Current Issue Review **84-3E**

PORNOGRAPHY

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Revised 30 September 2002

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PORNOGRAPHY*

ISSUE DEFINITION

Sexually explicit material, or "pornography," is not a new phenomenon. It has existed in some form in virtually every society throughout history. It is clear, however, that in Canada today more of such material is available than ever before; it is also more explicit and more violent than in the past. New technologies, such as the Internet, have created unique challenges and problems.

Traditionally, society's response to sexually explicit material has been to prohibit or restrict what is beyond the community's level of tolerance. The implicit rationale of this approach is that pornography may be forbidden because it offends a common standard of taste. Not only is pornography considered immoral insofar as it expresses an ideology and view of the sexes and their relationship that is repugnant, but it is also argued that pornography causes actual harm. Thus, many consider it an appropriate matter for use of the regulatory and coercive powers of the state.

On the other hand, there are those who contend that there is no convincing evidence of any causal relationship between pornography and actual physical harm, and that any other effects are too attenuated or insignificant to justify the infringement of the constitutionally guaranteed freedom of expression. There is also the issue of how or who is to determine what is offensive, and what standard is to be used. This review will attempt to give a survey of this debate.

BACKGROUND AND ANALYSIS

A. "Pornography" and Harm

A great deal of the difficulty in discussing pornography results from confusion or lack of agreement over what is meant by the term. Except for a 1993 amendment regarding "child pornography," the criminal law does not use the word "pornography" but rather "obscenity."

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* The original version of this Current Issue Review was published in February 1984; the paper has been regularly updated since that time.

Pornography can be an extremely emotive word, whose scope can vary with the outlook of the person using it.

Some people consider any depiction of nudity or sexual activity to be pornographic. What is objectionable to others, however, is not sexual content *per se*, or "erotica," which depicts normal consensual sexual activity, but material in which one or more participants are demeaned, degraded or abused in some manner. Pornography, according to this view, is material that condones or encourages sexual debasement. Such a distinction cuts across conventional definitions because it means that very explicit sexual depictions can be called "erotica," while sexual material with relatively unexplicit but demeaning content can be called "pornography." At the same time, much conventional pornography depicts naked women, and it is argued that such material perpetrates images of women as sexual objects and, thus, can victimize women directly and indirectly.

The elasticity of the word also contributes to society's difficulty in determining the prevalence of pornography. It is clear, however, that it is more available, and certainly more explicit, than in the past. It has also been suggested that community standards have changed to the point where 30% of all Canadian newsstand sales now consist of periodicals that would have been illegal 20 years ago. Furthermore, in recent years a whole new videocassette market has developed, and the Internet has emerged as a major communications system.

Notwithstanding the uncertainties of definition, many believe that material which depicts violence towards – or demeans – women is demonstrably harmful and should be controlled. There is, however, considerable divergence on the appropriate strategy. Harm is said to flow from pornography in two ways. First, it is theorized that there is a direct causal link between violent pornography and violence against women, so that such material can act as a "trigger" to aggression. Second, it is said that pornography contributes in a general way to myths about sexuality and about women that ultimately make violence and degradation more acceptable to society as a whole. According to this view, distinctions among types of pornography are invidious. Such material constitutes a continuum: consumers are desensitized or "numbed" by "soft" pornography, the wide distribution of which makes the allegedly more directly harmful "hard" pornography easier to accept and, indeed, encourages its production.

It can be, however, difficult to find objective proof of the harmful effects of pornography. Three potential sources of such proof are available:

- *anecdotal evidence* – police or press reports may say that a sex offender was a habitual consumer of explicit material, or victims may claim that their assailant had been influenced by pornography;

- *statistical evidence* – attempts to show a correlation between the prevalence of pornography and the incidence of violent crime; and

- *experimental evidence* – accounts of experiments which attempt to measure the reactions of individuals to the stimulus of pornography, in particular, aggressive or violent material.

Anecdotal and statistical evidence suffers from the defect of being unable to establish a causal link between pornography and violence. The presence of such material may be merely symptomatic of anti-social behaviour, rather than its cause. Indeed, some research has purported to show that many rapists report having had little exposure to pornographic material. As for statistical evidence, rates of sexual assault have increased, but not significantly more than those of other forms of crime. In any event, establishing a statistical link of this sort is extremely problematic.

Experimental studies can lay claim to being the likeliest source of a proven link between violence and pornography, and, indeed, some work has shown that, under laboratory conditions, there may be a measurable relationship between aggressive behaviour and exposure to aggressive pornography. Critics point out, however, that such experiments are inherently artificial, and that the results are not particularly significant. Even those conducting the experiments concede that their results are not readily transferable from the laboratory to the real world, where a wealth of other stimuli and inhibitions also affect social behaviour.

Not all studies of the effects of pornography inquire into its negative consequences. Some subscribe to the so-called "catharsis" theory – that pornography can act as a safety valve of sorts, allowing its consumers to satisfy aggressive impulses in a non-violent way. The catharsis theory is as unprovable as the theory that pornography induces aggression, and some of the attempts to find substantive proof in the experience of countries that have liberalized obscenity laws have been discredited.

Some contend that the absence of conclusive scientific proof of a direct causal link between pornography and violence should not deter action to suppress such material; because of the nature of the phenomenon and its social context, such "proof" is next to impossible to obtain. According to this view, the self-evident fact that pornography contributes negatively to societal perceptions of women and sexuality is sufficient justification for its suppression. Opponents of this

view contend that society should impose limitations on expression only where there is demonstrable proof of actual harm, and that, in any event, current legal sanctions, possibly slightly modified, deal adequately with the problem.

