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A SURVEY OF CANADIAN DISTRIBUTORS
OF PORNOGRAPHIC MATERIAL

by
B. Kaite

POLICY, PROGRAMS
AND RESEARCH BRANCH
RESEARCH AND
STATISTICS SECTION

DISTRIBUTORS AND THE DISTRIBUTION OF
ADULT AND PORNOGRAPHIC VIDEO
AND MAGAZINES IN QUEBEC AND ONTARIO

Berkeley Kaite

Department of Sociology and
Anthropology

Carleton University, Ottawa

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The views expressed herein are those of the author and do not necessarily represent the views or policies of the Department of Justice.

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INTRODUCTION

The following contains a profile of Canadian distributors and distribution practices of adult (i.e. what we would commonly refer to as pornographic) video and magazine companies. The report proceeds with a methodology section outlining the contours of the study. It is then divided into two broad segments, the parameters of which are defined by the two media (video and print) under study. The two media were chosen for their persistency and popularity as forms of adult expression (the video field currently expanding at an impressive rate) and their being the focus of much critical attention from various sectors in society.¹

The profile, obtained from structured interviews with the distributors themselves, includes a description of what is generally available to the public; an overview of popular, saleable imagery in contemporary adult videos and magazines; and, distributors' perceptions of the typical consumer. There follows a discussion of the legal aspects of the distribution of adult video and magazines, the impact of the obscenity law on distribution activities, and the role of customs and respective censor boards in the adult entertainment industry.

Each section contains an account of the distributors' perceptions of contemporary Canadian community standards and of their opinions regarding the changes they would like to see effected

in the current obscenity law, as it influences their work.

By way of conclusion, the need for clarity and consistency in the obscenity law is underlined, and some discursive comments are offered on the problem of sexual representation and desire, not restricted to genre.

METHODOLOGY

The original mandate of the study was to design a survey guide and contact Canadian producers and distributors of pornographic material, whose companies were located in Ontario or Québec, with a view to assess their marketing strategies; their perceptions of existing laws on obscenity and the impacts of legal decisions on their activities; their perceptions of their customers; and changes they would like to see in the law as it affects their work.

It soon appeared, however, that despite many efforts, no producers could be contacted. If any, there is a very limited production of "legitimate" adult material in Canada.¹ Some distributors own publication rights to some films; beyond that, if there is Canadian produced material it is underground. Hence, the decisions regarding what is available to the Canadian public are made at the point of distribution. Changes in the legal status of obscenity, particularly in the Canadian Criminal Code, will thus affect the distribution of adult videos and magazines.

For the purposes of this report, 20 formal interviews were conducted, eighteen with video and magazine distributors and one each with the chairperson of the Ontario Advisory Committee (retained by magazine wholesalers to advise on contemporary Canadian community standards) and the President of the Video

Retailers Association (legal counsel). In Québec one magazine and seven video distributors were interviewed. Three distributors of magazines and seven of videos were interviewed in Ontario. Discussions were also held with the head of the Morality Squad of the Montreal Urban Community and two members of Project "P" in Toronto. (Project "P" is a joint effort of the Metro Toronto and OPP units which deals with the education of police officers on the obscenity law and the confiscation of obscene material.) As well telephone interviews were conducted with some distributors who could not be met, individuals who have been or are currently involved in work in the areas of adult entertainment/pornography/censorship, customs officials, members of the Montréal Urban Community, the Sûreté du Québec, representatives from the Ontario Censor Board and a member of the Canadian Film Development Corporation.

The interviewees were chosen from the provinces of Québec and Ontario as these possibly represent the two extremes of the Canadian situation. Québec and British Columbia are reputed to have lax interpretations of obscenity while Ontario is known to be more conservative. Respondents were located through word of mouth and referral and the sample emerged on a "snowball" fashion. Furthermore, the study focussed on Toronto and Montréal (and surrounding areas). In the case of both media, names of competitors came up either during an initial phone conversation with a respondent or during the interview. It may thus be said that

the sample is likely to be representative of the major distributors in the field.

Finding adult video distributors was not difficult because of their success, visibility and (often) their association with feature film distribution (although two of the sixteen contacted would not return repeated phone messages). Six of the fourteen video distributors interviewed (3 from Ontario and 3 from Québec) deal solely with adult material, one also with a mail order business. The rest distribute feature films as well. Two respondents are involved with the handling of 35mm films (those which are seen in movie houses).

The distributors of adult magazines tended to be more elusive. This may be due to their having for a long while been the objects of control, hence their tendency to keep a low profile. A member of the Sûreté de Québec mentioned that home video has been "ignored" by the provincial police due to lack of censorship regulations. Thus they concentrate on the distribution of obscene magazines. This person could not provide the names of any video distributors; but nor could (would) he supply the names of those involved with publications (e.g. magazines) of a sexually explicit nature. Similarly, magazine distributors who were interviewed claimed no knowledge of the origin (in Canada) of sexually explicit magazines which contain close-up shots of sexual intercourse. Three magazine distributors contacted were going to be out of town. Four others would not participate in

an interview (either by not returning phone calls or by claiming they had "nothing new to say"). Of the four respondents finally interviewed, two (1 in Québec and 1 in Ontario) rely on adult material to bring in most of their business. The other two distribute other titles as well.

The interview schedule was designed around the following question areas: (1) the product: genre, country of origin; (2) the business: number of retailers under their auspices, average monthly sales; (3) the demand/desire for the product and the consumer; (4) the law: familiarity with the obscenity and customs laws and the way they work in practice; (5) their definitions of pornography; (6) desired changes in the law and community standards. Each interview lasted on average between 2 and 3 hours. They were open-ended: many respondents spoke at great length on topics which, although related, were not originally included in the survey. Notes were taken and interviews written up in prose immediately after their occurrence.

As preparation for the interviews which have informed this research, it was necessary to view videos (both Québec and Ontario versions) and peruse adult magazines, those available in Ontario "corner stores" or "adult" bookstores, and in "sex" shops in Québec. The author was also acquainted with legal literature on the obscenity law and various court cases.

VIDEO DISTRIBUTION: PORNOGRAPHY VS. ADULT ENTERTAINMENT

One of the problems with the discussions surrounding the topic of pornography centers on sifting through various levels of debate and arriving at an accessible definition of the phenomenon and its discourse. This is not easy as disparate factions and theoretical perspectives identify the issues differently, depending on what is felt to be at stake. Conservatives are concerned with the decline in morality, with emergent forms of polysexuality, and with the disintegration of the nuclear family. The decline in social values is seen in light of representations of "unhealthy" sexuality: sexual activity which takes place outside of a traditional relationship and which is non-functional (i.e. non-reproductive).¹ The liberal/libertarian position sees society as pluralist, "containing many points of view in uneasy co-existence."² Freedom of expression shall supersede any moral concerns.

Pornography, however objectionable it might appear, should therefore be available for individuals unless it can be proved that its presence within society affronts other individuals going about their daily business, or indeed produces forms of antisocial behaviour such as aggression upon particular individuals.³

The feminist intervention mobilizes around campaigns and demonstrations, identifies the main social antagonism as that between the sexes, and argues for "change in public attitudes by a redefinition of what constitutes an offensive representation."⁴

Recently, feminists have been anxious to nullify claims of prudery by isolating what they consider to be the most nefarious of genres: representations which combine sexuality with some forms of violence or with children. This is seen as inherently harmful and predicated on gender relations of dominance:

Pornography is a presentation, whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the presentation, and in which such behaviour can be taken to be advocated or endorsed.⁵

On another level, a parallel feminist-informed intervention opposes these "feminist" visions which deny the acceptability of certain forms of sexual expression.⁶ It also questions the variable status of different modes of representations in a cultural language with meaningful codes to be deciphered and attempts to analyse their association with the basic social and economic conditions (e.g. photography).⁷ Discussion is also given to the possibilities of developing a women's erotica.⁸

As can be seen from this short overview, pornography is an issue charged with emotion and strange political alliances and an elusive definition. It does have certain identifiable features: it deals with sexual taboos and dominant images, inscribed into everyday practice and it portrays characters who possess only one dimension,

a sexual/genital one.⁹ As a social "institution", however, it is defined differently according to the conceptions political groups have and their subsequent struggles.¹⁰

The distributors interviewed in this study deal with video and graphic representations of a sexual nature, and their own struggle is to "legitimize" their business and make sense of their "worlds" in the least dissonant way. The dissonance for them is personal, as is the notion of legitimation. They have moral concerns but also a business acumen which presupposes the necessity of making a profit, regardless of personal taste. Many mentioned that they did not enter this business to break the law: they worried about their reputations within the community and with their families, especially after a raid (their parents and in-laws read the papers, for example, and their kids talked amongst themselves). But these distributors also recognized that the level of discourse surrounding the "racy" material was a boost for the industry; thus retaining the "illegitimate" tag was often considered in business terms.

Distributors distinguish between "pornography" and "adult entertainment" (some magazine distributors refer to products of a sexually explicit nature as "men's sophisticate titles") not only as a descriptive tool, i.e. to identify qualitative differences in imagery contained in feature films and home video movies, but also to reinforce a moral dichotomy already in existence in popular opinion, in many other sectors in society and that is

accessible to many. No video distributor considers his products to be pornographic. Products are variously labelled "adult movies", "sex movies" or "erotica films". Within this context their work is justified on the basis that films/videos are produced by responsible "adults" for the consumption of similarly responsible "adults". There is a presumed need for adult movies which distributors feel they are satisfying (the nature of the need will be discussed further on).

When asked if they considered their work to be pornographic, video/film distributors consistently responded in the negative. However, they consistently used the word "pornography" as a descriptive label and may implicitly consider their work as such. For example, common phrases were: "when I got into the pornography business..."; "there will always be a demand for pornography...". The label is one which, historically and in common sense terms, refers to representations of a sexual orientation and thus has currency among the public, of which the distributors are a part. Hence, the appeal and accessibility of the term. However, attempts are made at refining the use of the word pornography (which curiously resemble the more vocal feminist position/definition).¹¹ Aware of debates surrounding sex in the public sphere, at least at the level of media creation, and the contentiousness of the issues, distributors use the term "pornography" explicitly to refer to a variety of things, usually undesirable and deemed offensive. This allows for location within the moral debate without implication. Allowing for the difficulties with trying to define an elusive term

yet one laden with social and moral meaning, some identify pornography, conceptually, as a "personal thing":

"Nobody, by today's standards, can define it." (Q.a.)¹²

"Define degrading. What is it?" (O.a.)

"Explicit sex is good taste... it's according to one's own definition." (A.a/f.)

Taking this to its extreme one respondent defined as pornographic "anything that will shock me". At the descriptive level, most Ontario distributors, operating with tighter interpretations of obscenity than in Québec (by the censor boards and local police) deem pornography to be what they do not deal in, i.e. an explicit focus on genitalia, graphic depictions of sexual activity; penetration, masturbation, ejaculation; anal or oral sex; or in other words explicit representations with nothing left to the imagination. One Ontario distributor defined pornography as bestiality, "kiddie-porn" (using children as models or models depicting children) and mutilation.

"Pornography would be graphic depictions of sexual activity and animals, kids, violence - it's not normal" (O.a/f.)

