are inferior and subordinate.

This argument received support in the decision of Mr. Justice Quigley of the Alberta Court of Queen's Bench, in *R.* v. *Keegstra*.[11] It had been argued that section 281.2(2) of the *Code*, under which James Keegstra had been charged, was contrary to the *Charter's* guarantee in paragraph 2(b) of freedom of expression, and could not be characterized as a reasonable limit demonstrably justifiable in a free and democratic society, so as to prove constitutionally permissible. Mr. Justice Quigley took the position that it was appropriate to consider all of the *Charter's* guarantees when determining whether an alleged curb on one of them was justifiable. Against the freedom of expression guarantee he balanced the equality rights conferred by section 15 of the *Charter*, and the proviso in section 27 that in interpreting the *Charter*, Canada's multicultural heritage must be borne in mind. The need to protect these interests would justify the incursion by section 281.2 into freedom of expression.[12]

It seems to us that this balancing of interests is a desirable one. The guarantee of freedom of expression must, in our view, be tempered by the sometimes countervailing demands of the equality guarantee.

This position seems to us to be reinforced by a further consideration emanating from section 15 of the *Charter*. Subsection 15(1) guarantees the equal benefit of the law without discrimination on the basis of sex and a number of other grounds. Section 281.1(4) of the *Code* provides that "identifiable group" for purposes of the provision means a group distinguished by "colour, race, religion or ethnic origin." It is apparent that the "benefit" of section 281.2 is not available to members of groups identified by some other of the enumerated categories in subsection 15(1) of the *Charter*, like sex, age, and disability. It could be maintained, on that basis, that section 281.2 does not go far enough in the protection it provides and, for that reason, is vulnerable to

consitutional challenge. Perhaps a simple failure to include a particular group mentioned in subsection 15(1) might not, in and of itself, render section 281.2 unconstitutional. However, it would be more likely to be found unconstitutional where the excluded group is also the target of the kinds of messages forbidden by the section. The arguments and evidence before this Committee give, in our view, ample evidence that women are the targets of messages promoting hatred against an identifiable group.

It seems to us, then, that if provisions like section 281.2 are to be included in the *Criminal Code*, there are strong arguments on equality principles, stemming from the nature of pornography, in favour of extending the protection of the law to women as an identifiable group.

Having said that, however, we must examine still further questions relating to this equality rationale. The first is whether its logic requires a further extension of the hate provision to cover groups distinguished by all the other enumerated characteristics in subsection 15(1) of the *Charter* which do not now appear in section 281.2. If so, what are the implications of such an extension? We note that the hate message sections of the Canadian, Manitoba and Saskatchewan Human Rights Acts all extend the protection to each protected group covered by the legislation.

By the same token, we observe with interest recent amendments to the regulations under the *Broadcasting Act*. It is now forbidden for an AM or FM licensee to broadcast "any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[13] These grounds are the ones specifically enumerated in the equality rights section of the *Canadian Charter of Rights and Freedoms*. The new regulations for television and for pay television broadcasting are similar, extending not only to comment but also "abusive pictorial representation".[14]

The case of pornography involving children provides a useful point of departure to examine these questions. It is certainly the case that not all the children portrayed in the material deplored by presenters of briefs are female children. Accordingly, even a section including as an identifiable group "persons characterized by sex" would fail to protect all those who, on the basis of the argument set out above, would be in need of protection. It would seem, taking this ground alone, that some further bases would have to be added to make the benefit of the section really equal. On the other hand, however, it was not argued before us that pornography involving children was hate literature, in the same way that this point was made concerning pornography involving women. The complaints about child pornography focused largely on its exploitation and corruption of the innocent, and did not argue that this material taught us to hate the young. It might be argued on that basis that the dual rationale for extending the section, namely equality considerations and whether the evil aimed at actually can be described as material promoting hatred, is not present.

Given the nature of the material and submissions we have received in the area of child pornography, we doubt whether the dual rationale for extending the section to persons identifiable by age is present. We would make the same observations with respect to the other protected grounds listed in section 15 of the *Charter*. At this time, we simply have no evidence on which to conclude that hate propaganda with respect to these groups is being disseminated. On the other hand, however, we are aware that the imperatives of the *Charter* are strong ones. We have seen, in the case of the hate message section of the *Canadian Human Rights Act*, the *B.C. Civil Rights Protection Act, 1981*, and sections 281.1 and 281.2 themselves, how responding quite specifically to a particular emergency can result in legislation that can soon be perceived as too narrow.

We have concluded that it would be desirable to expand the definition of identifiable group in section 281.1(4) of the *Code* to include protection for an identifiable group based on sex or gender and we see little cogent reason for refraining from extending it to other groups named in the *Charter*, even if the need may not be immediately obvious. We think, however, that this change must be accompanied by implementation of the three changes recommended in *Equality Now!* and accepted by the Justice Minister of the day in responding to that report: removal of the requirement of wilfulness from the section; removal of the requirement that the Attorney General consent to a prosecution, and classification of the defences.