The 1985 report of the Special Committee on Pornography and Prostitution (the Fraser Committee) made several significant findings on pornography in Canada. The Committee declined to give an explicit definition of what it considered "pornography," principally because there is no accepted definition in the community at large. It acknowledged the validity of the idea that pornography should be distinguished from erotica, and agreed that, although it is violent pornography that is of most concern, to some extent there is a continuum from apparently mild sexually offensive material to violent material.

Pornographic material was found to be almost exclusively imported into the country, and to be more widely available in 1985 than 15 years earlier, although this conclusion seemed to depend "not on concise and comprehensive statistics, but on the piecing together of some statistics with indications, trends and general observations." Moreover, the Committee could not determine with any precision whether more people were actually using pornographic materials than before. It concluded:

> The research which has been conducted on magazines and videos does not confirm the overwhelmingly awful picture presented by some groups and individuals in their briefs to the Committee. ... [T]he view that large amounts of violent pornography or child pornography are being consumed is not substantiated by the research.

The Committee strongly suggested that pornography represents and nourishes attitudes and activities inimical to the equality of men and women and that it presents demeaning images as normal and commendable, so that it perpetrates "lies about aspects of women's humanity and denies the validity of their aspirations to be treated as full and equal citizens."

B. The Current Law

The principal existing sanctions against pornography are found in the criminal law. Section 163 of the *Criminal Code* creates a number of offences in relation to the fabrication and distribution of "obscene" publications, or to possessing them for the purpose of distribution. It is also an offence to mail obscene matter, or to give an "immoral, indecent or obscene" theatrical performance. These offences may be punished on summary conviction or by indictment, with up to

two years' imprisonment where the latter course is chosen. There is also provision for the seizure and forfeiture of obscene materials.

Central to these prohibitions is the elaboration of what is obscene in section 163(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.

Whether there is "undue" exploitation is almost invariably determined by reference to community standards, i.e., if a dominant characteristic is the exploitation of sex or of sex and any other enumerated quality, the trier of fact must determine the community standard of tolerance. Would the community tolerate the presentation, publication or distribution of the material as presented or published? If not, the material is deemed obscene. As the Supreme Court of Canada pointed out in the *Butler* case, the community standards test is concerned not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadians being exposed to.

It should be noted that crime, horror, cruelty and violence by themselves are not obscene; it is only when they are portrayed in conjunction with sex that obscenity exists for legal purposes.

The obscenity standard is flexible – it responds to shifts in public acceptance of explicit material. Notwithstanding the theory that it is also national in application, there is potential for considerable variation, because the criminal law is administered by the provinces, which may set different prosecution standards. Finally, the obscenity standard is today quite "liberal." In media such as magazines or films, where there is little likelihood that those unwilling to view the material will be exposed to it, there is considerable leeway; in other, less discretionary forms of expression, such as television, tolerance is lower.

Section 163.1 of the *Criminal Code* was enacted in 1993. It prohibits the production, distribution and sale of "child pornography," and also makes it an offence to possess such material. Maximum sentences of ten years for its production and distribution, and five years for simple possession, are prescribed. The section contains a definition of child pornography that includes:

- visual representations of explicit sexual activity involving anyone under the age of 18 or depicted as being so;

- other visual representations of a sexual nature of persons under the age of 18; and
- written material or visual depictions that advocate or counsel illegal sexual activity involving persons under that age.

Other than the criminal sanctions, there is little else in federal law that purports to control sexually explicit or violent material. Under the *Customs Tariff*, customs officials were, until 1985, empowered to forbid entry into Canada of material of an "immoral or indecent" character, as determined by reference to community standards; the scope of those words was wider than that of "obscenity." Thus, a broader range of materials could be kept out of the country by administrative action than by criminal prosecution. On 14 March 1985, however, the Federal Court of Appeal found that that this provision was too vague to be compatible with the guarantee of freedom of expression in the *Canadian Charter of Rights and Freedoms* and, therefore, was of no force or effect. The *Customs Tariff* was subsequently amended to change the reference in the Schedule to materials "deemed to be obscene" under subsection 163(8) of the Code, or found to be hate propaganda under section 320(8). Since 1993, it has also referred to material that constitutes "child pornography" within the meaning of that term in the *Criminal Code*.

The provinces have a relatively narrow role in the control of pornography. Because the enactment of criminal legislation is beyond provincial jurisdiction, direct prohibition by regulation is not possible, although regulation may incidentally deal with, or complement, obscenity laws. Such is the case with the censorship and classification of films by provincial boards, the constitutionality of which was vindicated by the Supreme Court of Canada in 1978. The power of such boards to order deletions from motion pictures, or to prohibit exhibition entirely, has been put in doubt by a 1984 decision of the Ontario Court of Appeal. The Court held that the absence of specific guidelines concerning censorship rendered the power of the Ontario Censor Board (now the Ontario Film Review Board) an unreasonable limitation on freedom of expression under the *Charter of Rights and Freedoms*.

Beyond regulation of film, provincial involvement in this area is limited. Municipalities, using powers derived from the provinces, can regulate the pornography industry by prescribing how such material is to be displayed, or through licensing and zoning restrictions, but this control must not infringe on criminal jurisdiction. This limitation on provincial jurisdiction was emphasized in October 1984 by a decision of the Ontario Divisional Court dealing with a provision

of that province's *Municipal Act* (and particularly a by-law of the municipality of Toronto) that would have allowed the regulation of the sale of erotic magazines. The provision was struck down on the ground that the by-law affected public morality – something that can be dealt with only by the federal criminal power.

New technologies have created new problems: computer pornography is an increasing concern, especially because dissemination of such material cannot generally be controlled. There are also issues regarding the potential liability of the owners or managers of computer networks, such as universities. Although criminal charges have been laid regarding the distribution or possession of pornography on the Internet, to date there has been little judicial guidance on the issues involved.