"...whatever is unacceptable to the agency regulating it... degradation of the human body - usually women - but it's a personal thing." (O.a/f.)

"... penetration, oral or anal sex, a focus on genitalia." (O.a/f.)

In Québec, however, explicitness is the norm. Thus, pornographic representations are considered to be those involving the "undue

debasement of women"; violence towards women or depictions of sado-masochism; kiddie-porn; bestiality and things another distributor considered to be "disgusting" - his examples were whipping and defecation.

Throughout, therefore, the terms "adult entertainment" or "adult magazines/videos" shall be used when referring to what is generally available.

The business

Most video distributors own businesses that are between 1-6 years old. The majority are approximately three years old, the oldest is seven and one Ontario respondent began distributing feature films to cinemas 14 years ago. Although it appears that no adult videos are actually made in Canada, some distributors (seven in the sample) speak of "producing" videos. This refers to copyright ownership of certain films and their subsequent duplication. Only in that sense are commercially available videos produced here. Most adult videos were originally produced for theatrical distribution (35mm) and originate from New York and California - most respondents were reluctant to reveal the names of their American distributors.

Distribution companies which deal solely with adult video make, on average, approximately \$180,000 per month in sales. Without

their adult titles the businesses would likely fold. Distributors whose adult inventory is only a part of their overall stock (which includes feature films) have estimated monthly sales, from adult videos, which can range from \$1,000 per month to \$70,000 per month, representing from 1% to 25% of their total line (i.e. titles). Some respondents mentioned that they had to carry adult titles as part of their general line otherwise they'd have no business: their American distributors said "take all" (i.e. with adult) or nothing.

What is available

Within the popular lexicon there is a further distinction between "soft" and "hard core" pornography. "Soft" is taken to mean an Ontario version, with sexual activity that is simulated or implied: everything is left to the imagination. There is fondling and caressing but no direct viewing of genitals, no direct genital contact (either inter, manual or oral). Explicit scenes have been cut or edited, i.e. part of the screen will blacken until only the actors faces are revealed. Hard core typifies what is generally available in Québec: scenes of a sexually explicit nature, including oral sex, anal sex and ejaculation. Reference to "uncut versions" (which only one interviewee admitted to carrying, only after he deleted rape scenes) implies the original U.S. product which can differ from its hard-core equivalent in two ways: it may contain scenes of violence

(e.g. rape); and the duration of the scenes of sexual activity are sometimes longer than in the Québec version.

My encounter with videos containing violent sexuality was confined to specific segments of videos confiscated by members of Project "P" and previously distributed by one of my respondents (who claimed no knowledge of them only to say that he wasn't part of the company when they were in circulation). The scenes I saw were from 2 videos and they could be described as containing simulated violence, some of it of a sexual nature. For example, the rape of a woman off camera - off camera, one only heard her cries - and the subsequent "revenge" of this woman by hacking off the sex organs of her attacker - again, the only evidence of this act was the blood. Another portrayed the filming of a woman's legs being sawed off. It was noted that these films are routinely confiscated and distributors prosecuted. Kiddie-porn is thought by both police officers and distributors to be available only through underground circulation, not video stores, and cater to a small but "sick" market.¹³

Some respondents mentioned that they have seen "stag" movies which routinely contain standard scenes of bestiality (women and animals, available through mail order from the United States). During one interview, an office clerk (female) overheard and volunteered the information that she knew of a retailer in Scarborough who had "animal" movies under the counter. Some respondents denied the existence of this type of pornography; others knew, theoretically

they said, of its availability under the counter or out of the trunk of someone's car. Again, it is assumed that the market for this material is select and suspect.

What sells

The video business appears to be a highly lucrative one. The market is already defined for these distributors: they know that "anything with sex sells" (they also know, and mentioned, that anything with violence sells: witness the popularity of such features as "Friday the 13th" and "Halloween"). It was mentioned a few times that most customers include an adult movies with their first rental selection after the initial purchase of their VCR.¹⁴

"What sells... star quality, good, hard sex, some story, triple X." (Q.a/f.)

"People want to see what they can't see... this challenges authority... and (re: violence) people like to be scared." (O.a/f.)

"... they want the girl next door to be bad; they must be searching for some truth - why would they keep going back?" (Q.a/f.)

In the words of one respondent, "there's a marketplace for anything." Anything with sex will sell but not every title is equally popular. What determines this popularity, almost invariably, is the cover of the video jacket. The packaging of sexual imagery is extremely important to consumer selection as

is the inclusion of name stars in a particular movie. One distributor pointed out that often the stars are only in a given movie for a short duration while another similarly noted "what rents is not necessarily what makes a good film". Two other features seem to influence or manipulate demand. Labelling a video cassette with a "triple X" sticker ensures popularity during its shelf life (estimated at about 6 months). Another factor which is good for business generally, and individual titles specifically, is the publicity generated through protest (feminist for example) and obscenity charges.

It was also noted that as women emerge as a consumer block and viewing audience they may demand movies with story lines and sex scenes which appeal to them. In "Confessions of a Feminist Porn Programmer" Karen Jaehne writes:

The actual increase in fantasy and decrease in brutality in adult movies has been found to be in a direct relationship to the increase in female viewers. Not only did we operate on the information supplied by our customer surveys that over 60% of our viewers were female, but the Playboy Channel is on record as tailoring its product to and programming for what is believed to be a dominantly female home audience.¹⁵

The Consumer

Most distributors don't have direct access to the consumer but assume that the typical one is male, between the ages of 18-45.¹⁶ It was acknowledged that some women rent videos due to the lessened

embarrassment of viewing one in the home as opposed to a theatre. One respondent speculated that women rent videos only to view them in order to "register their shock".

When contemplating the reasons why there is a demand for adult films, interviewees invariably spoke of the male consumer (the pronoun "he" was used and/or in "fleshing out" the stereotypical consumer informants often extra-polated from their own experiences/ desires to form generalizations).

"The public is a world of believers... they think there are good or bad sex films and are gullible - they don't stop looking for the good." (Q.a/f.)

The reasons for the demand are seen in ahistorical and naturalistic terms, i.e. it is argued that sex and sexual enjoyment is natural and naturally important to everyone; that videos embody a desire for sex; that sex is a tabooed area in our society and thus one lusts after the "forbidden fruit".

"We are suppressed... people don't get enough sex either that they need or think they need." (O.a.)

Videos are seen as fantasy, escapism and not to be taken seriously. Most distributors admit that their products are "boring, silly and stupid."

"I don't think sex is a spectator sport... these movies are garbage." (O.a/f.)

"Movies are fantasy, you can read evil into anything:
the feminist outcry is not representative; couples
watch films at home because they want privacy." (Q.a/f.)

Familiarity with obscenity laws

Most of the interviewees have been raided on obscenity charges at least once; some are before the courts now. Most distributors, however, still have little familiarity with the current obscenity law. Three knew of the Borins judgement and were using it as a guideline.¹⁷ This lack of familiarity and simultaneous complacency about it (the lack not the law) stems, it would appear, from two phenomena. After a raid, distributors respond with resilience: demand for the product is high, the drop in business is temporary and fines are "minimal". Also, because the law is not uniformly enforced (discussed under "Desired changes") most respondents felt it was a matter of interpretation and because they don't feel they are doing anything wrong, don't know how to interpret the law.

Those who were familiar with the law (three who are involved in the distribution of only adult video) were able to quote the phrases "undue exploitation" and "community standards". Beyond that all these individuals have a comprehension of the law in practical terms, i.e. as it affects their work.

The vagueness of their comprehension of the current obscenity law corresponds to the lack of precision with which it is applied. Two Québec distributors, dealing almost exclusively with adult

video, knew of the law "generally", could not paraphrase it but mentioned what was "definitely" not allowed: violence, kiddie-porn and bestiality. Other distributors exhibit confusion over what is/is not acceptable and allow that "a lot depends on how you interpret it". All are aware that what is at issue is the notion of "sexual exploitation" but there are "grey areas in all aspects of the definition (of obscenity)". In Ontario where customs and Censor Board restrictions appear to be tighter, any form of explicitness is deemed to be obscene. Thus various representations fall into this category and are cut from the original to render an "Ontario version." They are: erections, penetration, ejaculation, masturbation, violence and "of course, no bestiality and no kids". One theatrical distributor thought that "nothing degrading" was allowed.

"You can't put another person down for your own personal satisfaction." (O.a.)

The law: its impact on activities

Video distributors manage to operate within the confines of vague legal restrictions in a variety of ways. In Ontario, according to interviewees, all videos have been Censor Board-approved, as they were originally for theatrical release, or some distributors do their own editing and "gamble with what (we) think the Censor Board won't allow". These are: no "excessive violence against women" (e.g. a rape with other forms of violence or mutilation),

erections, penetration, genital contact, oral-genital contact, no long shots (of duration), no pelvic movement and no profanity during sex scenes.

The situation in Québec is similar: some "master tapes" (the original received from, usually, the United States) are sent to the Film Classification Board, before or after editing by the distributor. Others are edited and then distributed and a small percentage are left uncut. The biggest problem the respondents (in both Québec and Ontario) have in dealing with the law involves the lack of consistent, workable guidelines within which to operate. There are discrepancies between the authorities, i.e. raids are conducted regardless of whether videos have been Censor Board or Customs-approved.¹⁸ On the other hand, there is almost total uniformity of opinion regarding what is not desirable viewing material: kiddie-porn, violence and bestiality. To that end, Québec distributors "self-regulate" with a tacit agreement among themselves to not carry the above three. Most feel this sort of material is immoral but are also concerned that, if there is a market for anything, new products will give their competitors a financial advantage. One Québec distributor (who dealt with more feature than adult titles) had a complaint centered on this insecurity regarding what is allowable. After a raid, and after confiscated tapes were returned because of technical problems with the warrant, he stopped carrying X-rated, explicit videos while his competitors continued to do so but were still not charged. He was losing money and this hurt his business.

Two distributors from Québec mentioned the problem of privacy: very small operations by individuals who work out of their cars and sell videos which have eluded customs. They do not own copyright and do not pay royalties; the tapes can then be sold to distributors at low prices. Legitimate distributors then lose some business. But piracy is extremely difficult to detect. A recent Globe and Mail article suggests that movie companies have lost up to \$10 million in revenue due to a piracy ring.¹⁹

Customs

It is generally acknowledged that many master tapes are not viewed at customs. In the words of one distributor: "customs is a joke". Customs will often "rubber stamp" incoming videos and, according to one respondent, they don't have the facilities, personnel or time to look at everything. Some distributors send their videos to the Censor Board, either before or after editing and Québec distributors edit their videos for Ontario viewing. There is a method by which videos can make it through customs and receive Censor Board approval and still circulate in an uncut version or with scenes considered obscene by certain local authorities. There are currently (with the province of Ontario emerging as an exception) no provincial legal restrictions on or provisions for the control of home viewing of videos. Therefore, masters are not subject to approval from either customs or the respective Censor Boards. Distributors can also retain 35mm films for a period of 60 days

before submitting them for Censor Board classification. Within that period, copies of the original can be made and distributed in whatever form desired, i.e. censored or uncut.