Recommendation 38

The definition of "identifiable group" in subsection 281.1(4) of the Criminal Code should be broadened to include sex, age, and mental or physical disability, at least insofar as the definition applies to section 281.2 of the Code.

Recommendation 39

The word "wilfully" should be removed from section 281.2(2) of the Code, so as to remove the requirement of specific intent for the offence of promoting hatred against an identifiable group.

Recommendation 40

The requirement in section 281.2(6) that the Attorney General consent to a prosecution under section 281.2(2) should be repealed.

We do not think that removing the requirement of specific intent which is contained in the word "wilfully" will leave section 281.2 unduly broad. Still in place is the requirement of general intent which is an ingredient of every criminal offence. Thus, a person who unwittingly or accidently communicates a message will be spared conviction.

In the area of pornography, a wilfulness requirement would place an almost impossible burden on the prosecutor. The effect of material may be to engender hatred of women, but persons may all too readily establish that this was not done "wilfully". The motive behind the publication may be described as sexual entertainment, or simply profit; even an unattractive motive, other than hatred, would serve to defeat a prosecution where specific intent was required. Such a result is surely not desirable, for it amounts to saying that one might create messages promoting hatred against women, or other groups, as long as that effect is only incidental to the profit motive.

We are mindful that some persons fear that removal of the requirement of the consent of the Attorney General will bring a flood of prosecutions, many of which would be ill-founded. The fear of potential harm to the innocent accused is behind these concerns. A slightly different perception of the issue is the concern that without the requirement of the Attorney General's involvement, important cases which should be won will be bungled by inexperienced complainants, with or without legal advisers. With regard to the first of these concerns, the Report *Equality Now!* notes that there have been fewer than six prosecutions under the hate provisions since their enactment.[15]

We expect that attempts to use the revised section by way of private prosecutions may, indeed, occur frequently during the first period of its being in force. However, once the limitations of the provision are recognized by citizens and lawyers, resort to it may decline. The section, in our view, will indeed cover a very limited range of material, for much that is repellent, or even criminal, may not be considered to be a message of "hate", even in the sense of misogyny. We hope that the other sections we propose to deal with pornography will, as well, reduce the need for persons to resort to private initiative by way of section 281.2.

We also think that extension of subsection 281.2(2) to include the hate messages of pornography may well require another change to the definitions in the section. At present, only "statements" are caught by the provision. Subsection 281.2(7) defines statements as including "words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations". Because the general term "visible representations" may be interpreted along the lines of the specific ones preceding it, namely "gestures" and "signs", we question whether the graphic images of pornography would come within this definition.

Many of the messages that convey hatred of women may be by way of visual representations, or a combination of the visual and written. At the hearing in Québec City, for example, we were shown a tabloid bearing on the front a photograph of a fully dressed woman, on her hands and knees, wearing a heavy leather dog collar and being pulled by a lead. Across the picture were words suggesting that as women are bitches, they should be chained. The combination of the colour photograph of the woman subjugated like an animal, and the words, was most compelling. In one notable instance, no words were used at all. Often drawn to our attention at the public hearings was a cover

from Hustler magazine showing a meat grinder. Protruding from the top were what remained of shapely female legs. Coming out at the other end was red minced meat.

We suggest that the term "visual representations" (or a term like it) be added to the section, to introduce some certainty as to whether a photo or other graphic way of conveying hatred would be included.

Recommendation 41

> **The text of subsection 281.2(2) should be amended to make it clear that graphic representations which promote hatred would be covered by the provision. The subsection could prohibit "publishing statements or visual representations or any combination thereof, other than in private communications" which promote hatred against any identifiable group.**

Given the hope that our other proposed sections, particularly those dealing with sexually agressive pornography, will deal with much of the material which offends, what area then is left to the hate provision? Violent or degrading material which is not sexually explicit may well be reached by a revised section 281.2. Additionally, we note that with respect to prosecutions under section 281.2, there is no defence of artistic merit, education or scientific purpose. The section may thus be regarded as a sort of complement to the provisions we have recommended to deal with "sexually violent and degrading" material, which do provide defences of these sorts.

We think that one of the important reasons for extending the reach of section 281.2 is because of the symbolic value of the extension. The ideas that pornography is a form of hate message about women, and intimately connected with the misogyny of our social institutions, are conceptually very significant. In shifting our thinking on pornogaphy from notions of sexual impropriety to concerns about human dignity and responsibility, these ideas have illuminated, in our view, the real evils of pornography. As they are significant, they merit inclusion and embodiment in the criminal law.

