

POLICING THE “GROTESQUE”: THE REGULATION OF PORNOGRAPHY IN CANADA

by

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ABSTRACT

Adult pornography has gained increased prominence in the public domain. Pornographic iconography has extended into the mainstream as new technologies have contributed to its growing distribution and consumption. These social changes point to the need to examine this field of study and consider the altered place of pornography in society and the consequent socio-legal reactions to it. This dissertation examines this sexualization of culture through qualitative legal research, focusing on obscenity law in Canada. Utilizing feminist critical discourse analysis, legal provisions and cases (n=218) between 1959 and 2009 were examined.

Governmentality provides a lens through which to look at the regulation of adult pornography and comprehend the impact of neo-liberal politics on society and sexual citizenship. Using the work of such scholars as Michel Foucault and Nikolas Rose, this research contemplates the notions of 'technologies of the self' and 'governing at a distance' in relation to the production and consumption of adult pornography and the ways in which it is controlled. This research shows that adult pornography has been enabled to flourish as a commodity in a neo-liberal age which is preoccupied with the self, the individual and a 'biopolitical' conception of power. This development is shown through a discussion of discourses around sex and obscenity that came to light out of an analysis of the Canadian legal system.

Paying attention to the judicial discourse, what becomes clear is that a harm-based approach emerges in the 1980s and starts a trend within the legal realm to adopt neo-liberal language and concepts such as, individual responsibility and 'freedom'. This shift towards a free-market mentality constructs a framework in which individuals are

encouraged to self-regulate and police their own pornographic behaviour and consumption. Simultaneously, the neo-liberal mindset quickly perceives and defines risk in sexual content using this harm-based approach. The reduction in legal cases pertaining to adult pornography can be explained through this lens and changes in legal governance can be seen as playing a central role in a greater move towards neo-liberalism in Canada.

Keywords: pornography; sexualized culture; neo-liberalism; post-feminism; governmentality; sexual citizenship

DEDICATION

To my mother and father, Helen and Michael Sears, who always provided me with so much love and support. They truly were the best parents and I am who I am today because of them.

When I was eighteen, my mother included an inscription to me in a copy of Kahlil Gibran's *The Prophet*, she said, "You are our 'living arrow' and your 'bending' is our 'gladness'. May you be 'swift' and go far." I hope that I have made them proud.

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~William Shakespeare

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CHAPTER ONE

INTRODUCTION: THE SEXING OF SOCIETY

I'm on a mission,
And it involves some heavy touchin' yeah.
You've indicated your interest,
I'm educated in sex, yes.
And now I want it bad,
Want it bad.
A love game,
A love game.

Hold me and love me.
Just want to touch you for a minute.
Baby three seconds is enough for my heart to quit.

Let's have some fun,
This beat is sick
I wanna take a ride on your disco stick
Don't think too much just bust that dick
I wanna take a ride on your disco stick

Lady GaGa, Love Game¹

Lady GaGa's popular hit, Love Game, is just one song played continuously on the radio with a predominantly sexual theme. Other areas of popular culture demonstrate a similar trend, insofar as they are saturated with sex and pornographic motifs. For example, the creation and distribution of Hollywood movies that centre themselves on the topic of pornography, such as *The House Bunny* (2008) and *Miss March* (2009). Both movies feature main characters that are bunnies from the *Playboy Mansion*. Such a storyline draws attention to this ever-expanding industry. Further the *Playboy* logo has become a well known symbol on anything from cigarette lighters to

¹ Accessed on <http://www.azlyrics.com/lyrics/ladygaga/lovegame.html>, June 22nd 2009.

underwear.² The logo itself is not pornographic; however, its growing use as a product denotes its normalized place within the public sphere. Consequently, the increasing extension of pornographic iconography into the mainstream points to it being a terrain that requires greater examination which takes into account the altered place of pornography in society.

In 2008, Angela McRobbie wrote an article highlighting our need to conduct research recognizing these shifts. She contends that, “existing paradigms have not been updated or revised so as to be capable of fully engaging with current pornographic permutations” (McRobbie, 2008: 225). Further, McRobbie (2008) argues that there is an additional challenge, “posed by a changing regime of sexuality within the context of an increasingly neo-liberal global culture” (229). Thereby, she delineates the importance of paying attention to the neo-liberal ideology and how it impacts on the (re)production of sex and sexuality. The question that is raised is how do we respond to the current socio-cultural landscape and the proliferation of sex and sexual images? It is clearly a complex and complicated question which scholars have attempted to consider. The response goes from being positive, negative, to no clear, succinct response to how we are to negotiate these cultural trends (see Henderson, 2008; McRobbie, 2008; Mayer, 2005; Press, 2008).

What emerges as a key concern are the ways in which neo-liberalism plays a role in (re)constructing the concept of citizenship and sexuality. As McRobbie (2008) maintains, “a triumphant neo-liberal popular culture defines and organizes a sexual world: who are the winners and the losers?” (230). Therefore, it can alter, “our

² *Playboy*, by today’s standards seems very tame – however, it was at one time considered to be obscene under S.163(8). In making such a determination, Kent D.C.J. contended in *R. v. Marshall*, 1962 CarswellNfld 13, para. 24 that, “Sex in this publication, *Playboy*, is dealt with to no useful purpose, suggestively, unnecessarily, and overstepping the bounds that anyone of good will or good judgment would normally tolerate.”

understandings of and attitudes to sexuality” and initiate changes which, “are simultaneously leading to greater homogeneity and greater inequality” (Altman, 2001: 1). We are presented with the notion that everyone can ‘have it all’ – but such an idea exists on shaky ground when we pay attention to the social, political and economic circumstances of *all* citizens. As Arthurs (2004) contends, “only certain kinds of sexual identity are compatible with consumerism and new exclusions are created that disadvantage the poor” (2004; see also Altman, 2001). The reality is that not everyone is enabled to experience their sexual identity as outlined in the neo-liberal script.

Resulting from these concerns, it becomes clear that this certainly is an area that deserves and requires attention. We need to recognize and understand the varied ways in which sex and sexuality are constructed, particularly through discourse planes, such as the legal realm. In the current research, I am responding to McRobbie’s call that, new forms of research need to be undertaken to recognize the paradigmatic shift in sex and sexuality. McRobbie (2008) contends,

I would suggest that younger women scholars working in the field of sexuality today might perhaps pay more attention to the interface of neo-liberal values surfacing within popular culture, with the seeming relaxation or liberalization of the heterosexual matrix, so that “lesbian” is simultaneously acknowledged and permitted, while also aggressively disavowed ... The mainstreaming of pornography, as well as the wide availability of sex entertainment and the requirement that young women in their everyday behavior comply with the criteria for being “hot,” or being like the Pussycat Dolls, introduces a new dynamic into the field of sexuality, which existing feminist vocabularies ... do not seem fully equipped to deal with. (235)

The purpose of this chapter is to provide context for the current research and delineate what it is that we see everyday around us.

The Sexualization of Culture

What has become evident is that there has been a gradual sexing of society and a broad sexualization of culture. Consequently, imagery that was once ‘forbidden’ or

hidden from public view, is displayed with prominence on television screens, in movie theatres, on the pages of magazines, and on billboards. This idea is nicely demonstrated in the work of Linda Williams and her concept of 'on/scenity' which assists us in our understanding of the role of pornography in this new environment. She comments that sexual representations have moved from a place "off/scene (ob/scene) to a new prominence on/scene" (Williams, 1993: 234). She argues that,

[i]f obscenity is the term given to those sexually explicit acts that once seemed unspeakable and were thus permanently kept off/scene, on/scenity is the more conflicted term with which we can mark the tension between the speakable and the unspeakable which animates so many of our contemporary discourses of sexuality. (Williams, 2004: 4)

In this way, no longer is pornography, or at least representations of sex, relegated to 'dark corners' but it has been integrated into the mainstream. In the words of Nicola Simpson (2004), "porn is no longer flirting with the mainstream; it *is* the mainstream" (635; emphasis added). The current environment points to, a commercialization of desires, where "pornography's iconography has been more widely disseminated and its social significance more openly debated" (Arthur, 2004: 42).³

There is a growing body of literature that addresses this concept of the sexualization of culture, which outlines the ways in which, "sex is becoming more and more visible, and more explicit" in our culture (Attwood, 2006: 82) and normalized within mainstream culture (Boyle, 2008: 35). Brian McNair's well-cited book *Striptease Culture* (2002),⁴ talks about "the pornographication of the mainstream" which he says is a trend

³ Of note here is Karen Boyle's comment on this trend. She makes a distinction between "the commercialization of sex (the invitation to buy products to enhance our sex lives) and commercial sex (purchasing access to the bodies of others for our own gratification and independent of theirs)" (Boyle, 2010a:3). She argues that it is a mistake to conflate the two.

⁴ We have seen increased commentary on what has been called 'striptease' or 'raunch' culture. Holland & Attwood (2009) talk about the increasing availability of fitness classes, such as pole-dancing courses. They contemplate the appeal and benefits of such a course and prompt us to remain critical of such new sexualized practices but to also consider how they may play a role in the empowerment of female sexuality. See also, Levy (2005) for commentary on 'raunch' culture in her text *Female Chauvinist Pigs: Women and the Rise of Raunch Culture*.

apparent since the 1990s, where “the *representation* of porn” emerges “in non-pornographic art and culture” (61; emphasis in original).

We only need to look at what is on offer on television to see this trend. As Mayer (2005) comments, “the line between televisual content and pornography has shifted and blurred over the last decade” (302). Viewers can choose to access such content through pay-per-view television which has played a large role in driving the production and distribution of pornography in Canada. For example, *Hustler* and *Playboy* are adult specialty channels available to Canadian viewers, which offer access to pornographic films, on an hourly basis, for an additional cost to regular cable fees. Such channels have assisted in moving the consumption of pornography into the home. However, it is not only pay-per-view channels that offer depictions of sex. Various other network and basic cable channels offer a continual diet of sexually explicit programming, such as *Girls Gone Wild*, which is a show that includes footage of young women baring all. Further, even if you do not want to watch such content, this notion of the sexualization of culture, implies that it is much broader than just a program or a film. Sex becomes a mode of communication in multiple formats. For example, Sarracino and Scott (2008) comment,

if you want porn, the Playboy Channel brings it right into our living rooms. But even if we don't want it, Paris Hilton, for one, brings it into our living rooms via, for example, a television ad for the fast food chain Carl's Jr. in which Hilton – it can only be described this way – performs oral sex on a hamburger. (x)⁵

It is apparent in the literature that such a trend plays a role in the sexualization of both women and children and in this way, we are faced with, “a complicated mix of

⁵ In their work, Sarracino and Scott (2008) provide some interesting commentary on the sexualization of culture. However, it is important to note that such a text, along with the work of writers such as Ariel Levy, are popular cultural texts dealing with sexualization. A distinction needs to be made between such texts as these and academic references as they do tend to deal with sexualization in a sensationalist manner rather than treating it as a discourse that needs to be studied and examined.

images" (Meyers, 1999: 12), that by some may be viewed as a democratic and inclusive shift, and by others as detrimental and as another means of objectifying women. For example, in relation to women, this has been conceptualized as a positive shift because it has shaped new spaces for female sexual display where women are "agentially engaged in their own liberation" (Evans, Riley & Shankar, 2010: 116). These spaces foster opportunities for women to explore empowerment through their own sexuality. However, on the other hand, Hall and Bishop (2007) comment in reference to the work of Ariel Levy that, within this 'raunch' culture, "women's participation in pornography as creators and consumers is not a source of empowerment ... but simply another way in which women are objectified" (2).

In relation to children, it is clear that we are increasingly living in "a culture where mainstream media and retail marketers sexualize girls at younger and younger ages" (Oppliger, 2008: 1). We only have to look at the changes in fashion to see this trend. For example, the promotion of g-strings and lingerie for tweens, along with mini-skirts and belly tops (see Gill, 2007a; and Oppliger, 2008). Further, toys that are marketed to young girls are explicitly sexualized, such as *The Bratz Dolls*, to a point where, "toys themselves have been, if not rendered pornographic, drafted into pornography's service" (Sarracino and Scott, 2008: x).

Therefore, how do we respond to this cultural landscape? I think what is clear is that we have to actively engage with what is happening. It is important to consider this fundamental change in society and the consequences of it. Through this, it is vital to acknowledge, "the legitimacy of diverse responses, from both women and men, to the processes of pornographication and cultural sexualization" (McNair, 2009: 71). Further, we have to consider ways in which to negotiate this increasing sexualization and reflect on it in light of post-feminist debates and the neo-liberal socio-cultural context. As

Attwood (2009) comments, “sexualization is associated with the rise of neo-liberalism in which the individual becomes a self-regulating unit within society” (xxiii). The increasing pornographication of the mainstream has been an indicator of the influence of the neo-liberal political rationality. Sexual imagery has become a central part of the marketplace which is almost free from state interference. Citizens are afforded the opportunity to consume any type of material that they want and are encouraged to monitor themselves as a marker of good citizenship. Therefore, this “‘responsibilization’ or self governance of sexual matters” is reflective of a neo-liberal era (Attwood, 2009: xxiii) – and this will be considered in the current research.

A Paradigmatic Shift

Such a cultural trend has certainly impacted on the way that pornography is researched and talked about, primarily because it becomes, “increasingly difficult to define boundaries of pornography” (Boyle, 2008: 38). In the 1990s, we saw a shift away from the established anti-porn studies towards, “a wave of academic studies of porn” that have spent time “distancing themselves from the binary logic of the porn debates to date” (Paasonen, Nikunen & Saarenmaa, 2007: 17). As a result, there has been recognition of a new field of porn studies (see Attwood, 2009; Hardy, 2008; and McNair, 2005), and the entrance of pornography into the “academic marketplace” (Wicke, 2004: 176).⁶ With this, we have been witnessing a “fundamental change in the theory and practice of sexuality” where academic writings have moved past what Juffer (1998) has called a “tired binary” (2; see also, Attwood, 2002a, 2009). Instead of focusing on the effects of pornography and the discourse of censorship, it is possible to identify “a ‘paradigm shift’ in the theorizing of porn” (Attwood, 2002a: 92; see also Attwood, 2011)

⁶ In relation to this, Feona Attwood & I.Q. Hunter (2009) talk about the practice of “bringing sex media into the university” (548) and the challenges of teaching classes on pornography.

where scholars are engaging in cultural analysis and paying attention to the texts themselves.

The work of Linda Williams has been central to this shift. As Rutherford (2007) comments, she is “one of the scholars who first took up the modern study of pornography as a genre” (263n42). And in 2004, she put together an edited collection entitled *Porn Studies* that includes numerous examples of the cultural analysis of pornographic texts. Attwood (2004) argues that, “greater attentiveness to the context of particular images and to the reactions they provoke ... may provide a more helpful way of developing the analysis of contemporary sexual representations” (7). And as Williams (1989) comments, very little is known about the actual texts and she asks, “how can we adequately discuss the pornographic without making some stab at a description of specific pornography?” (29; emphasis in original). Attwood (2002b) does just this in her deconstruction of *Fiesta*, the British downmarket softcore magazine, and she locates it in relation to other forms of sexual and non-sexual representation (see also, the work of Kipnis, 1996; and Penley, 1996, 2004).

Although this shift can be commended for providing insight and commentary on areas previously overlooked in research, it has not come without criticism. Even Attwood (2002a) comments that these accounts and trends in research “flatten all our opposition to pornography” (98). Karen Boyle (2006) has provided a strong critique against this “re-mapping of porn studies” (2) and particularly focuses on the work of Linda Williams. She asserts in reference to Williams’ edited *Porn Studies* that,

there is a definite sense that Williams and her collaborators are throwing the baby out with the bathwater, prematurely discarding important questions raised in feminist debate. For example, in abandoning feminist debates about pornography’s existence, *Porn Studies* ignores the regulatory issues: not only should pornography exist, but who should be able to access it and in what circumstances? These questions remain pertinent in public policy and it is disappointing to find the academic debate moving in a direction that undermines its practical application. (Boyle, 2006: 3)

She comments that there is no sustained discussion of violent pornography in current research, to the point where, “violent pornography is largely ignored” (Boyle, 2006: 3). Consequently, she remarks that, “to exclude such content sanitises the object of study and marginalises an extensive body of academic work” (Boyle, 2006: 3), which paid attention to “abusive production and consumption practices” (Boyle, 2008: 38).⁷ As a result of this lack of attention, Boyle put together her own edited collection entitled *Everyday Pornography* (2010), which aims to draw attention to the industry of commercial sex.

Despite such criticisms this trend in academia has continued and there are few examples of new books or articles considering the harm and effects of (violent) pornography. Instead, what we have seen is a growing body of literature on child pornography where there are increasing concerns for the harm and victimization of children.⁸ This paradigm shift will be considered in light of the current research and Canada’s response to the prohibition of adult pornography.

Chapter Outlines

The purpose of this research was to contemplate how the legal realm in Canada acts as an effective tool in the regulation and monitoring of behaviour through the production of discourse. Through the review and analysis of legal cases before and after the emergence of a neo-liberal political rationality, the hope was to draw attention to

⁷ It is important to comment here that this is somewhat reflective of the larger culture where, violence in general is not taken seriously. Even programs such as *CSI* are extremely violent – but they legitimize it by treating it as a topic which is just part of everyday life.

⁸ Rightly or wrongly, child pornography has become the object of a new moral crusade, with increasing amounts of academic and legal attention being paid to it. What is problematic in how Parliament has delineated the child pornography provisions is that they apply to individuals who merely ‘appear’ to be under 18. Consequently, the term ‘child pornography’ in Canada includes matters that may involve young adults. This can serve to make the term too broad and conflate exploitative child pornography with young adult pornography. In this way, young adult bodies are treated with the same moral zeal as child bodies.

shifts in discourse within obscenity law and comment on how various 'discourse strands' may operate to control or enable access to sexually explicit materials.⁹ The current project is comprised of six chapters, including this introduction. The organization and content of the other five chapters is as follows.