C. The Obscenity Standard

The criminal prohibitions of obscenity, with their emphasis on sexual explicitness, are viewed by many as inadequate. Furthermore, many do not find the community standards test to be particularly useful – if pornography is in fact harmful in some way, an objective standard is required, rather than a mere subjective assessment of what the community will not tolerate.

In 1984, as part of Bill C-19, the Liberal government proposed a new definition of obscenity that would have taken into account some of these criticisms. It would have read as follows:

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

This proposal would have effected two major changes. First, it would have made it quite clear that the definition would apply to all "matters or things" and not merely publications, thus removing a persistent ambiguity. Second, it would have severed the link between sex and cruelty, horror or violence now necessary for material to be deemed obscene.

The proposal would have retained the requirement of "undue exploitation," however, and thus the community standards test would still have applied. The suggested addition of a

reference to degradation would have added little to the existing sanction; it is within the current power of the courts to find undue exploitation arising from circumstances of degradation.

A different approach to redefinition has been proposed by some feminist groups. This would not rely on an assessment of the community standard of toleration at all, but rather on a purportedly objective determination of whether material can be taken to express approval of the behaviour that it depicts. One version, which has been proposed by the National Association of Women and the Law, would replace the word "obscenity" with "pornography," which would be defined as:

> A presentation or representation whether live, simulated, verbal, pictorial, filmed, video-taped 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.

The clear basis of the proposal is that any depiction of sexual activity beyond an ideal of mutual consent is harmful and should be suppressed. Nevertheless, the potential difficulties with such a definition, in the context of enforcement of the criminal law, would be significant. Many of the terms used are extremely vague, and would require the courts to analyze the intentions of those who made the representations.

The Special Committee on Pornography and Prostitution (the Fraser Committee) proposed a thorough revision of the criminal law in relation to obscenity. The suggested changes would have gone considerably farther than the 1984 government proposals, but would have avoided the subjectivity inherent in some feminist proposals. Suggested revisions were based on the view that two "harms" flow from pornography: harm to those involuntarily subjected to it, and the broader social harm resulting from the undermining of the right to equality.

The most notable aspect of these proposals was the jettisoning of the "community standards" test. It was intended that pornography would be subject to an assessment based not on "taste," but on more objective grounds, although the defences of scientific or educational purpose, or of artistic merit with respect to sexually violent or degrading pornography, would continue to require a large element of subjective analysis. Furthermore, sexual explicitness alone would not be a sufficient ground for application of the criminal sanction. Some may still question, however,

whether it would in fact be appropriate to permit in this way any sexual depiction, however explicit, so long as it was not violent, did not involve children, and was not indiscriminately open to the public.

The Fraser Committee was of the opinion that its proposals were constitutional; although they might infringe upon freedom of expression, the Charter allows freedom to be subject to reasonable limits. In the Committee's view, such limits could be justified on the grounds that pornography may encourage inequality for certain elements of society.

D. Pornography as a Human Rights Issue and as Hate Literature

The Fraser Committee took the position that new ways of seeking redress for the social harm caused by pornography should be explored. One of these was the inclusion in human rights legislation of measures intended to reduce exposure to pornography in the workplace, stores and other facilities. It was also suggested that consideration be given to the provision of a civil right of action in respect of the promotion of hatred through pornography.

Anti-pornography activists are attempting to move their fight into the realm of human rights law, and seek to build on previous cases in which depictions of naked women in the workplace have been found to be harassment of female employees. The Ontario Human Rights Commission argued in 1993 before a board of inquiry that the presence of men's sex magazines in corner stores is a form of discrimination against women. The case targets "soft-core" materials, such as *Penthouse* and *Playboy*, which are generally considered to meet the community standard of tolerance outlined by the Supreme Court of Canada in *Butler*. In a 2-1 decision, the case was dismissed on a preliminary motion on the basis that the Commission had not complied with its statutory obligation to endeavour to effect a settlement before proceeding to a board of inquiry (*Findlay and McKay* v. *Four Star Variety*, 22 October 1993). In May 1996, the Commission finally quashed the complaint on the basis that "evidence" against the store owner, and the "current state of the law," made further inquiry into it "inappropriate."

Finally, the hate propaganda provisions of the *Criminal Code* could be amended to include sex, age, and mental or physical disability as attributes of "identifiable groups" protected by those sections. The inclusion of "sex" would presumably allow for the prosecution of a distributor or maker of material that promotes hatred of either sex. Whether amendments such as these would have anything other than symbolic significance is open to question. The intention to promote hatred,

according to the current provisions of the *Criminal Code*, has proved very difficult to establish; this would probably also be the case if the provisions were extended to include pornographic material.

E. Child Pornography

Child pornography is generally acknowledged to raise some issues that do not apply to pornography dealing exclusively with adults. Those issues have to do with the participation of children in the production of such material and their exposure to it. It is assumed that adults may choose to be involved in pornographic productions or to view them, while children are deemed incapable of giving informed consent to such activity. Accordingly, it is argued by some that the use of children should be outlawed, and that any sexually explicit display involving children should be deemed obscene.

The Committee on Sexual Offences against Children and Youths (the Badgley Committee) – a special committee appointed by the Ministers of Health and Justice – issued its report in August 1984. Part of its mandate had to do with the use of children in the production of pornography, and their access to such material. The Committee found that there was no evidence to support claims that child pornography had reached "epidemic" proportions in Canada, as some had claimed. What child pornography there is, is imported and constitutes a small proportion of all pornography entering Canada. There is a good deal of "pseudo-child pornography" – pornography that uses adults who appear to be children – entering the country, however, and this may appeal to the same tastes and evoke the same responses as material actually using children. The Committee urged a concerted effort to strengthen the processes whereby the importation of such material could be prevented.

