Department of Justice
Canada

WORKING PAPERS ON PORNOGRAPHY AND PROSTITUTION

Report # 16

SEXUALITY AND VIOLENCE, IMAGERY AND REALITY: CENSORSHIP AND THE CRIMINAL CONTROL OF OBSCENITY

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POLICY, PROGRAMS
AND RESEARCH BRANCH

RESEARCH AND
STATISTICS SECTION

Canada

SEXUALITY AND VIOLENCE, IMAGERY AND REALITY:

CENSORSHIP AND THE CRIMINAL CONTROL OF OBSCENITY

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*Prepared under contract with the Ministry of Justice, Canada

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July, 1984

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Acknowledgements

This research has been made possible by the willing co-operation of the provincial boards of censorship and classification. I would particularly like to thank Mary Brown of the Ontario Censor Board, Jean Tellier of the Bureau de Surveillance du Cinema, Don Trivett of Nova Scotia's Amusements Regulation Board, and Mary Lou McCausland, David Huitson and Reece Wrightman of B.C.'s Film Classification Branch.

Ron Rheingold and M.J. Parlor of Statistics Canada have graciously supplied me with useful data; my colleagues Ted Palys and Simon Verdun Jones have provided me with thoughtful analyses. The staff of the Criminology Research Centre, Simon Fraser University, have made possible the technical production of this report. My final debt is to Daniel Sansfacon of the Ministry of Justice; his support and supervision have been much appreciated.

The views expressed here are those of the author; the present and future policies of the Ministry of Justice are not presumed to be reflected in the analysis that follows.

PURPOSE AND METHOD OF STUDY

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The purpose of this study was to review the legal status and the decision-making processes of four provincial censor boards, those in Ontario, Quebec, British Columbia and Nova Scotia.

The project necessarily involved an examination of the existing relationship between provincial control of censorship and classification and federal control of the Code's obscenity provisions. In the first section of the paper I set out the historical backdrop for both obscenity and censorship; statutory and case law, academic analyses, House of Commons Debates, and Committee proceedings have all been used to create a picture of our past.

In the second section of the paper I set out the specifics of censor board decision-making in the four provinces under study. I have focussed on the decisions that are most crucial to the legal sphere - those involving prohibitions of public exhibition. Board policies were made clear as a consequence of case analysis, study of annual reports, considerations inherent in statutory and regulatory provisions, and meetings with Board members in Vancouver, Toronto, Montreal and Halifax.

In the third section of the paper I focus on the present relationship between provincial powers of censorship and federal jurisdiction. Police and court data give some

indications of current practice in the federal sphere; case law reveals the interlocking nature of the roles of federal and provincial control. The question of appropriate targets for censorship and for criminalization is ultimately addressed; recent empirical research concerning aggressive pornography is canvassed and analyzed. The report finishes with seven conclusions relating to actions in both the federal and provincial spheres.

DATA AND ANALYSIS

It seems difficult, not surprisingly, to begin discussion in the arena of censorship. Though the provincial practice of prior restraint can more effectively suppress offensive material than the federal criminal process, the fear of unjustly restricting expression lurks in the shadows in both instances.[1]

And yet the images that "pornography" promotes are, for the most part, as Britain's Williams Report would have it, "ugly, shallow, and obvious."[2] The task that confronts the student of legal control is that of both separating and connecting imagery and reality.

The federal government has been involved in the construction of definitions of obscenity since 1892;[3] the provinces have been engaged in prior restraint of the medium of film since 1911.[4] These legacies are instructive, revealing fundamental changes in the nature of public

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[1] For a most recent judicial discussion of this issue in the federal sphere see R. v. Red Hot Video, 6 C.C.C. (3d) 331. For a consideration of provincial powers of censorship see Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, (1983) 147 D.L.R. (3d)58, 141 O.R. (2d)583.

[2] Report of the Committee on Obscenity and Film Censorship, Bernard Williams, Chairman. London, Home Office, 1979 at p.96.

[3] Statutes of Canada, 1892, c.29.

[4] Statutes of Ontario, 1911 The Theatres and Cinematograph Act, c.73.

concern. Media of communication have expanded in type, scope and intensity; the production of the sexually explicit images of 1984 starkly reveals a portrait of human relations that could not be comprehended by Canada of 1892, or 1911.

Defining the Intolerable: The Genesis of Censorship and Obscenity

Until 1959 Canadian courts relied upon Britain's Hicklin[5] test for a judicial enunciation of the notion of obscenity. While the provinces have historically limited themselves to prior control of the public exhibition of film,[6] the concerns of the federal government have not been so constrained. Indeed, Ontario's recent decision to control the exhibition of videotapes in private homes is arguably noteworthy, in this context. The technological development and mass consumption of a new medium can help to restructure the perception of federal and provincial responsibilities for the control of offensive material. As media of communication expand and contract, federal-provincial dialogue regarding the roles of censorship and obscenity becomes a matter having greater

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[5] R. v. Hicklin, (1868) 3 Q.B.D. 360.

[6] David Price has perceptively commented on the notion of public exhibition of film in "The Role of Choice in a Definition of Obscenity, 57 Canadian Bar Review 301, at 318.

salience.[7] It seems useful, then, to inform the present--to chart this relationship in historical context.

Inappropriate sexual arousal has always been at the heart of the criminal offence of obscenity, crime comics and depictions of prizefights notwithstanding. Chief Justice Cockburn first wrote in R. v. Hicklin in 1868, "...the test of obscenity is this, 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."[8] Although the Hicklin conception of obscenity has met with considerable judicial and academic criticism, it did have a political life of almost 70 years in Canada.[9]

In early applications Canadian courts worried about the immorality that the potential for sexual arousal might produce. In 1905 in R. v. Beaver,[10] the Ontario Court of Appeal said of a printed paper , "There can be no doubt that the language complained of is so foul and disgusting that it would prove repulsive to most persons reading it, and is so gross that there would be no danger of its corrupting their morals. But unfortunately there are others susceptible to

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[7] See below, Obscenity and Censorship: A Question of Focus.
[8] See note 5, above, at p.371.
[9] See W.H. Charles, "Obscene Literature and the Legal Process in Canada", 44 Canadian Bar Review 243 (1966). For an early indication of judicial discontent with Hicklin , see R. v. Stroll (1951) 100 C.C.C. 171 (Mtl. Ct. of Sess.)
[10] R. v. Beaver, (1904) 9 C.C.C. 415 (Ont. C.A.)

lustful ideas upon whom it would have precisely the opposite effect."[11].

In other cases reported during the early twentieth century, Canadian courts similarly endorsed the application of the Hicklin test. W.H. Charles has said of his canvassing of obscenity decisions from 1900 to 1940, "it seems fair to conclude that the Hicklin test was applied with all its vigour. Some publications were condemned on the basis of isolated passages, which were considered to have a possible tendency to corrupt and deprave a susceptible minority, even though most persons would be disgusted rather than corrupted by the material. In all cases the author's intention or motive was completely disregarded."[12]

Amendments to federal obscenity provisions were made in 1900, 1909, 1913, and 1949, prior to the reconstruction of 1959. Particularly illuminating is the Criminal Code Amendment Act of 1913. Section 8 of the Act prohibited "...an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility, or curing venereal diseases, or diseases of the generative organs."[13] On the face of it, this appears as patriarchial repression

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[11] Ibid, p. 422-423.
[12] See note 9, above, 44 Canadian Bar Review at 246.
[13] Statutes of Canada, 1913, Criminal Code Amendment Act, c.13, s.8.

of dysfunctional sexuality. Only male "virility" is properly thought the target of the law. The advertisement of appropriate treatment for venereal disease, or other diseases of reproductive anatomy, scarcely seems an appropriate object for the criminal sanction. And yet this prohibition remains today as s.159(2)(d) of the Code; it seems difficult to make sense of its continued inclusion.

Amendments to Criminal Code provisions respecting obscenity were not generally focused upon amending the Hicklin definition, until 1959. Only in 1949 was the issue of more precisely categorizing obscenity specifically addressed, with the criminalization of the crime comic.[14] The bill introduced was entitled, "Pictures in magazines etc. tending to induce violence", and was the work of the architect of the 1959 revision, E. Davie Fulton. There is, then, a sense of deja vu, with respect to current debate about the negative content of images of violence. What is fundamentally different in the present is the focus given to violence against women. Sexual arousal, per se, is accepted, indeed welcomed. As the Toronto Area Caucus of Women and the Law suggests, "...It is not erotica to which women object - it is pornography. In erotica neither sex is degraded, nor is either sex seen as a target of violence.

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[14] Statutes of Canada, 1913, Criminal Code Amendment Act, c.13, s.1(3).

...What women object to is not material of an erotic or sexual nature; what we object to is pornography, that is, material that shows violence against, or humiliates or degrades women."[15]

Sexual arousal has not always been so kindly regarded within the public sphere. On March 24, 1911, Ontario, Quebec, and Manitoba all passed Acts to both licence and censor public exhibitions of film. In their first few years of operation, the provinces were often involved in suppression of film commentary concerning venereal disease. There was a reluctance to acknowledge the unsavoury side of the sexual contacts of Canada's young men at war.[16] In 1919 the Ontario Censor Board prohibited exhibition of The End of the Road, a Y.W.C.A. sponsored film, described as "one of the strongest forces for arousing public opinion to the necessity of fighting venereal diseases."[17]

Ontario's initial statute, The Theatres and Cinematographs Act, tended to be rather prohibitive in its

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[15] Toronto Area Caucus of Women and the Law, "Pornography: The Law and Women's Rights" unpublished manuscript, 1984, at 45.

[16] A useful discussion of the early years of provincial censorship of film can be found in Malcolm Dean's Censored Only in Canada, Toronto, Virgo Press, 1981. Though the book simply endorses existing libertarian analyses, it does sketch a valuable history.

[17] This was the position of the Canadian National Council for Combatting Veneral Disease, outlined in Censored Only in Canada, note 16, above, at p. 24.

early operation.[18] In its first few years the Board approved only 25 per cent of all films submitted. But legislative enactment was not, and never has been, at the heart of censor board decision-making. The present section 2(a) of Ontario's Theatres Act maintains a power first given in 1911, "to censor any film and...remove by cutting or otherwise from the film any portion thereof that it does not approve of for exhibition in Ontario."[19]

While the evolution of obscenity law is best understood by case analysis, the evolution of censorship is best understood by examining the tenure of successive censor boards. The power of prohibition has always existed, as with the criminal offence of obscenity. But while judicial decisions have necessarily built upon pre-existing case law, successive censors have set out distinctive and often discontinuous models of censorship and classification. This need not be regarded as philosophically or practically repugnant ,however; provincial autonomy in the control of public exhibitions cannot be expected to necessarily yield a chronological consistency.

Malcolm Dean has called Ontario's O.J. Silverthorne,

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[18] Ibid, pp. 135 - 138.
[19] Revised Statutes of Ontario, 1980, The Theatres Act, c.498 s.2(a).

"the very model of a modern censor."[20] Omri J. Silverthorne became chairman of the Ontario Censor Board before the age of 30; for almost 40 years Silverthorne's thought shaped the structure of decision-making. From 1936 to 1974, Silverthorne weathered the storms of censorship, and of its critics. In 1971 he told a conference of Canadian censors, "...the outcry which went up in Ontario over the censoring of films such as Elmer Gantry and Saturday Night and Sunday Morning is proof enough that we frequently go too far in our work...perhaps the time has come to start considering the abolition of censorship by government fiat in Canada...I would like to see censorship as it is presently being practised abolished in Canada within the next two years."[21]

And yet Silverthorne and the Board were not reluctant to ask for eliminations that were statements of inflamed sexuality. In 1967, with the film Ulysses, the following passage was excised, "I often felt I wanted to kiss him all over, also his lovely young cock there so simply. I wouldn't mind taking him in my mouth if nobody was looking, as if it was asking you to suck it. So clean and white he looked with his boyish face."[22]

While O.J. Silverthorne's first twenty years of office were relatively uneventful, through the late sixties and

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[20] Censored Only in Canada, note 16 above , pp. 138 - 148.
[21] Ibid, p. 147.
[22] Ibid, p. 145.

early seventies the realities of the "sexual revolution" began to be reflected in an increasing number of films. The Censor Board in Ontario, and boards in Quebec, Nova Scotia, and British Columbia were having to respond to new boundaries of tolerance regarding the role of sexuality in the public domain. Taboos regarding the display of pubic hair and genitalia were re-examined and ultimately abandandoned, albeit at different times and in different contexts in the four provinces. Unlike the federal criminal process, provincial control of censorship has not been tied to specific changes in statute and case law, excepting Quebec's "Padlock Law" of 1936. The 1959 amendment to federal obscenity provisions similarly does not appear to have impacted directly upon provincial approaches to censorship and classification.