Footnotes

[1] The definition is found at s.281.1(4) of the *Criminal Code*. It is incorporated into s.281.2 by s.281.2(7).

[2] Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!*, (1984, Supply and Services Canada, Ottawa) at 69-70.

[3] Minister of Justice and Attorney General of Canada, News Release: "Justice Minister Proposes Measures Against Hate Propaganda", June 1, 1984, at 1-2.

[4] *Equality Now!*, Recommendation 37, at 71.

[5] Minister of Justice News Release at 2.

[6] *Equality Now!*, Recommendation 37, at 70.

[7] *Ibid., at 69.*

[8] Minister of Justice News Release at 3-4.

[9] *Saskatchewan Human Rights Commission* v. *The Engineering Students' Society, University of Saskatchewan et al.*, 7 Mar. 1984 unreported (Red Eye Decision) at 32.

[10] Maxwell Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy," (1970) 9 *Alta. L. Rev.* 103, at 113.

[11] *R.* v. *Keegstra*, 5 Nov. 1984 (Red Deer) unreported (pretrial hearing).

[12] *R.* v. *Keegstra* (pretrial hearing) at 20-23.

[13] *Radio A.M. Broadcasting Regulations, amendment*, SOR/84-786, schedule, s.1 (amending s.5(1)(b)); *Radio (F.M.) Broadcasting Regulations, amendment*, SOR/84-787, schedule, s.1 (amending s.6(1)(b)).

[14] *Television Broadcasting Regulations, amendment*, SOR/84-788, schedule, s.1 (amending s.6(1)(b)), *Pay Television Regulations*, SOR/84-797, s.6.

[15] *Equality Now!*, Recommendation 35, at 69.

Chapter 26

Film Classification and Censorship

1. National Action

A number of submissions to the Committee suggested that Canada implement a film review and classification system on a national scale. There are several different ways of structuring such a system.

One would be to encourage the various provincial boards to consult with one another to develop uniform standards of acceptability. Then each board operating locally would apply the common standards, and no new body need be set up.

Alternatively, the provinces could set up a national or joint board to which each province would appoint representatives. The Manitoba legislation contemplates such a possibility by providing that Manitoba may co-operate with the governments of other provinces in appointing a joint film classification board of not more than 15 persons, nominated by the provinces. The joint board would classify films or slides to be exhibited in the member provinces.[1]

A third possibility is that the national review function could be an aspect of an expanded and improved Customs service. In Australia, the authority for the federal government to have a censorship board arises from its jurisdiction over Customs, and, by agreement, the states have given to the national board the power which they have to review locally produced films.

We have considered the suggestion that we opt for a national review function, (see Section II, Chapter 14 of the Report) along with each of the ways in which it would be possible to bring it about, and we have decided not to recommend this approach.

It seems to us that review at the provincial level serves a valuable function. We have been impressed by the desire of people to feel that they have access to the review process, and that they can influence its decisions. A national board would be even more remote, in the eyes of some, than the boards now located in the provincial capitals. Over and over again, we were told that standards of acceptability do vary from place to place in Canada. The provincial board can

and should be more sensitive to local taste, albeit within the framework of the national criminal law, than a national board could be. As we discuss elsewhere, we have recommended the deletion from the *Criminal Code* of the "community standards" test which now helps determine whether material is obscene, because we do not think that this element of subjectivity has a role to play in the criminal law. The community does, however, have a useful role in determining what it wants its young people to see, as opposed to determining what is criminal, and we think that that role can be exercised to more effect on a provincial rather than a national basis.

Recommendation 42

Canada should not opt for a national film review system, but rather maintain the existing arrangement whereby review is done on a province by province basis.

2. Problems with Co-ordination of Provincial Regulation

Having rejected the prospect of review on a national scale, however, we must still observe that there are problems affecting a provincially-oriented system which bear looking into. We have noted that some provinces and territories have no local film review authority. In this position are Newfoundland, Prince Edward Island, the Yukon and the Northwest Territories. Although they may consider it suitable to borrow the classifications of others, it seems that absence of legislation may be depriving them of more than a classification function.

The provincial film review legislation, for example, requires that theatre operators observe classifications, advertise them, and post them by the entrance to the theatre for the guidance of patrons. We heard complaints in Whitehorse that local theatres were inconsistent in their practices concerning notification of film classifications. Parents were sometimes unable to determine whether or not a particular movie would be suitable for their children. Some complained, in a similar vein, about non-enforcement of age restrictions on entrances to theatres.

Accordingly, we think that it would be desirable for provinces without film review legislation at present to explore whether they wish to enact it, in whole or in part. Even if they do not have the inclination or the resources to institute review of films, the aspects of the typical film review legislation which might usefully be enacted are those concerning notification of the classifications and entrance restrictions for children.