As for domestically produced child pornography, the Badgley Committee found that it existed in an "informal and fragmented" system of private production, primarily undertaken to serve the sexual gratification of those involved. It also found that such production almost invariably involves the sexual abuse of the children used, and that new communications technology holds the potential for much more production. Accordingly, the Committee recommended that it be made an offence to use children in the production, manufacture, sale or distribution of, and to possess, visual representations of "explicit sexual conduct" of persons under age 18. All except the possession offence would be indictable, punishable by up to 10 years' imprisonment; the possession offence would be punishable on summary conviction.

The Badgley Committee also found that the existing laws governing restrictions on children's access to pornography were inadequate. The criminal obscenity law does not specifically deal with restricting access, and provincial and municipal laws are unevenly applied, or non-existent. The Committee suggested a summary conviction offence of knowingly selling, displaying or offering to sell "visual pornographic materials" to persons under the age of 16.

The Fraser Committee's 1985 report set out its recommendations with respect to children and pornography separately, to emphasize the special treatment children should receive. Perpetrators of child pornography would be subject to the severest punishment. It would also be an offence to "induce, incite, or coerce" a person under age 18 to participate in any representation of explicit sexual conduct. Significantly, the Committee also recommended an offence, punishable on summary conviction, of being in possession of child pornography. Possession of adult pornography would be an offence only where that possession was for the purposes of sale or distribution. The Committee acknowledged that this was a severe recommendation, but justified it on the ground that it was necessary in order to deter the production of child pornography.

On 13 May 1993, the federal government tabled in the House of Commons Bill C-128, An Act to amend the Criminal Code and the Customs Tariff (child pornography and corrupting morals). The bill was dealt with expeditiously by both the House of Commons and the Senate, receiving all-party support. Various arts and cultural groups and civil libertarians, while endorsing the need for measures to combat child pornography, expressed serious reservations and concerns about the wording of the bill, which nevertheless received Royal Assent on 23 June 1993, and was proclaimed in force on 1 August 1993. For a more detailed discussion of the bill, see Library of Parliament Legislative Summary LS-178E, *Bill C-128: An Act to amend the Criminal Code and Customs Tariff (child pornography).*

A controversial case that arose in December 1993 involved child pornography charges against a Toronto artist, Eli Langer, and the art gallery that displayed his work. Mr. Langer's paintings and drawings show children performing a variety of sexual acts. Subsequently, in February 1994, the Crown dropped charges against Mr. Langer and an art gallery official, but applied for forfeiture of the artwork in order to destroy the paintings and drawings seized in the case. The case raises questions about the scope of the new legislation and its exemption for works of artistic merit. Arts groups have expressed concerns that serious and legitimate artists run the risk of violating the new law, and that the prospect of criminal charges will

have a "chilling" effect on artistic activity because of the loss of time and money and the notoriety they involve. At the same time, advocates of tougher child pornography measures are concerned about the definition of art and the ambiguity of the artistic defence, as well as the prospect that it could be used to justify or cloak pornography involving children.

In April 1995, Mr. Justice David McCombs ruled that Langer's art was not illegal. Although he called the pictures "shocking and disturbing," the judge said that they had "artistic merit," and that he was not convinced that they "pose a realistic risk of harm to children." At the same time, the judge rejected the constitutional challenge by Langer and groups representing artists, writers and civil libertarians. He said that the child pornography law was a reasonable restriction on artists' freedom of expression and was designed to protect children from the harmful impact of child pornography. The case was appealed to the Supreme Court of Canada on the basis that the law contravened the *Charter of Rights and Freedoms*, and also with respect to the issuance of warrants authorizing the seizure of allegedly pornographic materials. Although the application was supported by the Ontario government, leave to appeal and cross-appeal was refused by the Court on 11 October 1995. (*Ontario (Attorney General)* v. *Langer* (1995), 97 C.C.C. (3d) 290, 123 D.L.R. (4th) 289, 40 C.R. (4th) 204, leave to appeal to S.C.C. refused 100 C.C.C. (3d) vi, 126 D.L.R. (4th) vii, 42 C.R. (4th) 410*n*.)

In January 1999, in *R.* v. *Sharpe* [169 D.L.R. (4th) 536, 22 C.R. (5th) 129, 58 C.R.R. (2d) 261, 40 W.C.B. (2d) 507], a justice of the Supreme Court of British Columbia ruled that the prohibition against possession of child pornography in the *Criminal Code* was unconstitutional, although he upheld the prohibitions on the possession of child pornography for purposes of publication, distribution and sale. The case was appealed, on an expedited basis, to the Court of Appeal for British Columbia, where a majority decided, in June 1999 [136 C.C.C. (3d) 97, 175 D.L.R. (4th) 1], that section 163.1(4) – the offence of possession of child pornography – contravened the *Canadian Charter of Rights and Freedoms*. The case was appealed to the Supreme Court of Canada, where it was heard on 18-19 January 2000, **and a decision was rendered on 26 January 2001. The Court found that the law on child pornography strikes a constitutional balance between freedom of expression and the prevention of harm to children. Nevertheless, the Court read into the law two exceptions relating to expressive material privately created and kept by the accused. It found that possession of such material poses no reasonable risk of harm to children if it is:**

- **self-created expressive material, i.e., any written material or visual representation created by the accused alone, exclusively for his or her own personal use; and**

- **private recordings of lawful sexual activity, i.e., any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.**

The Court ruled that the possession of these materials should be excepted from section 163.1(4). It should be noted that in the second instance all parties involved must have consented to both the activity and the creation of the record, and the possessor of such material must have personally recorded or participated in the sexual activity it portrays.