Chapter two engages in a discussion of neo-liberal politics and considers the changes that we have seen in the socio-political landscape as a result of it. It contemplates this rationality, the ways in which it extends into all social, political, cultural and economic domains and how it 'governs our present.' Within this discussion of relevant literature, attention is paid to the construction of citizenship and how it has been altered to be equated with consumerism. Time is also spent considering the notion of sexual citizenship which is central to the topic at hand.

In addition to this, the chapter considers the impact of neo-liberal politics on feminism as an effective social movement, particularly in relation to the shape of citizenship and the construction of a new female subject. Relevant literature is discussed on post-feminism and how it has delineated notions of the post-feminist female subject that draws on ideas such as the 'can-do' girl and the 'active desiring sexual subject.' The core argument within this literature is that post-feminism has promoted the idea that women have achieved equality and can now 'have it all'; however, as noted by various scholars, there are a number of criticisms of such assumptions, which are delineated in this section.

⁹ At this point, it is important to note the specific geographical and time-frame limits of this research. In such a way, a majority of the legal cases selected and the various examples of academic literature are drawn from Anglo-Canadian and Anglo-American case law and research between 1959 and 2011. In terms of the legal cases, the focus was not intended to only be on the Anglo-Canadian cases, however, there were few francophone cases found within the databases. For the literature discussed, readers will find a particular focus on English language texts and the use of translations for those that are originally in another language (for example, Michel Foucault's work).

Chapter three explores the theoretical framework that is adopted in this research, that of governmentality, which provides a lens through which to look at and comprehend neo-liberal politics and the impact on society and citizenship. The chapter provides an understanding of this approach, which highlights modes of governance within society and how individuals have gradually been encouraged to self-regulate and self-police themselves. There has been a promotion of 'governing at a distance' and a focus on the self. Time is spent considering the construction of self as enterprising, healthy and risk-free – and how this consequently alters the shape of citizenship.

Chapter four discusses the chosen research methodology and approach. It explores the principles of critical discourse analysis and feminist critical discourse analysis (FCDA) and identifies the aspects of these that work for the current research. In particular, ideas are drawn from the work of Norman Fairclough, Siegfried Jäger, and the insights of FCDA to develop an integrated framework. The chapter also examines the methods and integrated framework in relation to the current research. It outlines the social problem focused on in the research and the discourse plane that is investigated on this basis. Further, discussion centres on how data sources were accessed, the data collection process, and data analysis. Commentary is also included on the limitations and contributions of the research.

Chapter five includes an in-depth analysis and discussion of the historical development of obscenity law between 1959 and 2009. The chapter includes remarks on the major trends within this area of law and considers the shifts that have occurred in the way the courts have dealt with issues of obscenity and indecency. The chapter reveals the use of a community standard test of tolerance in the assessment of obscenity which is replaced by a strict harm-based approach in the Supreme Court of Canada decision in *Labaye*. The chapter also highlights a key moment in Canadian

history, the passing of the *Canadian Charter of Rights and Freedoms* and the constitutional entrenchment of freedom of expression. This section explores what the case law has said about the entrance of the *Charter*, the issues this has raised, particularly with regard to the obscenity provisions, and commentary on the freedom of expression. Through the analysis of case law, it is possible to articulate that neo-liberalism provides a context for understanding the ways in which pornography has come to be regulated in Canada. By moving towards a strict harm-based approach and by placing more emphasis on freedom of expression, there has been a decline in adult pornography cases, which serves to demonstrate that the courts are operating in accordance with a free-market mentality and contributing to a greater shift in Canada towards neo-liberalism.

This shift is explored further in the final chapter which views the history of obscenity law in light of the socio-political context, and considers it critically. Through an analysis of the key discourse strands, the chapter identifies how, within the legal realm, they have played a role in perpetuating neo-liberal ideals regarding sexuality and citizenship. The chapter emphasizes how there has been a gradual shift to 'governing at a distance' and the emergent reliance on notions of individual responsibility, choice and autonomy in how obscenity, particularly pornography, is dealt with. The chapter also includes some concluding remarks which crystallize the key arguments of the research and clearly identify the impact that neo-liberalism has had on obscenity law in Canada, through the operation of various discourse strands. This section also includes some ideas of where to go from here, with particular examples of research that should be conducted in the near future.

CHAPTER TWO

NEO-LIBERALISM: THE EMERGENCE OF MARKET GOVERNANCE AND CONSUMER SOVEREIGNTY

This is our time – to put our people back to work and open doors of opportunity for our kids; to restore prosperity and promote the cause of peace; to reclaim the American Dream and reaffirm that fundamental truth – that out of many, we are one; that while we breathe, we hope, and where we are met with cynicism, and doubt, and those who tell us that we can't, we will respond with that timeless creed that sums up the spirit of a people: Yes We Can. (Obama, November 4th 2008)

In 2008, we witnessed a large scale financial crisis, something very reminiscent of the Great Depression of the 1930s. That same year, on November 4th 2008, Barack Obama became President-Elect of the United States of America. Amidst a financial crisis, a new leader was chosen to effect change and to respond to the instability of these late modern times. Since his appointment, critics have queried his ability to effect change in such a climate.

Consequent to the financial crisis, questions were raised about the “deregulatory pendulum” and whether it had swung too far (Norton Smith, November 5th 2008: 3). As corporations scrambled to be bailed out by the government, the breakdown of free market capitalism became glaring, and “the magic of the marketplace” (Norton Smith, November 5th 2008:3) began to collapse under the weight of corporate failures. This economic downturn had far reaching impacts and along with corporations, citizens suffered a hard blow. For example, within the United States, what we saw was the failure of the Bush administration’s “neo-liberal housing policies that privileged homeownership over rental assistance or public housing” (McMurria, 2008: 311). We saw the creation of, “a neo-liberal “ownership society”” (McMurria, 2008: 319), which

crumbled with the economic crisis. In the US, many people were over-extended and thus faced foreclosures forcing them out of their own homes.

These events point to the failure of neo-liberal policies and strategies and pose potential threats to the continued existence of neo-liberalism and a deregulatory environment. The media had a field day with covering and representing this economic downturn. For example, in 2008, neo-liberalism entered into, “a convulsive spasm” and we saw, “newspapers openly declare the “End of American Capitalism,” the “New Depression” and heap scorn on the policies of “deregulation” that produced the financial crises of 2008” (Raffnsøe et al., 2009: 1). Even Alan Greenspan, the former Federal Reserve Chairman, and champion of neo-liberal politics, “conceded that his free-market ideology shunning regulation was flawed” (Lanman & Matthews, 2008: para. 1) and expressed, “‘shocked disbelief’ that financial companies failed to execute sufficient ‘surveillance’ on their trading counterparties to prevent surging losses” (para, 14).

Despite these revelations and greater levels of state intervention into the financial sector, there has only been a temporary rupture in the prevalence of neo-liberal values and ideals. When we consider the socio-political context, the post-2008 era has not led to a more progressive period and a re-establishment of a welfare-state. Instead, in the US, UK and Canada, corporate tax cuts are favoured over social spending. For example, in Canada, Stephen Harper’s Conservative government “seeks to maximize market oriented values” and “has decreased taxes for citizens while decreasing state funding in programs such as education and health care” (Abu-Jazar, 2009: para. 26).¹⁰ Further, as will be demonstrated, neo-liberalism “has shifted from being a political/economic rationality to a mode of governmentality that operates across a range of social spheres” (Gill, 2009a: 365). Consequently, neo-liberalism has become more

¹⁰ See also, Arif (2010) and Broadbent (2009).

pervasive than just something to do with the financial markets and is impacting the shape and construction of citizenship. Understanding the influence and power of neo-liberalism and how it has defined citizenship since the 1980s is imperative to the topic at hand. Before exploring sexuality and sexual citizenship in more detail, time will be spent exploring the political ideology of our time.

Neo-Liberalist Politics

Central to the current research is the need to consider the political rationality that 'governs our present' (Barry, Osborne & Rose, 1993: 265) and contemplate the impact it has had over the last three decades. However, when we pay attention to politics and current events, it can at times be like, "shooting at a moving target" (McChesney, 1999: 9), because things are in a state of constant flux. McChesney (1999) comments that, "it is difficult at any time for a scholar to write with certainty about current events" (9). We have to attempt to keep up with political shifts and changes in technology. Yet, as McChesney says of analyzing the media, we cannot shy away from such studies as it is important to engage with and consider such areas, despite the difficulties that may lie ahead. Therefore, we will spend time thinking about neo-liberalist politics and the consequent effects on the shape of citizenship.

Neo-liberalism has been "the dominant organizing principle of government and the economy in the past quarter century" (King, 2006: xxvi) and has,

[i]n short, become hegemonic as a mode of discourse. It has pervasive effects on ways of thought to the point where it has become incorporated into the common-sense way many of us interpret, live in, and understand the world. (Harvey, 2005: 3)

In such a way, we can view neo-liberalism as "a hegemonic project" which continuously attempts to make, countries such as Canada, "conform to its desires" (Clarke, 2004: 89;

see also Hasinoff, 2008; Vavrus, 2007). Through its discourse becoming 'common sense,' citizens are persuaded to act in accordance with its goals and ideals.

There is No Such Thing as Society

Since the 1980s and the rise of Reagan and Thatcher, there has been a distinct shift within the socio-political landscape. Instead of committing to a welfare state, government has moved to modes of 'governing at a distance' and adopting a neo-liberal ideology, where they reject, "all forms of direct State control" (Hay, 2000: 53), and "a preoccupation with governmental solutions to the problems of society's disadvantaged groups" (Weiler, 1984: 367). For example, consider the following remarks that were made by Margaret Thatcher in a 1987 interview,

I think we've been through a period where too many people have been given to understand that if they have a problem, it's the government's job to cope with it. 'I have a problem. I'll get a grant.' 'I'm homeless, the government must house me.' They're casting their problem on society. And, you know, *there is no such thing as society*. There are individual men and women, and there are families. And no government can do anything except through people and people must look to themselves first. It is our duty to look after ourselves, and then look after our neighbour. (quoted in Dean, 1999a: 151; emphasis added)

Such comments demonstrate this move towards a neo-liberal rationality where there was a dramatic shift away from welfare and social reform concerns. It was in the 1970s, when wealth and prosperity began to be threatened, resulting in a dwindling of support for welfare programs. As Weiler (1984) comments, Roosevelt's original conception of the Great Society began to lose support, and "Great Society programs became a luxury the nation could no longer afford" and as President Ronald Reagan ascended, there was a definite, "flight from social equity concerns" (Weiler, 1984: 366).

Neo-liberalism was first introduced into the Canadian political realm by the Conservative government led by Brian Mulroney, and it came to represent, "a broad range of practices, including the sale of government assets, the transfer of government

functions to the private sector (contracting out), and the restructuring of government activities to more closely emulate market norms” (Fudge & Cossman, 2002: 4; see also Mitchell, 2001). Consider the following words of Mulroney,

I am a Canadian and I want to be free, to the extent reasonably possible, of government intrusion and direction and regimentation and bureaucratic overkill ... It is absolutely clear that the private sector is and must continue to be the driving force in the economy... The role and purpose of government policy will relate to how we can nurture and stimulate the Canadian private sector. (Brian Mulroney, quoted in Fudge & Cossman, 2002: 3)

We saw a striking shift towards a deregulation of the marketplace and the emergence of a growing economic freedom. As Garland (2001) contends, “if the watchwords of post-war social democracy had been *economic control and social liberation*, the new politics of the 1980s put in place a quite different framework of *economic freedom and social control*” (99; emphasis in original). In such a way, this type of ideology advocated for, “a leaner, meaner government (fewer social services, more “law and order”), a state-supported but “privatized” economy, an invigorated and socially responsible civil society, and a moralized family with gendered marriage at its center” (Duggan, 2003: 10).

Such a mindset of deregulation and free trade, created a very beneficial environment for businesses and corporations. However, it did not foster such an advantageous situation for Canadian citizens. For example, through ‘governing at a distance,’ there was an alteration in who became responsible for the welfare of citizens. The delivery of social welfare services was increasingly “transferred from government to the non-public sector in a variety of jurisdictions in Canada and elsewhere” (Kline, 1997: 331). And the Canadian government cut the amount of its Gross Domestic Product that it puts towards social programs, and not surprisingly, “these changes to the social infrastructure have had devastating impacts on the lives of many Canadians, especially those dependent on social support” (Brownlee, 2005: 6). Therefore, it has been those in the most need who have been greatly affected by such a political shift in mentality. As

Duggan (2003) argues, private households have become responsible for providing a social safety net, and,

[t]he gap between the needs of workers and their dependents, and the inadequate pay and benefits provided by their insecure, often no-benefits jobs, is left to be filled by over-stretched families and overburdened volunteer charities. Thus social service functions are *privatized* through *personal responsibility* as the proper functions of the state are narrowed, tax and wage costs in the economy are cut, and more social costs are absorbed by civil society and the family. In addition, this redistribution of costs and benefits has been starkly differentiated by hierarchies of race, gender, and sexuality. (Duggan, 2003: 15-16; emphasis in original)

How far has such an ideology extended? Such a philosophy regarding governing posits that, “society works best when business runs things and there is little possibility of government “interference” with business as possible” (McChesney, 1999: 6). However, we are not just talking about the economics of society when we refer to neo-liberalism, for it is not just a set of economic policies and it is more than a political philosophy (Rofel, 2007; see also Rose, 1992). It goes beyond that,

it is not only about facilitating free trade, maximizing corporate profits, and challenging welfarism. Rather, neo-liberalism carries a social analysis which, when deployed as a form of governmentality, reaches from the soul of the citizen-subject to education policy to practices of empire. (Brown, 2003: para 7)

This demonstrates an extension and dissemination of market values to all areas of life (Brown, 2003; Gill & Arthurs, 2006; Larner, 2000a) and within “this new orientation to government we are to prioritize our relationship to the market” (Palmer, 2008: 1-2). It is a rationality that renders, “the social domain economic” (Lemke, 2001: 203), and extends,

the rationality of the market, the schemes of analysis it proposes, and the decision making criteria it suggests to areas that are not exclusively or not primarily economic. For example, the family and birth policy, or delinquency and penal policy. (Foucault, 1997c: 79)

Therefore, “many dimensions of social life that once remained at least partly outside of the structure of the market have now been incorporated substantially into it” (Hallin, 2008: 43) and a system of “market governance” prevails (Larner, 2000a:11; see

also Larner, 1997). For example, the university has been among the social institutions, “subject to ‘enclosure’ by the logic of the market in the Age of Neo-liberalism” (Hallin, 2008: 43). In Canada, we have seen, “the commodification of knowledge and marketization of universities” (Martel, Hogeveen & Woolford, 2006: 636). Students become consumers and knowledge becomes something to purchase in a marketplace of ideas. We gradually move away from the original intentions of scholarly institutions. And as there is more and more corporate sponsorship within the university, we see the potential limitations to, “one’s capacity to conduct critical research, as certain types of research get organized off the public agenda” (Martel et al, 2006: 636).

Self-Governing Subjects

The overall impact of this framework has been to considerably undermine, “the sovereignty and legitimacy of the nation state” (Cammaerts, 2007: 2). Instead what we have seen is the nation state being replaced by “the market state” (Hoffman, 2004: 2) and by “consumer sovereignty” (Pauwels, 1999: 65). The latter pointing to an “individualistic, utilitarian model of citizenship” (Pauwels, 1999: 65), dominating late modernity. As Garland and Sparks (2000) maintain, late modernity has brought with it, “new freedoms, new levels of consumption and new possibilities for individual choice” (199). This has resulted in a move away from national strategies and the concept of ‘nation,’ and a focus on “individual rather than collective approaches” (McBride, 2001: 14).

In such a way, neo-liberalism has become “a wide-ranging political *and* cultural project” (Duggan, 2003: xi; emphasis added) which is premised on the notion of an “active society” (Dean, 1995) and an “active citizenship” (Larner, 2000b: 244; see also Evans, 1993). Within it, citizens are encouraged, “to see themselves as individualized and active subjects responsible for enhancing their own well being” (Larner, 2000a: 11)

and self-care. Therefore, we have seen a striking shift where now, citizens are constructed as “autonomous, rationally calculating, and free” (Gill & Arthurs, 2006: 445), and “*self-governing subjects* who regulate themselves without the need for state control or repression” (Gill & Arthurs, 2006: 445; see also Brown, 2003; Lemke, 2001). In such a societal structure, “its method is to govern people by getting them to govern themselves” (Cruikshank, 1999: 39).

Such a shift is demonstrated with the politics and actions of the criminal justice system. A shift to neo-liberal ideals has caused a greater focus on penalization and a move away from rehabilitation (Comack, 2006). Instead of rehabilitating offenders, a crime control strategy is being favoured which places all responsibility on the individuals for their actions. As a result, a “neo-liberal responsabilization model of crime control” emerges, where criminals are seen to be agents exercising free will and thus, “responsible for the choices they make” (Comack, 2006: 45). As Garland (2001) states, “rather than clients in need of support, they are seen as risks who must be managed” (175). Balfour (2006) asserts that a risk society has emerged wherein, “the homeless, the mentally ill, and the criminalized were no longer connected to conditions of oppression but, instead, were increasingly responsabilized and expected to make rational choices and to accept the consequences of those choices” (738). Therefore, as O’Malley (2001) suggests,

[p]unitive and just deserts penalties remove the welfare orientation of the previous penal regimes and bring to the fore the responsabilisation of individuals, while at the same time reducing correctional costs. Strict discipline programmes likewise focus on individual responsibility, while at the same time promoting values of self-reliance and application consistent with neo-liberal images of the active citizen. (21)

Therefore, when we render ‘the social domain economic,’ there are powerful consequences, like those seen in the criminal justice system. By shifting the responsibility for the welfare and care of citizens onto the individual themselves (Fudge

& Cossman, 2002), we are bound to see the creation and maintenance of various social problems and inequalities.