Community standards

In the law, obscenity means "undue exploitation of sex"; "undue" means contravening community standards. McCormack argues that the law has its biases: it is applied to pornography/adult material and little else:

In a society where a large majority of people do not read the books or see the plays and art exhibits that meet the criteria for erotic art, any distinction made on aesthetic grounds tends to be discriminatory. In other words, here as elsewhere there is one law for the rich and one for the poor, with additional discrimination against the sexual deviate: one law for the normal and one for the abnormal.²⁰

Distributors, too, feel they can gauge the pulse of the community based on the demand for their products. The majority of respondents do not favour inclusion of the notion of community standards in a legal definition of obscenity nor do they value a law based on this assessment.

No interviewee could define or roughly put into words what a community standard might be, other than to say "it's what people living here want" and "people want to live a certain way". Nor could they speak of how it might vary from region to region or

province to province. It is almost uniformly accepted that "community standards" in theory: are different from what local police enforce; are what the Censor Board, not the community, will tolerate; or are dictated by authorities or small vocal groups. Some distributors believe that community standards are an individual thing, i.e. "everybody has their own".

When speaking of community standards in practice a slightly different picture emerges. Three respondents pointed out that sales dictate what current standards are. One argued that the notion of a community standard makes "second class citizens of some of us... a community standard should be defined by what is acceptable to the public which pays money to see (the film)" (O.a.). In other words the product should be allowed to "find its own market" (Q.a/f.).

Distributors prefer to talk of the community of Canada both because they believe standards do not vary and, as one from Ontario pointed out, his "right" and/or desire to see what he wants is curtailed. From a business point of view, without a universal standard, too much energy and time goes into marketing different versions of the same product, to satisfy supposedly different communities.

Distributors have definite opinions about what Canadians will tolerate. All distributors advocated acceptance of a "hard-core" Québec standard and its universal application. It was acknowledged

that individual and group opinion differ and that it is vocal individuals who use the notion of community standards behind which to hide, moralize and/or prosecute. However, the belief is that the public should do its own self-regulating. What is currently available in Québec - explicit sexual activity, oral, anal, group, lesbian - is understood by Québec and Ontario distributors to be acceptable and desirable to Canadians. One Québec distributor said: "people are not shocked by what they see in stores now." This sentiment is shared by Judge Stephen Borins in a judgement for the judicial district of York:

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 group 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.²¹

It was also argued that Canadians will tolerate almost anything provided they know what they're getting.

Desired changes

Two respondents replied that they could "live with the law" as their businesses are successful based on the volume of sales from other feature videos.

Contradictions are inherent in discussions surrounding changes other distributors would like to see in existing laws as they affect their work. For example, they confront the civil libertarian dilemma by finding certain representations morally reprehensible or "disgusting": while advocating that individuals should be able to look at what they desire, they want the "undesirables" (kiddie-porn, bestiality and violence) unavailable.

"I won't advocate the distribution of hard-core, but I have problems with censorship." (O.a.)

Anybody who wants to look at the three taboos is "sick", a "wacko" and should be denied the rights available to others. In philosophical terms they want to watch what they want (and will extend that "right" to others) but in practical terms they want a clearer definition of what is allowed/not allowed.

All respondents subscribe to the notion that videos destined for home viewing are a private matter (in the words of one: "a man's home is his castle") and should be based on individual discretion: private viewing is the important criterion here.

"You cannot tell an adult in a free society that he cannot see something. We don't force the public to buy films; there's a strong demand for adult material." (Q.a.)

Two distributors do not believe "obscenity" should be in the Criminal Code; most others want a precise, concise re-definition

of the concept, to include violence, bestiality and kiddie-porn. One mentioned as desirable the separation of sex and violence in the current wording of the law. The application of one standard for the country and consistency of this application were strongly urged.

Some respondents were concerned that U.S., uncut videos, which can contain the three tabooed areas (or longer sex scenes, e.g. "Swedish erotica" which has no story line) stay out of Canada for fear that they would threaten the Canadian market. New, more explicit products will increase sales and competition but will lower prices. Businesses might then remain in the same or weaker financial position.

One can infer from responses regarding the nature of representations of violence that distributors feel there may be a "slippery slope", i.e. a connection between the viewing of such actions and the acting out of same. Hence the desirability of restrictions to offset the descent into depravity. They would maintain however that what is available now is innocuous and that those that may be influenced have a prior susceptibility to be so, are already depraved.

"It's better that people live out their fantasies through movies not reality... if people act out violent fantasies... this is not the product of a healthy mind." (Q.a/f.)

"Distributors of such have low ethics and morals... but I don't think it's out there anyway." (Q.a/f.)

"It's not humane to enjoy being seen raped, tied, beaten or to see pictures of those. But, horror films are beautiful (i.e. they are popular and bring in a lot of money)." (Q.a/f.)

"Censorship is a necessity... bestiality, kids, violence, nobody wants this - I don't believe in the eroticization of rape. But what is excessive violence? How do you determine this?" (O.a/f.)

"If it's not inciting harm or violence, it doesn't infringe on anyone's rights." (Q.a)

In tandem with the concern with clarification of the law, and definitions of "obscene", "violence", is a further frustration with the inconsistent and idiosyncratic way that obscenity charges are laid. Raids are conducted, and video cassettes confiscated, usually by municipal authorities, often after the videos have been approved for distribution by the Censor Board or Customs (as noted in the Borins' judgement). Hence, the law is interpreted freely and inconsistently, often at the whim of a police officer or judge. It is also argued that Censor Boards themselves apply obscenity laws inconsistently depending on the individual decision-maker, as there are no objective criteria by which to define what is obscene.

Classification

The majority of respondents favour some form of classification of videos for home viewing. Those who don't rest their case on the separation of public and private viewing. The rental and viewing of home videos is seen to be a private matter; similarly

responsibility for controlling what goes on in the home is perceived as parental and parents are charged with "censoring" what their children can watch.

One respondent favoured classification only with input from members of the industry.

Many interviewees suggested that the already existing system of classification for theatrical viewing should be applied to home videos. Again, a national standard is strongly urged, along with local enforcement. As one distributor said, communities now operate in a vacuum with a blurred distinction between what is legal/illegal.

Some distributors had some more specific suggestions for the regulation of home video rental. One suggested that manufacturers do the classifying. An age restriction (18 and over) was generally favoured, as was the practice of segregating "adult" sections in retail outlets. Other suggestions were: the issuing of permits to store owners and the removal of the picture on the cassette jacket so as not to influence children in the store. It was pointed out that from a business point of view the classification of home videos has its drawbacks. U.S. "parent" distributors issue a release date for the availability of videos in retail stores. This affects sales as new videos are released all the time. Subjection to classification will impose delays on the release date and possibly affect overall sales.

MAGAZINE DISTRIBUTION: PORNOGRAPHY?

Magazine distributors are divided on the issue of whether or not their products are "pornographic". All began by saying "no", that pornography is anything explicit (graphic depictions of sexual activity), violence coupled with sexual degradation, anything with children, animals or "unusual sex... maybe couples together in sexual activity". Again defining pornography proved to be difficult and as one respondent remarked: "pornography is within one's own mind". However, two magazine distributors thought out loud and responded: "It's all pornography". Those answers adhere to the definition of the word: "explicit description or exhibition of sexual activity in literature... intended to stimulate erotic rather than aesthetic feelings (from porné: prostitute; grapho: write)" (The Concise Oxford Dictionary, 6th edition). Both these respondents further refined the definition by noting that violence and kiddie-porn were just two forms of this "pornography" (and should be banned) and that it's all the exploitation of sex (although not undue).

Generally, the preferred label is "adult magazines" or "men's sophisticate titles". Like video distributors, those involved in the distribution of adult magazines use pornography to refer to representations with which they do not deal and that they find offensive or "obscene". They eschew the negative connotations of the word.

Hard-core magazines are those which contain photographs of explicit sexual activity, close-up shots of genital or oral penetration. These are commonly available in Québec in sex shops.²² In corner magazine stores the "racier" magazines appear to contain explicit photos (judging by the cover photo and title) but are covered with plastic wrap, making perusal impossible. In a general magazine store in Montréal I found one magazine with a depiction of a woman in bondage on the cover.

In Ontario, "soft-core" is the norm and this includes representations of simulated sexual activity (no actual shots of penetration, for example) or photographs with "black dots" superimposed over the offending part of the photo, e.g. penetration. Soft core is also understood to mean that the magazine contains articles of "socially redeeming value". In an adult store on Yonge Street in Toronto I discovered 2 magazines, surreptitiously placed behind other "soft" ones, which were unmistakably "hard-core", i.e. the kind that would probably be confiscated during a raid. At Project "P" I was shown "obscene" magazines which contained images of women in bondage, or women in leather, usually brandishing a whip.

Of the four magazine distributors in the sample, one deals strictly with adult material, about 30 magazines and 40 books a month; one carries 50% adult; another about 14 titles out of 260 and one is the Canadian distributor for a British adult magazine. Two respondents are secondary independent distributors dealing with

remainders-magazines that haven't sold and are collected by "jobbers", are sold again to distributors, and then to the public, this time in packages of 2 & 3 at reduced prices. One Ontario distributor also has a mail-order video business - whose customers are mostly in Ontario - in which he distributes 8mm video (with no sound; he obtains these videos from one of the video distributors interviewed who said everything is Censor Board-approved.) These, as well as the other magazines, originate from the United States. There are a few European titles.²³

Respondents deal with anywhere from 35 to 700 retailers across the country, most of them in Ontario and Québec. Only one distributor could estimate monthly sales, which he put at \$15,000. The others didn't know what their adult percentage was or, in the case of those dealing with remainders, said the figures changed every month depending on available titles.

What is available

In Ontario the norm of acceptability is full nudity, of men and women, simulated sexual activity (between men and women, lesbian and male homosexual sex) with, according to one respondent, erections allowed only in the last 6 years. There is no penetration, ejaculation or "full beaver spreads" (highlighted female genitalia). One Ontario distributor used to carry bondage and "spanking" magazines (images of men spanking women) but has been convicted and

no longer does. Common fare in Québec is explicit photos of sexual intercourse, oral and anal penetration, lesbian and gay male sexual activity and ejaculation. The Québec distributor said that if there was "violence" in adult magazines in Québec it was "dressed up", i.e. women in leather, often carrying whips.

No respondent claimed knowledge of kiddie-porn or bestiality except to say that maybe there was an underground market for such.

What sells

The magazine business is highly competitive and many magazines don't make it past volume 1, number 1. The determining factor in adult magazine popularity is invariably the cover but distributors are hard pressed to articulate what it is exactly that will capture the consumer's eye. They only know it when they see it. The decision as to what attributes go into making a successful photo presumably lie with photographers, models and editors. One distributor mentioned "busty magazines" (those with photos of women with large breasts) as big sellers. There are magazines for other specialized tastes, shots of only anal sex, for example, or magazines which contain models portraying young girls, usually engaged in masturbatory activities (always with the disclaimer that the models are 18 years of age and older).

The cover is important; so is the plastic cover, the cellophane wrap on most "racier" magazines, those most exclusively comprised

of photographs, without articles, stories or ads (Penthouse, Playboy, Hustler, Mayfair do not fall into this category, for example). The plastic cover serves a dual purpose: children cannot flip through them and the customer must make an immediate decision: to buy or not to buy. This is good for business.