In Quebec the early years of censorship reflected not only a moral, but a social and political agenda. This circumstance was most pronounced during the reign of Maurice Duplessis, with the Padlock Act of 1936 the epitome of the spirit of the times. Ultimately rejected by the Supreme Court of Canada as a repugnant restriction upon freedom of expression, the Act exerted dominance, nonetheless, for over 20 years. The statute's expressed purpose of protecting the province against Communist propaganda infused the work of Quebec's censors; films supportive of trade unionism were

clear targets for prohibition.[23]

But the twin concerns of inappropriately depicted violence and inappropriately depicted sexuality were also dominant in Quebec during this period of time. Malcolm Dean notes of the standards of the Quebec Censor Board in the 1930's, "Allusion to divorce in dialogue was to be permitted in films, but divorce was never to be presented attractively... In crime films, the use of firearms (was to) be restricted to essentials."[24]

This restrictive era in Quebec's practice of film censorship came to an end with the appointment of Andre Guerin as president of the Board in 1962; Guerin, Pierre Saucier, Jean Tellier, and others have since fashioned a stewardship of film, often critically acclaimed for its thorough analysis of the medium.[25] Criticisms of the Quebec Board of Cinema Censors had led the provincial government to form a "Provisory Committee for the Study of Film Censorship" in 1961. The Regis Committee was unequivocal in its denunciation of Quebec's practice to that date, "There is only one way to describe both the practice of this

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[23] Interestingly, recent decisions in Re Ontario Film and Video Appreciation Society note 1 above and Re Nova Scotia Board of Censors et al and McNeil (1978) 84 D.L.R. (3d) 1, suggest a continuing judicial concern with unfettered provincial powers of prohibition.

[24] Censored Only in Canada, note 161, above , at 159.

[25] See "Andre Guerin et Son Bureau Unique Au Monde", LaPresse, Jan 10, 1981, C-1-C2 and Ted Blackman, "How the censors judge the Movies", Montreal Gazette, Jan. 19, 1983.

institution and the spirit which animates it: it is completely archaic and the Committee believes it to be beyond recall."[26] While Ontario's early years of operation reflected the liberalism of O.J. Silverthorne's administration, Quebec's early censors were apparently more restrictive in the spirit of their rhetoric and the substance of their actions.

British Columbia and Nova Scotia both constructed statutes for censorship of film within a few years of the Ontario-Quebec-Manitoba initiative.[27] In both provinces the early years of censorship were marked by restrictive application of existing statutory provisions. The twin concerns of images of sexuality and images of violence were again evident, albeit at different points of time, within both provinces. In British Columbia A Law Unto Himself was prohibited for amounting to "nothing but gun-play, robbery, violence and gruesome scenes, with no redeeming features"[28]; in Nova Scotia Who's Afraid of Virginia Woolf was prohibited for its "obscenity" and "blasphemy", "four-letter words", and "colloquial references to

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[26] Quoted in The Democratic State and Its Attitude to Film and Publications, unpublished address to Directors of the Greater Quebec Area Police Departments, 1969, p.4.
[27] Statutes of British Columbia, 1913, "An Act to Regulate Theatres and Kinematographs" Statutes of Nova Scotia, 1915 "An Act Respecting Theatres and Cinematographs", c. 36.
[28] Censored Only in Canada, note 16, above , at 118.

copulation."[29]

In both provinces a restrictive era of censorship was ultimately accompanied by increasing criticism and subsequent entrance into a more liberal era. In British Columbia Ray MacDonald's ascendance to chief censor in 1954 marked this change of style; in Nova Scotia provincial Secretary Gerald Doucet's 1966 call for a study of film censorship marked the end of a more restrictive period of operation.

And yet the early history of film censorship in Ontario, Quebec, Nova Scotia, and British Columbia is better understood as discontinuous than as continuous. While Ontario worked within the rhetoric and style of liberalism, Quebec, Nova Scotia, and British Columbia had embarked upon more restrictive routes of control. More importantly, the ebb and flow of opposing models of censorship reveals few consistent patterns across the four provinces over time, arguably testimony to the value of autonomy in the matter of prior restraint.

With the federal power over obscenity, our discussion of the past reveals a similar ebb and flow, at least insofar as the appropriate target for the criminal law is concerned. The late forties and early fifties were a time in which sexuality became more prominent in the public domain.

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[29] Ibid, p. 134.

Indeed, the 1953 Senate Committee concerning Salacious and Indecent Literature was formed as a consequence of public reaction to this new prominence.[30] Case law from this period reveals both increasing tolerance of sexuality in public view, and increasing public concern over this development.

Particularly representative of this debate was the decision of Lazure, J., in Conway v. The King.[31] The court was asked to rule upon the legality of an allegedly obscene theatrical performance at Montreal's Gayety Theatre. Six young women appeared largely naked from the shoulder to the waist and stood motionless during the performance of Spin A Web of Dreams. While evidence led in court established that the women wore "...brassieres or bust bodices made of a very light material",[32] this was not sufficiently exculpatory for the trial court judge. Cloutier, J. Sess. concluded that, "...from the evidence as a whole it may be said that the performance in question boldly displayed persons of the fair sex so scantily clothed that it was immoral, indecent or obscene."[33] Lazure, J. allowed the appeal against conviction, noting, "Since the actresses could neither move nor speak, but sought to represent statues, it seems quite

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[30] The Senate of Canada, Proceedings of the Special Committee on Sale and Distribution of Salacious and Indecent Literature, Queen's Printer, Ottawa, 1952.
[31] Conway v. The King (1944) 2 D.L.R. 530.
[32] Ibid, p. 533.
[33] Ibid, p. 535.

evident to me that the object was not to suggest obscenity...the intention was to create an artistic background and not an immoral scene."[34]

The objection to Conway v. The King was representative of public reaction to changing conceptions of both nudity and sexuality; the very real images of film, stage, and print photography were reflections of a changing social order and were in turn serving to structure thought. The Senate Committee of 1952 was constructed in an attempt to speak to the tensions that had arisen.

The proceedings of the Special Committee reveal that the developing sexuality of Canadian youth, and indeed Canadian adults, was central to all agendas. The Committee's report to Parliament concluded "...those who print, import, distribute or exhibit for sale salacious and indecent publications will feel the force of this public opinion and be made to realize that they are doing a filthy, immoral and nasty thing to the detriment of Canada in its present position...anything that undermines the morals of our citizens and particularly of the young, is a direct un-Canadian act.[35]

The rhetoric here is historically specific, with submissions to the committee complaining of "positions

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[34]Ibid, p. 536.
[35]See note 30, above, at 246.

calculated to arouse lascivious emotions" and "highly coloured illustrations of would-be provocative nudes."[36] The Ottawa Catholic Parent Teacher Associations suggest the prohibition of teen-age records, "sold to teenagers for teenage parties, which are, to say the least, frankly suggestive and intended to attend the "Smooch Session", when the lights are low. The Association continued,"...We may add that we are not unaware of the filthy films and records purveyed to adult audiences; but of these we prefer not to speak here."[37]

And yet there are criticisms that are enduring, this distant rhetorical framework notwithstanding. The Special Committee heard of pornography's ignorance of the spiritual aspects of human relationships, what we now may term the commodification or objectification of sexuality.[38] Margaret O'Brien, Chairman of the Provincial Committee on Good Literature, further suggested, "Lurid sex literature in the hands of the very young is not apt to excite emotion and animal instincts...but (it does) colour their attitudes towards society and so tend to undermine the family unit on

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[36] Ibid, p.38.
[37] Ibid, p.38.
[38] For an interesting, albeit problematic discussion of the subjects of commodification and objectification, see Germaine Greer, Sex and Destiny, London, Secker and Warburg Limited, 1984.

which our society is based".[39] The family unit has, perhaps more fairly, been subject to rapid changes in both structure and composition over the past 32 years. What remains unclear are the complementary roles that pornography possesses - to both reflect and impact upon social order.

Interestingly, the Special Committee found the Hicklin test "explicit" and " enforceable". They noted, "No cases have been brought to the attention of the Department of Justice in which prosecutions have failed through any vagueness in the law. The law is quite explicit."[40] The Committee did, however, acknowledge existing complaints with the conciliatory statement, "The Department of Justice further adds that if, after experience with the enforcement of this law, it is shown that it is not enforceable, the Government of Canada will be willing to again consult with the provincial authorities to that end, and revise existing legislation."[41]

From 1953 to 1957 the Minister of Justice affirmed his support for the Hicklin test. But, with the election of a Conservative government, the most outspoken opponent of the test, E. Davie Fulton, was elevated to the status of Minister of Justice. Mr. Fulton had told the Special Committee in 1952 that the Hicklin test is purely subjective

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[39] See note 30, above, at 201.
[40] Ibid, p. 246.
[41] Ibid, p. 246.

and that "more workable" legislation is necessary. W.H. Charles notes in a 1966 Canadian Bar Review article, "The offensive type of publication which Mr. Fulton had in mind included pulp and pocket magazines as well as magazines featuring nude or half nude females. These magazines were dangerous, Mr. Fulton suggested, because youngsters would try to imitate the actions described in the magazines and would thus have their morals perverted."[42]

In speaking to the House of Commons in July of 1959, Mr. Fulton said of Bill C-58, "We believe we have produced a definition which will be capable of application...in addition to the somewhat vague subjective test. ...The tests will be: does the publication complained of deal with sex, or sex and one or more of the other subjects named? If so, is this a dominant characteristic? Again, if so, does it exploit these subjects in an undue manner?"[43]

Mr. Fulton was suggesting that the Hicklin test was not being displaced; the ambit of obscenity control was simply expanding. It was the Minister's intention that the definition be extended. He stated, "In our efforts we have deliberately stopped short of any attempt to outlaw publications concerning which there may be any contention that they have genuine literary, artistic or scientific

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[42] W.H. Charles, note 9 above, at 251.
[43] Canada, House of Commons Debates, July 6, 1959, 1t 5517.

merit. These works remain to be dealt with under the Hicklin definition, which is not superseded by the new statutory definition."[44]

Mr. Fulton's analysis was not shared by the Supreme Court of Canada. In its first reading of obscenity after the 1959 amendment, the Court considered D.H. Lawrence's "literary work", Lady Chatterley's Lover, using the new s.159(8) as the relevant definition of the offence. In Brodie, Dansky, and Rubin v. The Queen,[45] the Supreme Court of Canada did not so much rule out the Hicklin test as possible, but rather displaced it as the operative standard.

It is important to note that concerns regarding freedom of expression existed at the time of Bill C-58. The opposition quoted approvingly from Frank Underhill of the University of Toronto, "The point that I am trying to make is that modern literary artists, in their concentration on sex, violence, and societies in decay, are not just exploiting these themes for the sake of vulgar notoriety and best-seller profits. They are trying, seriously and intensely, to say something significant about the condition of man in our day. ...If they look on the black side, and present painful or repulsive pictures of human beings in action, can anyone blame them who has been sensitive to the

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[44] Ibid, p. 5517.
[45] 45 Brodie, Dansky and Rubin v. The Queen, (1967) S.C.R. 681, 132 C.C.C. 161, 32 D.L.R. (2d) 507, 37 c.r. 120.

experience of our age."[46]

While it is difficult to assert that much of today's pornography attempts "seriously and intensely, to say something significant", it is fair to note that in both 1959 and 1984 we can see reflections of social order; the reality of sexual relations in 1984 is that we have both "painful or repulsive pictures of human beings in action"; pornography remains a very real reflection and commentary upon the times in which we live.

Mr. Fulton's 1959 statute did, however, produce significant changes in the structure of the legal control of obscenity. The judiciary quickly developed the new standard. In Brodie, Dansky and Rubin the Supreme Court stated that Canadian Courts must look to the serious purpose of the author or producer, to the artistic merit of the matter in dispute, and to community standards. Judson, J. quoted approvingly from Fullagar, J. in R. v. Close,[47] "There does exist in any community at all times - however the standard may vary from time to time - a general instructive sense of what is decent and what is indecent, of what is clean and what is dirty, and when the distinction has to be drawn, I do not know that there is any better

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[46] Canada, House of Commons Debates, June 30, 1959, at 5314.
[47] R. v. Close, (1948) V.L.R. 445.

tribunal than a jury to draw it."[48]

This analysis represented a marked departure from the Hicklin test. The weakest members of the community, those "open to immoral influences" were not the focus of concern. As Freedman, J.A. pointedly remarked in Dominion News and Gifts v. The Queen, "...a large readership is...not always an entirely irrelevant factor, it may have to be taken into account when one seeks to ascertain or identify the standards of the community in these matters. Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered."[49] Justice Freedman's remarks were affirmed by the Supreme Court in 1964, and in the years since, the judiciary has further defined this concept. It now seems clear that it is a national community standard that defines obscenity, not that of a university community, city, or province.[50] Ontario Crown Attorney David Price further notes, "In recent years,the relevant Canadian

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[48] Brodie, Dansky and Rubin v. The Queen, note 45 above, 132 C.C.C. at 182.
[49] Dominion News and Gifts v. The Queen, (1967) 3 C.C.C. 1 and 2 c.c.c 103 (1969) (Man. C.A.).
[50] See R. v. Goldberg and Reitman (1971) 4 C.C.C. (2d) 187 (Ont. C.A., R. v. Kiverago (1973) 11 C.C.C. (2d) 463 (Ont. C.A. and R. v. MacMillan Company of Canada Ltd. (1976) 31 C.C.C. (2d) at p. 322.

community standard has been defined to be the standard of tolerance and not the standard of acceptance. The phrase "exceeds the accepted standard of tolerance in the community" was coined by McGillivray, J.A. in his judgement in the case of R. v. Goldberg and Reitman[51] and has been applied in numerous judgements since."[52]

The Hicklin test, in its use of the words "deprave" and "corrupt", necessitates a demonstration of harmfulness; the community standards test requires no demonstration of harm - it is sufficient that the publication in question exceed the accepted standard of tolerance. The implications here for provincial censorship are far reaching. Censor Board decision makers view themselves as answerable to the provincial community; they are influenced by discussion concerning the potential harm that pornography may impose, but they are ultimately bound by a standard of community tolerance, the issue of social harm notwithstanding.