Citizenship (Re)Defined

Ask not what your country can do for you, ask what you can do for your country.
(John F. Kennedy, Inaugural Address, January 20, 1961, quoted in Weiler, 1984: 372)

When considering the definition of citizenship, we have to be aware that, “as a phenomenon it has not been static nor is it consistent across societies in the modern world today” (Dahlgren, 1995: 135). To understand the liberal concept of citizenship, we need to turn to T. H. Marshall. In his seminal text, *Citizenship and Social Class*, Marshall (1992) states that,

I propose to divide citizenship into three parts. [...] I shall call these three parts, or elements, *civil, political and social*. The civil element is composed of the rights necessary for individual freedom [...] By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. [...] By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society. (8; emphasis added)

For Marshall, to be a citizen in a modern liberal society was “to enjoy the right to equal treatment under the law, equal voting rights, and equal entitlement to what are considered basic social necessities of life such as education, health care, housing and minimum level of income” (Saunders, 1993: 61). And according to Marshall, the evolution of citizenship “is linked to the rise and expansion of the modern welfare state” (Kivisto & Faist, 2007: 3). Thus, “any erosion of the welfare state consequent upon the transition from a socialized to a privatized mode of consumption necessarily represents an erosion of citizenship rights” (Saunders, 1993: 61). Therefore, we have seen the deterioration of Marshall’s original concept, particularly since the 1970s, when we saw the rise of the neo-liberal political rationality (Kivisto & Faist, 2007: 3).

Increased globalism and the rise of neo-liberalism have changed the meaning of citizenship. Consequently, Canadians “are currently living through a moment of redefinition of citizenship” (Jenson, 1997: 628), where “the citizen is increasingly being reduced to the consumer” (Cammaerts, 2007: 5) and reconstrued as, “subjects of entrepreneurial choices” (Rofel, 1997: 16). Thus, we have entered a “consumption-based culture” (King, 2006: xxvi; see also Nava et al., 1997), where, “the ideals of social citizenship are replaced by the market-based, self-reliant, and privatizing ideals of new order” (Comack, 2006: 45). Citizens are encouraged (or required) to consume, “oneself into being in a life of constant and continual improvement and change” (Ringrose & Walkerdine, 2008: 230). In addition, these ‘new’ consumers are subject to surveillance which becomes naturalized in, “the consensual regime of neo-liberalism” (Couldry, 2006: 6). This shift has been, “unequivocally associated with the enterprising and individualistic self of neo-liberalism” (Larner, 1997: 375) and the consumer has become, “the hegemonic form of identity” (Larner, 1997: 376; see also King, 2003: 312). As Miller (1993) suggests,

[t]hese are not citizens who exist to act politically inside or outside the state; not citizens concerned with questions of policy or of political ideology. Rather, they are users of public services who are being offered a limited power of redress when those services are delivered unsatisfactorily. (135)

This is a point agreed upon by Pauwels (1999) who articulates that, “a growing gap is observed between the citizen and political and economic life” (65).

This ideology of consumerism, “encourages people to seek private solutions to public problems by purchasing a commodity” and “it urges them to buy their way out of trouble rather than pressing for social change and improved social provision” (Murdock, 1992: 19). Consequently, citizenship, “becomes less a collective, political activity than an individual, economic activity – the right to pursue one’s interests, without hindrance, in the marketplace” (Dietz, 1987: 382). As suggested by Smith (2005), neo-liberalist politics

stand out as, “a political project that aims to govern, manage and defuse contentious collective action” (79), favouring instead individual action that does not resist neo-liberal norms and practices. And this reveals how neo-liberalism is particularly, “incompatible with social movements that include economic justice as a goal” (Vavrus, 2007: 59).

Therefore, what we have is a new order of citizenship where, “the ideal citizen as consumer” is closely connected to the figure of “the citizen as volunteer” (King, 2006: 73). As Smith (2005) contends, we now live in the age of the “scrutinized volunteer,” who “makes a decision to give, a new form of noblesse based on the individual’s decisions to allocate money and time” (Smith, 2005: 79). Such a shift is reminiscent of Reagan’s declaration when he said, “volunteerism is part of our plan to give government back to the people” (quoted in McMurria, 2008: 309). It is further exemplified in the new UK Lib-Con-Dem government discourse of the ‘big society,’ which is based on a governmental initiative to encourage greater volunteering and philanthropy and foster the growth of volunteer groups and their role in delivering services and improving communities. In a speech made by Prime Minister David Cameron, he said, “the talents and initiative of people had been wasted” and claimed that, “over-centralised government had turned public sector workers into the “weary, disillusioned puppets of government targets”” (BBC News, 19 July 2010). Such a comment is illustrative of and supportive of these ideals of active citizenry that are being promoted through this larger push towards volunteerism and philanthropy that we have been gradually witnessing since the 1980s.

Through a discussion of Breast Cancer-directed philanthropic activity, Samantha King (2003, 2006) demonstrates how such activities have been a prominent and successful example of individual and corporate volunteerism and philanthropy. She outlines what has been constructed as “ideal citizenship” and how such a focus on volunteerism and philanthropy can be read, “as an effect of the desire to ‘govern at a

distance” (King, 2006: xxix). Similar to Dean (1995) and Larner (2000a, 2000b), King (2006) highlights that the notion of active citizenship is central to neo-liberal thought when she comments that strategies of government have been designed to, “replace the passive dependent citizen of the welfare state with the active consumer-citizen of Neo-liberalism” (73). For example, she states that,

[u]nlike the divisive and apathy-inducing technologies of welfare (in George H W. Bush’s words, “Government programs can erode the enthusiasm that volunteers should have – and do have- in their hearts”), donning a brightly colored silicone bracelet or participating in a leisurely 5K stroll on a Sunday afternoon is thought to help rekindle America’s “traditional” culture of personal generosity and constitute a more harmonious, benevolent, personally responsible and active citizenry. (King, 2006: xxvii)

Through such a lens, it is thought that individual and corporate giving can be the solution for societal needs, “in lieu of the state’s role in mitigating the social effects of capitalism” (King, 2006: xxvii). Furthermore, this active citizenry can help America when it faces tragedies such as September 11th 2001. Following 9/11 while the Bush Administration was preparing for military action, “ordinary” Americans, were told that, “they could best help the nation recover from this tragedy by doing two things: shopping and volunteering, with the donation of money a frequently cited example of the types of volunteerism in which people could engage” (King, 2006: 63).

This idea of shopping being the answer to life’s crises is an often invoked idea, as King (2006) mentions throughout her discussion of breast cancer, by consumers purchasing products, they “will help ‘raise awareness’ of breast cancer or find a cure for the disease” (xxx). Many companies have adopted the “Think Pink” terminology to sell products, with a portion of the profits from the purchase going towards the fight against breast cancer. Although a great initiative, it places a lot of responsibility on the individual consumer rather than the government in regards to funding vital research.

This discussion has pointed to the shifts in citizenship that we have seen and what it means to be a 'full citizen.' It has highlighted the ways in which citizenship has become equated with consumerism and consumer practices. The following discussion will develop this further by looking at what other significant changes we have seen, particularly in relation to sexuality.

Sexual Citizenship

People do not go around saying 'I want to be a sexual citizen.' It is not an identity which people aspire to, nor is it an explicit project which people usually group around. Nevertheless the concept is a useful metaphor, condensing a range of cultural and political practices that embrace a whole set of new challenges and possibilities. (Weeks, 1998: 37)

A discussion of sexuality and its association to citizenship has been largely missing from current studies of citizenship (Richardson, 2001; see also Gotell, 2007). However, as Richardson (2001) identifies, a visible trend in the inclusion of sexuality has been the growth of a concept of sexual (or intimate) citizenship, which attempts to understand, "the shifting map of sexual (and political) rights and obligations" (Bell, 1995: 304). Richardson (2000) contends that such a notion represents, the "expansion of the idea of citizenship as it relates to sexuality" (106). In this regard, we have seen, "an application of the concept of citizenship to a sphere of intimate behaviour that in historical terms was excluded from the public sphere of political debate" (Arthurs, 2004: 27).

In terms of deciphering the concept of sexual citizenship, many scholars have worked towards developing a concrete definition. Although there is yet to be a "singular agreed definition of sexual citizenship" (Richardson, 2001: 154), scholars such as David Evans, Diane Richardson and Ken Plummer have certainly contributed to the construction and development of the term. 'Sexual citizenship' was first introduced as a construct by David Evans in 1993. His book, *Sexual Citizenship: The Material*

Construction of Sexualities, gives a comprehensive discussion of the concept. Evans (1993) discusses the rights afforded citizens and pays attention to the impact of the market and consumption/purchasing power on individuals. Central to this discussion is the “importance of consumer power and commodification, and of established formal civil, political and social rights” (Evans, 1993: 8). He finds it particularly significant that, “not only did the citizen become a consumer but the commodities on sale became the entire machinery of citizenship” (Evans, 1993: 5). Through this discussion, Evans (1993) is concerned with those who are “deemed to be less than fully qualified citizens” (5). In so doing, he pays attention to sexuality and sexual desires and how they fit into the “marginal matrix of citizenship” (Evans, 1993: 6).

In line with Evans’s (1993) work, Diane Richardson continued to develop the idea of ‘sexual citizenship.’ She outlines two ways of understanding it. Consider the following,

[f]irst, it may be used to refer specifically to the sexual rights granted or denied to various social groups. In this sense, we may, like Evans (1993), conceptualize sexual citizenship in terms of varying degrees of access to a set of rights to sexual expression and consumption. Second, we can conceptualize sexual citizenship in a much broader sense in terms of access to rights more generally. In other words, how are various forms of citizenship status dependent upon a person’s sexuality? (Richardson, 2000: 107)

In this article, Richardson (2000) focuses on the former of the two approaches to sexual citizenship. She spends time considering ‘the sexual rights granted or denied to various social groups,’ and in one of her later articles asks within this frame, “how are we entitled to express ourselves sexually?” (Richardson, 2001: 153). She is interested in exploring this, particularly because of “the exclusion of lesbians and gay men from certain rights” and “the normative construction of the citizen as heterosexual” (Richardson, 2001: 155). The current research intends to adopt a similar framework, in that it will consider the rights afforded to Canadian citizens, especially as it pertains to sexuality.

Ken Plummer's work is also valuable when thinking about the construct of sexual citizenship. Plummer (1995) considers T. H. Marshall's original conception of citizenship and alters it to include a consideration of sexuality. He adds a fourth element to the 'three realms of citizenship' (civil, political and social) articulated by Marshall. He contends,

[t]o the existing three realms of citizenship, a fourth could now be added at century's end: that of *intimate citizenship*. This speaks to an array of concerns too often neglected in past debates over citizenship, and which extend notions of rights and responsibilities. I call this intimate citizenship because it is concerned with all those matters linked to our most intimate desires, pleasures and ways of being in the world. (Plummer, 1995: 151; emphasis added)

In this way, Plummer (1995) is concerned with the control and access over one's identity, particular as it pertains to 'intimate desires.' Through his discussion, he adds to the work of Evans and Richardson, for example, by speaking specifically about Marshall's original concept and what was missing. He articulates this idea of 'intimate' citizenship that is, "an attempt to remedy the limitations of earlier notions of citizenship" (Weeks, 1998: 39). And in Jeffrey Weeks' (1998) discussion of Plummer's idea of 'intimate citizenship,' he asserts that it is about, "enfranchisement, about inclusion, about belonging, about equity and justice, about rights balanced by new responsibilities" (39).

Further, Attwood (2006) asserts that, "it is particularly important that a vision of sexual citizenship is not allowed to drift towards the familiar westernized, masculinized, heterosexualized models which we have inherited" (92) and that we need to interrogate "the questions of who will decide which sexual practices and identities are acceptable and unacceptable" (92).

Post-feminism: Making Sense of Feminism in a Neo-Liberal Age

Marlene: I don't mean anything personal. I don't believe in class. Anyone can do anything if they've got what it takes.

Joyce: And if they haven't?

Marlene: If they're stupid or lazy or frightened, I'm not going to help them get a job, why should I? (Churchill, 1982: 97)

Caryl Churchill wrote *Top Girls* in the early 1980's and it causes us to think about the relationship between feminism and neo-liberalism. Set in Thatcher's England, the play focuses on the sacrifices women have to make to take on top business positions, those traditionally dominated by men. Throughout the play, Marlene, the main character, uses the discourse of the individual to explain her actions and drive. What becomes evident is both "the gendered dimensions of the rhetoric of Thatcherism" (McNeil, 2007: 225) and the pervasive idea that began to be advanced in the 1980s, that, "a career-oriented woman is a lonely and unhappy one" (Ferriss & Young, 2008: 7). Such ideas prompt us to think about how neo-liberalism impacts on feminism and consequently, the formation of citizenship. It is vital to consider the consequences of such a political shift for women. Not only do we have to think about gender relations and women's place in the labour market (see Jenson, 1996; Lerner, 2000a), but also whether there are gender differences in what we consider 'citizenship' and further, the ideal citizen. James (1992) draws our attention to the fact that, "although liberal theory contains ... some means to take account of the differences between individuals, it has signally failed to pay attention to differences of gender in its construction of a norm of citizenship" (52). Therefore, it is imperative to consider the relation between neo-liberalism and gender as some feminist scholars have begun to do.

This section examines the "gendered dimensions of citizenship" (Aapola, Gonick & Harris, 2005: 167). Through such an endeavour, I will begin by considering the place of feminism since 1980s and how it has been altered through the emergence of a set of post-feminist ideals that are aligned with the goals of neo-liberalism. In such a way, since the 1980s, an ideal post-feminist subject has materialized. As part of this discussion, attention will be paid to the representation of the female body and femininity

in this new space and consider who is made invisible and who is excluded from these 'ideals,' particularly in relation to articulations of the 'ideal' body.

Where is Feminism?

Since the 1980s, we have seen significant shifts in relation to the shape of feminism and how it is viewed within the social and cultural landscape. A number of scholars, such as Angela McRobbie, have pointed to the dismantling of feminism that has occurred in the last three decades. McRobbie (2009) contends that the current milieu "is marked by a new kind of anti-feminist sentiment" (1), where "there is no longer any place for feminism in contemporary political culture" (McRobbie, 2007a: 721). In such a way, there has been a "fading away of feminism and the women's movement" (McRobbie, 2007a: 719) and "the undoing of feminism" (720; see also McRobbie, 2004) as we have known it. As a result, it is wrongly assumed that women do not need 'feminism' anymore and that, women "are already empowered, or so deeply in crisis that they struggle to come up with even personal solutions to their problems" (Aapola, Gonick & Harris, 2005: 194). This latter point highlights the move to individualizing problems that was so clearly evident in our discussion of neo-liberalism. We have seen a reshaping of both girlhood and womanhood, "to fit with new or emerging (neo-liberalised) social and economic arrangements" (McRobbie, 2007a: 721), where the idea that "if you fail, if you suffer, it's *your* fault" (Heinecken, 2003: 153) is continually promoted. In this manner, a requirement surfaces for women and girls to "perform as economically active female citizens" (McRobbie, 2007a: 722) and operate within a "well-regulated liberty" (McRobbie, 2007b: 38). Through notions of freedom, choice and empowerment,

feminism is aged and made to seem redundant. Feminism is thus cast into the shadows, where at best it can expect to have some afterlife, and where at worst it might be regarded ambivalently by those young women who must in more

public venues stake a distance from it, for the sake of social and sexual recognition. (McRobbie, 2004: 3; see also McRobbie, 2007b; McRobbie, 2009)

Numerous questions are asked as to why feminism is viewed in such a way. For example, McRobbie (2007b) poses, “why is feminism so hated? Why do young women recoil in horror at the very idea of the feminist?” (31). In my own experience of teaching, I have seen these types of reactions to notions of feminism or to the idea of someone being a feminist. For example, after teaching one class on feminist criminology, a student asked his teaching assistant “is she a feminist or something?” The tone of the question indicated that the student found such an alignment problematic. Therefore, it seems that we exist in a social and cultural time, that individuals, both male and female, find the feminist identity difficult to negotiate. Instead of recognizing the power of feminism or even its utility, individuals come to view feminism as “old and weary” (McRobbie, 2000: 211; see also Bulbeck & Harris, 2008) and strive to create a distance between themselves and what they see as a ‘feminist.’ Brunson (2005) calls this a “disidentity – not being like that, not being like those other women, not being like those images of women” (112).

The media plays a central role in this ‘undoing of feminism.’ In particular, through the development of a post-feminist media culture, women and girls are exposed continuously to images of the empowered female imbued with agentive power. Consequently, we are offered, “an ‘acceptable’ version of feminism” (Heineken, 2003: 153) that does not disrupt the notion that women have achieved equality and are able to ‘have it all.’ Post-feminism, “offers the pleasure and comfort of (re)claiming an identity uncomplicated by gender politics, postmodernism, or institutional critique” and “performs as if it is commonsensical and presents itself as pleasingly moderated in contrast to a “shrill” feminism” (Negra, 2009: 2). As a result, “post-feminism is privileged in discursive patterns that constitute a solipsistic perspective on women: generalizing about women

using a small and very particular group of women's voices and concerns to the exclusion of others" (Vavrus, 2002: 165-166). In this next section, we will explore these ideas further. What do we mean by this term 'post-feminist' and how does it affect the (re)production of citizenship and female identity? And who does it exclude and make (in)visible?