Two other factors were mentioned as good for business: the anti-pornography protest stimulates interest and curiosity. Also, the by-law which stipulates that magazines must be displayed 1-5 meter above the floor meant that the (remainder) products of one distributor which formerly were kept in boxes on the floor now have more prominence in stores.

It is generally assumed that adult magazines fill a need and serve a useful and vital social function.

"They portray the expression of bottled up fantasies." (O.a/o.)

"Everybody likes sex." (Q.a.)

"We're used to looking at women's bodies." (O.a.)

Adult magazines are seen as here to stay.

The consumer

The consumer of adult magazines is assumed to be male. As with video distributors, speculation on customer motivation is minimal.

What matters to the distributors is whether magazines sell, not why. Some respondents were quick to point out that kids do not buy their magazines; the distributor of a soft-core magazine assumed his consumers were "upper income, more sophisticated". It appears that adult magazines, like others, can be stratified according to the consumers' class or lifestyle. Magazines which enjoy a less sullied reputation (e.g. Penthouse and Playboy) would cater to men whose consumer interests are decidedly middle to upper class, judging by the articles on and ads for cars, stereos and other expensive items and hobbies, e.g. photography. There are also articles on politics and high-brow culture. Alternatively, Hall argues that Hustler functions as a "carrier of working class consciousness". Through its editorial policy (August 1977: "... Hustler gives the average man in America what he has wanted in a publication, but has been denied in the past and presents the information in terms he can understand... Hustler has become a voice for these previously ignored people") and "Promethean bad taste", Hustler debunks the establishment, institutions and agents of authority, but in highly individualistic terms. The reader, loyal according to Hall, is able to maintain a posture of defiance, "finger the system," but the ultimate message is that, unlike the middle-class reader of Playboy, his power doesn't extend beyond himself.²⁴ Interestingly, certain protests suggest that Penthouse and Playboy (and others of their ilk) are acceptable, maybe unappealing but innocuous, but the "average man's" (i.e. working class) magazines are deemed offensive (e.g., Hustler). The class bias of their argument eludes them.

Familiarity with obscenity laws

As with video distributors, the magazine distributors understand the obscenity laws in terms of how they affect their work. Two were familiar with the wording of the law yet all still argued that in practice the interpretation of the law was dependent on which individual or body was doing the enforcing. In Ontario this is assumed to mean that violence and cruelty towards women was not allowed (although, clearly, neither is anything graphic). It was mentioned that in Toronto there used to exist a "working relationship" between municipal police and retailers whereby the latter would be advised to remove "obscene" material from the shelves. Apparently raids are now conducted without warning.

The Québec respondents thought there was a "list" at Customs which stipulated what was acceptable but also thought that interpretation of this list depended on the whim of the individual on duty.

"On paper nothing is allowed... but things get in depending on who decides." (Q.a/o.)

The law: its impact on activities

All but one respondent has been raided. All experience frustration with the vicissitudes of the law's interpretation and, like video distributors, gamble with what they think is acceptable. One

Ontario distributor submits his publications to the Ontario Advisory Committee. The OAC is a committee of three professionals (a psychologist, a law professor and an editor) approved by the Attorney General of Ontario and retained by magazine wholesalers to inform them on contemporary Canadian community standards. The committee is powerless - merely advisory. Another Ontario respondent has been the victim of raids, the subject of which was material which had already been cleared through Customs. He said: "I might as well deal with underground material if the cleared stuff is considered illegal anyway".

Customs

All respondents reported that their material was cleared at customs. All showed me sample letters to that effect. It seems that it is often up to the distributor to submit a publication for Customs approval. Customs then make the necessary editorial suggestions before the magazine is returned to the publisher who then issues a version toned-down for the Canadian market. The toned-down copy will often have specific photographic spreads (usually those deemed violent, i.e. with leather) deleted; photos with graphic shots of penetration contain a black dot covering the offending part of the photo.

One Ontario distributor noted that following the Borins' judgement one video distribution, Customs officials were now "on the look out" for violence in cartoon and the narrative accompanying photographs.

Community standards

"I believe there's a silent majority which will tolerate the explicit stuff." (O.a.)

"I have lost the concept of what a community standard is." (O.a/o.)

It is assumed that theoretically it is impossible to conceptualize a community standard. Yet again, in practice distributors are able to articulate what they think Canadians will tolerate in adult magazines. There is fear that the decisions as to what is acceptable will be left to an arbitrary body or the whim of an individual.

What are identified as not acceptable are: violence (bondage and sado-masochistic representations), kiddie-porn and bestiality. It is believed that "normal sex", fellatio, cunnilingus and depictions of homosexual activity are tolerated and desired. It was pointed out by the Québec respondent that the most explicit material, maybe containing depictions of the tabooed representations, is often available in rural areas because urban police forces can't reach there and therefore raids are infrequent.

It can be argued that distributors know there is such a thing as community standards (and that they might vary) but don't want to live with the consequences. For example, one respondent mentioned that he supported the by-law imposing height restrictions on the sale of adult material; he also had made suggestions to his

publishers to tone down the covers of their magazines destined for the Canadian market. This implies that distributors know what is tolerable, i.e. what the standard of the community is (at least the community of Canada), yet begrudge it at the same time. They resent the imposition of restrictions on their activities and, as businessmen, see the necessity of other measures such as having to gage what is acceptable and dealing with Customs as a time expenditure and something that may possibly affect sales. If there is a market for something, most want to tap it regardless of their moral concerns or the moral concerns of others.²⁵

Desired changes

Respondents have a uniform view on the necessity and desirability of clear guidelines, one standard that is applied consistently. None sees the merit of the availability of "pornography" (kids, animals, violence) in Canada. All voiced concern that materials can be confiscated after they have been cleared at Customs. They see this situation as hypocritical and idiosyncratic. To that end two suggestions were put forth: obscenity should be taken out of the Criminal Code and there should be one central clearing house for materials such that once they are let in the country no charges will be possible.

CONCLUSION/SUMMARY

The preceeding can perhaps be characterized as a distillation of the ideal-typical distributor and distribution practices of adult material. The current situation with respect to the distribution of adult magazines and videos can be summarized in the following way. Apparently what is generally available to the public differs in Québec and Ontario. It appears that both magazines and videos vary according to the levels of sexual explicitness. Publications (magazines, videos and 35mm films) which are distributed in Québec are graphic in nature, depicting "real" sexual activity. In contrast, commonfare in Ontario are representations of simulated sexual imagery, and penetration, for example, is taboo. The circulation of publications which contain depictions of violence and/or kiddie-porn and bestiality appears to be underground in origin. Whether or not this latter situation is harmful is the subject of debate. At the present time the "problem" seems to be a small one. In his submission to the Special Committee on Pornography and Prostitution, the President of Benjamin News, Mr. Gerald Benjamin, writes:

(With respect to) hard core pornography and obscenity... Nothing of this nature is knowingly distributed by PDC members. This is not to say there may not be occasions, however, when such material may get by Canada Customs, or may get by the Advisory Committee, or may slip through unnoticed at the wholesaler level, among the many thousands of periodicals and books that our members must handle.26

In other words the legitimate channels for the distribution of such material appear to be weak. Dismissing the problem on this basis may be akin to saying: "only 100 women have died from toxic shock". However, this implies two things: that the material is intrinsically harmful; and its production is most likely underground and therefore outside the mandate of censorship or other legal restrictions.

The obscenity law is currently unevenly enforced. There are disparities in the situations in Québec and Ontario, in terms of what is considered acceptable. Furthermore, inconsistencies are apparent in the way various levels of authority interpret and apply the law. Officials with the power to enforce the law are vague as to its definition; and so are distributors who must try to work within unclear guidelines. Thus, it might be useful, conceptually and legally, to distinguish between adult material and pornography: kiddie-porn, bestiality and violence, to clarify what we are addressing in this "pornography debate". But that still leaves the problem of violence in other contexts. Sexual violence is considered to be more obscene than other forms of violent imagery. The mutilation of genitals is more offensive than, say, the sawing off of one's limbs. Right now only the former is considered obscene. As a video distributor noted: "If you chop a woman's head it's OK; if you fondle her breasts first and then chop off her head, it's obscene". The very process of defining what constitutes pornographic imagery points to a divided community and the instability of community standards.

One other useful move may be to segregate adult material and pornography into separate stores so as to clearly demarcate the market for such material and prevent involuntary exposure. The question of self-regulation was raised and quickly eschewed by the respondents as they quite blatantly stated that they didn't trust each other and would rather leave decision making to those with the power to do so. As businessmen they don't want to actively flirt with breaking the law and thus seek clear guidelines and their consistent and uniform application.

There are contradictions in debates surrounding sex in the public domain. The variances in discourse are reflected in the way distributors frame the rhetoric of their work. The most obvious incongruity surfaces around notions of what makes good business sense and respondents' own sense of morality. Very few respondents would curtail the distribution of products which they identify as offensive if they were guaranteed to produce a profit. Distributors prefer a position of non-involvement in any sort of moral debate regarding the possible turpitude of pornography and/or adult material.

They are also aware that the attention and publicity created by discourses at various levels of society (the media, political interest groups, religious affiliations) are beneficial to business; keeping the moral issues alive and unresolved, it can be argued, may catalyze interest in the product and hence demand.

While distributors state that they believe they have the right to see whatever they desire, they will specify what they want deleted from public viewing. In other words, they would like to deny others the privilege they would allow themselves. That asymmetrical notion also unwittingly fixes the debate at an anti-social, individualistic level, whereby pornography or adult material is ultimately to be defined by the beholder/buyer - an individual, not a critical mass.

There are inconsistencies in academic and social discourses on the sexual problematic. These exchanges posit a recognizable distinction between pornographic imagery (assumed to be sadistic) and explicit depictions of sexuality (considered harmless or even educational, e.g. an illustration in a medical textbook). Thus, anti-pornographers implicitly denounce not what is shown but how. Willis writes:

The fallacy here is that the range of potentially pornographic images - that is, images primarily used for the purpose of sexual arousal - is limited only by the user's imagination. Even if one wants to argue that the use of an image for sexual gratification requires a sadistic fantasy, the image itself may be 'objectively' innocuous. And what about cryptopornography like Gothic novels? The appeal of Gothics is also rooted in sado-masochism, and just as Hustler magazine shows men how to act like rapists, Gothics show women how to act like victims. The crucial difference is that Gothics purvey a repressed, romanticized sexuality, while hard-core pornography is explicitly lustful and genital. 27

Willis points to another fissure in the debate. Visual imagery is the object under scrutiny and is assumed to be more subversive than narrative. This imbalances the discussion by disfavouing one form of sexual explicitness over another, one genre against another.

The "pornography issue" can be further stratified into those who want to argue that the image and the act can be conflated and those who posit that violence against women is not the same as its imagery. The tension may not be resolved. What can be stated is that other models exist (through socialization and other forms of imagery) and that sexual expression may assume many forms: violence is only one of them and is, more importantly, not restricted to visual imagery. Clearly the problem is not one of genre but sexual politics. The conditions which give rise to asymmetrical sexual imagery, imagery which associates male power with the phallus warrants further consideration.²⁸

Another bias surfaces around the distinction between pornography and erotica, in the popular lexicon. Offensive photos are those which portray women who approximate the "everyday", they are the "girl next door" but they certainly aren't nice. They are too real, too common: models in these representations (e.g. Club International, Gent: Home of the D Cups, both available in Ontario) often have soiled hair, chipped finger nail polish, runs in their stockings. Or they are photographed in less opulent surroundings, the photos are of a poorer quality, with poor lighting and obvious touch-ups

thus destroying the fantasy of the innocent "model of perfection". Their femininity is not without blemish. Erotic (read: classier) publications however are deemed inoffensive. Models in the photos contained within them have achieved the status of physical perfection as only the very wealthy and leisured can. The elusive, elite woman without blemish is OK; her working class sister, a poor imitation, is not.