And yet public discussion of obscenity and censorship is centered upon the issue of harm. While retrospective analysis often reveals that fears have been overstated, the hypothesis of harm is always present. In 1984 a growing body of empirical literature focuses its attention upon specific kinds of harm flowing from images that promote or

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[51] See note 50 above.
[52] David Price, 57 Canadian Bar Review, note 6, above at 312.

condone sexual violence.[53] In 1959 there was a quite different concern - that young men "would have their morals perverted" by looking at photographs of naked women. The issue of harm has remained at the centre of public concern, nonetheless.

And yet "obscene" material itself is constantly being redefined through the medium of case law, legislative amendments notwithstanding. As Simon Verdun-Jones notes, "...the allegedly obscene pages in Lady Chatterley's Lover appear extremely tame in light of the type of explicit sexual material that is available in the 1980's. ...When George Bernard Shaw's play Pygmalion was originally produced in turn-of-the-century England, there was a public outcry when Eliza Doolittle uttered the line, "not bloody likely". ...when the movie Gone with the Wind first appeared some forty years ago, there was considerable public disapproval of Rhett Butler's immortal, "Frankly, My Dear, I Don't Give a Damn." From today's perspective, it is difficult to imagine why there was such public consternation in relation

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[53] Perhaps the most comprehensive and analytic discussion of this research is Edward C. Nelson's "Pornography and Sexual Aggression", in M. Yaffe and E.C. Nelson, The influences of pornography on behaviour, London, Academic Press, 1982. One should also see N. Malamuth and E. Donnerstein, "The Effects of Aggressive-Pornographic Mass Media Stimuli", 15 Advances in Experimental Social Psychology, 103, Academic Press, 1982 and T. McCormack, "Machismo in Media Research: A Critical Review of Research on Violence and Pronography", 25 Social Problems 544-555, 1978.

to these utterances."[54] The definition of obscenity appears to form a closer attachment to changing social structure than to changing legislative enactments. Taboos against explicit sexuality on the screen have not been erased by statute; case law appears as the important medium of analysis, over time, arguably the more used and useful tool in the development of state policy.

Indeed, the state of the legislative definition of obscenity remains a subject of debate today. In 1977, in Dechow v.The Queen,[55] the Supreme Court had yet to resolve the issue of the Hicklin test's application; it can still be fairly suggested that the Hicklin test and s.159(8) provide complementary definitions of obscenity, that both are properly used by the judicicary.[56] In Dechow the Court was asked to determine whether a number of sexual aids or "stimulators" were publications, within the meaning of s.159. While it has always been clear that in the case of "publications", s.159(8) supersedes Hicklin, it is arguable that Hicklin could be applied to an obscenity that is not a publication. Counsel for the accused contended that the sexual aids in question were not publications, and that

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[54] Simon Verdun Jones, Criminal Law 230, Disc Course, Simon Fraser University, 1984, Course Reader; p. 43.
[55] Dechow v. The Queen, (1977) 35 C.C.C. (2d) 22, 76 D.L.R. (3d) 1, s.c.c.
[56] For all practicial purposes s.159(8) supersedes the 1868 pronouncement; Hicklin has never actually been applied in any reported decision since 1959.

Hicklin could not apply, s.159(8) providing the sole definition of obscenity in Canada. The majority in Dechow found the sex devices, "Anal Stimulator", "Automated Cunnilingus" and "Robot Lover", among others, to be publications and hence found it unnecessary to speak to the exhaustiveness of the s.159(8) definition of obscenity. The dissent of the late Chief Justice Laskin accepted the dual contentions of the defence, that the sexual aids were not publications, and that s.159(8) is the exhaustive test of obscenity in Canada. Bill C-19 now suggests that the intention of the government is to make the statutory definition of obscenity an exhaustive one; the word "publication" has been replaced with the words "matter or thing". "Matters" or "things" are now to be deemed obscene, a more inclusive class of objects than that of publications.

This continuing difficulty concerning the roles to be accorded to different legal definitions of obscenity has little salience, however, placed outside the context of legality. For purposes of common practice, the statutory definition of obscenity is the operative standard in Canadian courts.

What is of greater salience in the development of social policy is the role that restrictions on access have played in making determinations of obscenity. In R. v.

Harrison[57] an allegedly obscene film was shown at a community hall to some twenty-five male guests; a posted notice indicated that a private party was in progress. The Alberta District Court held that there was no exposure to "public view", within the meaning of s.159(2)(a) of the Code, and hence no finding of obscenity. In R. v. Murphy[58] a theatrical performance was found not to be obscene, the court influenced by the fact that performances were limited to adults who paid to see naked women dancing on stage, adults who had been clearly informed by advertising regarding the nature of the "entertainment". In R. v. MacMillan Company of Canada[59], the court noted that the packaging and pricing of the book Show Me effectively limited readership to adults, and suggested that a child would have to have the guidance of an adult in understanding the book's contents.

In all of these instances the court is making clear the relative nature of the legal conception of obscenity. With the emergence of sexuality in the public domain, the issue is often not one of prohibition, but of the regulation of access through the medium of the criminal process. As David Price has suggested, "...a line of judicial authority...has

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[57] R. v. Harrison, (1973) 12 C.C.C.(2d) 26 (1973) 4 W.W.R. 439 (Alta. Dist. Ct.)
[58] R. v. Murphy, (1072) 3 C.C.C.(2d) 313.
[59] R. v. MacMillan Company of Canada Ltd. (1976) 31 C.C.C.(2d) 286.

developed in recent years to give effect to circumstances of exposure so as to distinguish between what the public will accept for its own viewing and what the public as a whole will tolerate being viewed by those of its members who wish to do so." [60]

The role of the expert witness in determinations of obscenity has similarly been developed by judicial pronouncements. The question of whether allegedly obscene material exceeds a national standard of tolerance is one that can be informed by empirical test. Dickson, J.A. has helped to establish the parameters here stating in Regina v. Prairie Schooner News Ltd. and Powers,[61] "...the "community" whose standards are being considered is all of Canada. The universe from which "the sample"...is to be selected must be representative of Canada and not be drawn from a single city."[62]

In R. v. Pink Triangle Press[63] the Ontario Court of Appeal ruled that there is no requirement that public opinion surveys on the subject of community standards form part of the evidence led by the Crown, that it is ultimately the duty of the Court to determine the legal question of

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[60] David Price, 57 Canadian Bar Review, note 6, above, at 324.
[61] R. v. Prairie Schooner News Ltd. and Powers (1970) 1 C.C.C.(2d) 251, 75 W.W.R. 585.
[62] Ibid, p. 258.
[63] R. v. Pink Triangle Press (1980) 51 C.C.C.(2d) 485 (Ont. C.A.), reversing (1979), 45 C.C.C. (2d) (Ont. Co. Ct.)

community tolerance. While the Canadian community's standard of tolerance is amenable to empirical test, both Crown and defence counsel have been reluctant to enter the fray, in any kind of systematic manner. The judiciary's construction of strict methodological requirements and the consequent costs of empirical study have tended to work against any routine introduction of opinion survey evidence. Implicit in such judicial analysis is the notion that research capable of any methodological criticism cannot be of assistance to the court; the judiciary has often declined the role of evaluating social science data. Given the ability of both Crown and defence counsel to call expert testimony to assist the Court, this seems an unnecessary reluctance.

The community standards test remains as problematic, nonetheless. While the Hicklin test requires that the judiciary believe an alleged obscenity is harmful, the present statutory provision mandates criminalization on the criterion of offensiveness. The Toronto Area Caucus of Women and the Law has suggested that "...Obscenity is vague and changeable. As sado-masochism becomes more commonly portrayed throughout our society, the "community standard of tolerance" would no doubt be said to increasingly accept sado-masochism. In contrast, we think that violence against

women is inherently unacceptable."[64]

The point here is well taken, insofar as it critiques the logic on which the criminalization of obscene matter is now resting. The criminalization of obscenity must arguably be more than an index of community intolerance; the issue of social harm should not be allowed to escape from judicial rhetoric. A 1979 survey by Market Facts established that while 61 percent of Ontarians would cut or ban "explicit sexual intercourse" and 61 percent "vividly portrayed scenes of violence", 67 percent would cut or ban "sex between two women or two men."[65] The standard of community intolerance may, then, demonstrate a lack of consistency in the morality that it espouses. As we turn our attention to the subject of censor board decision-making, we will see more clearly the limitations of the tolerance test as a final arbiter of the process of criminalization.

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[64] Toronto Area Caucus of Women and the Law, note 15, above, at 27.

[65] Market Facts of Canada, A Study of Attitudes in Ontario, Movie Censorship and Classification, Report prepared for the Ministry of Consumer and Commercial Relations, p. 19.

Censor Board Decision Making: Constructing Community Standards

Unlike the federal power over the construction of criminal law, provincial control of the process of prior restraint is more properly subject to the "community standards" test. The decision here is not one of prohibition, but rather one of determining the context in which access can occur. With the classification of public exhibitions, community intolerance provides a useful guide for an essentially regulatory function. Access to private exhibition is, to this date, beyond the ambit of censor board powers in British Columbia, Ontario, Quebec, and Nova Scotia.[66]

British Columbia's Motion Picture Act provides that "...every film intended for public exhibition or display in a motion picture theatre in the Province shall first be

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[66] As is argued below, it is nonetheless difficult to draw this line between the public and the private sphere. It is not clear that the standard of prohibition should be markedly different in these two instances. See Obscenity and Censorship: A Question of Focus, below.

submitted to the director for approval."[67] The powers of the director are spelled out in section four; s.4(c) states that he or she may "subject to this Act, approve, prohibit or regulate exhibiting or displaying of a film in the Province."[68] The specifics of British Columbia's controls are set out in s.8(2); the Act provides that approved films will be classified as either "(a) general, being suitable for all persons; (b) adult, being unsuitable for or of no interest to a person under the age of 18 years; or (c) restricted, being suitable only for a person 18 years of age or over."[69] Interestingly, s.8(3) further provides that a person under 18 may attend a "restricted" movie, if accompanied by "...his parent or other responsible adult person", the section stressing the value of individual adult choice in determining access to the theatre.

The Motion Picture Act provides powers of both censorship and classification; in practice, films may be rejected, may run with eliminations, and will always be classified as either general, mature, or restricted entertainment. The legislative framework of censorship is quite similar in Ontario, Quebec, and Nova Scotia; powers of rejection and classification exist in all four provinces.

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[67] Revised Statutes of British Columbia, 1979, The Motion Picture Act, c. 284, s.6.
[68] Ibid, s.4(c).
[69] Ibid, s.8(2).

But it is here that any marked similarity ends; the provinces have created distinctive approaches to prior restraint, in their statutory language alone.

Ontario's Theatres Act dictates that "No person shall exhibit or cause to be exhibited in Ontario any film that has not been approved by the Board."[70] Section 1(c) of the Act defines exhibit, "...when used in respect of film or moving pictures,(exhibit) means to show film for viewing for direct or indirect gain or for viewing by the public..."[71] The section is more inclusive in its definition than is British Columbia's Motion Picture Act. Section 6(2) of the Motion Picture Act exempts federal and provincial governments, universities, film societies, and certain educational institutes from the operation of the statute. The powers of Ontario's censors are set out in s.3(2)(b) of the Theatres Act, "subject to the regulations, to approve, prohibit or regulate the exhibition of any film in Ontario."[72]

Ontario's categories of classification are family, Parental guidance advised, adult accompaniment required, and restricted to those 18 and over.[73] The adult accompaniment category dictates that children under 14 will only be

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[70] Revised Statutes of Ontario, 1980, The Theatres Act, c.498, s.38.
[71] Ibid, s.I(c).
[72] Ibid, s.3(2)(b).
[73] Ontario, Ministry of Consumer and Commercial Relations, Theatres Branch Annual Report 1982-1983, pp. 14 - 15.

allowed admission, if accompanied by an adult; Ontario's Adult Accompaniment classification is much like British Columbia's Restricted classification, with the age of accompaniment simply raised to 18 in the latter case.

Quebec's new Cinema Act states that "No person may...exhibit a film to the public unless the print of the film has been stamped, in accordance with this Act to show the classification assigned to the film."[74] Section 77 provides an exception to the norm, "The Regie may, on such conditions as it may determine, issue a special authorization permitting the films it indicates to be exhibited to the public at a diplomatic event, a festival or any other similar event."[75]

The powers of the Regie du Cinema are set out in s.81, a marked departure from the statutory language of Ontario, British Columbia and Nova Scotia, "...the Regie, if of the opinion that the content of the film does not endanger public order or good morals, in particular, that it does not condone nor promote sexual violence, shall assign one of the three following classes to the film, according to the sector of the audience to which it is directed: (1) For all (2) 14

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[74] Quebec, Bill 109, Cinema Act 1983 Assented to June 23, 1983, yet to be proclaimed. Although the Cinema Act is not yet operative in Quebec, I have chosen to use it here as the best expression of the province's policy at the present time.

[75] Ibid, s.77.

and over, (3) 18 and over."[76] Quebec's Cinema Act requires that there be a demonstration of harmfulness, in the event of prohibition of public exhibition. While a classificatory scheme is used to regulate the potential offensiveness of the film medium, prohibition depends upon endangering morals or condoning or promoting sexual violence. The prevention of potential harm is at the heart of Quebec's control and supervision of the film medium, at least insofar as statutory language is concerned.