The Supreme Court also ruled on the wording of section 163.1(1)(b), which prohibits "any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years." In order to meet the requirement of "advocates" or "counsels," the Court ruled that the material must be viewed objectively and seen as "actively inducing" or encouraging the described offences with children. Thus, the mere description of the act is not enough to contravene the law.

Section 163.1(6) provides that material that constitutes child pornography can be defended if it has "artistic merit." The Supreme Court defined "artistic merit" as "possessing the quality of art" or having "artistic character." This defence must also be established objectively. The Court then set to define what is meant by "art." It found that the decision must, for each case, be left to trial judges to make the determination on the basis of a variety of factors. These can include the subjective intention of the creator, the form and content, and its connections with artistic conventions, traditions or styles. Judges may even rely partly on the opinion of experts. The Court did find that the defence of artistic merit does not incorporate a community tolerance standard because it was not included in the legislation. The Court decided that reading such a standard in would run counter to the logic of the defence that artistic merit outweighs any harm that might result from the work. The Court also held that the defences of medical, educational, and scientific purpose should also be taken into consideration regarding what can be deemed as child pornography.

Finally, the Supreme Court ordered that the charges against Mr. Sharpe be sent back to the British Columbia Supreme Court for trial. There, the trial judge, Mr. Justice Shaw, rejected Mr. Sharpe's defence that the photographs of children he had had in his possession were lawful as they were intended exclusively for his own private use. Mr. Sharpe also argued that the boys depicted were likely over 14 years old and since the age of consent for sexual activity in Canada is 14, the children had legally consented to be depicted in the materials.

Mr. Justice Shaw ruled that Mr. Sharpe could not prove that the pictures were for his own personal use, nor could he prove that the boys depicted had any further involvement in the use of the photographs after they were taken. Thus, on account of these photographs, Mr. Sharpe was convicted of possessing child pornography. As for the written materials in Mr. Sharpe's possession, the judge found that, while they were morally repugnant, they did not counsel or advocate the commission of sexual crimes against children. Mr. Sharpe, therefore, was acquitted of the offence of possessing child pornography for the purpose of distribution or sale.

As for the issue of artistic merit, Mr. Justice Shaw went on to address Mr. Sharpe's "artistic merit" defence although it was no longer necessary for his decision. Three English professors and one psychiatrist testified as expert witnesses on the matter. The majority found some artistic merit in the writings. One of the professors denied artistic merit but was found to have applied a community standard of tolerance test in his assessment, thereby mistakenly letting considerations of morality play a role in assessing the work. The trial judge concurred with the majority of the expert witnesses and found evidence of artistic merit in Mr. Sharpe's writings. Such factors included the portrayal of people, events and scenes that were reasonably well written, parody and allegory, characterization, imagination, and at times reasonably complex plots.

This case has been extremely controversial, and the issue has become very political: outrage was expressed over the implications of striking down the prohibition against possession of child pornography, and there have been demands that Parliament should invoke the notwithstanding clause of the Charter to ensure that the law remains in force.

F. Pornography on the Internet

A major concern in recent years has been the proliferation of pornography – particularly child pornography – on the Internet, which, according to one expert, offers about 250,000 "adult-oriented" web-sites. This raises serious issues of access and liability, as well as the question of how such material is to be regulated, particularly where it transcends national boundaries. The focus of much police work is now on the Internet; although there have been convictions, the very nature of computer technology often impedes investigations.

In 1995, an accused was convicted of distributing child pornography via a computer bulletin board, although he was acquitted of other charges (*R.* v. *Pecciarich* (1995), 22 O.R. (3d) 748). In April 1998, the Ontario Court of Appeal upheld the principle that jail sentences are necessary in the fight against child pornography on the Internet: *R.* v. *Lisk*, [1998] O.J. 1456.

Other approaches have also been used. **In July 1996, iStar – a provider of Internet access – blocked customers' access to material deemed offensive, such as child pornography or bestiality. This action came quietly after months of complaints from customers who were upset with the content of Internet newsgroups or "alt.binaries" where pictures can be easily transmitted.**

iStar made this decision after discussions with the RCMP. The company claimed that since child pornography was illegal, it had to do something to prevent its spread in order to "comply with the law of the land" because "if we don't do something about illegal activity, the police or government have a right to shut down or take our computer equipment." At the time, however, Canada had yet to lay out any laws regulating the Internet. Despite this situation, the then federal Justice Minister Allan Rock publicly supported iStar's move.

While iStar feared being shut down if offensive materials were spread through its services, David Jones, President of Electronic Frontier Canada, claimed that the Internet should be treated the same way as Canada Post or the telephone system. In these cases, people such as postal carriers are not responsible under the law for the content of the message they carry through their system. As long as they don't do so consciously, they cannot be held responsible for distributing material such as child pornography.

In the case of iStar, although few people supported the material that was being spread through the newsgroups, many expressed concerns about the blocking

process and the precedent it might set, as well as about issues of censorship. Alan Borovoy of the Canadian Civil Liberties Association worried that legitimate material would be blocked as well.

Some of the other Internet providers indicated that they would not be following iStar's example. For the future, iStar indicated that while it cannot possibly monitor the roughly 20,000 newsgroups it carries, it will investigate complaints received from customers or authorities. The company will then block access to these areas if they are spreading "illegal" material (but not solely because someone finds them offensive).

In February 1996, the United States Congress passed the *Communications Decency Act*. One of its goals was to punish those who disseminate "indecent" material over the Internet. In June of that year, however, a three-judge panel from a District Court in Philadelphia found that the word "indecent" was too vague and the Act was ruled unconstitutional. In 1998 the U.S. Congress enacted the *Child Online Protection Act*, which imposes prison sentences and fines of up to $100,000 for placing material that is "harmful to minors" on a web-site available to those under the age of 17; the statute has never taken effect as there has been a Federal District Court order blocking its enforcement since February 1999, and this was continued in effect by a decision of the U.S. Supreme Court in May 2002. These issues remain unresolved.