The Post-feminist Masquerade

From reviewing numerous texts on the topic of post-feminism,¹¹ it became evident that the definition of the term is complicated, contested and at times confused.¹² As Rosalind Gill (2007a) points out, "after nearly two decades of argument about post-feminism, there is still no agreement as to what it is and the term is used variously and contradictorily to signal a theoretical position, a type of feminism after the Second Wave, or a regressive political stance" (Gill, 2007a: 147-148; see also Gamble, 2000; Holmlund, 2005; Lotz, 2001). The goal of the following discussion is to travel some distance in trying to understand and define post-feminism, particularly in ways that relate to the current research. As Lotz (2001) comments, using such terms as 'post-feminism' "(is) largely useless unless the user first states his or her definition" (Lotz, 2001: 106; see also Lotz, 2003); therefore, we will review relevant literature to achieve this end.

Sarah Gamble (2000) supplies a comprehensive discussion of 'post-feminism' and definitions that have been provided by scholars in the area. Lotz (2001) summarizes

¹¹ The heading for this section is taken from Angela McRobbie's (2007a) concept of a 'post-feminist masquerade.'

¹² It must be noted that there is a vast literature on post-feminism and within it there is a comprehensive discussion of the different configurations of post-feminism in different countries. For example, there is a growing conversation about the distinction between post-feminism in the UK and the United States of America. For example, Ashby (2005) talks about the various forms of post-feminism and argues that, "there can be no "one-size-fits-all" framework" (128). Due to space and scope of the current research, a detailed discussion of this cannot happen and will have to wait for future work. What I will do is discuss the general themes related to defining post-feminism and its place in contemporary society.

Gamble's offering, and presents a succinct statement about the various definitions of 'post-feminism.' She states that there exists, "conflicting definitions of post-feminism, recognizing its use in relation to backlash, postmodernism, and as the feminism of the third wave" (Lotz, 2001: 112). Connected to the latter two, Lotz (2001) points out that there has been effort to separate 'post-feminism' from the more negative meaning it has acquired. She contends, "the utility of reclaiming the term as a descriptor that delineates recent developments in feminist theory and representations, instead of its more negative connotation" (Lotz, 2001: 106; see also Lotz, 2003).

In this regard, there has been a trend to understand post-feminism and its more theoretical grounding. For example, Ann Brooks (1997) maintains that, "the term is now understood as a useful conceptual frame of reference encompassing the intersection of feminism with other anti-foundationalist movements including postmodernism, post-structuralism and post-colonialism" (1). A primary factor within this "conceptual shift within feminism" (Brooks, 1997: 4) is to move away from a more essentialist discourse of identity and move towards one of difference, recognizing diversity in relation to race, ethnicity, class, sexual orientation, age and nationality (Sonnet, 1999: 170). Therefore, post-feminism is "not a depoliticisation of feminism, but a political shift in feminism's conceptual and theoretical agenda" (Brooks, 1997: 4). It becomes "dedicated to disrupting universalising patterns of thought" which allows for it to be seen in line with such theoretical movements as postmodernism (Gamble, 2000: 50). As Friedberg (1993) comments, post-feminism is "the copulative discursive product of two intertwined theoretical 'bodies'," feminism and postmodernism (Friedberg, 1993: 195).

A second trend is to view post-feminism as the 'third wave' of feminism which emerged in the early 1990s. As with the term 'post-feminism,' there are multiple trajectories of third-wave feminist thinking (Lotz, 2003). Perceiving it as related to 'post-

feminism' is just one way that scholars have understood the third-wave that followed the second-wave of feminism. Amanda Lotz (2003) contends that, "post-feminism is not at odds with third-wave feminism" and "responds similarly with critiques of feminisms that have had racist and essentialist tendencies" (5). Therefore, we are using 'post-feminism' here as outlined above by scholars such as Brooks, where feminism is not depoliticized, but incorporated and revised into new strategies to tackle and challenge the place of women within the social, economic, and cultural landscape. This critical use of 'post-feminism' is outlined in Stacey's (1987) discussion of the term where she says,

I view the term post-feminist as analogous to "postrevolutionary" and use it not to indicate the death of the women's movement, but to describe the simultaneous incorporation, revision, and depoliticization of many of the central goals of second wave feminism. I believe post-feminism is distinct from antifeminism and sexism, for it aptly describes the consciousness and strategies increasing numbers of women have developed in response to the new difficulties and opportunities of postindustrial society. In this sense the diffusion of post-feminist consciousness signifies both the achievements of, and challenges for, modern feminist politics. (8)

Thus, post-feminism represents the third wave agenda that a number of feminists adopt.

A number of scholars have said that we need to be cautious with aligning post-feminism with third wave feminism. They do so because they characterize post-feminism as the sensibility used and popularized in popular media, which is the more negative definition indicated by Lotz. For example, Tasker and Negra (2007) contend that post-feminism, "needs to be carefully differentiated from third-wave feminism (the latter a self-identification rather than a tag provided by the popular media)" (19). In this vein, Gamble (2000) argues that, "third wave feminism is capable, as post-feminism is not, of describing a position from which past feminisms can be both celebrated and critiqued, and new strategies evolved" (Gamble, 2000: 54). Gamble's (2000) stance is that post-feminism is a term that "originated from within the media in the early 1980s, and has always tended to be used in this context as indicative of joyous liberation from the

ideological shackles of a hopelessly outdated feminist movement” (Gamble, 2000: 44). Therefore, it does not celebrate or invoke past feminisms as the third wave, viewed as distinct from post-feminism, might do.

Conceptualizing post-feminism in relation to popular media has certainly been a predominant trend. Definitions emerging from this perspective often relate post-feminism to a backlash against feminism. Tania Modleski’s seminal text, *Feminism Without Women: Culture and Criticism in a “Post-feminist” Age* (1991) talks about “the advent of post-feminism” and how it has played a role in “undermining the goals of feminism” and “in effect, delivering us back into a prefeminist world” (Modleski, 1991: 3; see also Sonnet, 1999). Such ideas are also put forward by Susan Faludi (1991) in her influential book, *Backlash: The Undeclared War Against American Women*. Her book brought our attention to a shift in society and culture, where she argues that there was a definite backlash against feminist goals and ideas. Faludi (1991) contends that, “the backlash has moved through the culture’s secret chambers, traveling through passageways of flattery and fear” (xxii). In particular, she comments that such ideas have infiltrated popular culture. To illustrate this, Faludi (1991) states,

[i]n the last decade, publications from the *New York Times* to *Vanity Fair* to the *Nation* have issued a steady stream of indictments against the women’s movement, with such headlines as WHEN FEMINISM FAILED or THE AWFUL TRUTH ABOUT WOMEN’S LIB. They hold the campaign for women’s equality responsible for nearly every woe besetting women, from mental depression to meager savings accounts, from teenage suicides to eating disorders to bad complexions. The “Today” show says women’s liberation is to blame for bag ladies. A guest columnist in the *Baltimore Sun* even proposes that feminists produced the rise in slasher movies. By making the “violence” of abortion more acceptable, the author reasons, women’s rights activists made it all right to show graphic murders on screen. (Faludi, 1991: x-xi)

In this way, popular post-feminism is “located within the generalized antifeminist backlash that has been given free rein in the past ten years” (Walters, 1995: 119; see also Moseley & Read, 2002; Owen, Stein & Berg, 2007). Walters (1995) delineates this

connection between antifeminist sentiments and post-feminism with this 'interesting' tale about the women's movement,

[i]n this time of backlash and revisionism, the popular narrative of the history of the contemporary women's movement unfolds like this: In the beginning ... our newly awakened anger and astonishment at the realities of our own oppression caused us to take positions that were extreme. We went too far, either becoming "like men" in our quest for acceptance or finding ourselves doing double duty at home and work. One of these "extreme" positions was the radical rethinking of motherhood as the sole fulfilling role of the adult woman. But as the popular historians would have it now, we have emerged from the dark, angry nights of early women's liberation into the bright dawn of a post-feminist era. (Walters, 1995: 119-120)

Post-feminism is regarded as the fun, pleasure-seeking, empowered form of feminism that stands in stark contrast to the 'old and weary' feminism of the second-wave, for example. However, underlying this, many scholars argue that feminism has in fact been dismantled by this rise of post-feminism, as discussed earlier. As Bonnie Dow (1996) maintains, "'backlash' implies a wholesale rejection of feminist ideals, an attempt to demonize women's liberation and to return women to the subordinate roles of a bygone era" (Dow, 1996: 86-87). Imelda Whelehan (2000) uses the term 'retro-sexism' to reflect this shift. She believes that we have moved into an era of 'retro-sexism,' which stands as a "nostalgia for a lost, uncomplicated past peopled by 'real' women and humorous cheeky chappies, where the battle of the sexes is most fondly remembered as being played out as if in a situation comedy" (11). As a result, inequality and oppression seem to be romanticized, glossing over a need for feminist theory and action.

However, a number of scholars ask, is post-feminism *simply* a backlash or is it more complicated than that? Rosalind Gill (2007b) draws our attention to this question and argues that, "although post-feminism ... is somewhat hostile to feminism, post-feminist discourses are much more than simply statements of anti-feminism. This is because of the relationship they claim to/with feminism" (253; see also McRobbie, 1994). Therefore, as Dow (1996) contends, there is not "a clear-cut attitude" towards

feminism, because “some discourse which questions certain feminist issues and/or goals assumes the validity of other feminist issues and/or goals” (87). There is an ambivalence and contradictory relation between feminism and post-feminism. To deal with this complicated relationship, Gill (2007a) offers a different way of reading post-feminism. She argues that it can be delineated as a sensibility demonstrated in media texts. For example, she states,

[p]ost-feminism is understood best neither as an epistemological perspective nor as an historical shift, nor (simply) as a backlash in which its meanings are pre-specified. Rather, post-feminism should be conceived of as a *sensibility*. From this perspective post-feminist media culture should be our critical object – a phenomenon into which scholars of culture should inquire – rather than an analytic perspective. This approach does not require a static notion of one single authentic feminism as a comparison point, but instead is informed by postmodernist and constructionist perspectives and seeks to examine what is distinctive about contemporary articulations of gender in the media. (Gill, 2007a: 148; emphasis added)

I find Gill’s articulation of post-feminism to be compelling and relevant to today’s cultural landscape. Many scholars have taken on post-feminist media culture as the ‘critical object’ because, through identification of the post-feminist discourse, it reveals constructions of gender, femininity, and the body that continue to be or become pervasive in the public sphere. There is a growing body of literature that explores the development and existence of post-feminist discourse within popular culture (for example, see Arthurs, 2003; Dow, 1996; Kim, 2001; Lotz, 2001; Moseley & Read, 2002; Negra, 2009; Tasker & Negra, 2007), and through this, we are able to see the “changing face of feminism in televisual discourse” (Kim, 2001: 319) and other media texts. Many of these writings consider the question posed by Tasker and Negra (2005) that asks, “how do we address and make sense of a post-feminist media culture that repeatedly and loudly insists that feminism is no longer relevant because it has somehow succeeded?” (108). Such a question is relevant and important because of the growing strength of post-feminism and a post-feminist discourse, and a recognition that, “we are

living in an essentially post-feminist culture” (Boyle, 2010b: 204). As Tasker and Negra (2007) maintain, post-feminism has emerged as “a dominating discursive system” (2-3) that plays a role in (re)creating “the figure of woman as empowered consumer” (Tasker & Negra, 2007: 2).

This idea of the ‘empowered consumer’ causes us to think about the work of Michelle Lazar (2006). In this particular article, Lazar (2006) is talking about contemporary advertising in Singapore and, through analysis of various examples, she discusses “the articulation of “power femininity”” (505) evident in the adverts. Lazar (2006) contends that this concept emerges out of the discourse of post-feminism. She states that, “popular (post)feminism is a hybrid media discourse that blends feminism and post-feminist elements with consumer capitalism to produce a de-politicized *power femininity* as one of its subject effects” (Lazar, 2006: 513; emphasis added).¹³ Consequent to her analysis of the adverts, she argues that, “advertisers distil feminism of its values and priorities to produce a signifier that is emptied of its political content, resulting in a brand of popular “commodity feminism” that is in the service of commodity consumption” (Lazar, 2006: 505). Through this, women are “united by consumption” (Lazar, 2006: 514) and their agentive power, “is directly tied to consumerism, i.e., women’s confidence and ability to act are enabled by and premised upon their consumption of beauty products and services” (Lazar, 2006: 510; see also Mizejewski, 2005). This becomes particularly troubling because, through this reliance on and power of consumerism, there is an “erasure of difference” between women (Lazar, 2006: 514) and creation of “certain criteria for inclusion” (515) in this “sisterhood of power femininity” (Lazar, 2006: 515). For those women who are unable to be or refuse to be, “part of the

¹³ See also Lazar (2009). She discusses “the formation of post-feminist feminine identities” through the notion of ‘entitled femininity’ (372). In this, she argues that ‘entitled femininity’ “celebrates as well as repudiates feminism, and re-installs normative gendered stereotypes” (371).

consumer collective,” they are “positioned as socially inadequate and uninformed” (Lazar, 2006: 515). In this way, post-feminist media culture rebukes the growing importance being placed on intersectionality. As Kelly Hannah-Moffat (2010) contends, intersectionality “refers to the interaction between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements and the outcomes of these interactions.” As a result, recognition of these intersecting factors reveals their power on women’s lives and the complex nature of societal inequalities. However, in a post-feminist narrative, they are erased and all women are delineated as ‘empowered’ and expected to perform in certain, acceptable and normative ways.

Further analysis of this ‘supposed’ empowerment brings us to consider the work of Rosalind Gill further. In her work, she points to a number of features of post-feminist discourse, with the primary one being an identified shift from the objectification of women to a subjectification. Lazar (2006) comments that this shift, “entails a resignification of the sexual terrain from being a sign of women’s exploitation to that of women’s empowerment” (Lazar, 2006: 512). The scope of this modification will be considered along with its consequences.

From Sex Object to Sexual Subject

In Laura Mulvey’s (1989) seminal piece on the gaze, she outlines that, “in a world ordered by sexual imbalance, pleasure in looking has been split between active/male and passive/female” (19). She argues that “women are simultaneously looked at and displayed” (Mulvey, 1989: 19), primarily for male pleasure. Women exist as, “objects of desire and spectacle” (Hansen, Needham & Nichols, 1991: 207; see also Macdonald, 1995; Stacey, 1992) and are disempowered by such a hierarchical structure. In current society, Rosalind Gill suggests that there has been a shift away from this and that what we are seeing instead is women as subjects rather than objects. While talking about

advertising, Gill (2008) argues that there has been a “move away from depictions of women as straightforward objects of the male gaze, and there is a new emphasis in some adverts upon women’s *sexual agency*” (38; emphasis in original); a shift that is rooted within an ever increasing sexualized culture.

Through an analysis of post-feminist media culture, Gill identifies this alteration in how the female body is constructed and viewed, and finds that there has been a significant shift away from passivity towards ‘active’ subjecthood. She contends that,

[w]here once sexualized representations of women in the media presented them as passive, mute objects of an assumed male gaze, today sexualization works somewhat differently in many domains. Women are not straightforwardly objectified but are portrayed as *active, desiring sexual subjects who choose* to present themselves in a seemingly objectified manner because it suits their liberated interests to do so. (Gill, 2007a: 151; emphasis added; see also Gill, 2007b; Gill, 2009b)

Therefore, in this regard, women are “pleasing themselves” when they dress or act in a sexy manner (Gill, 2007b: 91; see also Gill & Herdieckerhoff, 2006). When they wear t-shirts that display slogans such as, “one sexy bitch,” “J’adore sex,” or “F**K me I’m legal,”¹⁴ it is because they *want* to, rather than a result of a dominating male gaze. Gill (2008) states that, in this vein, there is a dispersion of a particular image of womanhood, that of the, “young, attractive, heterosexual woman who knowingly and deliberately plays with her sexual power and is always ‘up for it’ (that is, sex)” (Gill, 2008: 41). This suggests a certain liberty in the presentation of self. However, as Kim (2001) denotes, “moving from passive object of the male gaze to self-objectification does not necessarily achieve subjectivity, and it can be a *false freedom*” (Kim, 2001: 324; emphasis added). This ‘false freedom’ is also highlighted by Gill (2008), who suggests that, women are *required* to display a particular construction of self supported by post-feminist and neo-liberal ideals and are therefore not free to construct their own sense of self. She argues

¹⁴ T-shirt designs found on an online clothing site, <http://www.fukstore.com/Women-T-Shirts/c33/index.html?page=2>

that to Cronin's (2000a) concept of 'compulsory individuality,' which almost obliges people to be free and make choices regarding selfhood,¹⁵ "we may now have to add *compulsory (sexual) agency* as a required feature of contemporary post-feminist, neo-liberal subjectivity" (Gill, 2008: 40; emphasis in original).

Consequently, within this frame, 'sexual subjecthood' is presented in a certain way. This then promotes a monitoring of the self to ensure that certain goals and ideals are achieved. Therefore, what emerges is "a shift in the way that power operates: from an external, male judging gaze to a self-policing, narcissistic gaze" (Gill, 2007a: 151; see also Gill, 2003; Gill 2008). This involves a process of, "self-surveillance, self-monitoring and self-discipline" (Gill, 2007a: 155), which are actions advanced continuously within post-feminist media culture. The gaze, as articulated by Mulvey (1989), "is internalized to form a *new disciplinary regime*" (Gill, 2008: 45; emphasis added), which produces "the self-surveilling post-feminist subject" (Negra, 2009: 119). The young woman "is thus an intensively managed subject of post-feminist, gender-aware biopolitical practices of new governmentality" (McRobbie, 2007a: 723; see also, McRobbie, 2001); a framework that will be explored in detail in the following chapter.