Nova Scotia's Theatres and Amusements Act[77] provides that, "The Board shall have power to permit or to prohibit (a) the use or exhibition in Nova Scotia or in any part or parts thereof for public entertainment of any film and (b) any performance in any theatre..." Section 1(g) of the Act defines performance as "...any theatrical, vaudeville, musical or moving picture performance or exhibition for public entertainment."[78] Categories of classification are general, adult accompaniment required if under 14, and admission restricted to those 18 or over. Recent regulations to the Theatres and Amusements Act provide for some control over the sales and rentals of "videofilm". Section 8 states , "Every film exchange shall indicate...to

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[76] Ibid, s.81.
[77] Revised States of Nova Scotia, 1967, Theatres and Amusements Act, C. 304.
[78] Ibid, s. 1(G).

its customers the classification and captions, if any, given to the film by the Board and where the film has not been classified, it shall be indicated as unclassified."[79] While there is no intention here to compel video distributors to submit their tapes for classification, the section does require that the Nova Scotian consumer be better informed regarding the status of any given "videocassette, videodisc, or videotape."

The thorny issue of jurisdictional control over home video appears to be a matter of interest to all censor boards in the four provinces under study. While Ontario has served notice that it will move to both censor and classify videofilms for home use,[80] Quebec, Nova Scotia and British Columbia have yet to follow her lead. Of some importance here is a distinction between public and private entertainment. While motion picture theatres are the sources of publicly shared experiences, the private home is correspondingly the source of a private experience. The criminal process can already be invoked against the distributors of videofilm; the exercise of provincial jurisdiction here is arguably a costly duplication of a pre-existing mechanism of control.

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[79] Regulations Respecting Film Exchanges, Nova Scotia, 1984, pursuant to s.2(1) of the Theatres and Amusements Act, note 77, above, s.8.

[80] "Videotapes face censors in Ontario", The Globe and Mail, May 5, 1984 p.1.

And yet it is also difficult to separate the exhibition of film from the sales or rental of videofilm. Through classificatory categories and written warnings, the province may wish to limit circumstances of exposure to potentially offensive videofilm; Nova Scotia's Regulations Respecting Film Exchanges[81] seem to be a measured step in this direction.

But it is difficult to assert the value of different standards for prohibition. The issue that requires debate can be put simply enough: should a consenting adult be permitted to view material at home that could not be shown, to him or her in a theatre, at a price? Provincial prohibition has often been objected to on the ground of jurisdictional purity - that censorship occupies the federal terrritory surveyed by s.159(8) of the Code. Indeed, the decision to prohibit public access is essentially the decision made upon criminal conviction; some form of display in the public domain is a prerequisite for the invocation of the court process.[82]

The confusion here stems, I think, from a limited analysis of federal and provincial roles and responsibilities concerning obscenity and censorship. The

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[81] See note 79, above.
[82] Private possession of obscene materials is not generally the target of the law as written. See, however, Re Hawkshaw and the Queen (1982) 69 C.C.C.(2d) 503 (Ont. C.A.)

provinces and the federal government both share responsibility for structuring the meaning of obscenity. The statutory language of s.159 and Supreme Court pronouncements concerning this offence are not so detailed as to suggest the province's plan of action in the individual case. As a consequence, crown counsel, regional crown counsel, and ultimately the province's Attorney-General must contribute both detail and substance to the meaning of obscenity.

There is no rigid demarcation of federal and provincial spheres of responsibility. And it is in this context that the prohibitive powers of provincial censor boards can best be appreciated. Were the boards not to possess the power of prohibition, obscenity would be more directly shaped by police interests, albeit within a federally established legislative and judicial framework. The repeal of provincial powers of censorship would eliminate the checks and balances now implicit in Censor Board-police relations.

And yet to speak only of jurisdiction here is to fail to reach the essence of Censor Board decision-making, in practice. The legislative specifics of censor board powers do not yield insight into the reasoning that is being employed in decisions to ban, to request eliminations, and to classify. Indeed, it is this appearance of arbitrariness that has concerned both the Ontario Divisional Court and the

Ontario Court of Appeal in Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors.[83]

Each of the four provincial Boards strives to insure some measure of community representativeness in procedures for screening films submitted. Ontario has fifteen appointed board members who view each film in five to seven person panels; majority verdict determines approval, eliminations, and classifications. It is said that "...members...represent a cross-section of the community in age, philosophy, background, lifestyle and ethnic origin."[84] Over 7,500 Ontarians were contacted by Board members in 1982-83; assessments of community sentiment are presented at quarterly meetings of the full Board.

In Nova Scotia a similar kind of model prevails. The province has 9 board members who view each film in four person panels. Chairman Don Trivett notes that members are appointed to the Board in accordance with the principle of community representativeness. There exists a diversity of opinion among Board members, though decision-making stresses consensus as opposed to majority verdict.[85] With censorship

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[83] See Re, Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, above, and Ontario Court of Appeal decision, February, 1984, unreported.

[84] See note 73, above, at 13.

[85] With both consensus and majority verdicts, there is nonetheless a shared tolerance with respect to the decisions made; continued involvement in the process requires this much.

or classification issues that may be controversial or difficult, the full Board may sit as a panel.

In British Columbia Board members are again appointed, although all three classifiers have full-time appointments; in Nova Scotia eight of nine board members are part-time appointees, in Ontario 12 of 15 are part-time appointees, in Quebec three of six. In most instances all three B.C. classifiers see each film; the model of decision-making is again one that stresses consensus, as opposed to majority verdict. While disagreements are said to occur with approximately 10 per cent of classification decisions, a single statement of position ultimately emerges from the Branch.

Quebec's Bureau de Surveillance du Cinema has six appointed members. A jury of two screens each film. Three conditions must be met by members of the Board, a university degree in humanities or the social sciences, a passion for the cinema, and an involvement in community activities.[86] Again, as in British Columbia, and Nova Scotia, a consensus model of decision-making is predominant. In the event of disagreement over a film, there may be a 24 hour delay, but ultimately a single position will be taken; a third member may also screen the film and work toward consensus. The

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[86] Personal conversation, Jean Tellier, Bureau de Surveillance du Cinema, Quebec, April, 1984.

Regie du Cinema will leave present practice largely undisturbed; there is little reason to believe that the Cinema Act will herald marked departures from the status quo.

In all provinces Censor Board process gives some degree of importance to the issue of community standards, but the notion remains problematic. Market Facts data reveal that over 60 per cent of Ontario's adults believe that films with explicit sexual intercourse should be prohibited; 49 per cent believe that the use of vulgar or profane language must be prohibited.[87] At the same time the data indicate that only 7 per cent of Ontarians are concerned about sex in movies.

There is a need to examine more closely the targets of prohibition; the community standards test does not, in itself, furnish the state, be it provincial or federal, with an adequate justification or explanation for prohibition.

Ontario, Quebec, B.C. and Nova Scotia draw markedly different boundaries in making judgements to prohibit, eliminate, and classify the public exhibition of film.

Tables I through IV set out available data on the operations of the four boards. While there is little consistency in record-keeping across the provinces, the figures here do contribute, albeit modestly, to an

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[87] See note 65, above, at 19.

understanding of our processes of censorship and classification.

Comparison is difficult. I have tried to focus on feature length 35 and 16 MM films in each province, excepting short subjects, trailers and the like; the feature film is essentially the target of public scrutiny. A lack of uniform data collection complicates and limits this attempt. Given coverage of different periods of time in different provinces, and changes over time in bases of comparison, interpretation of these figures must be very circumscribed.[88]

Nonetheless, there are patterns here that bear consideration. It seems clear that all provinces have experienced modest declines in the number of films screened over the past few years; the size of each Board's operation is also reflected in the figures cited. The province of Nova Scotia processes one film for every four processed by Ontario; British Columbia and Quebec fall between, with the latter province closer to Ontario's numbers. It also seems that in B.C. and Ontario over the past few years, there have been significant increases in the absolute number of eliminations and rejections of film by provincial censor boards.

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[88] It is not presumed that there is any comparison of equivalent bases of data in Tables I to IV; the necessity of provincial autonomy precludes such analysis.

TABLE I: FEATURE FILMS, BRITISH COLUMBIA

No. Films Screened	Films with Eliminations	Films Rejected
1979 764	45	3
1980 672	14	3
1981 580	18	3
1982 561	21	2
1983 531	89	1

TABLE II: FEATURE FILMS, ONTARIO

No. Films Screened	Films with Eliminations	Films Rejected
1978-79 1060	146	4
79-80 1339	141	4
80-81 1154	58 (35 mm only)	5
81-82 1112	82 (35 mm only)	46
82-83 1050	109 (35 mm only)	46 (35 mm only)

TABLE III: FEATURE FILMS, NOVA SCOTIA

No. Films Screened	Films with Eliminations	Films Rejected
1977-78 468	Not available	Not available
78-79 382	Not available	Not available
79-80 283	Not available	Not available
80-81 247	Not available	Not available
81-82 256	Not available	Not available

TABLE IV: DES LONG METRAGES*, QUEBEC

No. Films Screened
1978-79 890
79-80 841
80-81 970
81-82 910
82-83 868

*Data concerning eliminations and rejections not available.

But it is here that the existing data must be placed alongside the reality of existing practice. Provincial thresholds of tolerance vary considerably. Of primary importance to those of us interested in the spheres of federal and provincial responsibility for obscenity and censorship, is the question of prohibition.

It must be stressed first that film distributors exercise a substantial degree of self-censorship. The distributors are sensitive to the parameters of each Board's policies; different versions of the same film are sent to Boards of different sympathies; some films are simply not considered for a general release to all provinces.

> Ontario's Director, Mary Brown, has indicated 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 and are scenes for which eliminations would normally be requested."[89]

The Director and Chairman of the Board of Censors since 1980, Mrs. Brown rejects the notion that explicit sexuality can be tolerated as public entertainment, breaking here with

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[89] Theatres Branch Annual Report, note 73, above, at 15.

her colleagues in British Columbia and Quebec.

Mrs. Brown's major concerns rest, nonetheless, with sexuality and children and with both violence and sexual violence. Study of requested eliminations reveals that sexuality and violence are seen as independently problematic. The Elimination Report of January 1984 gives some sense of what Ontario prohibits; the Board issued the following instructions in six different films.

> "Eliminate cutting of man's neck with knife; Establish and shorten scene of axe being used to hack bodies of man and women; Eliminate all views of copulation scene in which hips are visible and in motion; Eliminate closeup of erect penis with a condom being rolled on; Eliminate scene of tongue in rectum; Eliminate scene of spreading buttocks revealing rectum; Eliminate scene of prolonged close-up of penis; Eliminate scene of men being spanked on bare buttocks; Eliminate graphic scene of mouth-nose at rectum." [90]

British Columbia's standard for prohibition similarly flows from concerns about images of sexuality and violence. Monthly reports reveal, however, that "penetration", "ejaculation" and "violence" are the stated variables of concern. Director Mary Louise McCausland, a member of the

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[90] Theatres Branch Elimination Report, January 1984, Ministry of Consumer and Commercial Relations, Ontario.

Branch since 1976 and Director from 1978, suggests that these variables represent a kind of balancing of community tolerance. The Branch had been in the process of gradually allowing explicit sexuality between consenting adults, but became sensitive to adverse public reaction concerning the film Caligula. As a consequence of this reaction the Board has ultimately adopted a rather unique policy, permitting explicit scenes of both fellatio and cunnilingus, while prohibiting scenes involving penetration or ejaculation. The monthly report of eliminations for April of 1984 indicates that 14 of 17 films were cut as a consequence of either penetration or ejaculation or both; three of the 17 films contained unacceptable violence.[91]

> Nova Scotia's Amusements Regulation Board notes that, "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, undue or prolonged emphasis on genitalia."[92]

The province follows Ontario's example in not allowing explicit sexual activity as a form of public entertainment.

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[91] Eliminations, April, 1984, Film Classification Branch, British Columbia.
[92] Classification Parameters, 1984, Amusements Regulation Board, Nova Scotia.

Board Chairman Don Trivett notes that Nova Scotia is a smaller and somewhat more conservative province than Ontario, Quebec, or British Columbia; the community standard of tolerance correspondingly reflects these structural differences. Unlike British Columbia and Ontario, Nova Scotia does not provide the public with a statement of reasons for decisions concerning eliminations or rejections. The Amusements Regulation Board and the Department of Consumer Affairs suggest that their above-noted statement of policy regarding rejections yields sufficient detail.

The core of Quebec's Bureau de Surveillance du Cinema has remained largely unchanged over the past twenty years. Andre Guerin, Pierre Saucier, and Jean Tellier form the backbone of the organization. While Quebec, like Nova Scotia, does not provide a public statement of reasons for rejection of a film, the Bureau is quite candid about its decisions regarding prohibition. Explicit sexuality between consenting adults is viewed as an acceptable or tolerable form of public entertainment; sexuality, per se, is not a target for elimination. Jean Tellier notes that images viewed as intolerable are those of sexual violence, within the genre of the "sexploitation" film. M. Tellier stresses that the Bureau must also be sensitive to the shifting nature of community standards, that specific and inflexible criteria are simply not realistic. Unlike British Columbia,

Quebec allows the presentation of films containing penetration and ejaculation. The Bureau does not keep statistics regarding eliminations or rejections, arguing that the figures would be meaningless. A film may be rejected several times before ultimate acceptance; the number of rejections would then say little about Bureau policy. Jean Tellier stresses that the Bureau does not request specific cuts-that decisions regarding elimination are those of the film distributor.