The nature and extent of pornography on the Internet remain matters of some dispute. Although Internet pornography appears to be increasing, at the same time it defies traditional government regulation. The issues involved are complex and different from those of access to, and distribution of, ordinary pornography. Various governments have grappled with the problem, which is likely to increase over the next few years.

G. Judicial Developments

A number of court decisions have involved the obscenity provisions of the *Criminal Code*. In Ontario, in what is believed to have set a Canadian precedent, a seller of pornography was jailed in August 1990 after being convicted of 12 charges relating to his magazine distribution business. In Ottawa, a record company and record distributor were charged with distribution of obscene material and possession of such material, in relation to two records by a British Columbia punk band, Dayglo Abortions. The defendants were acquitted after a trial that lasted several days. In July 1991, a bookstore owner in London (Ontario) was found guilty of selling obscene material after police seized copies of an album by the controversial U.S. rap group 2 Live Crew.

In 1992, the Supreme Court of Canada handed down its decision in the case of *R.* v. *Butler* ((1992), 70 C.C.C. (3d) 129, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, [1992] 2 W.W.R. 577). The Court unanimously upheld the constitutionality of the obscenity provisions of the *Criminal Code*, holding that, although the prohibition against pornography contravened the freedom of expression guarantee in section 2(b) of the *Charter of Rights and Freedoms*, it could be justified under section 1 of the Charter as a reasonable limit prescribed by law. Mr. Justice Sopinka, writing on behalf of the Court, said that, although a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, there was nevertheless sufficient evidence that depictions of degrading and dehumanizing sex do harm society, and, in particular, adversely affect attitudes towards women. He held that the overriding objective of the law was not moral disapprobation but the avoidance of harm to society, and that the threat to equality resulting from exposure to certain types of violent and degrading material cannot be ignored.

In the course of his reasons, Mr. Justice Sopinka provided some guidance in applying the various tests to determine what constitutes undue exploitation: the community standards test, the degradation or dehumanization test, and the internal necessities test or artistic defence. He also divided pornography into three categories: (1) explicit sex with violence; (2) explicit sex without violence but that is degrading or dehumanizing; and (3) explicit sex without violence that is neither degrading nor dehumanizing. He believed that the first two categories would almost always constitute undue exploitation of sex, but the third category would generally be tolerated. However, two of the other judges disagreed, arguing that not only the content but also the representation can be

objectionable. A more detailed discussion of the case appears in Library of Parliament BP-289, *Obscenity: The Decision of the Supreme Court of Canada in R.* v. *Butler*.

The Supreme Court's decision in *Butler* helped to clarify the provisions of the *Criminal Code*, but there continues to be confusion about what constitutes obscenity. As expressed in an article in *The Globe and Mail* on 26 March 1993: "A year after Canada became the first country to define pornography as materials that harm women by degrading them, enforcement is infrequent, inconsistent and based on ill-defined terms." Police authorities complain that they cannot act without more guidance as to what constitutes "degradation." Some women's groups, while admitting that few charges have been laid, believe that the law and the Supreme Court decision have nevertheless had a self-policing effect on distributors.

In September 1991, Toronto police seized sexually explicit videotapes as being obscene. Two people were charged with various criminal counts of owning and distributing obscene material, notwithstanding the fact that the tapes had been viewed and cleared by Ontario's Film Review Board. In October 1993, the Ontario Court of Appeal ruled that the definition of obscenity is limited in order to capture only material that creates a substantial risk of harm. Moreover, the fact that films or videos have been approved by a provincial agency such as the Ontario Film Review Board, while relevant in terms of community standards, does not amount to a lawful justification or excuse for their content, or a bar to prosecution: "The [film] board's approval is not binding on a court or determinative of whether the films are criminally obscene" (*R.* v. *Hawkins* (1993), 15 O.R. (3d) 549). This incident highlights the differences between federal and provincial laws. It also illustrates the problems of enforcement of the obscenity provisions when some provinces adopt a more lenient attitude than others, as well as the difficulties and unpredictability inherent in the "community standards" test.

In November 1995, the Supreme Court of Canada ruled that retailers cannot assume that a film is not obscene simply because it received prior approval from a film review board. At the same time, the Court held that retailers of pornographic material must have at least a "general idea" that their products are obscene if they are to be found guilty of knowingly selling obscene materials. The Court warned, however, that retailers cannot avoid liability by simply turning a blind eye to whether or not the material could be obscene under the law, or viewing the material themselves and deciding whether or not it is obscene (*R.* v. *Jorgensen*, [1995] 4 S.C.R. 55).

In the autumn of 1994, the British Columbia Civil Liberties Association, the Little Sisters Book and Art Emporium in Vancouver and its owners challenged provisions of the *Customs Tariff* and its Schedule VII that authorize the seizure of obscene materials at the border, or "prior restraint," arguing that the system violated the Charter's section 2(b) freedom of expression guarantee. It was also contended that the law's application discriminated against the authors and consumers of the prohibited material on the basis of their sexual orientation, contrary to section 15. Government defendants conceded the section 2(b) infringement, but argued that it was justified under section 1 of the Charter; they denied any section 15 violation.