Recommendation 43

Those provinces and territories which have not implemented a film review system should consider doing so.

Another difficulty which will persist with a provincially-based system of review and classification is the problem that clearance in the most permissive jurisdiction can be, in effect, clearance for national purposes if the films are videotaped and then made available for private as opposed to public usage. It is, in our view, inevitable that entrepreneurs will take advantage of the differences in standards between provinces by using the most permissive jurisdictions as clearing houses for films destined for national distribution as videos. Mail order houses based in these provinces will offer material to a national market.

This problem of the *de facto* national influence of the boards in some jurisdictions in this regard was addressed by many briefs at our public hearings. The boards most often noted in this connection are those of British Columbia and Québec, which take a more tolerant view of some kinds of explicit material than does, say, Ontario. This issue generates considerable frustration and concern, especially among those whose views do not accord with the views of the boards which they perceive to be having this national influence.

We can appreciate the concern that is reflected in these submissions. However, in most jurisdictions, only films or videotapes intended for commercial exhibition are required to be reviewed and these represent a small proportion of the total amount of material in circulation. Videotapes, not films, are the largest aspect of the home viewing market. At this time, videotapes for private use can be imported or produced and sold in most jurisdictions without any contact at all with provincial classification or censor boards. The circulation of the bulk of this video material cannot thus be laid at the door of any censor board, however relaxed may be its views on what is acceptable in films.

Moreover, we note with interest the introduction in some provinces of schemes to regulate sale and rental of videotapes intended for private consumption. This direct attack on the problem of unsupervised circulation of allegedly offensive material may be more effective than any attempt to enforce uniform standards on all boards, or establish a national board.

3. Relationship Between Customs and Film Classification

It seems to us that the real influence bearing on the circulation of offensive material within Canada is that of Customs. It is, after all, through Customs clearance procedures that films and videotapes are imported. One can expect provincial film review authorities to be, if you will, a second filter for videos which are imported only if someone within the province exhibits them commercially or otherwise brings them within the comparatively narrow scope of the film or video classification scheme.

Accordingly, we think that the emphasis in our inquiry about national circulation of offensive material should be at the point of entry: the Customs administration. We are, in regard to pornography as in regard to so many other things, an importing nation. The film review boards, even if co-ordinated on a national level, cannot really be expected to control the adverse effects of importation.

In one respect, however, the link between Customs and film review authorities bears closer examination. As we have said, films or videos intended for commercial showing must be reviewed by provincial authorities. Before they can be reviewed, they must be in the country. To effect their entry, their importers would ordinarily be required to satisfy Customs officials that the films are not "immoral or indecent", under the wording of the present *Customs Tariff*.

There has grown up a practice in some jurisdictions of rolling into one, the Customs determination of acceptability for entry and the provincial film review board's determination of acceptability for showing. There are many reasons for doing this. On a practical level, importers will not want to go to the trouble of bringing a film into the country only to be told some time later that it cannot be shown in the province. In addition, the volume of material passing through Customs is so large that the relief of sharing the review work with another authority may be welcome. On a more fundamental level, many believe that it is not the role of Customs officials to act as the arbiters of public taste. Although to some observers, this view extends to claiming that neither Customs nor the film classification boards should play this role, in others, it merely results in a preference for the provincial authority over the Customs branch.

Whatever its rationale, it is clear that this practice involves deference by the Customs officials to the view of the film review board. Such deference can manifest itself in a number of ways. In Ontario and British Columbia, films being imported go in Customs bond directly to the office of the censor. In Québec, a practice has developed of allowing the importer to take the films from Customs and deliver them to the Bureau de Surveillance. There is no control over what happens to the film on its way from Customs to the office of the Bureau. A period of 60 days is given by Customs to the importer in which to seek clearance of the film from the Bureau. In all these cases, once the film is approved by the provincial censor, it is granted entry to Canada, effective not from the date of the censor's clearance but rather from the date of its initial entry at the Customs port. Customs officials do not consider that they have totally delegated their own powers to the various censor boards, because they still retain, in theory, the power to refuse entry even to a film which has been accepted for exhibition in a province.

We heard numerous complaints about this sort of relationship between Customs and provincial film reviewers. Singled out for special complaint was the 60-day grace period allowed to films entering by way of ports in Québec. It was felt that the unscrupulous could use this period to make videos of the film

which had been put in their custody. Then, even if it did not receive clearance for showing in the province as a film, the videos would nonetheless be circulating. Some witnesses have attributed to this scheme a high proportion of the offensive videotapes which they say are now circulating in Canada. It should be noted, however, that although such procedures may contribute to the circulation of pornographic tapes, a much more likely factor is that Customs only inspects a very small proportion of what actually comes into the country. Nevertheless, we have reservations about the apparent delegation by Customs authorities of their power to assess material entering the country. We are not comforted by their retention of a notional power to refuse or permit admission of a work contrary to the view of the local review board. In practice, we think such an overruling is unlikely to happen.