These portraits of provincial standards for prohibition raise a number of interesting issues. All provinces are very much bound by the notion of a community standard of tolerance and yet there is no systematic taking of the public pulse, excepting Ontario's Market Facts survey of 1979. The data there suggested that a majority of Ontario's adults would not tolerate explicit sexuality as public entertainment. Insofar as the Board's role is only to reflect majority will, its present eliminations appear as a sensitive reading of community sentiment.

And yet it is difficult to properly situate the role of community tolerance. Though the expression presumes a consensus of views within provincial boundaries, Ontario's survey confirms that there is no single definition of tolerance among adult residents. The issue can also be understood in terms of the notion of a critical mass. The

more urbanized areas or Canada are tolerating, or have a demand for, routinized exposure to pornographic film. Were Nova Scotia to assent to public exhibition of explicit sexuality, such a step might well encounter staunch resistance, the issue of harm notwithstanding; there is an understandable concern that the Amusements Regulation Board not act to create public controversy. We cannot dismiss the importance of community sentiment as a variable of significance in decisions to prohibit public exhibitions of film. The creation of a community tolerance test remains problematic, but the often guiding hand of public reaction must be acknowledged.

In this light, the issue of censor board accountability can be most fairly raised. The public ought to be able to discover what has been eliminated from a film, and why.[93] With both a test of harmfulness and a test of community tolerance, the public right to know persists. Ontario and British Columbia's policies of public access are models to be emulated in this respect. Indeed, Ontario's presentation of policy is particularly explicit, precisely describing the scene to be eliminated. While Ontario's decisions, in themselves, are not above criticism, the province's public accountability does create a model for other jurisdictions. Quebec and Nova Scotia's present policies do not mandate

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[93] See Conclusion 5, below.

public accessibility to the decision-making process. Yet public regulation should carry a corresponding burden of public accountability; it seems reasonable to suggest the development of policy geared towards enhancing public scrutiny.[94] And yet neither Quebec nor Nova Scotia Boards are fairly criticized for failure to respond to concerns that the public may raise. Quebec's Bureau de Surveillance du Cinema has been critically acclaimed for its sensitive and thoughtful response to community concerns; Nova Scotia's Amusements Regulation Board similarly enjoys strong community support.

In the final analysis, though, provincial Boards are judged by their decisions in the individual case. The films Pretty Baby, Beau Pere, Caligula, and Not a Love Story are among the most controversial of our recent past. Table V indicates the manner in which the different boards responded to these features.[95] The comparisons inform us that different versions of film are indeed sent to different Boards and that considerable differences of opinion exist in the individual case. Interestingly, the film Not a Love

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[94] The concerns here are markedly similar to those raised by the Ontario Divisional Court and the Ontario Court of Appeal in Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, above, note 83, above.

[95] This chart has drawn on a report, Peter Petruzzellis, Compilation and Review of Notes, Theatre Branches Across Canada, September, 1982. The Petruzzellis Report compares the films Pretty Baby, Beau Pere, and Caligula.

TABLE V: PROVINCIAL RESPONSES TO SPECIFIC FEATURE FILMS

Film	B.C.	Ontario	Nova Scotia	Quebec
Pretty Baby	Approved	Not Approved	Approved	Approved
Beau Pere	Approved	Not Approved	Not Submitted	Approved
Caligula	Approved (American version)	Approved (British version with cuts)	Not Approved	Approved (American version with cuts)
Not a Love Story	Exempted	Not Approved for comm. use	Not Approved for comm. use	Approved

Story, a documentary on the exploitive character of pornography, contains explicit sex; one scene involves both fellatio and penetration. The film's intention permits this presentation. Both Ontario and Nova Scotia licensed the film for educational purposes. Ontario's Mary Brown noted in June of 1982,

> "Although extensive use of hardcore footage prevented the general commercial release of Not_a_Love_Story in Ontario, the Board approved the National Film Board's original marketing plan to distribute and to exhibit it

as an educational film."[96]

Ironically, that section of the public that might most benefit from this stimulating polemic is excluded, in such a formulation. Commercial release expands the available adult audience and hence the arguable utility of the film. While the concern here was undoubtedly that of not wanting to define explicit sex as entertainment, the judgement is difficult to follow. We return to the question of the appropriate target for prohibition, the heart of both provincial powers of censorship and the criminal control of obscenity.

Obscenity and Censorship: A Question of Focus

We must discuss the theoretical and practical parameters of obscenity and censorship; the context of present enforcement provides a valuable backdrop for informed analysis. Figure I presents us with an index of

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[96] Letter to Dr. Robert Elgie, Minister of Consumer and Commercial Relations, June 21, 1982, from Mary Brown, Director, Theatres Branch, at p.3.

public concern about the criminal offence of obscenity. Although the data refer to the more general category of offences tending to corrupt public morals, discussions with a number of Crown counsel suggest that the overwhelming majority of charges relate to s. 159(8) of the Code. As a consequence, these police reports provide a good approximation of patterns of obscenity enforcement over the past nine years.[97]

Figure I reflects a recent increase in public concern about obscenity; in light of the current salience of the issue, one might well expect offences reported or known to the police to further increase in 1983 and 1984. Interestingly, Figure II reveals a significant decrease in the number of reported offences considered unfounded by the police; Figure III presents us with a picture of offences cleared - offences in which a prima facie case against a specific individual or business has been established, and either proceeded with, or abandoned for reasons unrelated to the sufficiency of the charge. In this instance we see consistent, if somewhat, moderate increases over the past five years.

Figure IV is perhaps our best index of control in the matter of obscenity; the past seven years have seen an

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[97] Relevant police data relating to "Offences Tending to Corrupt Public Morals" is not available prior to 1974.

Figure I
Patterns of Enforcement: Offences
Tending to Corrupt Public Morals,
1974 to 1982, Canada

Offences Reported or Known to Police

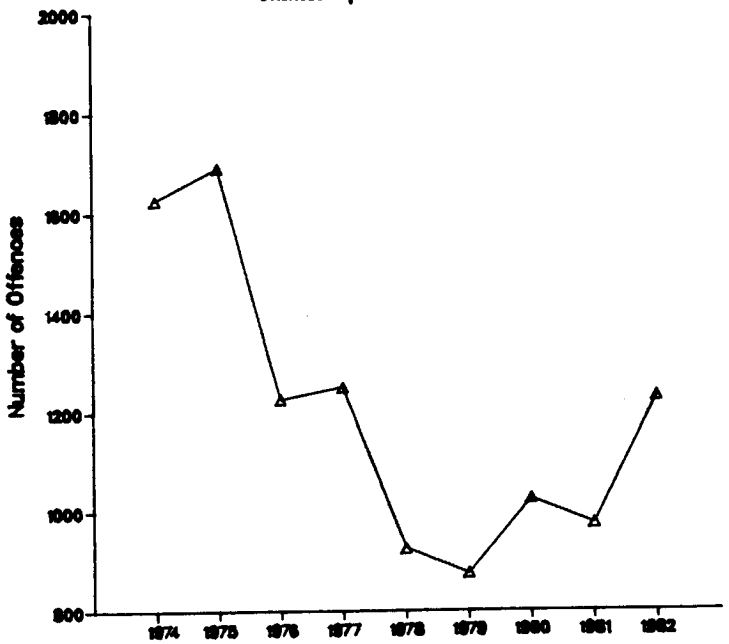


Figure II
Patterns of Enforcement: Offences
Tending to Corrupt Public Morals,
1974 to 1982, Canada

Offences Unfounded

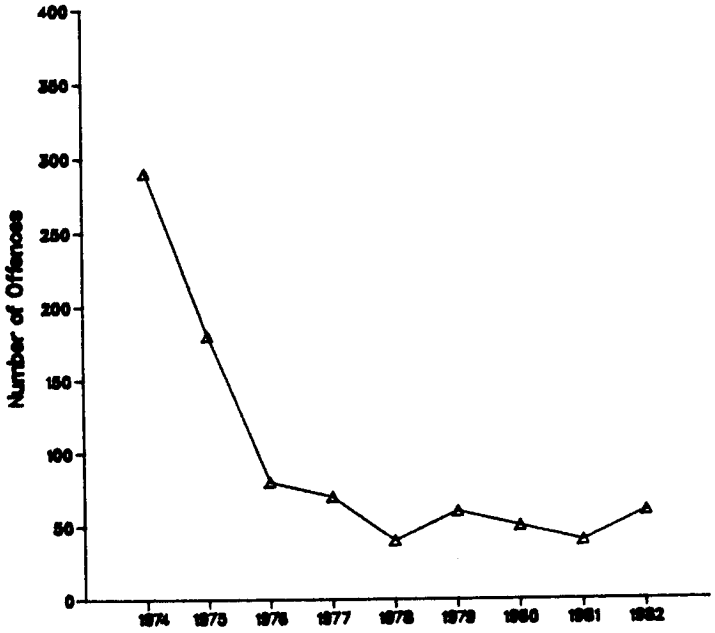


Figure II
Patterns of Enforcement: Offences
Tending to Corrupt Public Morals,
1974 to 1982, Canada

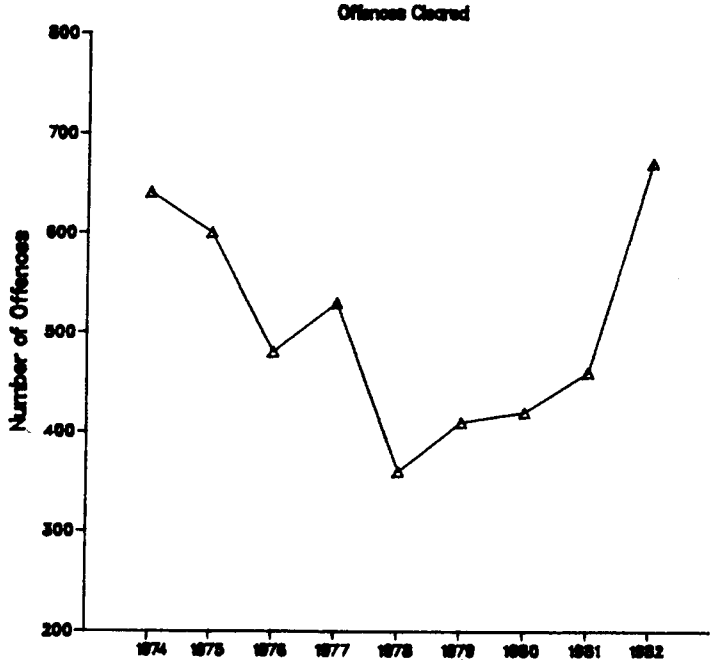
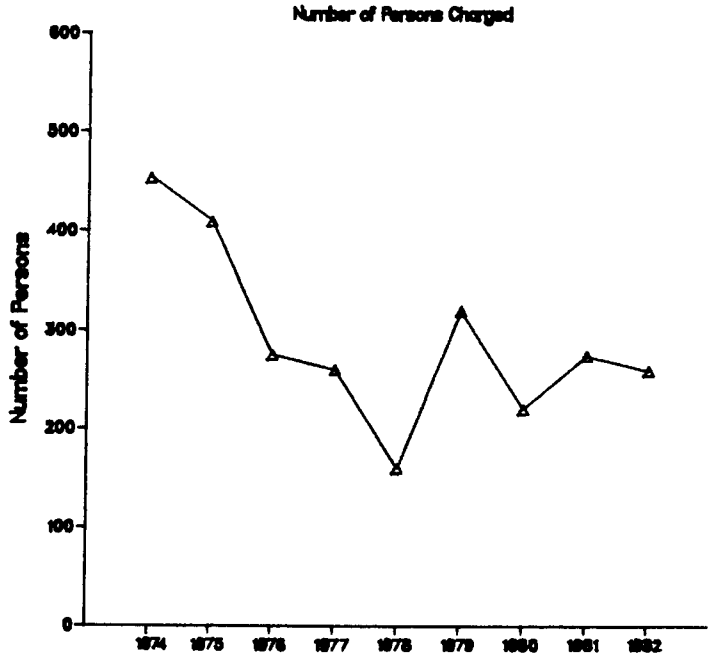


Figure IV
Patterns of Enforcement: Offences tending
Tending to Corrupt Public Morals,
1974 to 1982, Canada



average of 200 to 250 Canadians charged each year with the offence. While an increasing centralization of the distribution of potentially obscene material might result in more offences and correspondingly fewer offenders, one must acknowledge here that in human terms the control of the offence has been relatively static for the past seven years. Figures V to XIV reveal that provincial control has not been similarly static. In Newfoundland, Prince Edward Island, New Brunswick, Nova Scotia and Saskatchewan, the number of persons charged has remained at a relatively minimal level over the past nine years. Ontario provides the lion's share of obscenity charges; over half of all Canadians charged are charged within that province. In 1982 Quebec, with a roughly approximate population, charged one person for every four charged in Ontario. Over the past three years, while the number of persons charged with obscenity has been steadily decreasing in Quebec, the number of persons charged in British Columbia and Manitoba has been consistently increasing.