The January 1996 ruling of the Supreme Court of British Columbia considered the constitutionality of both the legislation and its application. Turning first to the law, the Court acknowledged a disproportionate impact on lesbian and gay individuals; however, it found this "inevitable" unequal effect not to be discriminatory under section 15, because "homosexual obscenity is proscribed because it is obscene, not because it is homosexual." The Court also found the legislation to be a justifiable limit on freedom of expression under section 1. In its view, criteria previously articulated by the Supreme Court of Canada in relation to section 2(b) and obscenity were equally applicable to homosexual material. Having found the law *per se* in compliance with the Charter, however, the Court concluded that systemic deficiencies in the law's application and patterns of arbitrary and improper practices by Customs officials had resulted in the wrongful prohibition of admissible materials. These shortcomings infringed the section 2(b) rights of the plaintiffs as well as of authors, artists and other consumers in Canada. In the result, the Court issued a declaration that the legislative provisions at issue had been construed and applied in violation of section 2(b) and section 15 (*Little Sisters Book and Art Emporium et al.* v. *Canada (Minister of Justice of Canada)* (1996), 131 D.L.R. (4th) 486).

In June 1998, the British Columbia Court of Appeal ruled that harm could arise from the proliferation of obscenity – whether homosexual or heterosexual – and that the *Customs Act* is reasonable legislation in a free and democratic society. The majority of the Court felt that the law allowing agents to seize gay material is not unconstitutional. There was, however, a lengthy dissenting opinion from the third judge. The case was appealed to the Supreme Court of Canada, which heard arguments on 16 March 2000; **on 15 December 2000, the Supreme Court rendered its decision, with three judges dissenting in part. While the Court ruled that the *Customs Act* and *Customs Tariff* were constitutional, it found that Customs officials' adverse treatment in applying the legislation, targeting the appellants at the administrative**

level, was prejudicial and demeaning to their dignity. The resulting section 15 violation was not capable of section 1 justification as it was not "prescribed by law" (*Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*).

Several cases involved indecent or immoral theatrical performances, such as so-called "lap dancing." In *R.* v. *Ludacka* (1996), 105 C.C.C. (3d) 565, 28 O.R. (2d) 19, the Ontario Court of Appeal ruled that performances involving physical sexual contact between the performers and patrons constituted an immoral performance contrary to section 167(1) of the *Criminal Code*. The activity was not protected under section 2 of the Charter, as it could not be characterized as a form of expression. In March 1997, the Supreme Court of Canada confirmed that "sexual touching" in such circumstances was illegal: writing for a unanimous court, Mr. Justice John Sopinka said that the practice is degrading to women and "objectifies [them] in a socially unacceptable manner." In the Court's view, lap dancing exceeds community standards of tolerance, although it is not clear whether other forms of touching between dancers and patrons would be permissible (*R.* v. *Mara*, [1997] 2 S.C.R. 630).

PARLIAMENTARY ACTION

A. Justice Committee Report, 22 March 1978

The House of Commons Standing Committee on Justice and Legal Affairs issued a report after conducting a study of the subject matter of several Private Members' bills dealing with pornography. The report made a number of recommendations, among them a new definition of obscenity that would have included "degradation," and that would also have included reference to materials involving children.

B. Bill C-51, First Reading 1 May 1978 (3rd Session, 30th Parliament)

This omnibus *Criminal Code* amendment bill included a redefinition of obscenity similar to the Justice Committee's recommendation. It died on the *Order Paper*, as did identical Bill C-21, introduced in November 1978.

C. Bill C-19, First Reading 7 February 1984

(2nd Session, 32nd Parliament)

This omnibus *Criminal Code* amendment bill included a new definition of obscenity which no longer required that obscene material have a sexual element; the bill also specified degrading representations as a means of "undue exploitation" and substituted "matter or thing" for "publication" in the definition. It provided for forfeiture of obscene material, and would have placed limitations on prosecutions of materials passed by provincial classification boards. The bill died on the *Order Paper* in July 1984.

D. Bill C-38, First Reading 1 April 1985
(1st Session, 33rd Parliament)

This bill, which received Royal Assent on 3 April 1985, amended the *Customs Tariff* to incorporate the obscenity standard in the *Criminal Code* by reference. It was necessitated by a court decision striking down the previous prohibition on the importation of "immoral or indecent" material as contrary to the *Charter of Rights and Freedoms*. Originally slated to expire on 30 June 1987, the tariff item was extended on an annual basis until 1989, when it was made permanent. It is now Tariff Item 9956 of Schedule VII to the *Customs Tariff*.

E. Bill C-114, First Reading 10 June 1986
(1st Session, 33rd Parliament)

This bill would have repealed the obscenity provisions in the Code (and in the *Customs Tariff*), replacing them with strict and more objective provisions dealing with various types of pornography. It died on the *Order Paper* in August 1986.

F. Bill C-54, First Reading 4 May 1987
(2nd Session, 33rd Parliament)

Bill C-54 constituted a revision of Bill C-114, with some relatively minor changes and a few important additions.

The bill proposed amendments to the *Criminal Code* and the *Customs Tariff* that were similar in structure to the recommendations of the Fraser Committee, with some significant differences. There would have been a series of "tiered" offences, the severity of punishment depending on the nature of the material in issue. The offences would have applied to visual matter,

i.e., child pornography, pornography showing physical harm in a sexual context, sexually violent pornography, "degrading" pornography, and what might be termed "simple" pornography. Each type of pornography would have had a specific statutory definition, and "dealing" in any would be an offence. All, except child pornography and pornography showing physical harm, would have been subject to a defence based on artistic merit or scientific, medical or educational purpose. Perhaps the most significant difference between the bill and the recommendations of the Fraser Report was with respect to "simple pornography," i.e., the depiction of non-violent, non-degrading sex acts involving consenting people. The Fraser Committee would have placed restrictions only on the display of such material; the bill (subject to the defences just noted) would presumptively have prohibited manufacture, distribution, sale and any other dealing in such material.