Resulting from this, Gill (2008) suggests that, although at first such a shift seems positive, "there are good reasons for avoiding a too easy celebration of the empowered sexual agency" (43). She has a more pessimistic reading of it, because of the regulatory functions it serves on the female body, and for "what it renders invisible" (Gill, 2008: 44; see also Gill, 2003). For example, "only some women are constructed as active desiring sexual subjects" (Gill, 2003: 103; see also, Gill, 2007a; Macdonald, 1995), in media representations, to the detriment of others. There are "*exclusions* of this representational practice" (Gill, 2003: 103; emphasis in original), where some women are made invisible.

¹⁵ We will talk further about Cronin's (2000) concept of 'compulsory individuality' in the following chapter.

Gill (2008) contends that numerous media representations operate, “within a resolutely heteronormative economy” (Gill, 2008: 43), where “anyone living outside of the heterosexual norm” are excluded (43). The image that dominates post-feminist media culture, then, is that of the young, white, heterosexual, middle-class female permeated with sexual power and agency (which is primarily aligned with attractiveness) (Gill, 2008: 44). In line with this, Gill and Herdieckerhoff (2006) question this notion of ‘freely choosing sexual subjects’ because there is a lack of diversity in the images of women that we see. They state,

what makes the notion of new freely choosing sexual subjects so problematic is that it presents women as entirely free agents and cannot explain why if women are really just “pleasing themselves” the resulting valued look is so similar: thin, toned, hairless body, etc. (Gill & Herdieckerhoff, 2006: 499; see also Gill, 2003)

Through this reading of post-feminist media culture, there are exclusionary practices which serve to construct an ideal female citizen. Although a shift away from objectification pushes us to think that we have moved away from the oppressive male gaze, Rosalind Gill prompts us to query whether it really indicates a positive step for women. The governing and regulation of self are highlighted within this post-feminist, neo-liberal era.

The ‘Can-Do’ Girl

Another feature of post-feminist discourse is the construction of the ‘can-do’ girl. Throughout the discussion above, the links between both neo-liberalism and post-feminism became apparent. With this idea of the ‘can-do’ girl, “rhetorics of neo-liberalism become particularly visible in representations of young women” (Hasinoff, 2008: 329). What we see is “the remaking of girls and women as the modern neo-liberal subject” (Walkerdine, Lucey & Melody, 2001: 3), capable of working hard and succeeding in the current socio-political landscape. The ideal citizen becomes, “the “can-do girl” who is

successful and career-oriented,” an idea that is promoted as “an attainable norm for all young women” (Hasinoff, 2008: 329; see also McRobbie, 2007a). This paradigm sets up a framework for how young women are to act and behave in society, particularly in relation to the labour market. Subsequently, “a new normativity” emerges, which serves as “a consistent set of injunctions about ‘how to be’ for young women” (McRobbie, 2001: 362). A normativity that elevates the idea of young women as “self-making, resilient, and flexible” subjects (Harris, 2004: 6). Young women are persuaded by the notion that, “girls can do anything” (Harris, 2004: 8), despite difference amongst them.

Harris (2004) negotiates this construction of the ‘can-do’ girl and contends that it exists alongside the ‘at-risk’ girl. Harris (2004) argues that there are, “new depictions of girls as either can-do or at-risk” (14; see also Projansky, 2007), and there is a regulation of young women through these constructions. In this regard, Harris (2004) argues that this notion of the ‘can-do’ girl, “functions as a powerful ideal that suggests that all young women are now enjoying these kinds of lives” (8), which fails to recognize that, “many young women are not living in ways that match the image of success” (9; see also McRobbie, 2001). Young women are identified to be ‘at-risk’ if they are not able or willing to achieve the standards operant in this construction of the ideal subject/citizen. Socioeconomic factors are not taken into account, and instead, “their circumstances are labeled ‘failure,’ and this is attributed to poor choices, insufficient effort, irresponsible families, bad neighbourhoods, and lazy communities” (Harris, 2004: 9). It is these factors that delineate who are designated as ‘at-risk’ – “the failed subject” (Hasinoff, 2008: 329) is the one who is unable or unwilling to make the *right choices*. This “post-feminist fantasy” rewards the ‘can-do’ girls, “who stay focused and work hard to succeed” but strives to regulate and control ‘at-risk’ girls whose failure, “is depicted as a set of personal limitations” and a result of “individual choice” (Harris, 2004: 27).

This discourse around the 'can-do' girl takes various forms within media culture. Popular terminology that has been utilized widely to depict these ideas relate to the notion of 'girl power.' According to Harris (2004), "one of the most important words in the new lexicon of young female success is *girlpower*. The concept of girlpower has been highly significant in the image of young women as independent, successful, and self-inventing" (Harris, 2004: 16; emphasis in original; see also Aapola, Gonick & Harris, 2005; Ashby, 2005; Whelehan, 2000). As Jackson (2006) maintains, "girl power girls are "can-do" girls agentic and confident; powerfulness, independence, and equality are assumed in all aspects of being a girl, including, and perhaps especially, as far as her sexuality is concerned" (Jackson, 2006: 471).

There has been - and continues to be - multiple references to this notion of girl power in popular culture. You can just turn on the *Disney* channel for example, to see the *Cheetah Girls* – a franchise that is incredibly popular with young girls of all ages - sing their popular song, Girl Power:

Throw your hands up if you know that you're a star
You better stand up if you know just who you are
Never give up never say down
Girl Power Girl Power!!
Throw your hands up if you know that you're a star
You better stand up if you know just who you are
Never give up 'cause we've come too far
Girl Power Girl Power!!¹⁶

Additionally, the *Spice Girls*, a British pop 'girl' group that was formed in 1994, embraced this notion of girl power and female empowerment. Through their performance of selves, they displayed the strong, sexy, confident female self that is central to 'girl power' rhetoric. However, as Jackson (2006) contends, what we saw was also "contradictory versions of femininity: strong and confident on the one hand, traditionally feminine (i.e.,

¹⁶ Accessed on <http://www.elyrics.net/read/c/cheetah-girls-lyrics/girl-power-lyrics.html>, July 11th 2009.

appearance produced for the male gaze) on the other” (472) – an observation that seems common with such representations of ‘girl power.’ Therefore, this sense of empowerment does not seem to “erase dominant discourses of conventional femininity” (Jackson, 2006: 484), even though there has been a shift from objectification to sexual subjecthood, as suggested by Rosalind Gill.

Consequently, notions of ‘girl power’ have been met with mixed reactions. As Gonick (2006) notes, such a term is “celebrated by some for creating more expansive forms of femininity and critiqued by others for the ways it transforms feminist ideals into crass consumerism” (6). In terms of the latter, the mainstreaming and “commodification of Girl Power” (Gonick, 2006: 10) has led scholars to consider the narratives of girlhood that are promoted through these spaces and the ideals of female subjecthood that are formulated. Gonick, Renold, Ringrose and Weems (2009) argue that within this frame, girls “are now *expected/demanded* to be fully self-actualized neo-liberal subjects” (2; emphasis in original), which can serve to be exclusionary.

As with the discourse around the ‘can-do’ girl, the rhetoric of girl power can function to exclude. For example, Walkerdine et al. (2001) interviewed young women in Britain about their transition to womanhood. From this, they state, “in our view the discourses of ‘girl power’, which stress the possibility of having and being what you want, provide an ideal that it is almost impossible to live up to, and through which young women read their own failure as personal pathology” (Walkerdine, Lucey & Melody, 2001: 178; see also Ringrose, 2007). Such a discourse can be stifling and damaging. If an unattainable goal is raised up as the ideal, many girls can suffer from a failure to achieve it – not because of personal limitations or pathology but because of

socioeconomic circumstances. Therefore, these “normative views of girlhood” (Gonick et al., 2009: 3) can play a role in shaping citizenship and demarcating boundaries.¹⁷

The (Missing) Discourse of Female Desire

A third feature of post-feminist discourse is the visibility and representation of female desire in the social and cultural landscape. Michelle Fine’s (1988) influential article set the groundwork for a growing discussion on this topic as she brought to light ‘the *missing* discourse of female desire.’ Her focus was primarily on the educational system and sex education curricula – where she felt that there was a significant lack of recognition of female sexual desire. She maintains that,

within today’s standard sex education curricula and many public school classrooms, we find: (1) the authorized suppression of a discourse of female sexual desire; (2) the promotion of a discourse of female sexual victimization; and (3) the explicit privileging of married heterosexuality over other practices of sexuality. (Fine, 1988: 30)

Fine (1988) demarcates this absence and asserts that, “a discourse of desire, though absent in the “official” curriculum, is by no means missing from the lived experiences or commentaries of young women” (35). Therefore, she advocates for such a dearth to be rectified through recognition of female sexuality, particularly through a discussion of desire and pleasure, and she argues that such discussion needs to go beyond the “official discourses of sexuality” (Fine, 1988: 40), that are continually promoted in curricula and beyond.

Tolman (2005) talks about Fine’s (1988) seminal piece and its consequent impacts on feminist scholarship. Tolman (2005) states that, in Fine’s article, “the denial

¹⁷ Such a discussion also raises the question of whether these ideals of girlhood can be resisted and whether there are spaces to demonstrate a sense of agency. Gonick et al. (2006) ask, “where do the possibilities for resistance lie?” (4). We can turn to the work of Currie, Kelly & Pomerantz (2009) and their Vancouver-based project to provide some examples of resistance. Through interviewing local girls, the researchers found ways in which the interviewees were ‘reinventing girlhood’ and finding ways to challenge mainstream ideas around identity and femininity.

of female adolescent sexuality through the sanctioned discourses of victimization, vulnerability and morality was laid bare, and the missing discourse of girls' sexual desire is now a significant discourse of research, theory and practice focused on girls' sexuality" (5; see also Gill, 2008). What is recognized in current research is that there has been an explosion of representations of female desire and sexual agency seemingly filling in this gap identified originally by Fine (1988). Tolman (2005) asks, "In what arenas do we still encounter a roaring silence about female adolescent girls' sexual desire?" (Tolman, 2005: 6). A number of people would argue that there is no longer a 'roaring silence.' Harris (2005) contends that, "young women are afforded more opportunity to speak, enact and display sexual desire than ever before" (39). However, she cautions an easy celebration of this increased visibility. Harris (2005) questions "the regulatory elements of this public emergence of a discourse of desire" (39) and suggests that, "the feminist project of eliciting this missing discourse has become somewhat problematic" (41).

Jane Ussher (2005) suggests that one reason for an apprehensive response to the growing proliferation of images of female sexual desire and the increasing space given to expressing desire is because of the type of images that are promoted and who they exclude. She argues that,

[d]espite recent discussions of 'girl-power', post-feminism, and the celebration of woman as agentic sexual subject, hegemonic sexual scripts still position women's desire as a response to man, 'sex' as heterosexual intercourse, and practices of desires that deviate from this narrow norm as problematic or perverse. (Ussher, 2005: 27)

Therefore, a diversity of sexuality is overlooked and some individuals are positioned, "outside of the heterosexual matrix" (Ussher, 2005: 29), that does nothing for creating a space for lesbian sexuality and desire. As Ussher (2005) states, "lesbian sexuality is

invariably invisible, or staged for titillation” (27), which does not allow for or promote spaces for serious dialogue or debate about varied forms of female sexual desire.

Such a discussion pushes us to question whether a simple recognition of female sexual desire is enough. As a number of scholars have recognized, although there may be more discussion of a discourse of desire, that does not mean that it is sufficient or adequate or that it represents any kind of liberation. For example, Burns and Torre (2004) argue that Fine’s (1988) original concerns are still valid and state that they, “understand “missing” as an insufficiency or inadequacy of current discourses of girls’ desire, rather than as absence or lack thereof” (128). In this vein, Gill (2008) suggests that, “‘voice’ or ‘agency’ may not be the solution to the ‘missing discourse of female desire’ but may in fact be a technology of discipline and regulation” (35). Therefore, although girls may be given an increasing voice regarding sexual desire, this does not necessarily equate to a full discourse about female desire. Further, as Harris (2005) comments, “regulation and oppression can occur not only through shutting down voices, but by evoking them” (Harris, 2005: 41). We are often pushed to believe that, by giving a voice to something, we are filling in a gap or giving full recognition to something that has in the past been marginalized. This may not be the case. Instead, certain voices may still be marginalized and those that are given space may be monitored and policed through them. Harris (2005) argues that “young women’s bodies are in part currently ‘governed’ through the discourse of desire” (39).

To rectify these more negative consequences of the current discourse about female desire, Harris (2005) draws on something that Fine (1988) maintains in her original article. Fine (1988) contends that, “the absence of safe spaces for exploring sexuality affects all adolescents” (36). In light of this, Harris (2005) argues that, “it is critical that spaces are found where ‘subjugated knowledges’ can be voiced where

surveillance and appropriation are minimized” (41). For example, the internet and zines can both “operate as marginal spaces for the expression of missing discourses” (Harris, 2005: 42). Within such sites, “young women are able to engage in unregulated dialogue and debate with one another, to generate their own meanings and terminologies around sexual desire...” (Harris, 2005: 42). They allow for ‘safe spaces’ where young women are not restricted by the ‘official discourses of sexuality’ and can express their *own* sexual desire and pleasure. In this way, they may ‘deviate’ from the heterosexual matrix that is so often promoted as the authorized form of sexuality.

Compulsory Heterosexuality

Further to this notion of a ‘heterosexual matrix’ that is suggested to be dominant within the public sphere, it is important to discuss other influential work regarding this idea. For example, in her leading article, Adrienne Rich (1980) sets out the concept of ‘compulsory heterosexuality.’ She explains that there exists, a “bias of compulsory heterosexuality, through which lesbian experience is perceived on a scale ranging from deviant to abhorrent, or simply rendered invisible...” (Rich, 1980: 632). In this regard, she argues that scholars need to scrutinize the institution of heterosexuality to make some attempts at challenging its authority within society and to make room for diversity in the definition of sexuality. Rich (1980) contends, that,

the failure to examine heterosexuality as an institution is like failing to admit that the economic system called capitalism or the caste system of racism is maintained by a variety of forces, including both physical violence and false consciousness. To take the step of questioning heterosexuality as a “preference” or “choice” for women – and to do the intellectual and emotional work that follows – will call for a special quality of courage in heterosexuality identified feminists but I think the rewards will be great: a freeing-up of thinking, the exploring of new paths, the shattering of another great silence, new clarity in personal relationships. (648)

While talking about Rich’s work, Kim et al. (2007) maintain that the key argument within the concept of ‘compulsory heterosexuality’ is that, “heterosexuality relationships are the

only sanctioned social arrangement that constitutes “appropriate” or “normal” relational and sexual behaviour for boys/men and girls/women” (146). Other forms of sexuality or preference are marginalized through this lens.

Since Rich’s original writing, a number of scholars have discussed this concept of ‘compulsory heterosexuality.’ Jane Ussher (1997b) argues that we still see, “a social milieu where heterosexuality is almost ‘compulsory’” (145). Kim et al. (2007) assess the presence of this concept through a consideration of a heterosexual script in primetime television programming. They argue that, such a script can have, “pervasive normalizing and regulatory functions” (Kim et al., 2007: 146). Yep and Camacho (2004) talk about *The Bachelor* and how it subscribes to heterosexual norms and a heterosexual script. They note that the whole premise of the show is to offer, “the promise of heterosexual romance and a fairy tale ending” (Yep & Camacho, 2004: 338). The show reinforces “heteronormative standards for women” and excludes “women who subscribe to different ideals in their relationships with men,” and “these ideals exclude queer women altogether” (Yep & Camacho, 2004: 340). Yep and Camacho (2004) point to the power of these ideals and norms and contend that, “through visibility and representation, it constructs what is attractive and desirable, what is loving, and who is lovable” and that, “anyone who deviates from the mythical norm is pathologized, dismissed, silenced, or erased” (340).

To counter these representations that foster certain ideals and norms, a number of scholars argue that spaces need to be created for alternative portrayals of sexuality. There needs to be resistance to this notion of ‘compulsory heterosexuality.’¹⁸ Kim et al. (2007) argue that, “a plausible solution may be to provide viewers with more diverse

¹⁸ In relation to this idea of resistance, Gordon (2006) conducted a research study in the mid-west where she examined sex and dating amongst a white middle-class lesbian community. Her participants described how, “they resist heterosexual norms of sexuality” (171).

alternatives to the Heterosexual Script,” which could mean, “the inclusion of counter-scripted television characters” (156). In this regard, we have seen a shift in the last few years where there has been a growing diversification of media images. There has been a rise in the number of gay-themed programming available on cable channels and an increase in gay and lesbian characters (see Freitas, 2007; Gill, 2008; Munt, 2006; Sender, 2006; Sender 2007). For example, reality TV has been central to this diversification of images. As Sender (2007) argues, “the relative ubiquity of gay and lesbian characters on reality-TV shows reflects the expectations of a genre that demands diversity and conflict among participants as well as a long history of gay activist agitation towards media visibility” (304).

Further, there has been development of television shows that contribute to the visibility of different sexualities and lifestyles. For example, Showtime’s *The L Word* is often used as an illustration of this point. As Lee and Meyer (2006) contend, “Showtime’s drama *The L Word* offers a narrative where lesbian lives are at the fore front, making it a powerful statement on lesbian identity” (6). Warn (2006) concurs and argues that, in *The L Word*, “lesbians finally get to see their lives and relationships front-and-centre ... with the heterosexual characters and relationships on the periphery for a change” (3). Such representations help in offering an alternative script to that of ‘compulsory heterosexuality.’