The demand for videos and magazines of a sexually explicit nature is commonly a male phenomenon. In "straight" films there are not scenes of male homosexual sex: because this would involve erections, penetration and ejaculation, in Ontario at least these are tabooed. But all distributors responded with repugnance at the idea: these videos and magazines are for the pleasurable viewing of men. But what of women's desire? This raises other more theoretical questions concerning the conditions which give rise to the dominant sexual representations which exist and the purposes they serve. Pornography and sexually explicit material should be understood in historical context. Blachford argues that the growth of sexually explicit material is coincident with the increase in the concern for privacy and the confinement of sexuality to a separate and insulated sphere of one's life. This material is fantasy, shaped by ideological values which are not random.²⁹ In this sense, pornography and adult material are continuous with other discourses on sex. The pornographic discourse, or monopoly of knowledge, naturalizes sex and sexualizes nature but does so within the context of knowledge that is already

accessible to its consumers. The problem might be then that power and the phallus are aligned, not that this is depicted in pictures. Carter notes that rather than inciting sexuality, pornography defuses its expressive potential by keeping it in its place, outside of everyday human intercourse: it titillates desire but never assuages it.³⁰ The task then would be to eroticize human expression and this would involve all aspects of humanity, not just the visual. Replacing what does exist has greater potential than obliterating it.

Notes to Introduction

1. Les Whittington, "Video pornography difficult to curb,"
The Ottawa Citizen, 26 November, 1983; Tom Bierbaum,
"VCR boom continues unabated," Variety, 203:39, 30
April, 1984.

Notes to Methodology

1. Zuhair Kashmeri, "Officials say criminals control sex industry," The Globe and Mail, 9 February, 1984;
Bryan Johnson, "The Porno Scene: is it unreal?" The Globe and Mail, 20 August, 1983.

NOTES TO TEXT

1. John Ellis, "Photography/Pornography/Art/Pornography", Screen, 21:1, Spring 1980.
2. Ellis, op cit., 84.
3. Ellis, op cit., 90.
4. Ellis, op cit., 84.
5. Jillian Riddington, "Discussion Paper on Pornography", prepared for National Action Committee on the Status of Women, March 1983, p. 4; cf. also Laura Lederer (ed.) Take Back the Night, New York: William Morrow and Company, 1980; Lorene M.G. Clark, "Liberalism and Pornography," Pornography and Censorship, edited by David Copp and Susan Wendell, New York: Prometheus Books, 1983; cf. also articles by Ann Garry and Susan Wendell in the same volume.
6. "Some feminists cannot digest the concept of benign sexual variation." Deirdre English, Amber Hollibaugh, Gayle Rubin, "Talking Sex: A Conversation on Sexuality and Feminism", Socialist Review, #58, 11:4, July-August 1981, p. 43; and Pajakowska argues that there is a political problem with the convergence of rightist and feminist positions on pornography. The unintended focus is on certain sexual practices such that "anything goes" as long as it "goes" within a "meaningful relationship and doesn't involve violence. This set of assumptions reconfirms the marginality of sexual behaviour such as s&m, transvestism, transsexualism, paedophilia, homosexuality and lesbianism and prostitution." "Imagistic Representation and the Status of the Image in Pornography", Ciné-Tracts, 3:3, Fall 1980, p. 13.
7. Ros Coward, Yve Lomax and Kathy Myers, "Beyond the Fragments", Camerawork, November 1982.
8. Varda Burstyn, "Pornography and Eroticism", Fuse, 6:1/2, May/June 1982.
9. Thelma McCormack, "Understanding Pornography", Canadian Woman Studies, 4:4, Summer/August 1983.
10. Ellis, op cit.
11. Riddington, op cit.; Wendell, op cit.

12. Quotation are drawn from interviews with distributors of adult video and magazines. To identify the speaker I have indicated the province in which he works (Q or O) and the material in which he deals (video - a, adult; a/f, adult/feature; magazines - a, adult; a/o, adult/other).
13. Bryan Johnson, "The Porno Scene: is it unreal?" The Globe and Mail, 28 April, 1984.
14. Brenda Zosky Proulx, "Video Porn: Where do we draw the Line?" The Montreal Gazette, 2 June, 1984.
15. Karen Jaehne, "Confessions of a Feminist Porn Programmer", Film Quarterly, 37:1, Fall 1983, p. 15.
16. A study conducted by the NFB determined that those renting videos of all kinds were between the ages of 18 and 35. "Les Membres Clubs Video du Québec", Colette Noiseux, Office National du Film du Canada". Septembre 1983.
17. Judge Stephen Borins, for the Judicial District of York, in October 1983, found the Doug Rankine Company and Act 111 Video Productions guilty of obscenity charges because some confiscated videos contained depictions of "degradation, humiliation, victimization and violence in human relationships as normal and acceptable behaviour". Scenes of explicit sexual activity were deemed to be acceptable to the community, however.
18. In his judgement, Borins noted that 8 of the 18 confiscated films had been approved by the Ontario Censor Board and thirteen had been viewed at Customs and did not contravene the Customs Tariff Act which prohibits the importation into Canada of goods "of an immoral or indecent character".
19. Zuhair Kashmeri, "Obscenity probe turns up video piracy", The Globe and Mail, 6 June, 1984.
20. Thelma McCromack, "Censorship and 'Community Standards' in Canada", Communications in Canadian Society, edited by B.D.
21. Borins, op cit., 28-9.
22. At the sex shops I have seen, one's view inside the store is obstructed by, usually, a curtain, one must be at least 18 to gain admittance and often there is a cover charge which is deducted from a purchase.
23. Elite, Honey, Fox and Manhattan used to be published in Canada by a Canadian, David Wells, but his former distributor told me that the publications could not make it financially. Elite used to sell 50,000 copies a month.

24. Dennis R. Hall, "A Note on Erotic Imagination: Hustler as a Secondary Carrier of Working Class Consciousness", Journal of Popular Culture, 15:4, Spring 1982.
25. In response to a newspaper article which told of the chairperson of Expo '86 resigning from presidency of his distribution company (which distributes adult magazines and possibly pornography) after charges that he was not a respectable businessman, a respondent mentioned his lack of admiration for such a move. He fears the bad name the business has and refuses to believe there is any moral harm in it. cf. "Expo '86 head hit for porn links", The Ottawa Citizen, 4 April, 1984.
26. Gerald Benjamin, "Presentation to the Special Committee on Pornography and Prostitution", 6 April, 1984.
27. Ellen Willis, "Nature's Revenge", The New York Times Book Review, 12 July, 1981.
28. Richard Dyer, "Don't Look Now", Screen, 23:3/4, September-October 1982.
29. Gregg Blachford, "Looking at Pornography", Screen Education, 29, Winter 1978-9.
30. Angela Carter, The Sadeian Woman, London: Virago, 1979.

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APPENDIX 1: Interview Schedule

Respondent _____

Company _____

magazines videos

which kind/genre?

titles

Who produces them (any Canadian)? Where do they come from?

Who, in country of origin, distributes the material?

of retailers under auspices of distribution company/respondent.

Monthly sales? % from adult titles.

Are you familiar with the laws on obscenity?

How do you believe they work in practice? Are they evenly enforced?

How do you manage to operate within the law?

How do you define community standards?

Does a law that is based on this assessment make sense?

Has the law had an impact on your activities, i.e. what you distribute, where and to whom?

Have you ever been raided, sued?

Can you describe your dealings with customs?

What changes would you like to see in the law as it affects
Your work?

Comment on the classification of home videos. Is this inevitable?
desirable?

How would this work? How should it work?

Would you be willing to pay the Censor Board to review and classify your products?

Do you consider your work pornographic?

How do you define pornography?

How should it be defined?

What is the distinction between hard and soft pornography?

Who do you think buys/rents magazines/videos?

Why do you think there is a desire for these titles?

Are magazines feeling competition from videos?

What are the most popular images in your products? What sells?

Do covers matter? Comment on the plastic wrap.

Are you part of a larger organization?

Comment on self-regulation. Is this desirable? How should it work?

APPENDIX 2: Partial list of available magazines

Mayfair	Chunky Asses
Hustler	Sweet Ass
Bust Parade	Sweet Asses
Cheeks	T.V. Queens
Bottom	Big Bust Vixen
Fanny	Hanging Breasts
Legs and Asses	Kingsize
Legs Boobs Lingerie	Tits 4 U
Hot Legs	Tit Hangers
Standing Tall	Ass Holes
Legs Legs Legs	Leg Parade
Hot Wet Pussies	Leg Show
Hefty Mamas	Tip Top
Floppers	T.V. Treats
Erect Nipples	The Queens
Busting Out	Drag Queens
Anal Babes	T.V. Switchers
Strip Tease	Les Femmes
Crotches	Skirts Up
Latin Babes	Tease
Ladies in Lace	T.V. Lovelies
Ass Parade	Knockers & Nipples
Split Beavers	Foxette
Shaved	Gent: Home of the D-Cups
Geisha Girls	Club International
Melons & Mounds	Celeb
Milky	International H&E Monthly
Milk	Fiesta
T.V. Action	Adam
Naked Nymphs	Men Only
Hot Buns	Torso (for men)
Eros	Mandate (for men)
Skinflicks	Blueboy (for men)
French Pussy	Penthouse
Female Flesh	Playboy
Baby Face	
Peach Fuzz Pussies	
Rapier	

IN THE COUNTY COURT JUDGES' CRIMINAL COURT FOR THE JUDICIAL
DISTRICT OF YORK

B E T W E E N:

HER MAJESTY THE QUEEN

AGAINST

DOUG RANKINE COMPANY LTD.
AND ACT III VIDEO PRODUCTIONS
LTD.

)
)
) Appearances:
) Peter DeJulio Esq.,
)
) - for the Crown
)
)
) E.L. Greenspan Esq., Q.C.,
) and Marc Rosenberg Esq.,
)
) - for the Accused
)
)
) Heard:
)
) September 12, 13 and 14,
) October 17 and 18, 1983
)
)
) Judgment: October 24, 1983
)

REASONS FOR JUDGMENT

BORINS, C.C.J.

In this case Doug Rankine Company Ltd., and Act III Video Productions Ltd., are charged jointly with the distribution of obscene publications, namely, the 18 motion pictures recorded on video cassette tapes listed in Schedule "A" to the indictment. Act III Video Productions Ltd., is also charged with the distribution of additional obscene publications which consist of the 7 motion pictures recorded on video cassette tapes and listed in

Schedule "B" to the indictment. Both offences are alleged to have taken place from December, 1982 to April, 1983. The only issue to be decided is whether the prosecution has proved that the motion pictures, or some of them, are obscene pursuant to the provisions of s.159(8) of the Criminal Code.