These distinctive provincial patterns of criminal enforcement raise the question of a working relationship with powers of censorship and classification. Quebec and Ontario Boards have markedly different perceptions of community tolerance; it does not seem unreasonable to suggest that the greater tolerance of the Quebec Censor

Figure V
Patterns of Enforcement: Persons charged with Offences Tending to Corrupt Public Morals, 1974 to 1982

British Columbia

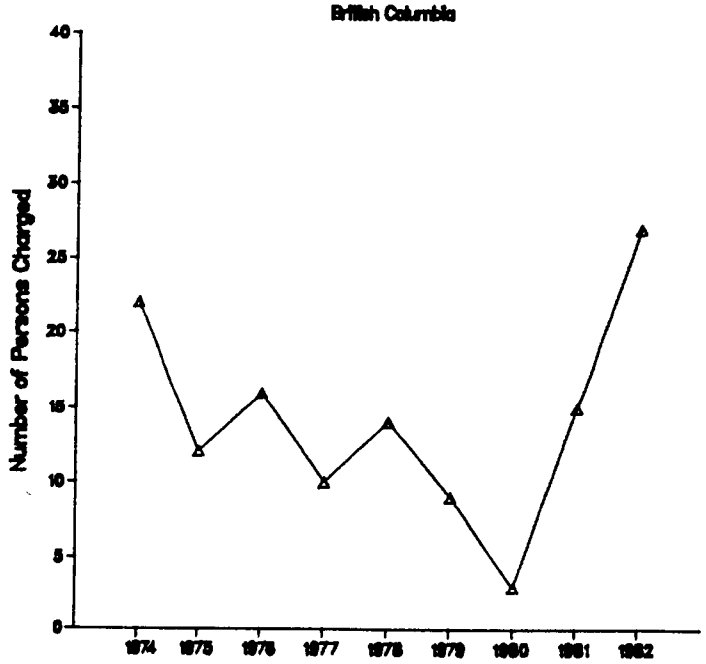


Figure VI
Patterns of Enforcement: Persons charged with Offences Tending to Corrupt Public Morals, 1974 to 1982

Alberta

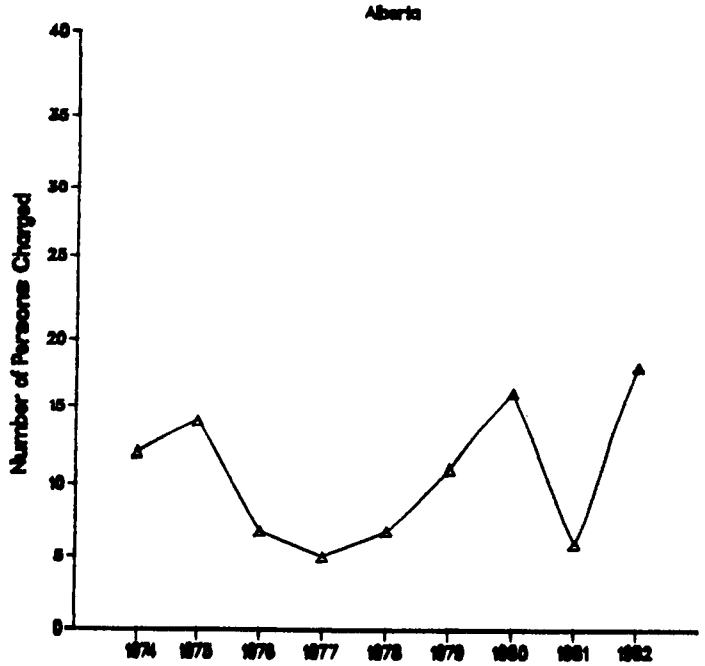


Figure VII
Patterns of Enforcement: Persons charged with Offences Tending to Corrupt Public Morals, 1974 to 1982

Saskatchewan

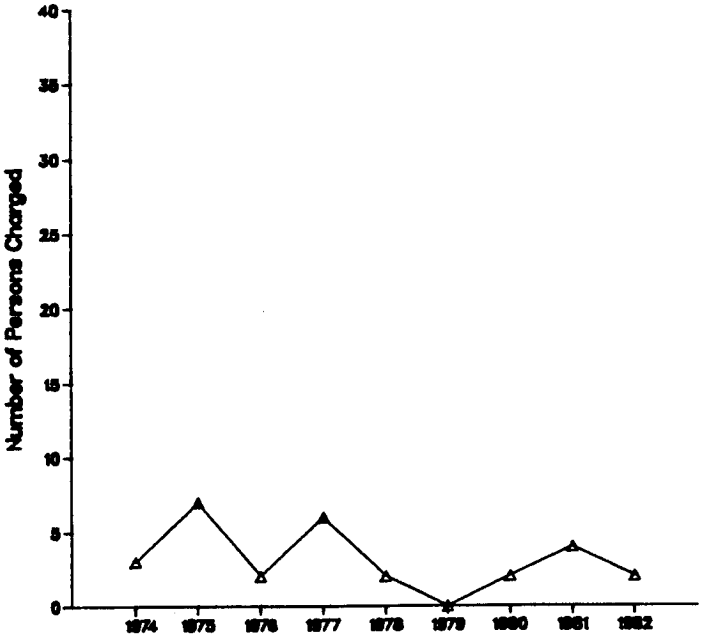


Figure VII
Patterns of Enforcement: Persons charged with Offences Tending to Corrupt Public Morals, 1974 to 1982

Manitoba

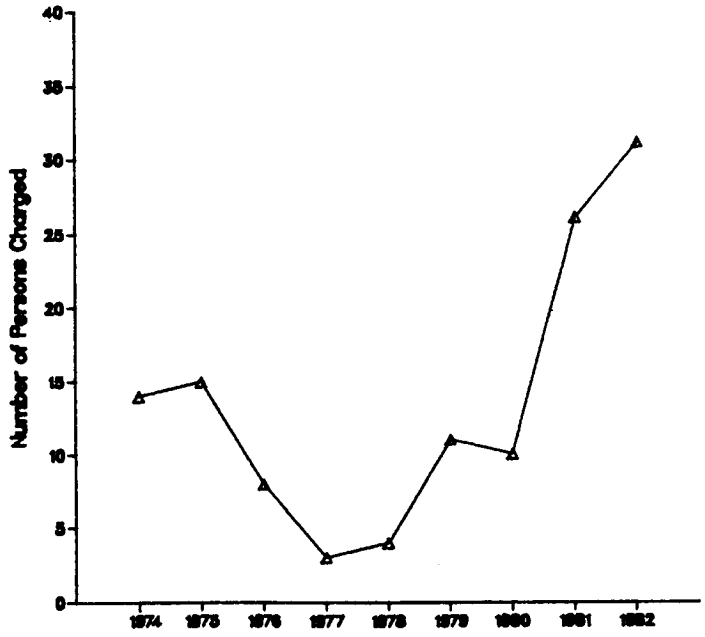


Figure IX
Patterns of Enforcement: Persons charged with Offences Tending to Corrupt Public Morals, 1974 to 1982

Ontario

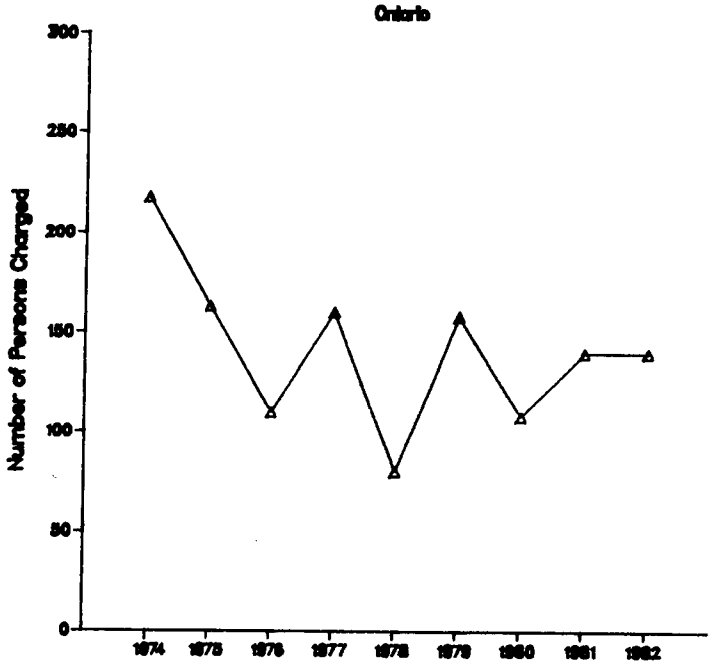


Figure X
Patterns of Enforcement: Persons charged with Offences Tending to Corrupt Public Morals, 1974 to 1982

Quebec

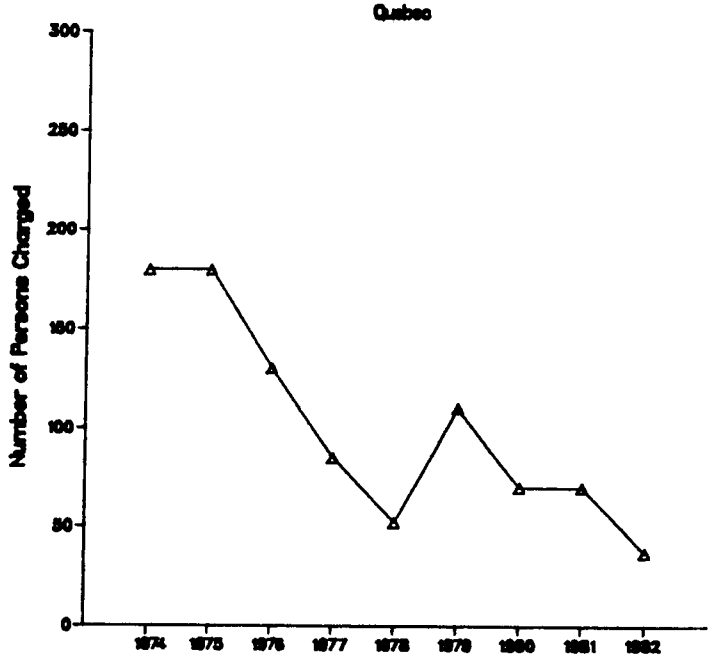


Figure XI
Patterns of Enforcement: Persons charged
with Offences Tending to Corrupt Public
Morals, 1974 to 1982

New Brunswick

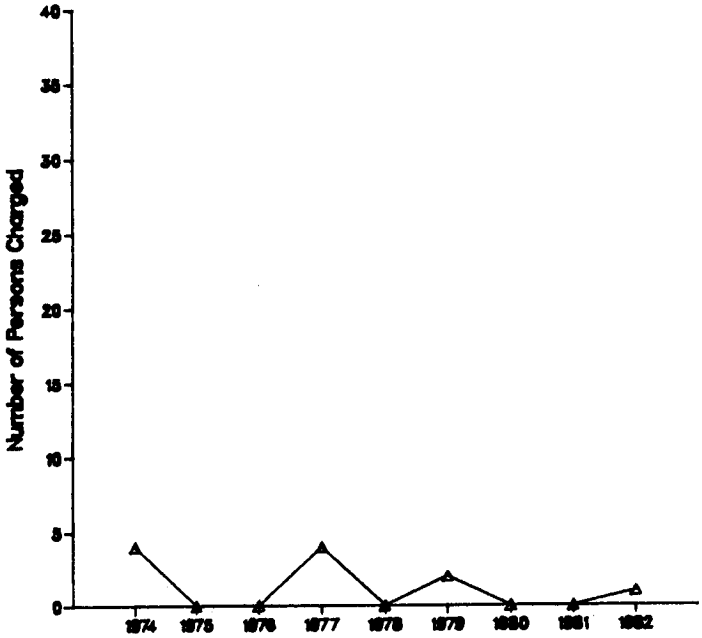


Figure XI
Patterns of Enforcement: Persons charged
with Offences Tending to Corrupt Public
Morals, 1974 to 1982

Nova Scotia

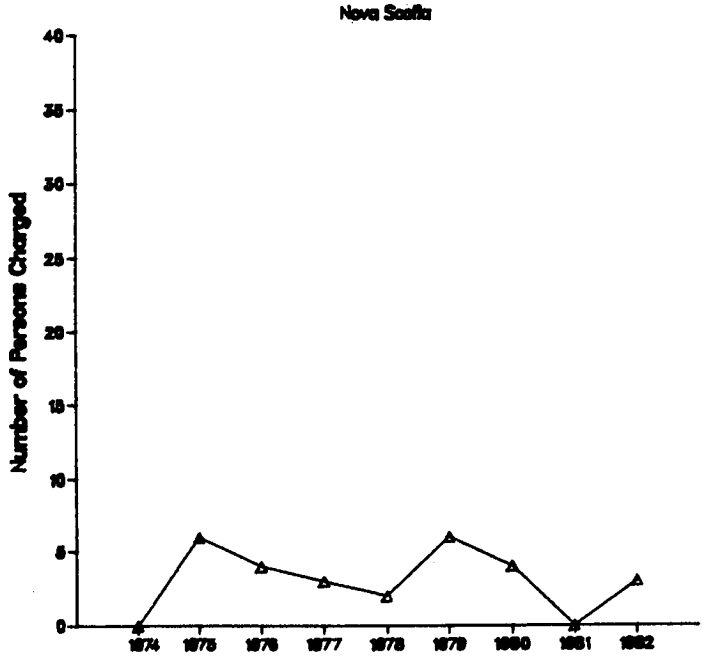


Figure XII
Patterns of Enforcement: Persons charged with Offences Tending to Corrupt Public Morals, 1974 to 1982