However, such examples have not come without critique, and *The L Word*, for example, has been the subject of much controversy. The question that arises is how much is such a show, and those like it, an actual representation of lesbian sexuality. Even though they seemingly create a space for alternative identities, are we still viewing them through a heterosexual lens? Lee and Meyer (2006) argue that, “in many ways, *The L Word* perpetuates a heteronormative gaze” (20; see also Chambers, 2006),

primarily through its characters. The show displays and perpetuates, “the ‘lesbian chic’ identity which ... plays into heteronormative cards” (Lee & Meyer, 2006: 21). Gill (2008) delineates this as the ‘hot, luscious lesbian,’ and finds that although such an image, “marks a rupture with earlier negative portrayals of lesbians as manly or ugly, such representations have been criticized for packaging lesbianism within heterosexual norms of female attractiveness” (50). Consequently, “this figure is invariably constructed in relation to heterosexuality – not as an autonomous or independent sexual identity” (Gill, 2008: 51). Radner (2008) argues that Adrienne Rich, “would no doubt respond that *The L Word* presents a lesbian world deformed by the lens of heterosexuality – that is to say, presented through a rhetoric in which the terms of intelligibility are provided by heterosexuality” (98). Therefore, we are caught in a place where increased visibility is a positive change to earlier representations of sexuality; however, we need to be careful of the type of representations these are and whether they do offer true alternatives. As Lee and Meyer (2006) comment, “we find ourselves torn between applauding progress and remaining wary of the new array of lesbian images offered for public consumption” (22).

Lisa Diamond (2005) argues that, a critique should be made of these representations, particularly of female same-sex sexuality. She maintains that, “these mass media representations signal a new appreciation and celebration of women’s sexual freedom and diversity,” but also contends that, “this is not necessarily the case, particularly with regard to depictions of ‘heteroflexibility’” (Diamond, 2005: 105; emphasis added). This concept of ‘heteroflexibility’ conveys the increase in media images of women and girls, “hinting at or experimenting with same-sex sexuality” (Diamond, 2005: 104). For example, we can turn to the musical scene for illustrations of this. Katy Perry’s song ‘I Kissed a Girl’ is a perfect representation of Diamond’s point. Consider the following segment of lyrics:

This was never the way I planned, not my intention
I got so brave, drink in hand, lost my discretion
It's not what I'm used to, just wanna try you on
I'm curious for you
caught my attention

I kissed a girl and I liked it
The taste of her cherry chapstick
I kissed a girl just to try it
I hope my boyfriend don't mind it

It felt so wrong, it felt so right
Don't mean I'm in love tonight
I kissed a girl and I liked it
I liked it¹⁹

Such a song promotes this 'bi-curiosity,' but keeps it within a heterosexual frame. As Wilkinson (1996) argues, such representations construct bisexuality as "a la mode" or in fashion (293). She contends that within the current milieu, "the risqué glamour of a girlfriend is marketed as the latest *fashion accessory* for the heterosexual woman" (Wilkinson, 1996: 293; emphasis added). Therefore, these images do not provide any real critique of the institution of heterosexuality. In this case, bisexuality is constructed as a consumer product, rather than as an identity. It is seen as the latest trend and a woman can choose to be 'flexible' but is assured that, "she remains within the bounds of normality, that her straight identity is not under threat, that she is just having a little fun" (Wilkinson, 1996: 298).

These images, then, do not serve to critique the repressive nature of the institution of heterosexuality. Instead, they exist within it, and by having the possibility of depoliticizing sex, they make us think that we no longer have to analyze, "heterosexuality as an oppressive and compulsory institution" (Wilkinson, 1996: 294). Through these representations of "pleasure, style and fashion," there is cause to think that there are increased positive illustrations of diverse sexualities. However, as

¹⁹ Accessed on <http://www.elyrics.net/read/k/katy-perry-lyrics/i-kissed-a-girl-lyrics.html>, November 26th 2008.

Diamond (2005) argues, “such depictions reliably serve a dominant social order that continues to prioritize the regulation and control of female sexuality” (109).

This discussion of ‘compulsory heterosexuality’ draws our attention to the difficulties in actually making a critique of the ‘post-feminist fantasy.’ Arguments can be made that we have seen a shift away from female objectification towards one of the strong, confident woman who has access to it all, and that there is no longer a missing discourse of female desire. With these points in mind, we have to ask, how can we critique these changes?

Critiquing Post-feminism

Throughout this discussion, post-feminist discourse has been examined and defined. Underlying each of the sections, there have been various critiques about post-feminism and post-feminist media culture. However, what was just highlighted was the difficulty in making these critiques. As a number of scholars maintain, by its very nature, post-feminism defies an easy assessment and evaluation. For example, Tasker and Negra (2007) argue that, “post-feminism culture does not allow us to make straightforward distinctions between progressive and regressive texts” (22). Because of the “supposed easy celebratory “feminization” of consumption and desire” (Ringrose & Walkerdine, 2008: 231), that is present in such texts, we are halted in an absolute dismissal of such images. Gill (2003) draws our attention to the shift from sex object to sexual subject, as discussed earlier, and says that through sexual objectification now being, “the freely chosen wish of active, confident, assertive female subjects” (104), it makes critique very difficult. If these are choices, we have to be careful when evaluating them. And as Heinecken (2003) points out, having post-feminism is maybe better than no feminism at all.

However, as outlined in this section, there are some points of contention that we can draw out. As indicated, post-feminism does focus on the notion that a level playing field exists for women, which serves to “erase real-life difference” (Heinecken, 2003: 154), and create “an egalitarian utopia in which sexual, racial, and ethnic differences among consumers recede” (Mizejewski, 2005: 123). Therefore, as mentioned earlier socioeconomic inequalities are ignored and “emptied out of ... contemporary individualized notions of selfhood” (Ringrose & Walkerdine, 2008: 227), leaving a number of identities excluded and invisible from the public domain. And although “successful femininity is bourgeois,” within this post-feminist framework, it is constructed and “coded universal, normal and attainable for all” (Ringrose & Walkerdine, 2008: 228; see also Coleman, 2008), which can have various consequences. As Coleman (2008) suggests, there are dangers attached to such homogenous images. She contends that, “media images produce knowledges, understandings, and experiences of bodies through which these bodies become” (Coleman, 2008: 175). Post-feminist media culture can play a significant role in the construction and ‘becoming’ of the self, and assist in the governance and regulation of female sexuality. As a result of these constructed knowledges, it can serve to alter the relative possibility of women accessing full sexual citizenship; an issue of interest to the current research. The following chapter will consider this ‘governance of the self’ in more detail.

CHAPTER THREE

GOVERNMENTALITY: THE RISE OF THE SELF-REGULATING INDIVIDUAL

This chapter outlines the theoretical framework utilized in this dissertation. For a number of reasons, governmentality was selected to assist in understanding and reflecting on this research. As will be shown, governmentality provides a lens through which to examine and comprehend neo-liberal politics and their impact on society and citizenship. The chapter will begin by commenting on what has been called ‘neo-liberal governmentality.’ It will then discuss in more detail what governmentality is, as Foucault originally conceived it, and as scholars who have since developed and adapted it. The discussion will then focus on a key concept of governmentality - the self. Time will be spent considering the construction of self as enterprising, healthy and risk-free – and how this consequently alters the shape of citizenship.

Neo-Liberal Governmentality

Having already spent time thinking about what neo-liberalism is and how it impacts on the meaning of citizenship, a number of questions are raised as to how neo-liberalism achieves what it does. For example, Sender (2006) asks, “how does the neo-liberal state, with its commitment to “govern society at a distance,” succeed in binding subjects to its fundamental cause – the willing participation of citizens in the generation of capital?” (135). Further, Palmer (2006) poses the question, “how are free autonomous, self-regulating individuals turned into moral agents working in ways which accord with those of state agencies?” (3). For answers to these questions, we can turn

to governmentality, which offers a useful framework for tackling such queries (Nadesan, 2008: 1).

A number of scholars have outlined the use and importance of Michel Foucault's work, particularly his concept of governmentality (Garland, 1997; Hay, 2000; Lee, 2007; Lemke, 2000, 2001; Nadesan, 2008; O'Malley, 2001). Theoretically, such a tradition has aided greatly in an attempt to understand the dynamics and trends of neo-liberalism, or what Nicoll and Fejes (2008) term as "neo-liberal governmentality" (13). As Lemke (2000) contends, governmentality "allows for a more comprehensive account of the current political and social transformations" (7) and "a more complex analysis of neo-liberal forms of government" (12).

In speaking of those working to develop the idea of governmentality, Hay (2000) comments that such scholars, like Nikolas Rose, advance the thought that, "neo-liberalism cannot be explained purely in political economic terminology or as a new political philosophy," their argument suggests that,

there have been new forms of governing that could be described as "neo-" or "advanced" liberalism, but (after Foucault) they view this trend less as a new philosophy of governing and democracy than as a governmental rationality for a social arrangement that relies on *new kinds of citizen-subjects* and *new techniques for governing them*. (54, emphasis added)

Therefore, as a governmental rationality, neo-liberalism acts a mode of governance that impacts on how the state, the individual and social institutions interact. As Nadesan (2008) explains, "neo-liberal governmentality operates from a distance through dispersed, capillarylike technologies that expand the reach of neo-liberal financial and commodity markets" (91), creating "conditions that allow people to govern themselves" (Petersen & Bunton, 2002: 4) and encouraging a "reliance on self" (Hay, 2000: 54), which is a central concept of the governmentality framework.

The Art of Governing

How to govern oneself, how to be governed, how to govern others, by whom the people will accept being governed, how to become the best possible governor ... (Foucault, 1991: 87)

These are the questions that Foucault (1991) asked in his seminal piece entitled *Governmentality*. He was interested in tracing a genealogy of the modes of governing, particularly from the eighteenth century. What he determined was that, “the practices of government are ... multifarious and concern many kinds of people” (Foucault, 1991: 91) and “the instruments of government, instead of being laws, now come to be a range of multiform tactics” (Foucault, 1991: 95). In considering these various forms of power/governance, he identifies a transition that took place in government in the eighteenth century. He articulates a shift from, “an art of government to a political science, from a regime dominated by structures of sovereignty to one ruled by techniques of government” (Foucault, 1991: 101). Foucault (1991) determines that these modifications in government turned on “the theme of population” (101), in particular, the management of the population. In such a way, Foucault (1991) asserts that we have moved to an increasing “governmentalization of the state” (103), and that “we live in the era of a ‘governmentality’ first discovered in the eighteenth century” (103). What is important to note here is that Foucault did not think that we moved smoothly and succinctly from one type of governing to the next. Instead he envisioned a triangle, in which sovereignty, discipline and government were connected, with one never entirely replacing the other. He states,

[a]ccordingly, we need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government, in reality one has a triangle, sovereignty-discipline-government, which has as its primary target the population and as its essential mechanism the apparatuses of security. (Foucault, 1991: 102)

When considering the shifting nature of society and its modes of governance, it is important to consider the work of another key thinker, Gilles Deleuze, who conceived the idea that what we are starting to see are, 'societies of control,' which are, "in the process of replacing disciplinary societies" (Deleuze, 1992: 4). Within such a society, forms of technology, like computers, play a central role. As Isin (1998) points out, these begin to indicate a shift to "new technics of government" (36), where "the individual ... becomes a kind of field of control" (37). In her own work which she calls "a genealogy of the new societies of control" (5), Nadesan (2008) points out that Deleuze's intention in coming up with the idea of 'societies of control' was to, "address contemporary forms of power that circulate dynamically, producing individuals who experience themselves as internally fragmented, or dividuated, by dispersed networks" (5; see also Rose, 2000a). What is interesting is that Nadesan (2008) comments that a reliance on these new forms of government and control, as seen in the neo-liberal governmentality, do not "preclude operations of older forms of discipline and sovereignty" (9), an idea originally put forward by Foucault.

The Emergence of Biopolitics

This notion of managing the population is central to understanding governing. In such a way, Foucault formulated the concept of 'biopower' or 'biopolitics' that stood for, "a kind of anatomo-politics of the human body and control of the population at large" (Besley & Peters, 2007: 81). Thus, the body became a focus of politics and governing (Miller, 2002: 3). In his piece, *The Birth of Biopolitics*, Foucault (1997c) contends that biopolitics was an endeavour, "begun in the eighteenth century, to rationalize the problems presented to governmental practice by the phenomena characteristic of a group of living human beings constituted as a population: health, sanitation, birthrate, longevity, race ..." (73). Therefore, the population emerged as a site of interest and we

saw that government's role was, "not the act of government itself, but the welfare of the population" (Foucault, 1991:100), particularly its health. Foucault intended the idea of biopower and biopolitics to, "capture technologies of power that address the management of, and control over the life of the population" (Nadesan, 2008: 2). In a neo-liberal era, biopower offers "tools for societal *self-government*" (Nadesan, 2008:3; emphasis in original) and biopolitical forces "seek to minimize societal risk and maximize individual well-being through scientific engineering and individual technologies of the self" (Nadesan, 2008: 3; see also Rose, 2001a). By focusing on the risk and health of the population, biopower "both privileges and marginalizes, empowers and disciplines" (Nadesan, 2008: 5), therefore serving to include and exclude portions of the citizenry. These are ideas that will be developed later on in this chapter.

Central to biopolitics are the use of statistics in the management of the population. Foucault (1991) recognized the use of statistics or "the science of the state" (96) as a way "to identify problems specific to the population" (99). This led to what Lee (2007) calls, the "'statisticalisation' of government" (12). Statistics serve a vital purpose for modern government in that they "allow the problems of population to be made manageable and knowable" (Lee, 2007: 12-13). In such a way, individuals/citizens become "'*dividuals*," and masses, samples, data, markets, or "*banks*" (Deleuze, 1992: 5; emphasis in original). These "forms of inscription" (Garland, 1997: 183) feed biopolitical technologies and strategies, particularly because, "any exercise of power relies on knowledge of target or object of governance ..." (Lee, 2007: 13). Examples of such statistical techniques include, "budgetary calculations, economic forecast, demographic projections, actuarial tables, scientific surveys, market research and

epidemiological studies” which “all function as technologies of government in a modern state” (Garland, 1997: 180; see also Rose, 1993; Vaz & Bruno, 2003).²⁰

In relation to this, Ian Hacking (1986) introduces an idea that has been adopted by a number of other scholars. In his essay, *Making Up People*, Hacking (1986) suggests, “who we are is not only what we did, do, and will do but also what we might have done and may do. Making up people changes the space of possibilities for personhood” (229). Garland (1997) asserts that this idea shows that, “statistics contribute to the shaping and self-governing of people’s selves, as they adjust their self-conception and behavior to fit with ‘the normal’ or with other social types that are statistically produced” (180; see also Rose, 1993). Lyon (2001) adds to this by stating that biopower spends time, “‘making up people’ and fabricating them into the logic of the norm” (121). This notion of normalization is also identified as a goal of the state by Lupton (1999b) who reveals that it involves “gathering information about populations and subpopulations and subjecting it to statistical analysis” (61).

‘Governing at a Distance’

Since Foucault’s original work on governmentality and the ‘governmentalization of the state,’ many scholars have sought to adapt and develop his ideas, and “set out a new problematic for the analysis of ‘power beyond the state’” (Garland, 1997: 182). Amongst these governmentality scholars is Nikolas Rose. He has spent time expanding on Foucault’s work and creating new ideas and new directions in governmentality studies. In one of his early works, he notes that, “Michel Foucault’s notion of governmentality has a significance for us today because it suggests alternative ways of thinking about the activity of politics [sic]” (Rose, 1993: 286). In collaboration with Peter

²⁰ For a good discussion on the use of actuarial justice and risk management in the criminal justice system, see Feeley & Simon, 1992.

Miller (2008), they comment on the development of their approach and in fact create some distance between their work and that of Foucault. They state that, “in the development of our approach, we preferred not to be Foucault scholars. We picked and chose, added ideas and concepts from elsewhere, made up a few of our own ...” (Miller & Rose, 2008: 8). Although beginning with “Foucault’s own scattered comments on governmentality” (Miller & Rose, 2008: 10), they diverged from them early on and built up their own conceptual tools. Consider the following,

We had no idea that our writings on governmentality, together with Foucault’s own limited comments on this theme, would provide a reference point for the development of ‘governmentality studies’ over the 1990s, or that many of our formulations and conceptual tools would be retrospectively attributed to Foucault. (Miller & Rose, 2008: 13)

A key concept that they developed, one which has been utilized widely within governmentality studies, is the notion of ‘government at a distance’ or ‘governing at a distance’ (Miller & Rose, 2008:34). In developing this idea, they borrowed and adapted Latour’s (1987) concept of ‘action at a distance’ (219) which emerged out of his trajectory to answer, how one acts, “at a distance on unfamiliar events, places and people?” (223). Latour (1987) wanted to decipher the means allowing and “making domination at a distance feasible” (223). Miller and Rose (2008) took this idea further and applied it to current governing techniques and strategies. They determine that, “contemporary ‘governmentality’ ... accords a crucial role to ‘action at a distance,’ to mechanisms that promise to shape the conduct of diverse actors without shattering their formally autonomous character” (Miller & Rose, 2008: 39).²¹

As initially noted by Foucault, there are ‘a range of multiform tactics’ in which to govern, and Rose developed this idea further and discussed the various tools and apparatuses used to manage the population ‘at a distance.’ Rose (1999) talks about ‘the

²¹ See Allen (2003) for a comprehensive discussion of Latour’s concept of ‘action at a distance’ and Rose’s development of it.

will to govern' that is, "enacted in a multitude of programmes, strategies, tactics, devices, calculation, negotiations, intrigues, persuasions and seductions aimed at the conduct of individuals, groups, populations – and indeed oneself" (5). From this perspective, Rose (1999) clarifies how the role of the state is altered. Instead of being the one point of power, it now, "appears as simply one element ... in multiple circuits of power, connecting a diversity of authorities and forces, within a whole variety of complex assemblages" (5; see also Bratich, Packer & McCarthy, 2003; Rose, 1990, 1993; Miklaucic, 2003; Miller & Rose, 2008). These numerous mechanisms that now contribute to governing, play a central role in, "shaping and governing the capacities, competencies and wills of subjects" (Rose, 1996: 58). And they are able to "translate the goals of political, social and economic authorities into the choices and commitments of individuals" (Rose, 1996: 58; see also Rose, 1992; Rose, 2000a).