The relevant facts are not in dispute and have been agreed to by counsel for the parties. Both defendants carry on business in Toronto and are distributors of video cassette tapes. Act III Video Productions Ltd., is also responsible for the physical reproduction of the cassette tapes. A number of the tapes listed on Schedule "B" were delivered by Act III to a company known as Montevideo Entertainment in Montreal, which is the main distributor of the tapes in question in Quebec and elsewhere in Canada other than in Ontario. A quantity of the tapes listed in Schedule "A" were taken from the warehouse of Act III to the premises of Doug Rankine from which that defendant shipped a number of the tapes to four other distributors. During the time period alleged in the indictment Doug Rankine shipped a total of 2,840 video cassette tapes, being various quantities of the titles listed in Schedule "A", to the four distributors who in turn distributed them to many retail stores in Ontario for rental to the ultimate consumer. Each tape is packaged in a container which displays a sexually provocative photograph and a description of the motion picture. The tapes are displayed in the retail stores and rent for an average of \$4.00 per tape per day. The tapes are available for

distribution to any person who is able to pay the appropriate rental cost.

As evidence of current community standards the defendants tendered as exhibits a number of motion pictures approved by the Ontario Censor Board in the period from 1971 to 1983. These moves are: "I the Jury", "Tattoo", "A Clockwork Orange", "Lipstick", "The Story of O" and "Videodrome". All of these films were displayed commercially throughout Canada. The Ontario Censor Board restricted admittance to all of the films to persons 18 years of age or over. Of the films listed in Schedules "A" and "B" the following were approved by the Quebec Censor Board for viewing in movie theatres by persons 18 years of age or over: "Games Women Play", "Skintight", "Adventures Amoureuses de Monsieur O", "8 to 4", "Tara", "Scrabble D'Amour", "Please Mr. Postman", and "Memphis Cathouse Blues". In some instances the approval of the Censor Boards of both provinces were subject to certain modifications of the films. Also, evidence in the form of letters from Revenue Canada Customs and Excise indicate that 13 of the video-cassettes in issue had been viewed and admitted into Canada as not coming within the provisions of tariff item 99201-1 of the Customs Tariff Act, R.S.C. 1970, chap. C-41, which prohibits the importation into Canada of goods "of an immoral or indecent character". As well, two of the films, "Erotic Women in Love" and "3,4,5 and More" are montages which are comprised of scenes taken from films approved by Customs for entry into Canada. Thus, 15 of the films are foreign in origin

and received Customs approval. The remaining films were all purchased in Canada. Douglas Rankine, who is the sole shareholder and employee of Doug Rankine Company Ltd., personally screened all films his company distributed in Ontario and required that some films be edited before their release. On some occasions Mr. Rankine refused to distribute films which he considered to exceed the level of contemporary community tolerance.

Three witnesses were called by the Crown. No witnesses testified for the defence. As a result of an out of court interview given to the media by the witness Nancy Pollock prior to the completion of her evidence, counsel proposed that her evidence be disregarded. This leaves for consideration the evidence of Josephine Walker and June Rowlands. Mr. Greenspan has submitted that their evidence should be disregarded because they used the court as a political forum to present what he characterized as the "fashionable notion of militant feminism". He argued that the case must not be decided pursuant to the dictates of a particular segment of society which advocates a particular viewpoint. I agree with this submission, but I do not agree that I should ignore the evidence of Mrs. Walker and Mrs. Rowlands. What they said is as much evidence of "what is happening around [me]", to again use Mr. Greenspan's expression, as are the motion pictures filed by the defence and the evidence of the approval of certain motion pictures by the provincial censor boards and by Revenue Canada. The evidence of Mrs. Walker and Mrs. Rowlands may or may not be worthy of substantial weight but this is not to say that it should

be rejected.

Mrs. Walker has been a teacher for 23 years in the public school system in Scarborough, which is part of Metropolitan Toronto. She is a member of the Federation of Women Teachers of Ontario, which has 31,000 members, and is one of 580 delegates to the Federation's annual meeting. She was the sponsor of a resolution adopted by the delegates this summer on behalf of the Federation opposing "materials depicting women or children in degrading or sadistic sexual roles". She said she could not speak on behalf of the Federation or the 580 delegates. However, Mrs. Walker said that as a result of discussions with other teachers and with parents and others she believed that she could express contemporary community standards of tolerance. She saw five of the motion pictures before the court: "Skintight", "Tale of Tiffany Lust", "Anna Obsessed ", "Undulations", and "Scrabble D'Amour". It was Mrs. Walker's opinion that the contemporary Canadian community would not tolerate the distribution of these motion pictures in the form of video cassette tapes. In great detail she described a number of scenes in the films which resulted in her conclusion that the community would not tolerate their distribution. However, when cross-examined Mrs. Walker explained that she was unable to reflect Canadian standards as she has never been out of Ontario. As she put it, "everything I know has been confined to the borders of Ontario". Mrs. Walker conceded that perhaps 70% of the population of Ontario is indifferent to the distribution of the tapes and that she did not represent the views of the remaining 30%.

She admitted that her views on pornography were influenced by the National Film Board film, "Not A Love Story". She stated that she has seen very few films in movie houses. She perceived the Ontario Censor Board to reflect the standards of the contemporary Canadian community. In my opinion, Mrs. Walker's testimony cannot be regarded as representing the opinion of the contemporary Canadian community nor can it be regarded as an opinion of the level of tolerance common to the contemporary Canadian community. At the very most her evidence is reflective of the views of a very small segment of society and one which holds very strong views supporting the suppression of films similar to the five which she saw. In short, Mrs. Walker represents a particular point of view and her evidence must not be given great weight.

On the other hand, while Mrs. Rowlands also advocates a particular opinion, I believe that she has reached her opinion on the basis of a greater sampling of public views than did Mrs. Walker. Of course, Mrs. Rowlands did not conduct any surveys. However, as an elected Alderman in the City of Toronto and a member of various committees, organizations and boards in Metropolitan Toronto she has had the opportunity to meet and speak to many people and is in a very good position to offer her opinion with respect to community standards in Metropolitan Toronto. Indeed, Mrs. Rowlands made it very clear that she could speak only of the level of tolerance within Metropolitan Toronto. Mrs. Rowlands saw

parts of three films which are before the court: "Undulations", "Skintight", and "A Coming of Angels". It was her opinion that elements of sex, violence and brutality in "Skintight" and "A Coming of Angels" would result in these films not being tolerated by the contemporary community in Metropolitan Toronto. However, she was of the opinion that "Undulations", which she said consisted mainly of "sexual acrobatics", would be tolerated. Mrs. Rowlands testified that in her opinion the contemporary community of Metropolitan Toronto would tolerate the following elements in a video cassette tape: explicit scenes of oral sex, masturbation, sexual intercourse and group sex involving three or more people, voyeurism and offensive language. However, she was of the opinion that the following elements would exceed the level of community tolerance in Metropolitan Toronto: scenes of men ejaculating on women's faces, penetration of the vagina by foreign objects such as corn cobs, explicit scenes of buggery, a woman urinating into a pot, a man inserting a candle into his anus, sexual intercourse with women portrayed as young girls, and scenes of sexual intercourse coupled with violence and cruelty. It was the opinion of Mrs. Rowlands that most women would not tolerate the distribution of motion pictures depicting sex and violence. She said that the great lie of such films is that they depict women as enjoying sex and violence. She stated that there are many men who share the same opinion of such films.

I preparing my reasons for judgment I have had the advantage of reading a transcript of the evidence. I am bound to say that I was very impressed with the testimony of Mrs. Rowlands when she testified and I was more impressed with it after reading the transcript. I reject the characterization placed on it by Mr. Greenspan. He called it the "fashionable notion of militant feminism". In my view Mrs. Rowlands answered the questions both thoughtfully and fairly and did not use the occasion of testifying to turn the courtroom into a political forum. I must confess that most of her answers did not surprise me - although some of them did. I can think of very few women in this country who would tolerate the distribution of motion pictures portraying indignities to other human beings, particularly women, in the name of entertainment. A woman does not have to be a "militant feminist" to be intolerant of what is portrayed in many of the films before the court. Nor does a woman have to be a "militant feminist", or any other type of feminist, to believe that the distribution of such films would be unacceptable on the basis of current community standards. She need only be a person who respects the dignity of life and rejects those who seek to degrade it. True it is that Mrs. Rowlands does not purport to express an opinion of the level of tolerance of the entire contemporary Canadian community. However, careful attention should be paid to her testimony. There are well over a million women in Metropolitan Toronto. She has testified to what she believes to be the level of tolerance of a majority of them.

Turning to the law, both counsel reviewed the modern history of the law of obscenity in Canada and the United States. The starting point is s.159(8) of the Criminal Code which reads as follows:

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

It is conceded by the defence that the dominant characteristic of all of the motion pictures is the exploitation of sex and, in some of the motion pictures, the exploitation of both sex and violence. The prosecution and the defence part company on the central issue of whether the exploitation of sex and of sex and violence is "undue". The entire case, therefore, comes down to the test which must be applied - and the application of the test - to determine whether the Crown has satisfied the burden which rests on it to prove beyond a reasonable doubt that the exploitation of sex and sex and violence is "undue" as that term has been defined by the courts.

It is unnecessary to review in great detail the development of the law of obscenity in Canada. The law has been stated authoritatively by the Supreme Court of Canada and, subject to what I will say about the role of The Canadian Charter of Rights and Freedoms in the application of the law, it does not rest upon this court to take a new approach to the law of obscenity.

The significant judgments of the Supreme Court of Canada are Regina v. Brodie, (1962) 132 C.C.C. 161 and Regina v. Dominion News and Gifts (1962) Ltd., [1964] 3 C.C.C. 1 in which the Supreme Court adopted the reasons given by Freedman, J.A., in the Manitoba Court of Appeal: [1963] 2 C.C.C. 103 at 115. These cases and others were reviewed by the Ontario Court of Appeal in Regina v. Sudbury NewsService Ltd., (1978) 39 C.C.C. (2d) 1 where the test to be applied in determining whether or not the prosecution has proved that a publication is obscene is discussed by Howland, C.J.O. at 6:

"Let me turn now to the question of obscenity. At least as far as publications are concerned, it has now been determined by the Supreme Court of Canada in Dechow v. The Queen (1977), 35 C.C.C. (2d) 22, 76 D.L.R. (3d) 1, 40 C.R.N.S. 129, that the definition of obscenity in s.159(8) is exhaustive. Under s.159(8) of the Code, for a publication to be deemed to be obscene it is not sufficient that a dominant characteristic of it has been the exploitation of sex. There must have been an 'undue' exploitation of sex. In determining what is undue exploitation within s.159(8), the test to be applied is whether the accepted standards of tolerance in the contemporary Canadian community have been exceeded."