Child pornography would have been treated harshly, with the use of persons under the age of 18 in the production of sexually explicit material severely punished. Simple possession (i.e., not for commercial or distribution purposes) would also have been made a summary conviction offence. In a new departure, dealing in matter or "commercial communication" that "incites, promotes, advocates or encourages" any of the conduct covered by the definition of the various types of pornography (except the conduct involved in simple pornography) would also have been made a severely punished offence.

The bill would have incorporated the new pornography standards into offences dealing with theatrical performances, with the corresponding defences, and into that provision of the *Customs Tariff* dealing with prohibited imports. Finally, following a recommendation of the Fraser Report, "sex" would have been included in the definition of "identifiable group" in the hate propaganda provisions of the *Criminal Code*.

Bill C-54 was very controversial. Although some efforts were made to limit the scope of its proposed restrictions on pornography, some contend that the changes were merely cosmetic. It was argued that, in limiting defences as it did, and in proposing to apply the full force of the law only to material which was sexually explicit and not to that which was violent or degrading, the bill was an overreaction, and a threat to civil liberties. There remains, however, a significant constituency that wishes to see even greater controls on explicit materials. It may not be possible to reconcile these views in legislation.

Bill C-54 died on the *Order Paper* when Parliament was dissolved on 1 October 1988.

G. Bill C-128, Royal Assent 23 June 1993

(3rd Session, 34th Parliament)

Bill C-128 received widespread support and speedy passage through Parliament. Dealing solely with "child pornography," which is given its own definition, the bill creates separate offences for the production, distribution and possession of such material, and prohibits the importation of child pornography.

H. Justice Committee Report, 16 November 1994
(1st Session, 35th Parliament)

In April 1994, the Minister of Justice tabled in the House of Commons draft legislation that would prohibit the importation, sale and distribution of crime cards and board games to those under the age of 18. The House of Commons Standing Committee on Justice and Legal Affairs undertook a broad study of this issue, and tabled its Fourth Report in November 1994. The Committee rejected the draft legislation as too narrow, and recommended that the Minister of Justice table amendments to the obscenity provisions of the *Criminal Code* dealing with the undue glorification or exploitation of horror, cruelty and violence.

CHRONOLOGY

1959 -	The *Criminal Code* was amended to include a statutory definition of obscenity based on "undue exploitation," instead of the common law concept which involved assessment of whether material had a tendency to "deprave" or "corrupt."
19 January 1978 -	The Supreme Court of Canada, in the *McNeil* case, upheld the constitutionality of provincial film censorship and classification boards.
22 March 1978 -	The House of Commons Justice Committee issued its report on pornography.
1 May 1978 -	Bill C-51, which would have redefined obscenity, was introduced in the House of Commons.
12 January 1981 -	Bill C-53, which contained amendments to the *Criminal Code* on child pornography, was introduced in the House of Commons.
16 February 1981 -	The Committee on Sexual Offences Against Children and Youth (the Badgley Committee) was formed, part of its mandate being to inquire into child pornography.

17 April 1982 - The *Charter of Rights and Freedoms*, which contains a guarantee of freedom of expression, was proclaimed in force.

31 March 1983 - The Ontario Divisional Court ruled, based on the Charter, that the powers of the Ontario Censor Board to order deletions from films, or to ban films, must be supported by explicitly enunciated guidelines, which do not abridge freedom of expression. The Court of Appeal later upheld this decision.

23 June 1983 - The Minister of Justice announced the formation of the Special Committee on Pornography and Prostitution (the Fraser Committee).

7 February 1984 - Bill C-19, which contained several amendments to the obscenity provisions of the *Criminal Code*, was given first reading in the House of Commons.

22 August 1984 - The Badgley Committee issued its report, recommending the establishment of new offences having to do with the production of child pornography and the sale of pornography to children.

31 October 1984 - The Ontario Divisional Court struck down a Toronto by-law and a provision of the Ontario *Municipal Act* which purported to regulate the sale of erotic magazines.

14 March 1985 - The Federal Court of Appeal ruled that that part of the *Customs Tariff* which forbade the importation of "immoral or indecent" material was constitutionally invalid. In response, the Act was amended by R.S.C. 1985 (1st Supp.), chap. 21, to incorporate the obscenity standard, by reference. Subsequently, the tariff item was extended annually until 1989, when it became permanent.

3 April 1985 - Bill C-38, which amended the *Customs Tariff* to incorporate the obscenity standard in the *Criminal Code* by reference, received Royal Assent.

23 April 1985 - The Fraser Committee's report on pornography and prostitution was released, recommending extensive revision of the law.

10 June 1986 - The government introduced Bill C-114 embodying proposals for new laws on pornography. This bill died on the *Order Paper* when Parliament was prorogued in August 1986.

4 May 1987 - The government introduced Bill C-54, a revision of the proposals on pornography in Bill C-114. This bill died on the *Order Paper* when Parliament was dissolved in October 1988.

27 February 1992 - The Supreme Court of Canada upheld the constitutionality of the obscenity provisions in the *Criminal Code*, in *R.* v. *Butler*.

13 May 1993 - The government introduced Bill C-128, dealing with child pornography. The bill was passed quickly by the House of Commons and Senate, and received Royal Assent on 23 June 1993. It was proclaimed in force on 1 August 1993.

16 November 1994 - The House of Commons Standing Committee on Justice and Legal Affairs, in its Fourth Report, recommended that the Minister of Justice table amendments to the obscenity provisions of the *Criminal Code* dealing with the undue glorification or exploitation of horror, cruelty and violence. In its response of 19 April 1995, the government agreed, and undertook further study of possible amendments to the obscenity provisions of the *Criminal Code*.

REFERENCES

Library of Parliament. Bibliography Nos. 241 and 241 (Supp.) *Pornography and Prostitution in Canada*.