Our problem with this delegation is that it cuts into the attempt, and the opportunity, to forge national standards in the administration of the *Customs Act* and *Customs Tariff*. However much we may want to recognize the role of local taste in determining who sees what in provincial theatres, we think that there should be common national standards about what comes into the country.

We do not think that Customs officials should defer to the opinion of local boards. While to do so may have been helpful and convenient when the standards used by Customs to determine obscenity, and the level of officers' understanding, were relatively unsophisticated, we prefer that Customs concentrate in developing its own talents in this area. Although to resort to provincial assistance might be tempting given the scant resources available to Customs for the "pornography detail", we think that the focus should move to securing more resources. In our view, only the development of an active and sophisticated Customs will really address the problems of entry into Canada of pornographic material.

We have attempted to discover the details of the 60-day grace period in Québec which so angered some of the witnesses at our public hearings. They are discussed in detail in Section II, Chapter 14. Here, let us observe that, in our view, the more serious problem is the general influx through Customs of material which, because it will not be shown publicly, may never even be legally required to go to a film censor, rather than the possible abuse of the Customs/censorship interface in respect of a small amount of material. Over and above that, however, we have been advised that Customs officials are interested in ending this arrangement. We urge them to do so.

Recommendation 44

Film review boards and Customs authorities should not enter into arrangements whereby local film review boards have de facto control over what enters Canada; we further recommend that the 60-day clearance period allowed by Customs to films entering by way of Québec ports be discontinued.

4. Problems of Substance

We do not intend to comment here in depth on the details of running a provincial film review system. However, a few aspects of provincial regulation do have a bearing on our recommendations.

In devising our approach to pornography, we have proposed a three-tier classification of material. The most offensive material, that involving children or in which harm is suffered by the participants in its production, we would subject to harsh penalties, with no defences based on intent or value being available. The second tier of material is that which is sexually violent and degrading. Here we have recommended a new prohibition with respect to which the accused could defend the material (here a film or video) on the basis that it has artistic merit, or educational or scientific purpose. Material in this category is also subject to restrictions on its public display and on access to it by young people.

The third tier of material is that in respect of which we think there should also be controls on availability and display, but no absolute criminalization. We have restricted the use of the *Criminal Code* in this tier to prohibiting availability of this material to children, and to reducing its visibility and thus its capacity to shock or offend the unwilling consumer or passerby.

Because Customs is unlikely to be able to control the importation of all films and videos, we realize that some films which people would argue are unacceptable, will come into the country. In addition, of course, films that are produced within the country go to the provincial boards without any intermediary review.

Provincial film review boards will, therefore, be required to deal with all films that are presented to them with the purpose of being shown publicly. How they choose to respond to the material may vary, as it presently does among the boards. One approach is simply to classify the films according to the provincial scheme. A second approach involves the banning or cutting of films prior to a classification being designated.

One of the important roles of the state with respect to pornographic material is the protection from offence. We do not think, however, that as a rule, banning is necessary in order to protect people from being offended. We think that the classification systems now in place in the provinces have a major role to play in preventing offence, as do the controls on access to theatres by young people. The requirement of posting and advertising the classifications and the further requirement, in some jurisdictions, of warnings about certain kinds of content, are also in our view effective and desirable ways of helping people avoid the material which they do not want to see.

While we endorse measures like these in general, we do note that there are some difficulties with the working out in practice of these systems. Particularly with respect to classification, we are concerned that the standards upon which

classification is being done do not always appear in the legislation, or even the regulations. We regret this for two reasons.

Firstly, the legislative delineation of standards is a valuable way to protect against improper use of discretion in the administration of a scheme; the rights of exhibitors will be safeguarded when the legislature enunciates standards which must be observed by those administering the law. Secondly, articulation in legislation ensures a certain publicity for the standards, and allows citizens to know what is being done on their behalf. No matter how many pamphlets a board may distribute discussing its classification scheme, the legislative articulation still is the most enduring. A government may wish to include its standards in regulation rather than legislation, because regulations can be more responsive to changing community values. However, in our view, positive results will flow from greater elaboration of the classification standards in law, be it statute or regulation.

We have also observed that the legislation often does not contain any articulation of the standards upon which a board will be prohibiting or cutting films. What we have said above about the advantages of enunciation of standards in law, we reiterate even more forcefully in this connection. The power to prohibit exhibition of films or to cut them is an intrusion on the right of freedom of expression guaranteed by paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*. It must be a reasonable limit, *prescribed by law* and demonstrably justifiable in a free and democratic society, in order to survive constitutional challenge. The case challenging the Ontario *Theatres Act* shows, in our view, that these provisions for prohibiting and cutting films are on an infirm constitutional footing. We think that the provinces will be interested in reviewing them to ensure compliance with the *Charter of Rights*.