At 7 Howland, C.J.O. continues:

"It is the standards of the community as a whole which must be considered and not the standards of a small segment of that community such as the university community where a film was shown (R. v. Goldberg et al (1971), 4 C.C.C. (2d) 187, [1971] 3 O.R. 323) or a city where a picture was exposed: R. v. Kiverago (1973), 11 C.C.C. (2d) 463. The

standard to be applied is a national one, R. v. Cameron, [1966] 4 C.C.C. 273, [1966] 2 O.R. 777, 58 D.L.R. (2d) 486; R. v. Duthie Books Ltd., [1967] 1 C.C.C. 254, 58 D.L.R. (2d) 274, 50 C.R. 55; R. v. Ariadne Developments Ltd. et al. (1974), 19 C.C.C. (2d) 49 at p. 59, 8 N.S.R. (2d) 560."

Although s.159(8) speaks of a "publication" and although "publication" is not defined in the Criminal Code, it would seem that the courts have interpreted the word as including video cassette tapes and motion pictures: see, e.g., Regina v. Times Square Cinema Ltd., (1971) 4 C.C.C. (2d) 229 (Ont. C.A.); R. v. Odeon Morton Theatres Ltd., (1974) 16 C.C.C. (2d) 185 (Man. C.A.). It would seem, therefore, that "publication" as used in s.159(8) is not confined to anything produced by the medium of print such as a book or magazine.

In discussing how the judge or jury should approach the question of community standards Howland, C.J.O. states at 7-8:

".... The trier of fact, Judge or jury as the case may be, will no doubt rely on the best evidence available and will draw on a lifetime experience in the Canadian community. The task is to determine in an objective way what is tolerable in accordance with the contemporary standards of the Canadian community, and not merely to project one's own personal ideas of what is tolerable. Expert evidence has to be considered in determining the weight to be given to it, but it can be rejected in its entirety if the conclusion is reached that no finding can be based on it. Expert evidence may be of considerable assistance, particularly in areas where the Judge or jury making the determination has no expertise, such as the understanding and appreciation of art"

However, these comments appear to have been qualified somewhat by subsequent decisions. For example, in Regina v. Popert, (1981) 58 C.C.C. (2d) 505 (Ont. C.A.) at 508 Zuber, J.A. states:

"In my view, the learned trial Judge was in error. The reference to a community standard imports an objective test into the ascertainment of indecency and immorality and while evidence with respect to community standards is admissible and sometimes helpful, it is not a fact which the Crown is obliged to prove as a part of its case: see R. v. Prairie Schooner News Ltd. and Powers (1970), 1 C.C.C. (2d) 251, 75 W.W.R. 585, 12 Crim. L.Q. 462; R. v. Great West News Ltd., Mantell and Mitchell, [1970] 4 C.C.C. 307, 10 C.R.N.S. 42, 72 W.W.R. 354".

See, also, Regina v. Sidey, (1980) 52 C.C.C. (2d) 257 (Ont. C.A.) and Re Regina and Provincial News Co. and Two Others, (1974) 20 C.C.C. (2d) 129 at 137 (Alta. C.A.).

A very helpful discussion of the factors to be taken into account in ascertaining community standards is found in the reasons for judgment of Freedman, J.A. in the Dominion News case, supra, at 116-117, where he discusses the application of the test to two magazines:

"Can it fairly be said that this was a dominant characteristic of either Dude or Escapade? I have examined them both with care. That they do not qualify as reading matter which I would personally select for myself even in an idle hour is undoubtedly the case. But that does not make them obscene. In this area of the law one must be especially vigilant against erecting personal tastes or prejudices into legal principles. Many persons quite evidently desire to read these magazines, even though I do not. I recognize, of course, that the mere numerical support which a publication is able to attract is not determinative of the issue whether

it is obscene or not. Let a publication be sufficiently pornographic and it will be bound to appeal, in the hundreds or thousands, to the prurient, the lascivious, the ignorant, the simple, or even the merely curious. Admitting, therefore, that a large readership is not the test, I must yet add that it is not always an entirely irrelevant factor. For 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. Obviously this is no easy task, for we are seeking a quantity that is elusive. Yet the effort must be made if we are to have a fair objective standard in relation to which a publication can be tested as to whether it is obscene or not. The alternative would mean a subjective approach, with the result dependent upon and varying with the personal tastes and predilections of the particular Judge who happens to be trying the case.

Community standards must be contemporary. Times change and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candour that in an earlier day would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question whether *Dude and Escapade* are obscene according to our criminal law.

Community standards must also be local. In other words, they must be Canadian. In applying the definition in the Criminal Code we must determine what is obscene by Canadian standards, regardless of attitudes which may prevail elsewhere, be they more liberal or less so."

Of the role of the judge, Dickson, J.A., in delivering the majority judgment of the Manitoba Court of Appeal in Regina v. Great West News Ltd., [1970] 4 C.C.C. 307 had this to say at 314:

"The authorities would seem to ascribe to the Judge a much more important role in the assessment of contemporary community standards than counsel for the appellants would accord him. I do not find in Brodie, or elsewhere in the Commonwealth, any majority opinion that expert evidence of community standards is an essential ingredient to a finding of guilt. If any inference can be drawn from Brodie it is that the Judge must, in the final analysis, endeavour to apply what he, in the light of his experience, regards as contemporary standards of the Canadian community. In so doing he must be at pains to avoid having his decision simply reflect or project his own notions of what is tolerable."

In the Sudbury News case Howland, C.J.O. discussed another relevant issue - the extent to which the manner and circumstances of distribution are relevant in determining if a publication is obscene. A number of cases were reviewed in which these factors were considered to be of importance in regard to the particular material under consideration. The following passages found at pages 8 and 11 of the reasons for judgment of Howland, C.J.O. are very helpful:

"The next question which arises is the extent to which the manner and circumstances of distribution are relevant in determining whether or not a publication is obscene. There are some publications which are so blatantly indecent that they

would not be tolerable by the Canadian community under any circumstances. Some pictures are offensive to the majority of people to the point that the Canadian community would not tolerate them on a billboard, or on the cover of a magazine, or on a television screen where persons of all ages and sensibilities would be exposed to them, but would be prepared to tolerate them being viewed by persons who wished to view them. Some pictures would not be acceptable by Canadian community standards in a children's bedtime storybook or primer but would be in a magazine for general distribution. The Canadian community might be prepared to tolerate the exhibition of a motion picture to an adult audience, but would consider the exhibition of the same motion picture to a general audience, which included children, to be an undue exploitation of sex. Similarly, the general distribution of certain magazines to a neighbourhood store accessible to all ages would not be tolerable, whereas the distribution of such magazines to "adult" bookstores to which children under a certain age were not admitted might not be objectionable. The packaging and pricing of a publication may also be relevant in considering whether Canadian community standards have been exceeded. The distribution of magazines in plastic covers marked "adult" in some respects might act as an attraction rather than a deterrent unless the price was high enough to place it beyond the reach of most children.

.....

Turning to the specific issue in this appeal, the question which the learned trial Judge should have determined in an objective way, after considering the relevant evidence, was whether the contemporary Canadian community would have tolerated the distribution of the magazines in question to stores which made them available to the general public. It is the standard which the Canadian community is prepared to tolerate for publications which are given general distribution that has to be determined.

This standard is not one based solely on the fact that publications will be available to children nor on the fact that they will be available to persons of advanced years who have led a sheltered life, or, on the other hand, to persons who are broad-minded and permissive. It is the standard of tolerance based on the fact that the publications will be available to the general public which includes all of those groups. It is not proper to speak of the Canadian community standard in isolation. It must be considered in relation to the manner and circumstances of distribution. However, I do not think that the manner and circumstances of public display were relevant as that is a matter entirely for the proprietors of the confectionery stores."

The latter paragraph has particular relevance to this case.

Of assistance in assessing the matter before me in this case is the following passage from the judgment of Freedman, C.J.M., writing on behalf of the majority of the Manitoba Court of Appeal in Regina v. Odeon Morton Theatres Ltd., (1974) 16 C.C.C. (2d) 185 at 194:

"To determine whether a dominant characteristic of this film is the undue exploitation of sex we must have regard to many things - the author's artistic purpose, the manner in which he has portrayed and developed the story, his depiction and interplay of character, his creation of visual effects through skilful camera techniques, as well as other matters that might be mentioned. It is in relation to all of these that the sexual episodes must be considered. And the question here posed for us is this: Do the sexual episodes play a legitimate role in "Last Tango" when "measured by the internal necessities of the [film] itself"?: vide the Brodie case, supra, at p. 181 C.C.C. p.528 D.L.R. Or do they merely represent dirt for dirt's sake? I find assistance in supplying the answer

here by contrasting the present film with films that have been referred to in the evidence as "skin-flicks".

The basis characteristic of "skin-flicks" is that they are either wholly destitute of plot or, if they do have anything resembling a story line, it is one that is transparently thin, a palpably meagre framework on which to hang one erotic episode after another. In describing such films Father Pungente, Chairman of the Manitoba Film Classification Board, stated that they invariably show, among other depictions of sex, a scene of Lesbianism as well as the inevitable wild orgy. Anyone familiar with "skin-flicks" - either through stag movies or through certain types of commercial theatres - will be aware of something else too, namely that the sexual scenes often go beyond mere simulation. I share the view of the many qualified observers who testified for the defence that sex in "Last Tango" rests on an altogether different footing and that its role there is justified by the internal necessities of the film."

Finally, the authorities contain two statements of judicial thinking which, although written several years ago, are deserving of particular attention in light of s.2(b) of The Charter of Rights and Freedoms to which I will refer subsequently. The first statement is that of Freedman, J.A., in the Dominion News case, supra, at 117:

"I think I should add my view that in cases close to the border line, tolerance is to be preferred to proscription. To strike at a publication which is not clearly obscene may have repercussions and implications beyond what is immediately visible. To suppress the bad is one thing; to suppress the not so bad, or even the possibly good is quite another. Unless it is confined to clear cases, suppression may tend to inhibit those creative impulses and endeavours which ought to be encouraged in a free society."

The second is that of Dickson, J.A., in Regina v. Prairie Schooner News Ltd. and Powers, (1970) 1 C.C.C. (2d) 251 at 269, quoted with approval by Zuber, J.A. in the Propert case, supra at 510:

"In the Great West News case, we referred to contemporary standards of tolerance. I have no doubt, as Dr. Rich testified, and as the Judge agreed, a distinction can be made between private taste and standard of tolerance. It can hardly be questioned that many people would find personally offensive, material which they would permit others to read. Parliament, through its legislation on obscenity, could hardly have wished to proscribe as criminal that which was acceptable or tolerable according to current standards of the Canadian community."

Mr. Rosenberg has submitted that the test developed by such cases as Regina v. Brodie, supra, and Regina v. Dominion News and Gifts (1962) Ltd., supra, should be reexamined and modified in the light of s.2(b) of The Canadian Charter of Rights and Freedoms. Section 2(b) states:

"2. Everyone has the following fundamental freedoms:

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

It is submitted the establishment of a constitutional guarantee of a fundamental freedom of expression provides the justification for the creation of a new test for the determination of what is "undue exploitation" within s.159(8) of the Criminal Code. Mr. Rosenberg

argues that in assessing the standard of tolerance in the contemporary Canadian community the court must now include the "heightened respect for freedom of expression" guaranteed by the Constitution. With this I agree, although one must not lose sight of the limits upon freedom of expression which may be demonstrated pursuant to s.1 of the Charter: cf., Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, (1983) 41 O.R. (2d) 583 (Diy. Ct.). However, I do not agree with Mr. Rosenberg's submission that s.2(b) has opened the way to the establishment by this court of a new test for the measurement of "undue exploitation". The test advocated by Mr. Rosenberg would require the adoption of the test developed by the Supreme Court of the United States in Miller v. California, (1973) 413 U.S. 15 and explained in such cases as United States of America v. Various Articles of Obscene Merchandise, (1983) 709 F.2d 132 (U.S. Ct. App., 2nd Cir.).