Prince Edward Island

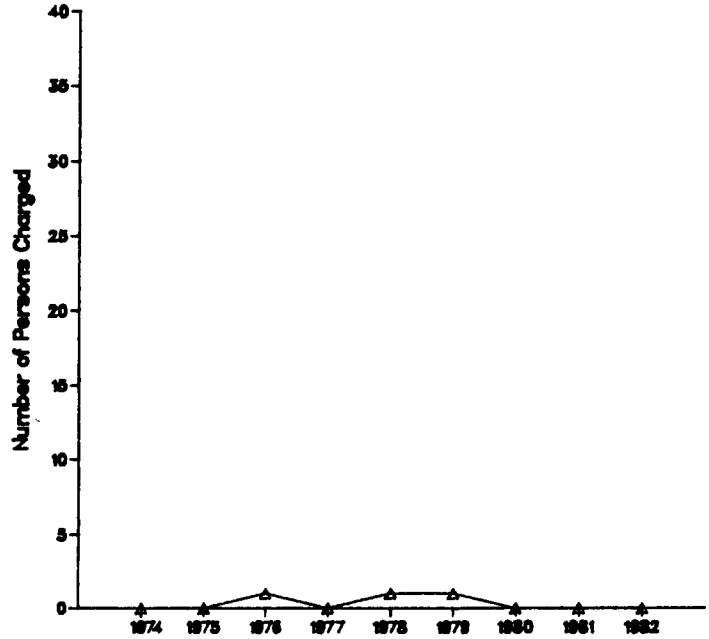
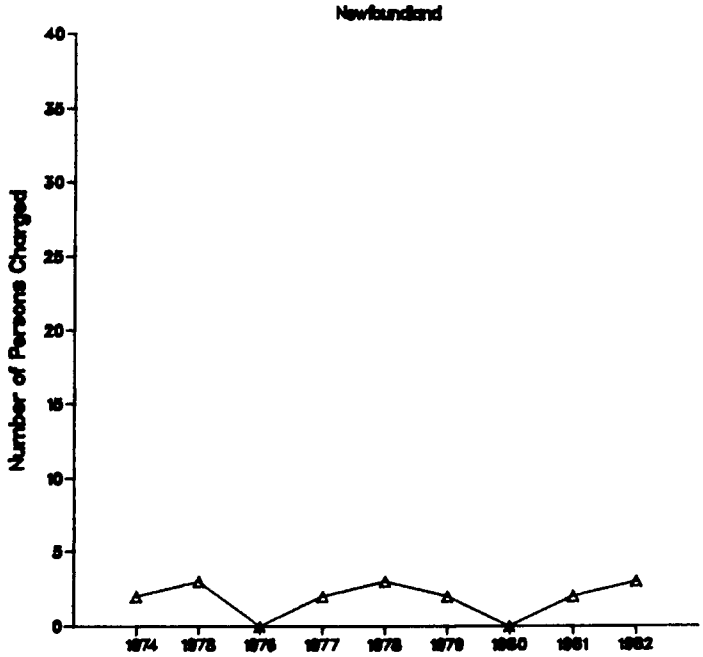


Figure XIV
Patterns of Enforcement: Persons charged with Offences Tending to Corrupt Public Morals, 1974 to 1982

Newfoundland



Board is reflected in the decision-making of law enforcement personnel, police and Crown counsel. Ontario's more restrictive criteria appear to be similarly manifest in Ontario's greater tendency towards use of the criminal process. Provincial censor boards have significant roles both in structuring provincial patterns of enforcement and in providing a definitional context for s. 159(8) of the Code.

Court data concerning the criminal offence of obscenity are very limited. Table VI presents data from only parts of British Columbia and Quebec and only for the years 1978 to 1980.[98] Nonetheless, we receive a fairly clear picture of sentencing policy for the offence. A fine is almost invariably imposed upon conviction. The single imprisonment noted here is something of a puzzle. Nadin-Davis and Sproule do not provide us with any practical possibility of an imprisonment option in their Canadian Sentencing Digest;[99]

> although the option does exist, it is very difficult to find judicial support for this response. A financial penalty typically appears as the state's symbolic response

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[98] M.J. Parlor, Senior Analyst, Courts Program, of the Canadian Centre for Justice Statistics writes, "It must be emphasized that there are severe methodological problems with the data. In particular, the limited coverage (which varies by year), the completeness of reporting, and the different sampling methods are all matters of concern".

[99] R.P. Nadin-Davis and C.B. Sproule, Canadian Sentencing Digest, Toronto, Carswell, 1982, 39-1, 39-2.

to the offender. In R. v. Ariadne Devs. Ltd.,[100] the Nova Scotia Court of Appeal reduced the accused corporation's fine from $12,500 to $7,500, arguing that this latter amount represented one year's profits and as such constituted an adequate deterrent.

The criminal enforcement of obscenity does not appear to be a particularly large enterprise of control. Less than 300 Canadians are charged each year with the offence; those convicted are invariably fined for their conduct. And yet pornography, obscenity, and censorship remain as salient public issues; recent decisions in Re Ontario Film and Video Appreciation Society and Ontario Board of Censors,[101] Re Nova Scotia Board of Censors et al. and McNeil[102], R. v. Red Hot Video Ltd.[103], and R. v. Doug Rankine Company Ltd and Act III Video Productions Ltd.[104] have served to sharpen our current focus.

Of particular interest to federal-provincial dialogue regarding obscenity and censorship are the recent decisions of the Ontario Divisional Court and the Ontario Court of

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[100] R. v. Ariadne Devs. Ltd., (1974) 19 C.C.C. (2d) 49 (N.S.C.A.)
[101] Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, note 83, above.
[102] Re Nova Scotia Board of Censors et al. and McNeil, note 23, above.
[103] R. v. Red Hot Video, note 1, above.
[104] R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd., Borins, C. Ct. J., (1984) 9 C.C.C. (3d) 53.

TABLE VI Sentences, s.159, 1978-80

	Convictions	Fine	Probation	Imprisonment
1978	22	20	2	0
1979	26	23	2	1
1980	22	22	0	0
Total	70	65	4	1

Appeal in Re Ontario Film and Video Appreciation Society and Ontario Board of Censors. The Film and Video Appreciation Society contended that certain sections of Ontario's Theatres Act contravened The Charter of Rights and Freedoms, in arbitrarily restricting freedom of expression.

The Divisional Court agreed, suggesting that while the provincial power of censorship has constitutional validity, Ontario's present legislative framework grants too much discretionary power to its Board. The court noted

> "...we (do not) find that sections 3, 35 and 38 are invalid but the problem is that standing alone they cannot be used to censor or prohibit the exhibition of films because they are so general, and because the detailed criteria employed in the process are not

prescribed by law."[105]

The court added that the sections in question,

"...may be rendered operable by the passage of regulations pursuant to the legislative authority or by the enactment of statutory amendments, imposing reasonable limits and standards."[106]

The decision of the Divisional Court implies no criticism of the actual criteria used by the Ontario Censor Board, in prohibiting public exhibition of film. The court notes,

"As to whether the Standards issued by the Board of Censors would be considered to be reasonable limits, we express no views. They may or may not be acceptable, but in the light of the position we take on the next issue, it is not necessary for us to express a view. One thing is sure, however; our courts will exercise considerable restraint in declaring legislative enactments, whether they be statutory or regulatory, to be unreasonable."[107]

This last statement of principle by the Divisional Court was not endorsed by the Ontario Court of Appeal. While the Court of Appeal upheld the Divisional Court's

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[105] Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 1, above, at 87.
[106] Ibid, p.67.
[107] Ibid, p.65.

ruling, it took issue with the notion that the judiciary ought to exercise "considerable restraint" in examining the reasonableness of legislative enactments. The Court noted,

> "We do not think, if they were purporting to enunciate a principle, that there is any such principle to be applied in the determination of what is "reasonable" under s. 1 of the Charter. In approaching the question, there is no presumption for or against the legislation..."[108]

The practical effects of the Ontario Court of Appeal decision are twofold. First, all provinces must give serious consideration to drafting statutory or regulatory guidelines for censorship and classification; in the event that the Supreme Court of Canada upholds the decision of the Ontario Court of Appeal, such legislation would appear to be a necessary provincial response. Second, the Court of Appeal's decision makes clear that the standards of prohibition and classification may continue to be a subject of judicial scrutiny, a more detailed legislative framework notwithstanding. The appropriate role for the province's censors and classifiers remains a subject in the process of judicial debate.

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[108] Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, note 83, above, at 4.

The Supreme Court's most important pronouncement to date on the subject of provincial censorship has been Re Nova Scotia Board of Censors et al. and McNeil. The Court held that while one regulation respecting the prohibition of indecent theatrical performances was beyond the jurisdiction of the province, the legal structure of Nova Scotia's approach to film censorship was properly within the provincial sphere. The Nova Scotia Board's censorship of Last Tango in Paris prompted this constitutional wrangle. It was argued that the power of censorship itself is beyond provincial jurisdiction, that it is an exercise of the federal criminal law power embodied in s. 159 of the Code.

Ritchie, J., speaking for the majority in McNeil, noted,

> "There is, in my view, no constitutional barrier preventing the Board from rejecting a film for exhibition in Nova Scotia on the sole ground that it fails to conform to standards of morality which the Board itself has fixed, notwithstanding the fact that the film is not offensive to any provision of the Criminal Code."[109]

The majority suggests, then, that different standards of prohibition for the provinces and the federal government can

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[109] Re Nova Scotia Board of Censors et al. and McNeil, note 13, above, at 24.

be seen as constitutionally valid. Ritchie, J. adds,

> "...there is no constitutional reason why a prosecution cannot be brought under s. 163 of the Criminal Code in respect of the exhibition of a film which the Board of Censors has approved as conforming to its standards of propriety."[110]

Ultimately Justice Ritchie rests the constitutional validity of provincial censorship on ss. 92(13) and 92(16) of the B.N.A. Act, noting that the Board's legal framework is concerned with "property and civil rights" and "matters of a local and private nature."

Laskin's dissent in McNeil takes a markedly different course. The former Chief Justice argues that the power of provincial censorship in Nova Scotia is not rooted in provincial jurisdiction. He notes,

> "...the Board is asserting authority to protect public morals, to safeguard the public from exposure to films, to ideas and images in films, that it regards as morally offensive, as indecent, probably as obscene. The determination of what is decent or indecent or obscene in conduct or in a publication, what is morally fit for public viewing, whether in film, in art or in a live performance is, as such, within the exclusive power of the Parliament of Canada under its enumerated authority

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[110] Ibid, p.24.

to legislate in relation to the criminal law."[111]

The implications of the McNeil decision are somewhat confusing, clouded by a slim 5-4 majority verdict. There would seem to be a strong minority doubt about the validity of the provincial power of censorship, in itself. It is not clear that a future Court will ultimately accede to the view that the provinces' prior restraint of the medium of film is constitutionally permissible. Nonetheless, the majority decision in McNeil upholds provincial powers of censorship and classification. Section 37 of the recently introduced Bill C-19 would also seem to give implicit recognition to provincial autonomy in the matters of censorship and classification. The section requires that any criminal prosecution of a provincially classified film cannot proceed,

"...without the personal consent of the Attorney General."[112]

A challenge to the prohibitive standard of the provincial Censor Board is posited as an exceptional circumstance; the interlocking roles of federal and provincial jurisdictions are being stressed here.

But it is not only the provincial power of censorship that is under scrutiny in Canadian courts. In R. v. Red

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[111] Ibid, p.14.
[112] Canada, House of Commons, Bill C-19, Criminal Law Reform Act, 1984, ss.36,37.

Hot Video, counsel for the accused argued that the Code's obscenity provisions contravene s.2(b) and s.7 of the Charter, the right of freedom of expression and the right to "life, liberty and security of the person." Collins, Prov. Ct.J. held,

> "...the Crown has established that the provisions of ss. (1)(a) and (8) of s.159 constitute reasonable limits as can be demonstrably justified in a free and democratic society."[113]

Collins suggested,

> "...there appears to be some uncertainty as to how to determine what is or is not obscene. Whatever may be the cause of this uncertainty, it does not, in my view, result from a lack of clarity in the law. I think the law is sufficiently clear for that well-intentioned citizen that learned defence counsel speak of."[114]

And yet one must acknowledge that the appropriate targets of prohibition remain a matter of debate, jurisdictional and constitutional argument notwithstanding. In R. v. Doug Rankine Co. Ltd. and Act III Video Productions, County Court Judge Stephen Borins has made an attempt to address this issue specifically, setting out a new focus for judicial analysis. In deciding that certain

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[113] R. v. Red Hot Video, note 1, above, at 353.
[114] Ibid, p. 353.

films could not fairly be called obscene, Borins notes,

> "All of the films contain what the Crown described as "standard, run of the mill scenes" of sexual intercourse. In my opinion, contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse. Contemporary community standards would also tolerate the distribution of films which consist of scenes of group sex, lesbianism, fellatio, cunnilingus, and anal sex. However, films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance".[115]

While Borins found non-coercive explicit sexuality to be "artless", "insipid" and "boring", he did not find it deserving of prohibition.

The judgement in R. v. Doug Rankine is a reminder that the judiciary is ultimately sensitive to arguments regarding the purpose of prohibition. While the test of community tolerance is set out here and is determinative of the issue in dispute, it is the focus given sexual violence that is

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[115] R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd., note 104, above, at 163.

most instructive.

The past decade has seen a refocussing of public concern about obscenity and censorship. The issue of public harm is beginning to displace the issue of public morality; it is now sexual violence that highlights our agenda. At the centre of much controversy are two American-based social psychologists, Neil Malamuth and Ed Donnerstein. Their laboratory and field research redirects our attention from the notion of community tolerance to the issue of pornography's social costs.