Of course, one way of ensuring compliance with the *Charter* is to remove from the provincial boards the power to cut or to ban films. We prefer this approach. If the provincial board is of the view that the film is caught by the prohibitions against first or second tier material, then presumably the board does not need any additional power to prohibit or to cut it. For greater certainty, the statute may provide that the board may decline to classify a film which, in its view, contravenes the *Criminal Code*, but there would be no power to cut, and no power to prohibit the showing of anything not prohibited by the *Criminal Code*. If material is not prohibited by the *Code*, then we believe that it should be shown, at least to those who wish to view it.

Recommendation 45

> **Provincial film review boards should have an explicit statutory mandate to refuse to permit exhibition in the province of films which are contrary to the Criminal Code. Provincial film review boards should not be empowered to prohibit or cut films which are not contrary to the Criminal Code.**

If the provinces decide to maintain the power to prohibit or cut films, then we strongly recommend that the standards upon which these decisions will be made should be embodied in legislation, or at least in regulations.

Recommendation 46

Provincial film review legislation or regulations should contain explicit standards to govern the boards' activities in classifying and, where these powers exist, in prohibiting and cutting films.

5. Advertising Restraints

There exist in provincial legislation, broad powers to control advertising of films. In addition to specific provisions requiring that the classification of a film be shown in advertising material for it, the legislation usually confers a power of prior restraint of advertising on the authority. Advertisements must be submitted to the board, which may approve or disapprove them.

We think that the rationale for this system of prior restraint has a lot to do with the exercise of the prior restraint powers of the boards with regard to film censorship. It would be regarded as inconsistent to go to the trouble of removing a particular scene from the film only to have it appear on the billboards outside the theatre. Interestingly enough, however, Manitoba, a province which does not censor films by way of prior restraint, has not only a power to impose prior restraint on advertising[2] but also a very intrusive power to remove offensive advertising from public places.

Any peace officer or inspector in Manitoba may be authorized by the board to order the removal from all public places of any advertisement relating to any film or slide if the advertisement is of an immoral, obscene or indecent nature or depicts any murder, robbery, criminal assault or the killing of any person. If the licensee of a theatre does not remove the material within 24 hours, then the licence will be cancelled by the Minister. There does not appear to be any right of appeal from an inspector's order.[3]

We are concerned with both the prior restraint of advertising and with broad power like that in the Manitoba statute just described. On the other hand, we think that it is quite reasonable, and entirely consistent with a scheme of classification, to require the theatre owners to include the classification of the film in advertising for it.

It seems to us that prior restraint on advertising is difficult to justify in light of the provision we have made to control display of visual pornographic material, discussed above. This provision would make it an offence punishable on summary conviction to display visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation. In our view, this offence would include display of such material in a theatre or outside it. The defence to the charge would be to demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advertising of the display within.

This sort of control upon the location of the third tier material is, to us, a far less intrusive way of protecting public sensibilities than the imposition of prior restraint.

Recommendation 47

The provinces should not exercise a power of prior restraint over advertising of films; however, the power to require that film classifications be included in an advertisement should be kept.

6. Relationship Between Provincial Film Review Boards and the Criminal Law

The Supreme Court of Canada has stated that there is no constitutional reason why a prosecution cannot be brought under the obscenity provisions of the *Criminal Code* against a film which has been approved by a provincial review board.[4] Under the *Code* as it now stands, the issue is whether approval of a provincial censor board would amount to a defence against a charge under section 159 or section 163 of the *Code*. Section 159(2) prohibits the doing of a number of acts "without lawful justification or excuse", and it is argued that the approval of a censor board should, in law, amount to such a lawful justification. The Canadian Motion Picture Distributors Association made representations to this effect to our Committee.

As we have noted earlier in this Report, Bill C-19, the omnibus Criminal Law Amendment Bill introduced in early 1984, would have recognized the operation of provincial law respecting film classification. With respect to offences under sections 159 and 163 of the *Code* the bill proposed a new section 163.1, which would have required the personal consent of the Attorney General to a prosecution of a film or videotape presented, published or shown in accordance with a rating or classification established pursuant to the law of the province where the film was shown. This provision would not have helped in those provinces without a local film classification system, of course, but the Motion Picture Distributors' Association nonetheless regarded it as an improvement over the previous laws.