I wish to make it clear that no constitutional issues have been raised in this case. The defendants do not seek a declaration that s.159 of the Criminal Code is unconstitutional on the ground that it represents an invasion of the freedom of expression guaranteed by s.2(b) of the Charter. Nor has the prosecution asked the Court to decide the question of whether obscene materials, such as video cassette films intended for home use, should be excluded from the protection of s.2(b) in the way that the Supreme Court of the United States has excluded obscenity as

a category from the protection of the First Amendment: see, e.g., Chaplinsky v. New Hampshire, (1942) 315 U.S. 568; Roth v. United States, (1957) 354 U.S. 476. For the purposes of this case counsel are content that the issues be litigated on the assumption that obscenity is properly excluded from the protection of s.2(b) pursuant to the limits set by s.1: Re Ontario Film and Video Appreciation Society and Ontario Board of Censors, supra. I trust that it is obvious that in proceeding in this manner I am not to be taken as expressing an opinion on whether or not obscenity should receive the absolute protection of s.2(b) free from such limits as may be demonstrated under s.1. I have not, of course, directed my attention to such questions as whether the governmental interest served by the regulation of obscenity can only be reasonable and justifiable in a free and democratic society if the harm resulting from the failure to regulate overrides the harm caused by the regulation of freedom of expression. Nor is the court required to decide whether the values served by free expression should be subordinate to the values served by censorship.

I come now to the 25 motion pictures which are the subject of this case and the determination of whether any of them unduly exploit sex or sex and violence. I have viewed 24 of the motion pictures. The film "Anna Obsessed" is the subject of both

counts in the indictment. It required 30 hours to view these films. Of the films introduced by the defence I watched "Lipstick", "Videodrome" and "Not a Love Story". I did not look at the other films tendered by the defendants as I had seen them on previous occasions. I do not intend to even attempt to describe each of the films which I watched. I do not feel that a description of every scene in each film would be helpful to any person who may read these reasons for judgment. There is no way in which I can adequately describe what I have seen, other than in a general way. For example, I do not find it possible to describe the degree of explicitness of the scenes of sexual activity and the scenes of violence and the scenes of both sex and violence exhibited in some of the films. In this regard, I find helpful the following words of Freedman, J.A., in R. v. Prairie Schooner News Ltd., supra, at 256:

"I think it fair to say that community tolerance of the printed word is greater than that of pictorial representations ... indeed it is easy to see why this should be so. A book requires some understanding and the exercise of imagination; a photograph at once tells its story to all, even to the illiterate. A book demands an expenditure of time and effort; a picture conveys its message swiftly and easily. A description in a book of an erotic scene, no matter how luridly written, still remains only a description; the same scene presented in the form of a vivid photograph instantly rivets the attention, whether its effect is to shock, stimulate or amuse. The familiar saying that one picture is worth a thousand words applies with special force in the field of obscenity."

Therefore, I will in a general way describe the 25 motion pictures. I preface my description by saying that the experience of having to watch all of the films was undoubtedly one of the less pleasant experiences of my judicial career. It brought new meaning to the phrase "cruel and unusual punishment". With the exception of "Erotic Women in Love" and "3,4,5 and More", each of the films has some sort of story line or plot. In some of the films, such as "Wanda Whips Wall Street" and "A Coming of Angels", the plot is reasonably well developed. However, such plot as there is in most of the films is banal at best and serves as the vehicle for uniting a number of scenes of sexual activities usually unrelated to one another. Examples of this type of film are "Please Mr. Postman" and "Scrabble D'Amour". Several films are poor imitations of popular motion pictures. "Blow Dry" resembles "Shampoo". "Brief Affair" has some resemblance to "Fame". "8 to 4" is "9 to 5" with scenes of explicit sex. "Summer of '72" was inspired by "Summer of '42". "Memphis Cathouse Blues" is modelled on "The Best Little Whorehouse in Texas". Most of the films could be described as soap operas with explicit scenes of sexual activities.

None of the films is a great work of art. In many of them it was difficult to detect and follow the story line. However, I found the story told by a few of them to be mildly interesting. In fairness, I must say that my interest in the

story deteriorated in direct proportion to the number of films I was required to view. Although my task does not require a critical review of the films, I am bound to say that for the most part they are insipid, dull and boring. The common denominator of the films is the artless way in which sexual intercourse is treated. Very little romanticism emanates from the scenes of sexual intercourse. Most of them reflected very little love or tenderness. For the most part the sexual scenes do not form an integral part of the plot. Rather a plot would appear to have been constructed to unite the various episodes of sex and, in some films, sex and violence. In virtually all of the films the quality of production is good. As well, the same people perform in many of the films. Obviously, there exists somewhere an adult movie industry which seems to have produced its own movie stars.

The motion pictures depict a wide range of scenes of explicit sex on the part of adults, singly, in pairs and in groups. These scenes include detailed portrayals of sexual intercourse, genitalia, masturbation, cunnilingus, fellatio, and anal intercourse. Standard fare for most of the films is at least one scene of Lesbianism and one sex orgy. The dialogue in most films is predictable and repetitive. In several films the sounds of erotic pleasure are obviously dubbed. This became apparent when I realized while watching one film that it would have been impossible for the performers to have been making the sounds attributed to

them as their mouths were so engaged as to make the uttering of any sounds impossible. Several of the films have scenes which couple violence and cruelty with sex. These scenes, such as scenes of bondage, frequently involve men perpetrating indignities on women in a sexual context. In my opinion many of the films are exploitive of women, portraying them as passive victims who derive limitless pleasure from inflicted pain and from subjugation to acts of violence, humiliation and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in clinical detail. Whether deliberately or otherwise, most of the films portray degradation, humiliation, victimization and violence in human relationships as normal and acceptable behaviour.

I must now determine whether or not the Crown has proved that the contemporary Canadian community will not tolerate the distribution of some or all of the films. This is not an easy test to apply. As I indicated earlier the evidence of Mrs. Walker is not particularly helpful and while the evidence of Mrs. Rowlands is helpful, she was unable to state an opinion with respect to national levels of tolerance. She was able to speak only with respect to Metropolitan Toronto. While it is true that I can take into account the fact that the Ontario and Quebec censor boards approved some of the films for commercial viewing, there is no evidence of the standards used by the boards in approving a

film as there was in Regina v. McFall, (1975) 26 C.C.C. (2d) 181 (B.C.C.A.). However, it is of significance that the showing of all of the films which received censor board approval was restricted to adult or mature audiences. In the present case there are no restrictions with respect to the age of the persons to whom the video cassette tapes may be rented or sold. The films are intended to be viewed in the home. While the pictures are presumably intended for an adult audience, once in the home they are available for viewing by all persons including children. Many of the films were allowed into Canada by Customs officials as not being "of an immoral or indecent character". This is also evidence the court may consider, but there is no evidence with respect to the meaning and application of this test and it would seem that it is a somewhat different test than the one which applies to obscenity: Re Priape Enrg. et al. and The Deputy Minister of National Revenue, (1980) 52 C.C.C. (2d) 44 (Que. Sup. Ct.). I should also add that there was no evidence tendered with respect to the purpose of the author and director of each film. Thus, there is very little evidence before the court to assist it in determining what is the national level of tolerance, other than the films themselves.

As I have said, I have watched all of the 25 motion pictures. In determining whether it has been proved that a film is obscene I am mindful that my own personal tastes or prejudices must play no role. My decision must not simply reflect

or project my own notion of what the contemporary Canadian community will tolerate. I must endeavour to apply what I, in the light of my experience, regard to be the contemporary standards of the Canadian community.

However, I feel constrained, as did Hugessen, A.C.J.O., in the Priape case, to make some comment upon the test which the Court must apply. It is well established that if the material itself is introduced into evidence, expert evidence as to obscenity or community standards is not required. Indeed, even if it is presented the trier of fact is not bound to accept it. There is no necessity for the judge or jury to rely on evidence introduced in court as the basis for identifying community standards. Therefore, the trier of fact may determine for himself or herself (or themselves in cases tried by a jury) the content of the community standard which is to be applied in determining whether the material in issue exceeds that standard. It is an objective test which applies. The test is not based on the level of tolerance of the judge or the jury. It is what the judge or jury believe the national level of tolerance to be.

This is a very difficult judgment to make in a community of 24,000,000 people who inhabit the second largest country in the world consisting of 3,831,012 square miles. No doubt very different levels of tolerance exist in small communities

such as Goose Bay in Labrador, Dawson in the Yukon, and Nobleton in Ontario, and the large Metropolitan centers of Montreal, Toronto and Vancouver. As well, Canada is a pluralistic society and different parts of that society will have different points of view. Yet it remains the task of the trier of fact, who is assumed to have his finger on the "pornographic pulse" of the nation, to assess objectively whether or not the contemporary Canadian community will tolerate the distribution of the motion pictures before the Court. There is some irony to this requirement. The judge, who by the very institutional nature of his calling is required to distance himself or herself from society, for the purposes of the application of the test of obscenity is expected to be a person for all seasons familiar with and aware of the national level of tolerance. Thus the trial judge (or jury) is required to rely upon his or her own experience and decide as best he or she can what most people in Canada think about such material to arrive upon a measure of community tolerance of that material. Judges or jurors lacking experience in the field of pornography and the attitudes of others toward it face a substantial challenge in making the findings demanded by the law. I am sure that s.159(8) of the Criminal Code is unique in its delegation by Parliament to the contemporary Canadian community of its power to determine what books and motion picture should or

should not be stigmatized with the label "Criminal".

I turn now to the motion pictures. In doing so, I believe that is important in this era of constitutionally guaranteed rights and freedoms to recall the words of Freedman, J.A. that "in cases close to the border line tolerance is to be preferred to proscription". In my opinion the Crown has proved beyond a reasonable doubt that the contemporary Canadian community would not tolerate the distribution of the following motion pictures: "Anna Obsessed" (both the Ontario and Quebec versions), "A Coming of Angels", "Erotic Women in Love", "Games Women Play", "Skintight", "Summer of '72", "The Tale of Tiffany Lust", "Les Aventures Amoureuses", "Broteuses Infernales", "Jeux De Corps", and "Scrabble D'Amour". In my view, these films would even exceed the community standards of tolerance of Sodom and Gomorrah. However, I entertain a reasonable doubt that the remaining films exceed the level of community tolerance.

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 con-

junction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed exceed the level of community tolerance. Most of the films which I have found to be obscene fall into this category. As for the other films which I am satisfied are obscene and which do not contain scenes of sex and violence and cruelty, it is the degree of explicitness of the sexual acts which leads me to the conclusion that they exceed community standards. In films of this nature it is impossible to define with any precision where the line is to be drawn. To do so would be to attempt to define what may be indefinable.

As some of the obscene motion pictures are the subject of both counts in the indictment, I find the accused to be guilty as charged.

Stephen B. Brown, C.S.J.

October 28 , 1983.