The task of obtaining sound empirical research concerning the social costs of pornography has long been problematic. The subjects of study have changed over time; the concerns of the early seventies differ from those of today, and from those of the post War period. The 1970 President's Commission on Obscenity and Pornography[116] correspondingly differs in its emphasis from Britain's Williams Report of 1979, the latter perhaps being better related to our present circumstances. A 1973 volume of the Journal of Social Issues featured "pornography"--articles that spoke of "consumers of erotica", "explicit sexual materials", and "erotic films". There was no suggestion that the topic under study was that of images of sexual

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[116] Technical Reports of the Commission on Obscenity and Pornography, Washington, D.C., U.S. Government Printing Office, 1971.

violence, the focus of current concerns.[117]

In a 1982 review article,[118] Malamuth and Donnerstein set out the specifics of recent research regarding aggressive pornography. In a book chapter now in press, Donnerstein writes, "it is the aggressive content of pornography which is the main contributor to violence against women...when we take out the sexual content from such films and just leave the aggressive aspect we find a similar pattern of aggression and asocial attitudes. ...The problem here is what we mean by pornography. Are we discussing just sexually explicit material? All the research to date would not suggest any harmful effects from such exposure."[119]

This is a theme echoed by E.C. Nelson in his comprehensive, Pornography and Sexual Aggression. Nelson writes, "...research continues to emphasize the usefulness of discriminating between the effects of aggressive vs. non-aggressive sexual materials".[120] Nelson further remarks that, "...even now it is reasonably clear that observing violent sexuality can facilitate aggression in the observer

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[117] "Pornography: Attitudes, Use, and Effects", 29(3) Journal of Social Issues, 1973, 1 - 227.
[118] Malamuth and Donnerstein, note 53, above.
[119] E. Donnerstein, "Pornography: Its Effect on Violence Against Women", in N. Malamuth and E. Donnerstein, Pornography and Sexual Aggression, New York, Academic Press, in Press, p. 32.
[120] E.C. Nelson, note 53, above, at 236.

- altering the context in which aggression is viewed does not appear to change anything".[121] The ability of the image to impact upon the reality of social relations seems well established. Nelson aptly describes this process, noting, "...the modelling of attitudes and behaviours which suggest that males are justified in their aggression toward females undoubtedly influences some males to disregard women's communications of non-consent and reinforces their beliefs about the appropriateness of using force or intimidation to make a woman do whatever they want her to do."[122]

Social scientists, particularly social psychologists, are now looking to the aggressive content of sexuality, in both laboratory and field experiments. A recent study involved 104 male subjects in Manitoba. In an initial session, questionnaires were given out, one item asking about the likelihood that the subject himself would rape if "...he could be assured of not being caught and punished." A five point scale was presented, with point one representing "not at all likely" and point five representing "very likely." The subjects were then divided into high rape potential and low rape potential groups; 62 males reported a one, "not at all likely"; 42 males reported a two, or more, on the scale. The subjects then listened to

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[121] Ibid, p. 236.
[122] Ibid, p.234.

one of three tapes, a mutually consenting depiction of sexuality, a depiction of rape in which a first unwilling victim becomes sexually aroused, or a depiction of rape in which the victim abhors the assault, a "negative outcome".

Malamuth and Check measured both penile tumescence and self-reported arousal to these stimuli.[123] For both males with "high rape" and "low rape" potential, blood flow to the penis increased most markedly in the rape-positive outcome condition; men were generally more physiologically aroused by violent sexuality than by consenting sexuality; for those with high rape potential, the effect was particularly pronounced. In the case of reported sexual arousal, those with high rape potential indicated that they were as excited by rape with victim abhorrence of assault as by sexuality with mutual consent.

The study does not present a flattering view of male sexuality. The predatory nature of the male finds expression in the fact that almost 50 percent of those sampled would consider sexually assaulting an unwilling woman, if no adverse consequences could be assured. There is a sense in which women have been commodified as objects for male satisfaction; the male often imagines stealing a woman in much the same way as the thief imagines stealing a

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[123] N. Malamuth and J.V.P. Check, "Aggressive-Pornography and Beliefs in Rape Myths: Individual Differences", unpublished manuscript, 1983.

bottle of scotch, or a colour television set. The breasts and the vagina are the valued goods, and the penis a willing weapon.

And yet, Malamuth, check, Donnerstein, and many others have been fairly criticized for what Thelma McCormack has has termed "Machismo in Media Research". McCormack notes that "...(a reasonable) research design would require subjects of both sexes, just as similar studies of racist content would include both black and white subjects. It is...significant that the experimental research on pornography has been carried out by men using almost exclusively male subjects."[124] McCormack also takes issue with the subject matter of much empirical effort to date. She argues for a conceptualization of pornography "...as an extreme form, almost a travesty, of sexual inequality in which women serve as sex objects to arouse and satisfy men and nothing more."[125]

In a field experiment Malamuth and Check have obtained, "...perhaps the strongest evidence to date to indicate that depictions of sexual aggression with positive consequences can adversely affect socially important perceptions and attitudes."[126]

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[124] T. McCormack, note 53, above at 553.
[125] Ibid, p.553.
[126] N. Malamuth and J.V.P. Check, "The effects of mass media exposure on acceptance of violence against women: A field experiment. 15 Journal of Research in Personality,

Some 270 subjects were shown either Swept Away and The Getaway, two commercially released feature films, or shown two neutral feature films. In Swept Away and The Getaway women are depicted as victims, within both sexual and non-sexual contexts. Questionnaires assessing acceptance of violence against women, rape myth acceptance, and belief in adversarial sexual relations were filled out several days after viewing. Comparisons between those who had seen Swept Away and The Getaway, and those who had seen neutral films revealed significant differences in expressed attitudes. Malamuth and Donnerstein note,

> "Results indicated that exposure to films portraying aggressive sexuality as having positive consequences significantly increased male, but not female, subjects' acceptance of interpersonal violence against women and tended to increase males' acceptance of rape myths."[127]

Malamuth and Donnerstein inform us of the value of context in focusing our concerns. The depiction of sexual violence, in itself, cannot be objected to; it is the message of the depiction that requires evaluation. There seems to be little empirical evidence to establish the social harm embodied in allowing the exhibition of explicit

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[126] (cont'd) 436-446, 1981.
[127] Malamuth and Donnerstein, note 53, above, at 115.

sexual relations.[128] It is rather the potential condonation or promotion of sexual violence that is problematic. In pornography we see reflections of the reality of male-female relations, and a simultaneous structuring of expressed attitudes and potential for physiological arousal.

The debate concerning a causal link between the consumption of pornography and actual violence is not particularly crucial here. While it is certainly difficult to unequivocally establish such a causal connection,[129] the criminal sanction is adequately premised on indications of social harm. Insofar as a medium of communication condones or promotes sexual violence, or cruelty, it may fairly be said to be obscene, to be unsuitable for the public sphere. The images of film and those of other media have the power to impact upon male attitudes towards aggression against women and to positively reinforce coercive sexuality.

And yet the vagueness of the standard is a problematic. Sexual violence can be differentiated from the violence of the boxing ring or the hockey rink; there is no illusion here of the fair fight. But the condonation or promotion of sexual violence or cruelty remains a subjective test, with the rigid line of criminal conviction difficult to draw.

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[128] See E. Donnerstein, "Pornography: Its Effect on Violence Against Women", note 119, above.
[129] See, for example, B. Kutchinsky, Law, Pornography and Crime: The Danish Experience, London, Martin Robertson, 1978.

It is, nonetheless, an appropriate focus of concern. The provincial power to refuse public exhibition is not an inherently onerous limitation upon freedom of speech, and the criminal processing of obscenity will allow for debate on the legitimacy of what is potentially a kind of hate literature in the sexual sphere. Should guilt be established, only a financial penalty will typically be imposed. Sexuality in the private sphere is not a focus of control.[130]

Ultimately, though, the more general issue of sexuality and violence is probably best understood in public education and discussion. We must not forget that the images of controversy are very real reflections of social life. To the extent that males and females view each other simply as commodities to be obtained, they entrench a predatory conduct in interpersonal relations.

Images of sexuality and violence act as a barometer on the condition of human relations. As much a reflection of changing social structure as a social force, they do not comfortably succumb to black and white pronouncements. We place the pleasure of sexuality alongside the pains of dominance and exploitation, and we simply weave a tangled web.

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[130] For a case that espouses a somewhat contrary view see Re Hawkshaw and the Queen (1982), 69 C.C.C. (2d) 503 Ontario C.A.

Conclusions

Implicit in the preceding pages are a number of conclusions concerning provincial powers of censorship and classification and federal obscenity provisions. These remarks are now made more explicit and will perhaps be of some assistance in Committee discussions.

1. The criminal definition of obscenity proposed in Bill C-19 could be further modified in the following manner.

> s.159(8) For the purposes of this Act, any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of sexual violence or cruelty.

It is not clear that consenting sexuality between adults is properly the focus of the criminal law; it is not the "undue exploitation" of sexuality, but the "undue exploitation" of sexual violence that is revealed as problematic by empirical research. The subjects of crime and horror do not appear to be necessary inclusions in s.159(8); there are no judicial pronouncements concerning these terms; the field of objectionable material would appear to be adequately covered by the notions of sexual violence and cruelty.

The proposed addition to s.159(8), "through degrading representations of a male or female person or in any other manner", does direct our attention from the community tolerance test towards some conception of

social harm. Nonetheless, the language here does not suggest the images deserving of criminalization. There is a sense in which many television commercials degrade both men and women, and yet the criminal sanction would scarcely be appropriate. The phrase "degrading representation" does not give any kind of focus to the judiciary; it is fairly criticized for its vagueness.

It should be noted that "sexual violence", as defined above, incorporates the two prohibitions of the Williams Report.

> Material whose production appears to the court to have involved the exploitation for sexual purposes of any person, where either (a) that person appears from the evidence as a whole to have been at the relevant time under the age of sixteen years; or (b) the material gives reason to believe that actual physical harm was inflicted on that person.[131]

2. The proposed s.163.1 of the Code should be enacted in its present form:

> "163.1 Where any film or videotape is presented, published or shown in accordance with a classification or rating established for films or videotapes pursuant to the law of the province in which the film or videotape is presented, published or shown, no proceeding shall be instituted under section 159 or 163 in respect of such presentation,

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[131] Report of the Committee on Obscenity and Film Censorship, note 2, above, at 161.

publication or showing or in respect of the possession of the film or videotape for any such purpose without the personal consent of the Attorney General."

The section highlights the value of Censor Board decision-making in the sphere of film censorship and classification. While the criminal process may still be invoked against a provincially classified film, it is set out here as an extraordinary circumstance, requiring "the personal consent of the Attorney General." The section raises the profile of any public conflict that may develop between law enforcement perceptions of obscenity and Censor Board perceptions of properly prohibited material. Insofar as this promotes a greater awareness of decision making processes in the public sphere, it can be seen as a progressive proposal.

3. Provincial Censor Boards should retain powers of both prohibition and classification. The statutory framework of s.159 and existing judicial pronouncements, while ultimately determinative of obscenity, are not sufficiently precise to suggest Board policy in the individual case. One must acknowledge, too, that provincial autonomy is an important value here - that provincial jurisdiction over "property and civil rights", and "matters of a local and private nature"

justifies intervention. The standard of community tolerance and the conception of harm may vary from province to province; it seems reasonable to honour these regional variations.

4. The spirit of the Ontario Court of Appeal decision in Re Ontario Film and Video Appreciation Society should be reflected in provincial legislation. Each censor board should set out its criteria for prohibition and classification in statutory or regulatory form. While the language employed may be difficult to construct, it seems important that section one of the Charter not be disregarded; the power of prohibition requires public justification.

5. Censor Board decision-making in the individual case should be accessible to the public. The reasons for elimination or rejection should be stated in written form, available for public scrutiny. There seems no reason to deny public access to a decision-making process undertaken in the public interest.

6. Censor board prohibition of the sales and rental of videofilms seems a costly and unnecessary expansion of provincial power. The criminal offence of obscenity should be able to adequately respond to this new medium of communication; the provinces have historically been concerned with the public exhibition of film.

While this provincial intrusion into a more private sphere does appear as inappropriate, some degree of regulation is, nevertheless, desirable. The operators of video outlets should be required to designate tapes reviewed by the province with the appropriate classification awarded. If the film has not been reviewed it should bear the label "unclassified". The consumer is thus better informed, and the distributor is made more aware of the legal context in which he or she is operating.

7. The standard of community tolerance does not create a sufficient basis for the prohibitions of the censor board or the criminal convictions of the court. While such tolerance is a variable that impacts upon the decision-making process, it ultimately raises more questions than it answers. If 60 percent of Ontario residents want to ban explicit sex, does prohibition follow? Is mere intolerance itself all that need be proven?

The prohibition of images of sexuality and violence is fairly based on some consideration of social harm. Quebec's new test of censorship, the condonation or promotion of sexual violence suggests a possible direction for case law. An author, publisher or film maker who condones or promotes sexual violence or

cruelty is not reasonably insulated from sanction, by claiming a legitimate right to freedom of speech. The recent decision of Borins, C.Ct.J. in R. v. Doug Rankine and Act III Video is also suggestive of a new direction in criminal control, the Court instructively drawing a line between the explicitly sexual and the sexually coercive.