We do not include in our proposed amendments any provision of this nature. We recognize that whether they have explicit power to ban films or not, an authority will inevitably make a preliminary determination of whether, in its view, a film offends the *Criminal Code*. Yet, even though this determination about criminality is going to be made, we do not think that it is desirable to elevate the board's judgment to the status of a defence or a discretionary bar to prosecution. If the board's decision were to constitute a full defence, then we would have, in effect, a delegation to provincial authorities of administration of the criminal law sanction. Where the decision of the board is a discretionary bar to prosecution, as in Bill C-19, the delegation is not complete, but the concern remains the same.

True, local prosecutors make decisions about what charges to bring under the *Criminal Code* and that is a form of decentralization, but it is not decentralization that is really the concern here. In our view, the objectives and the outlook of the classification or censor boards, while somewhat congruent to those of the law enforcement authorities, are nonetheless different from them. They are concerned primarily with community tastes, with the making of those kinds of subjective evaluations about what offends which we have sought to remove from the criminal law. We do not think that it would be useful to reintroduce that element into the law, indirectly, by means of reliance on the judgment of classification or censor boards about what breaches the criminal law.

It will be said, of course, that one is relying on the board's assessment of what does not breach the law, rather than on their assessment of what does. Surely, it will be argued, we can be certain that something does not offend the law if it is approved by a board as strict as the Ontario one, for example, and we need not hesitate about conferring immunity from prosecution. Here we meet again the concern about the variation from jurisdiction to jurisdiction in local censor board standards. Some boards may well take a different, and more permissive view, of the criminal threshold than would the local Crown attorney or the court. If a film were passed by such a board, then one might still not wish to insulate it from scrutiny by a court. In such a case, a provision like that in the proposed section 163.1 would produce the unhappy spectacle of the Attorney General and classification or the censor board at loggerheads.

The standards used by Crown attorneys and judges to determine criminality may well, of course, vary from place to place. But the fact of regional variation in the criminal justice system does not mean that we should add yet another system (itself affected by regional variation) to the decision-making process, possibly to conflict with the criminal justice system.

We are prepared to make one exception to this general position, an exception which is made necessary in our view by our recommendation on access of children to visual pornographic material. We have recommended that the *Criminal Code* make it an offence punishable on summary conviction for everyone who is the lessee, manager, agent, or person in charge of a theatre, to present therein to anyone under 18 years of age, any visual pornographic material. This provision could well include the acts of a theatre owner in showing a movie classified in the adult or similar category, for viewing by persons over 14. The film, while not restricted, might nonetheless contain some scenes which would attract the operation of the proposed section.

We have provided a defence to this offence for anyone who can demonstrate that the film or tape has been classified under the rating system for film and video in the province, as acceptable for viewing by those under 18. Thus, the certification of the board would insulate the theatre operator from prosecution.

Here, we are not deferring to the decision of a provincial authority about whether to prohibit a film or not; we are dealing with classification only. Moreover, the material being classified is, we assume, legal according to the *Criminal Code* provisions we have devised. Otherwise, presumably the board would not have classified it at all. So, we are really deferring here to the board's judgment about who should see legal material. We are content to defer in these circumstances.

Recommendation 48

Clearance for exhibition by a provincial authority should not constitute a defence or a discretionary bar to a prosecution under the Criminal Code, with the exception that a film classification permitting a film to be shown to persons under 18 will constitute a defence to a charge of displaying visual pornographic material to a person under 18.

7. Regulation of Video Recordings

There was strong support at the public hearings for review and classification schemes applicable to video recordings sold or rented for private use. The major concern of advocates of this proposal was for young people. Worried about the kinds of violence, degradation and explicit sex which children might be seeing on videotapes, parents and others were concerned that they now have almost no effective way of monitoring children's viewing.

We were told that the covers and advertising of videotapes often do not give accurate clues about the nature of the film. The merchants who rent tapes may not be as vigilant as many would hope in ensuring that young people avoid the worst material. Even where the retailer is watchful, young people may be getting videotapes in the same way that they traditionally got liquor or cigarettes: having an older youth obtain supplies for younger peers.

The ease with which videotapes can be duplicated means that they will be widely and readily accessible. Outlets have proliferated, with videotapes being available anywhere from the large department store to the corner gas station to the specialized video outlet, be it an "adult" video club or neighbourhood family store. Video recorders are now reasonably widely available in private homes across Canada, and home viewing means that consumption of the materials can take place in private. For many young people, this means away from supervision.

At present, only Ontario and Nova Scotia have included distribution of videotapes for private viewing within the provincial classification schemes.[5] Apart from these initiatives, which happened so recently that information about how effective they are was not available to us, there are almost no controls on videotapes intended for private use. Conceivably, of course, importation of videotapes would be subject to Customs regulation, but there was a widespread feeling that this is presently most ineffective. There simply

are not the resources to enforce the *Customs Tariff* thoroughly. The distribution by mail of obscene videotapes would be within the *Criminal Code* and *Canada Post Corporation Act* provisions respecting use of the mails for distribution of pornographic materials, but here again, enforcement is perceived as ineffectual.