This idea has been discussed and reinforced by a number of other scholars. Many agree that governance and power are employed through, "a diverse patchwork of sites," rather than "a centralized administrative apparatus" like the state (Williams & Lippert, 2006: 705; see also, Clarke, 2004; Isin, 1998). In such a way, the behaviour of individuals is impacted by several nodes of power. Therefore, there are "different scales and spheres of governance" (Greene & Breshears, 2004: 214). Within this, the communication media has been recognized as an effective tool to regulate the conduct of individuals. Hay (2000) acknowledges "the importance of media as a technology or power" (55) that can assist in the management of citizens. The communication media, in particular television, has the ability to, "produce different temporal and spatial arrangements for regulating conduct" (Greene & Breshears, 2004: 218) and can be used as a source of, "information, evaluation, and reproach" (Sender, 2006: 135).

Through the work of Foucault, Rose and others, the word 'government' starts to take on an expanded meaning. It is utilized more generally, shifting the definition away from being strictly related to the organization of provincial and federal government, for example. It becomes more about, "the knowledge of things" (Foucault, 1991: 96) and "the routines, mechanisms, discourses and procedures that are concerned with our behaviour" (Palmer, 2006: 3). As Dean (1995) asserts, "in this context government is not identified with the operation of the constitutional state or its executive and legislative arms. It is rather a general term to encompass all those agencies, practices, techniques and discourses that provide the means and conditions of administration and rule" (569-570; see also Dean, 1999a). It is concerned with, "the conduct of conduct or, more specifically, with the calculated direction of conduct to shape behaviours to certain ends" (Palmer, 2003: 3; see also Lee, 2007). The word 'government' is used to refer to, "a continuum, which extends from political government right through to forms of self-regulation" (Lemke, 2000: 12). Thus, when we talk about government, we are interested in looking at, "the government of others and the government of one's self" (Garland, 1997: 174) and paying attention to "how problems and technologies of governance are formulated and addressed" (Nadesan, 2008: 6).

Through these sites of governance, individuals are encouraged in various ways to govern themselves. Governmentality studies pay attention to how individuals come to manage and regulate their own behaviour. As Nadesan (2008) notes, governmentality investigates, "how individuals are privileged as autonomous self-regulating agents or are marginalized, disciplined, or subordinated as invisible or dangerous" (Nadesan, 2008: 1). Similarly, Garland (1997) pulls on this idea of independence when he says, that individuals relate to power, "not as coerced objects or as ideological dupes but as autonomous subjects" (183). Therefore, citizens come to be envisaged as "empowered"

– made free from debilitating state intervention – and encouraged to assemble their own lifestyles from among the array of commodified options available in the free market” (O’Malley, 2001: 16). They are expected to “avail themselves of the skills, resources and knowledges made available in the market in order to maximise their security, health and well-being: to build self-esteem, exercise care of their body, manage risks to their person and property, engage in life long learning, and so on” (O’Malley, 2001: 17).

The Free, Autonomous Subject

In advanced liberal societies, authorities recognize that it is usually much easier to achieve governmental goals if citizens believe that they are in charge of their own destinies, that their actions are unconstrained, and that they have the ability to exercise ‘freedom of choice’ in ways that benefit themselves. (Petersen & Bunton, 2002: 4)

Tying in with this idea of ‘governing at a distance,’ “government is not an explicit expression or obvious direction of power. The individual is not told or ordered to behave in a certain way. Government works, rather, by seeming to give the individual a sense of autonomy. His or her freedom lies in what appear to be choices” (Palmer, 2003: 3). According to Nicoll and Fejes (2008), within a neo-liberal governmentality, “freedom has become both the instrument and the effect of governing” (13). As Valverde (1998) notes, freedom has become the primary force of governance where, “we are governed not against but *through* our freedom” (17; emphasis in original; see also Dean, 1999a; Miller & Rose, 2008; Rose, 1992).

The idea of ‘freedom’ is interesting here – on the one hand, we have this notion of an “active agency” (Palmer, 2003: 3), where individuals are free to accomplish what they wish. However, on the other hand, Foucault himself emphasizes that, “his idea of the self in no way represents a retreat into a notion of a ‘sovereign, founding subject’ understood to be the origin of all action” (McNay, 1992: 61). Instead, the choices and actions of the individuals are not fully selected by themselves, but “proposed, suggested,

imposed upon him by his culture, his society, his social group” (Foucault, 1997b: 291; see also Foucault, 2000). As suggested by McNay (1992), “the individual might exercise a degree of choice in the way in which he fashioned his existence, but the practices through which self-mastery was achieved were always conditioned and overdetermined by the socio-cultural context” (61) and in line with “the acceptable ‘norm’” (Allen, 2003: 77). Therefore, “freedom is always regulated” (Petersen & Bunton, 2002: 183; see also Rimke, 2000) and in contrast to how we envision freedom to be. Citizens become “obliged to be free” (Besley & Peters, 2007: 16; see also Rimke, 2000), in order for them to be effectively governed.

Managing the Self

The conception of governmentality emerged in Foucault’s later work where he shifted from a consideration of ‘docile bodies’ to ‘active individuals’ (McNay, 1992: 59). In so doing, he dealt with various critiques of his earlier work, which pointed to a “‘neglect’ of the state” and a “supposed tendency to characterize human individuals as ‘docile bodies’ rather than active subjects” (Garland, 1997: 175). As McNay (1992) suggests, this demonstrated, “a significant methodological shift in Foucault’s understanding of how power relations influence the behaviour of individuals” (59; see also Besley & Peters, 2007; Lemke, 2000). A fundamental shift took place in his work, away from paying attention to how external forces discipline the individual to how internal pressures drive the individual to regulate their own behaviour. Therefore, the “self becomes the subject of one’s own government” (Lee, 2007: 13). Gauntlett (2008) delineates this alteration in Foucault’s work nicely when he says that, “Foucault’s emphasis changed ... from a world constructed from without – external discourses imposed on people – to a world constructed from within – the individual’s own dynamic adaptation to their surroundings” (126).

In his earlier studies of disciplinary power, Foucault focuses on the body and how it was controlled and managed through regimes of power (Bartky, 1988). In *Discipline and Punish* (1995), Foucault sets out how the body is, “manipulated, shaped, trained” (136) and transformed into “docile bodies” (138). He asserts,

What was then being formed was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behaviours. The human body was entering a machinery of power that explores it, breaks it down and rearranges it. A ‘political anatomy’, which was also a ‘mechanics of power,’ was being born; it defined how one may have hold over others’ bodies, not only so that they may do what one wishes, but so that they may operate as one wishes, with the techniques, the speed and the efficiency that one determines. Thus discipline produces subjected and practiced bodies, ‘docile’ bodies. (Foucault, 1995: 138)

Since Foucault’s original discussion of the ‘docile body,’ it has been utilized by many scholars interested in the disciplining of the body, particularly the female body (for example, Akass & McCabe, 2007; Bartky, 1988). A number of media scholars have been interested in determining the role of the media in such a process. In her discussion of *Survivor*, Waggoner (2004) contends that the show “serves as ... a site of inscription for disciplined female sexuality” (217) and is “part of a more comprehensive scheme of sexual subordination that turns female bodies into “docile bodies” all in the name “reality”” (220).

Another central idea within *Discipline and Punish* (1995) is Foucault’s development of Jeremy Bentham’s original conception of the panopticon. Foucault’s discussion of panopticism is central to how he felt discipline operated within society. In asserting that the control of the population came from external forces, Foucault (1995) talks about the panoptical structure and how power is maintained through it. He establishes that the panopticon secures, “for a small number, or even for a single individual, the instantaneous view of a great multitude” (Foucault, 1995: 216), and states,

[t]his enclosed, segmented space, observed at every point, in which the individuals are inserted in a fixed place, in which the slightest movements are supervised, in which all events are recorded, in which an uninterrupted work of writing links the centre and periphery, in which power is exercised without division, according to a continuous hierarchical figure, in which each individual is constantly located, examined and distributed among the living beings, the sick and the dead – all this constitutes a compact model of the disciplinary mechanism. (Foucault, 1995: 197)

A question that has been asked by Foucauldian scholars is whether there is an essential continuity between his earlier and later work (Besley & Peters, 2007). There is interest as to whether there is a stark difference or rupture between his discussions of external and internal discipline and governance. On examination, there is certainly an underlying connection amongst his body of work. For example, Andrejevic (2006) comments that, in both his earlier work and his later work on governance, Foucault, “explores techniques of control and governance that rely on the formation of subjects responsible for making the imperatives of authorities their own” (396). Further, Harrer (2005) wrote a particularly interesting piece examining this question. He affirms the shift that we have seen between Foucault’s early and late work, and comments that, “a popular view on this late period holds that at some point in his oeuvre, Foucault turned away from analysing the power/knowledge mechanisms that *fabricate* subjects, and turned to analysing how subjects *constitute* themselves” (Harrer, 2005: 76; emphasis in original). Harrer (2005) observes that these two ideas are often characterized as “distinct phenomena” (76; emphasis in original), but he advocates the view that instead we find “a conceptual continuity traversing the whole of Foucault’s oeuvre, rather than a rupture that separates the “early” from the “late” Foucault” (76). Harrer (2005) acknowledges that the themes of discipline and surveillance run through both periods of this work with the “common denominator” being power, and for him, this is what “allows us to find a continuity between Foucault’s earlier works on normalizing power and later work on ethical self-constitution” (80-81). For both periods of work, “power is something that

works its way into people's lives" (Allen, 2003: 76) and alters how individuals are disciplined or how they discipline themselves.

In his early work, Foucault focuses on the panopticon and how power and knowledge is achieved through it. But also, a central idea is that such a structure aims to train individuals to discipline themselves (Harrer, 2005: 80) and turn the gaze onto themselves. For example, Sherman (2008) notes, "under the panopticon, the subject watches, judges and polices him/herself according to the disciplinary norm, because they never know when they are being watched and judged. That is to say, the subject takes over the work of policing him/herself" (51) and internalizes "the monitoring gaze" (Andrejevic, 2006: 396). This is certainly the idea that Foucault draws on in his later work when he talks of individuals monitoring and regulating themselves. The concept of individuals being constantly looked at is developed further when Foucault implies that now they are, "under the ever-present gaze of one's self" (Rimke, 2000: 68), and actively involved in "the mechanisms that keep track and monitor their everyday lives" (Lyon, 2001: 7; see also Lyon, 1994).²²

Foucault's essay *The Subject and Power* (1982) was where these ideas were first articulated (Garland, 1997). He presents, "a revised concept of power that stressed the importance of *the active subject* as the entity through which, and by means of which, power is exercised" (Garland, 1997: 175; emphasis in original; see also, Berard, 1999). Following this, he developed these ideas further in the second and third volumes of *The History of Sexuality*. Here, he begins to "distinguish between subjectivation and forms of subjectification by exploring how selves were fashioned and then lived in ways which were both heteronomously and autonomously determined" (Dupont & Pearce, 2001: 125). Therefore, he undertook "a theoretical and methodological reformulation"

²² Lyon (2001) asserts that the panopticon still exists – however, with the changes in technology that we have seen, it is altered to produce an "electronic superpanopticon" (108).

(Foucault, 1985: 8) and his analysis of sexuality moved to considering ‘the desiring subject.’ As Lisa King (2003) argues, Foucault shifted “from a concern with power relations per se to a concern with the formation of the desiring subject itself through power relations” (346) and the formation of codes that, “dictate how one is supposed to act toward oneself and particularly others, which acts are acceptable and which are not and in what circumstances...” (347).

In *The Use of Pleasure* (1985), Foucault proposes “to analyze the practices by which individuals were led to focus their attention on themselves, to decipher, recognize, and acknowledge themselves as subjects of desire” (5). In attempting such a genealogy, Foucault (1985) states, it “would carry me far from my original project” and says, “I had to choose: either stick to the plan I had set, supplementing it with a brief historical survey of the theme of desire, or reorganize the whole study around the slow formation, in antiquity, of a hermeneutics of the self. I opted for the latter...” (Foucault, 1985: 6). Such a shift is fascinating and begins to highlight the ‘self’ as a central concept to governance and discipline. Under the subject of sexuality, Foucault (1985) commences an attempt to, “define the conditions in which human beings “*problematize*” what they are, what they do, and the world in which they live” (Foucault, 1985: 10; emphasis added). He is interested in,

those intentional and voluntary actions by which men not only set themselves rules of conduct, but also seek to transform themselves, to change themselves in their singular being, and to make their life into an *oeuvre* that carries certain aesthetic values and meets certain stylistic criteria. These “arts of existence,” these “techniques of the self.” (Foucault, 1985: 10-11; emphasis in original)

Foucault uncovers these ideas through an analysis of texts which he finds serve as, “functional devices” that “enable individuals to question their own conduct, to watch over and give shape to it, and to shape themselves as ethical subjects...” (Foucault, 1985: 13).

In Volume three, *The Care of the Self* (1986), Foucault continues to trace this 'problematization' and consider the "cultivation of the self" (44). Foucault (1986) identifies the evolvment of, "procedures, practices, and formulas that people reflected on, developed, perfected, and taught" (45). In so doing, he begins to reflect on the self in relation to health and medicine. Foucault (1986) determines that, "the care of the self is in close correlation with medical thought and practice" (54). And establishes that,

[t]he practice of the self implies that one should form the image of oneself not simply as an imperfect, ignorant individual who requires correction, training, and instruction, but as one who suffers from certain ills and who needs to have them treated, either by oneself or by someone who has the necessary competence. Everyone must discover that he is in a state of need, that he needs to receive medication and assistance. (Foucault, 1986: 57)

The notion of the 'healthy body,' the avoidance of risk and sickness, and the use of experts will be discussed further later on in this chapter.

From this point, Foucault continued to develop the idea of the 'ethical' and 'desiring' subject along with the 'techniques' or 'technologies' of the self in his writings that followed the second and third volume of *The History of Sexuality*. Instead of emphasizing the body, Foucault moved his attention to the 'self' and 'the care of the self.' He states that, "you must attend to yourself, you must not forget yourself, you must take *care* of yourself" (Foucault, 2005: 5; emphasis added). By focusing on this, he begins to articulate what he calls, 'the technologies of the self,' which according to Foucault, "permit individuals to effect by their own means, or with the help of others, a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality" (Foucault, 1997a: 225). Foucault no longer emphasizes, "the imposition of discourse on passive bodies," but instead talks of "a 'governmentality' in which technologies of domination articulate with technologies of the self" (Fox, 1997: 42). For Foucault, "individuals are at liberty to mould themselves

through various technologies of the self” (5), which “are applied by individuals as a means of transforming their conditions into those of a more autonomous sense of happiness” (Miller, 1993: xiv; see also, Besley & Peters, 2007; Rose, 1990). In this way, we are reminded of Rosalind Gill’s work on post-feminist media culture. As articulated earlier, she recognizes a shift in culture from objectifying the female body to subjectifying it. Such a comment resonates with David Garland who asserts that,

governmental power is not ‘objectifying’ but ‘subjectifying’. It constructs individuals who are capable of choice and action, shapes them as active subjects, and seeks to align their choices with the objectives of governing authorities. This kind of power does not seize hold of the individual’s body in a disciplinary grip or regiment individuals into conformity. Instead, it holds out technologies of the self, to be adopted by willing individuals who take an active part in their own ‘subjectification.’ Far from abolishing the individual’s capacity for choice and action, this kind of power presupposes it. (Garland, 1997:175)

In *Technologies of the Self* (1997a), Foucault comments on the shift he has made in regards to how power and governance is to be conceived. He states,

[p]erhaps I’ve insisted too much on the technology of domination and power. I am more and more interested in the interaction between one-self and others, and in the technologies of individual domination, in the mode of action that an individual exercises upon himself by means of the technologies of the self. (Foucault, 1997a: 225)

His interest in this, led him to examine these concepts and how they materialized in Ancient Greece and Rome (Foucault, 1997a, 2005).²³ By shifting his focus, it enables him to, “attribute a certain degree of autonomy and independence to the way in which individuals act, especially in the ordering of their day to day existence” (McNay, 1992: 61). Foucault asserts that certain technologies – the technologies of power and the technologies of the self – combine to create what he calls, ‘governmentality’ (Foucault, 1997a). In his discussions, Foucault demarcates what he means by this notion of ‘self.’ He states that, “the self is not clothing, tools, or possessions; it is to be found in the principle that uses these tools, a principle not of the body but of the soul. You have to

²³ See also Wong (2008) for a good discussion of Foucault’s hermeneutics of the self.

worry about your soul – that is the principal activity of caring for yourself” (Foucault, 1997a: 230).

Contemplating the ways in which ‘technologies of the self’ play out in a neo-liberal age, Gauntlett (2008) testifies that consumerism acts as a technology of the self. He asserts that, “through purchasing particular products, the adverts tell us, we can become like the liberated, aspiration beings seen in the ads” (139). Cronin (2000a) contributes to this line of thinking by affirming that, “consumerism promises women self-transformation and appears to validate women’s choices” (279; see also Cronin, 2000b). It guarantees an avenue to becoming a better person. In such a way, consumerism and advertising promote a notion of ‘compulsory individuality,’ where “the expression and enactment of choice (and the capacity of choosing) is framed as a compulsory choice: individuality is not an option but rather the compulsory route to selfhood” (Cronin, 2000a: 279). This is reminiscent of the idea discussed earlier where individuals are ‘obliged to be free.’