We can see some real merit in having a regulatory scheme designed for video recordings that are not shown publicly. We believe that the scheme should include only classification, but not prohibition or cuts. The power to prohibit, in our view, should be no more than a power to prohibit circulation of material offending the *Criminal Code* law, as we have recommended in the case of film classification.

Recommendation 49

> **Each province should establish a system of review and classification for video recordings intended for private use in the province. Under such a system, the review board should be given an explicit statutory mandate to refuse to classify video recordings which are contrary to the Criminal Code but not be empowered to prohibit or cut video recordings which are not contrary to the Criminal Code.**

Both Nova Scotia and Ontario have used the device of the film exchange licence to bring video retailers within the ambit of provincial legislation. Clearly, in our opinion, regulation of videotapes belongs at the provincial level, if done at all, and we see merit in the Ontario and Nova Scotia approach.

There are a number of problems which confront any authority seeking to regulate videotapes. One of the threshold issues is whether and to what extent videotapes should be submitted to a board and classified. At the point of starting up a system, the classification task (of all existing tapes available in retail outlets) would be huge. Even once that bulk had been digested, however, the large number of videotapes in circulation would still make the classification task formidable.

Even though regulation of videotapes is a recent innovation, there are already two different approaches to this problem. The *Video Recordings Act, 1984* of the United Kingdom requires that all videotapes, except for those in certain exempted categories, be presented to the authority in order to be classified. Nova Scotia, on the other hand, recognizes that tapes in an "unclassified" class will be distributed. In many instances, the videotape will be a reproduction of a film which itself has already been classified, and the classification of the original film will apply to the tape. However, not all tapes will be reproductions of classified works. It is clear that the thorough solution, to classify everything, is also the most demanding of resources.

The issue of advertising the classification may well present some technical difficulties. Affixing labels to the cartons and the tapes is possible, but boards may wish to consider whether it is possible or desirable to put some mark on

the actual film of a cleared tape. In the course of our consultations, we learned of the importation into Canada of a large number of empty boxes for a particular videotape. No tapes of that title were cleared through Customs. The cartons seem to have been destined for underground copies. Unless some symbol of board approval, which is difficult to counterfeit, could be put on the tape itself, it would be difficult to control this type of circumvention of a local system.

The Nova Scotia plan has a feature which we find quite attractive in the context of this problem of advertising. The regulation requires the retailer to put the classifications on each list of tapes distributed to customers. Such a requirement will aid in achieving what must be one of the most important objectives of this type of scheme: putting into the hands of parents and other adults the means of monitoring and guiding the viewing activities of their youngsters.

Another issue to be faced by those contemplating establishment of a video classification scheme is that of penalties for breach. Presumably, a key element in the scheme would be a requirement that persons not distribute tapes to those for whom the classifications indicate they are not intended. Our survey of the provincial censorship legislation shows, however, that any penalties provided for breach of the *Acts* or regulations are quite small. As systems founded on prior restraint, and aimed at preventing showings rather than penalizing them after the fact, these censorship regimes have not depended for their efficacy on prosecutions.

Yet proliferation of videotapes and the tremendous variety of outlets where they may be available, coupled with an absence of prior restraint, leads us to suggest that the issue of penalties should be a serious one to framers of any video regulation scheme. The *Video Recordings Act, 1984* of the U.K. provides quite substantial penalties. Supplying a video work in respect of which no certificate has been issued will, for example, attract a fine not exceeding £20,000.[6] Forfeiture of the videotape involved in the offence is also called for.[7] We think that using stiff penalties for violations of the scheme is preferable to using prior restraint.

A further element of a video retailer licensing scheme might usefully be considered. If retailers were required to keep a log showing the source, to them, of the various tapes which were sent to their stores, then bootleg tapes might be more readily detected. A tape which appeared in stock but in respect of which there was no *bona fide* supplier listed in the log, could well prompt the sorts of inquiries which might disclose not only breaches of the classification system but also of Customs legislation.[8]

Footnotes

[1] See s. 22(4) of the Manitoba *Amusements Act*, enacted by S.M. 1972, c. 74, s.4.

[2] *Ibid.*, s.22(3)(b).

[3] R.S.M 1970, c. A70, c. 24.

[4] *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1, *per* Ritchie, J. at 24.

[5] The government of British Columbia announced plans to regulate videotapes early this year. The details of those plans have not yet been made public, however.

[6] *Video Recordings Act, 1984*, c. 39 (U.K.) s.15.

[7] *Ibid.*, s.21.

[8] A parallel to this recommendation is the provision in s.103 of the *Criminal Code* requiring firearms merchants to keep a record of transactions and an inventory of firearms.