The media plays a key role in endorsing consumerism as a ‘technology of the self.’ For example, reality TV, in particular lifestyle television, acts as “an agent of consumerism” (Palmer, 2008: 6). As such, “the medium now offers itself as a resource for self-achievement, a consumption technology offering individuals new ways to order their lives in line with their own ambitions and those of designated psy-experts licensed to make these intrusions into the domestic” (Palmer, 2008: 7).

The Enterprising Self

There are various ways of characterizing the ideal self, one being the image of the ‘enterprising self’ (Rose, 1992: 141). This image is “embodied in the very language that we use to make persons thinkable, and in our ideal conceptions of what people

should be” (Rose, 1992: 141). We conceive of the ideal citizen as one who is resourceful, energetic and one who is willing to display initiative and take on new projects, such as transforming the self. Thus, the wellbeing of society is seen to be achieved, “not by centralized planning and bureaucracy, but through the ‘*enterprising*’ activities and choices of autonomous entities” (Rose, 1992: 142; emphasis added). In such a way, the individual is in a sense required to, “make a venture of its life, project itself a future and seek to shape itself in order to become that which it wishes to be” (Rose, 1992: 146). As Rose (1992) contends then the mantra of the current age is,

[b]ecome whole, become what you want, become yourself: the individual is to become, as it were, an entrepreneur of itself, seeking to maximize its own powers, its own happiness, its own quality of life, through enhancing its autonomy and then instrumentalizing its autonomous choices in the service of its lifestyle. The self is to style its life through acts of choice and, when it cannot conduct its life according to this *norm of choice*, it is to seek expert assistance. (Rose, 1992: 150-151: emphasis added)

A key point Rose identifies at the end of the above quote is in relation to the use of experts and therapeutic advice if the individual is not able to achieve the norms and standards set out by society by *themselves*. A fuller discussion of the use and role of experts in correcting the self will be included later on in this chapter.

The image of the enterprising self is particularly pertinent within neo-liberalism. With a focus on the autonomous individual making the ‘right’ choices and taking responsibility for themselves, the notion of ‘enterprise’ becomes central. As we saw in the Thatcher era, for example, there was a certain promotion of the ‘entrepreneurial self’ and the notion of an ‘enterprise culture’ (Besley & Peters, 2007: 155). Besley & Peters (2007) develop this point by saying, “neo-liberalism depends on the development of a set of practices of self-government whereby the individual learns to refashion himself or herself as the entrepreneur of oneself – the ‘enterprising self’” (142); in so doing, they make a project of themselves to improve and better who they are. As Palmer (2004)

comments, within such a socio-political context, “we see people considering themselves as projects, as enterprises to be invested in” (185).

In order to achieve this, consumerism is promoted as a mode through which to build a better lifestyle (Rose, 1992). As a ‘technology of self,’ consumerism acts as a way for individuals to become the ideal enterprising self. Through the purchasing of goods and services, individuals are enabled to “maximize their ‘quality of life’” (Rose, 1992: 155). A question that resonates now is how can we promote consumerism as the act of ideal citizens when in an economic crisis? How is it possible for individuals to purchase goods to improve themselves when employment is on shaky ground? How can we strive to achieve this concept of the ‘enterprising self’ as it has traditionally existed in such a climate? It seems particularly troubling that citizenship continues to be conceived in such a way when corporations have to be bailed out by the government.

The Healthy Self

A quick stroll past any newsstand will reveal a plethora of magazines devoted to health and fitness. “Healthy,” “fit” bodies are draped across covers serving as advertisements, cover models beckon, enticing readers. Take a closer look. Choose a magazine. Pick it up and your eyes will undoubtedly peruse the finely tuned form on the cover, communicating the meaning of the words “health” and “fitness,” singing it to you through rippling muscles. As if they could speak to you, cover models’ eyes look back at you with pride. “Hard work,” you hear the implied whisper. All of you can do it. (Dworkin & Wachs, 2009: 1)

In *The Care of the Self* (1986), Foucault brought our attention to how looking after the self connects with ‘medical thought and practice.’ This idea has been developed greatly to such a degree that another image of the ideal self is the ‘healthy self.’ As demonstrated by the quote by Dworkin and Wachs (2009), the healthy, fit body has come to dominate our culture and has become the “desirable bodily state” (Bauman, 1998: 23). Our current preoccupation is with health and the ‘healthy self’ and citizens are encouraged to look after themselves and demonstrate the right choices in relation to

their body. The body is governed through these notions of health and fitness. As Besley and Peters (2007) comment,

Today, the firm, well-toned and muscled body indicates a '*correct attitude*' implying personal qualities such as determination, willpower, energy. It displays the ability to 'make something' of oneself and an asceticism that is to a certain extent a denial of self – at least a denial of impulses to indulge the self – a self-discipline that controls desires to overindulge in epicurean pleasures. It shows that one '*cares*' about oneself and about how one appears to others. (45-46; emphasis added)

Instead of health being the responsibility of state-provided bureaucracies, it becomes the task of citizens to look after their *own* health. Individuals are required to monitor their own healthiness and wellbeing and a commitment to this has developed into a "marker of good citizenship" (Newman, 2007: 156). A 'healthy self' displays "the ideals of active citizenship" (Petersen & Bunton, 2002: 184) which have become incredibly important in this neo-liberal age. It is necessary for an individual to be, "an active agent in the fabrication of their own existence" (Rose, 1996: 59) and, "all active citizens have a right and a duty to maintain, contribute to and ensure ... their health status" (Nettleton, 1997: 208). And the state is absolved of this job and is, "no longer expected to resolve society's needs for health" (Rose, 2001a: 30).

Thus, what we have seen develop in neo-liberal societies is a "will to health" (Newman, 2007: 155). As Rose (2001b) articulates it, "every citizen must now become an active partner in the drive for health, accepting their responsibility for securing their own well-being" (6; see also Rose, 2001a). He describes this new "*will to health*" (Rose, 2001b: 6; emphasis added) and how there is now a "personal commitment to the norm of health" (Rose, 2001a: 40). In order to subscribe to this norm of health, individuals need to turn into, "experts of themselves" (Rose, 1996: 59). With this, there is a "reconfiguration of the individual, or subject, from being a relatively 'docile', passive recipient of advice and health care to one who possesses the capacity for self-control,

responsibility, rationality and enterprise” (Nettleton, 1997: 213-214). The ‘enterprising self’ must also be the ‘healthy self’ and seek out ways to improve and better themselves and their health, rather than the government having to take on this responsibility and subsequent cost.

Again there is an emphasis on the use of and reliance on experts to help individuals achieve a healthy self. To sustain and improve their health, an individual is, “increasingly expected to take note of and act upon the recommendations of a whole range of ‘experts’ and ‘advisers’ located in a range of *diffuse* institutional and cultural sites” (Bunton & Burrows, 1995: 208; emphasis in original; see also Rose, 1996). In such a way, “‘experts’ assist in the process of understanding the self” (Nettleton, 1997: 212) and help to, “define normal behavior and instill the appropriate values and dispositions in people” (Petersen & Bunton, 2002: 4). They assist in individuals achieving the norm of health in socially approved ways.

Further, in this late modern period, we see multiple forums that disperse information and “techniques for fabricating the healthy self” (Bunton, 1997: 239). As we saw with ‘the enterprising self,’ consumerism acts as a powerful ‘technology of the self,’ and has an increasing amount of importance in contemporary society (Vaz & Bruno, 2003: 283). An individual is encouraged to be, “an *active* seeker of information and ‘consumer’ of health care services” (Petersen & Bunton, 2002: 6; emphasis in original). Through purchasing various goods and services, citizens are told that they ‘can do it’ and become happy, healthy and well. We are encouraged to pursue and live a healthy lifestyle (Vaz & Bruno, 2003: 283) and through consumption, “individuals are offered ways of living, or a style of life, which promise personal happiness, health, and well being through acts of choice in the world of goods” (Petersen & Bunton, 2002: 182-183). Therefore, this demonstrates a “new domain of consumption” where, “individuals will

want to be healthy, experts will instruct them on how to be so, and entrepreneurs will exploit and enhance this market for health” (Rose, 1992: 155; emphasis in original).

The media plays a central role in communicating to citizens what they can do (or buy) to become healthy and helps to define, “the aspects of their lifestyles that individuals have to care for” (Vaz & Bruno, 2003: 283). Various media provide “advice on healthy lifestyles to individuals interested in taking possession of their lives and caring for themselves” (Vaz & Bruno, 2003: 283). For example, in some of his work, Robin Bunton (1997) pays particular attention to how popular health magazines serve as a source of, “techniques of the self” (243). And Christy Newman (2007) outlines how, “women’s health magazines capitalize on this healthiest culture” (156) and articulate discourses which, “inscribe new cultural imperatives for the “normal, healthy woman”” (166).

As pointed out earlier, the pursuit of healthiness becomes an indicator of good citizenship. A lack of care for the self and one’s health begins to demarcate those individuals as ‘bad citizens.’ As Diane Richardson (2000) suggests, “everyday practices of individuals are increasingly becoming the bases of citizenship,” and she gives ‘healthier citizenship’ as an example to demonstrate this shift (106). She asserts that, “as ‘good citizens,’ we are enjoined to take care and assume responsibility for our own health ...” and “in addition to patterns of eating and drinking, the ‘private’ and intimate practices of sex are also part of the realms in which healthy citizenship is constituted” (Richardson, 2000: 106). For example, safe sex becomes the responsibility of “responsible and self-governing citizens” (Richardson, 2000: 106); whereas those who practice unsafe sex are construed as ‘bad’ and risky citizens, who potentially can create enormous costs for the health system.

Failing to achieve these goals of good citizenship forces individuals into what we could see as a second class of citizens. Anything other than the healthy, fit body, for example, is not encouraged. As Dworkin and Wachs (2009) recognize, “while the *fat body* remains stigmatized as lazy, undisciplined, or as a poor member of the social body, the *fit body* becomes a metaphor for success, morality and good citizenship” (38; emphasis added). This pushes us to think of a binary in relation to the body – the fat/grotesque body versus the fit/classical body - ideas that will be discussed more later on in this chapter.

As we have continuously seen, the media plays a central role in distributing ideas such as these. In particular, reality TV has acted as a genre capable of reinforcing the ideals of citizenship. Lifestyle programming, for example, contributes in drawing both participants and viewers attention to the quest for the ideal healthy and fit body. Biressi and Nunn (2008) confirm this by revealing how such programming, “redirect bad citizens towards the socially approved goals of a slim, healthy and well-groomed body, a well-managed, well-socialized family and an aspirant future trajectory” (Biressi & Nunn, 2008: 20).

Therefore, the notion of the bad citizen seems to coincide with an unhealthy, unfit body, but also a risky body. We have not only become preoccupied with health but also with risk. Of interest here is something that Vaz and Bruno (2003) highlight in terms of responses to health. They note that, “the modern experience of health-care implied that individuals started to care for their health only once they felt sick,” however, today, “individuals accept restricting behaviour in order to care for their health even and principally when they experience well-being. Contemporary medicine is producing the strange status of individuals ‘*at risk*’ who can be viewed in fact as ‘*patients before their*

time” (Vaz & Bruno, 2003: 274, emphasis added). This concept of risk will be examined further in the following section.

The Risky Self

Discourses on risk are directed at the regulation of the body: how it moves in spaces, how it interacts with other bodies and things. (Lupton, 1999c: 88)

Risk has been a central concept in governmentality literature, where many scholars have discussed the connection between governmentality and the management and supervision of risk (Lyon, 2001: 121; see also Rose, 2001a). In contrast to the ‘enterprising’ and ‘healthy’ selves which, are constructed as ideal, individuals are warned against becoming risky. They are encouraged to avoid and manage risk, for fear of turning into the ‘risky self’; imperfect, flawed, deficient, damaged, and in some cases, dangerous. Risk “is a style of thinking and acting” which is central to how we manage and monitor the population, and it “tries to tame uncertainty by expertise, to bring future harms and benefits into present calculations, and to shape decisions in the present in terms of questions about the future, about the benefits that can be achieved, and the harms that can be averted, minimised or managed” (Rose, 2001a: 31; see also Garland, 1997; Rose, 2000a). Thus, we are continuously seeking to “*constrain or exclude*” individuals on the basis of their risk level (Rose, 2001a: 26; emphasis in original). Risk is recognized as a “governmental strategy of regulatory power by which populations and individuals are monitored and managed through the goals of neo-liberalism” (Lupton, 1999c: 87; see also Lupton, 1999a) and citizens “must be surveilled or even excluded

from society” for the betterment of the general populace (Vax & Bruno, 2003: 288).²⁴

‘Risky bodies’ may put “others at risk because they are careless with themselves” (Vax & Bruno, 2003: 288).

Thus, risk-avoiding behaviour has become a form of self-government and central to the ‘technologies of the self’ (Lupton, 1999c). Individuals are required to “minimize the risks to which they are exposed” and “police their own behaviour” (Lupton, 1999b: 61-62; see also Lupton, 1999a). In relation to health, this means viewing ourselves as ‘patients before our time’ – averting risky behaviour on the basis of future possibilities. In relation to this, Vaz and Bruno (2003) state,

[r]isk factor epidemiology and the progress in medical testing are in fact generalizing the concept of the risky self – the ‘patients before their time’. We are all virtual carriers of some illness because of our predispositions and our life habits. Hence, because we believe in a *possibility*, we should all behave as if we were ill, while we are not yet so, nor may we ever be from the specific diseases/illness we fight against. (Vaz & Bruno, 2003: 287; emphasis added)

This line of thinking encourages individuals to look to themselves to deal with risk but also to other available avenues. The role of experts is again highlighted as important to help individuals avert risk, but also consumerism, which acts continuously as a ‘technology of the self.’ For example, “the individual *consumer* is seen as responsible for the care of the self by seeking out appropriate ‘treatment’ and support, or by undertaking prescribed preventive action or risk management” (Petersen & Bunton, 2002: 156, emphasis added). For example, prenatal tests are widely used, and “in the future, self-testing for genetic disease may become routine, in much the same way as self-testing to confirm pregnancy now is” (Petersen & Bunton, 2002: 63; see also Lupton, 1999b).

²⁴ Similar ideas are reflected by Ericson and Doyle (2003), who while talking about insurance, comment that “governing mechanisms” are “a network of surveillance systems that form an assemblage to provide knowledge useful in addressing moral risks” (318). In such a way, they serve to “evaluate risks and the people associated with them as good or bad, and as subject to inclusion or exclusion” (318-319). See also, Ericson, Doyle & Barry (2003); and Ericson & Doyle (2004).

What we have seen through this discussion of self is that there are various 'technologies of citizenship' that guide individuals towards the ideal way to live. Initially delineated by Cruikshank (1993), these 'technologies of citizenship' exist to "engage us as active and free citizens ... and as agents capable of taking control of our own risks" (Dean, 1999b: 147; see also Dean, 1999a). Here again we see that we exist in an era where the state takes a step back and responsibility for "the management of a proliferating array of risks is offloaded onto the citizenry" (Andrejevic, 2006: 397; see also Lupton, 1999a). However, although accountable to supervise their *own* risk, individuals are required to respond to risk in specific ways and pursue societal norms through their actions. As Lupton (1999a) asserts, "those who are determined to deviate from the norm significantly are typically identified as being 'at risk'" (4-5); furthermore, to be categorized as such indicates that the individual needs to be, "singled out as requiring expert advice, surveillance and self-regulation" (Lupton, 1999b: 61). It is those individuals who fall outside the norm who are, "routinely encouraged (or sometimes coerced) to engage in practices that bring them closer to the norm" (Lupton, 1999b: 61) and "to pursue their interests and desires in ways which are socially approved and legally sanctioned" (Garland, 1997: 180). If an individual fails to accomplish the required transformation and move away from being classified as 'at risk,' they run the risk of being seen as a disappointment and unable to look after themselves appropriately. Consider Greco's (1993) comments in this regard,

If the regulation of life-style, the modification of risky behaviour and the transformation of unhealthy attitudes prove impossible through sheer strength of will, this constitutes, at least in part, a *failure of the self to take care of itself* – a form of irrationality, or simply a lack of *skilfulness* ... (361; emphasis in original)

To be unsuccessful indicates a failure to achieve the neo-liberal fantasy and ideals of citizenship. In this way, an individual remains 'risky' and, may because of this, be constrained or excluded from society. Further to this, Rose (2000b) argues that "a group

of individuals emerge who appear intractably risky – ‘monstrous individuals,’ who either cannot or do not wish to exercise the self-control upon conduct necessary in a culture of freedom” (200). These ‘monstrous’ individuals have also been classified by some as ‘grotesque’ because they are unable or unwilling to transform or modify their body to meet societal standards.

The Grotesque, Risky Body

A number of scholars have related the ‘risky body’ to the ‘grotesque body,’ showing how bodies that are constructed or classified as grotesque are also seen to be ‘at risk.’ The concept of ‘grotesque’ was initially introduced by Mikhail Bakhtin in his musings on *Rabelais and His World*. In this seminal text, Bakhtin (1984) talks about grotesque realism and the grotesque body and how it stands in opposition to the classical mentality. He states that, in contrast to the classical canon, “the grotesque body is not separated from the rest of the world. It is not a closed, completed unit; it is unfinished, outgrows itself, transgresses its own limits” (Bakhtin, 1984: 26). In such a way, the grotesque body was seen as “hideous and formless,” particularly because “it did not fit the framework of the “aesthetics of the beautiful” as conceived by the renaissance” (Bakhtin, 1984: 29). However, there was a pre-modern fascination with the grotesque body and oftentimes it was celebrated through carnival and the carnivalesque. Bakhtin (1984) comments that, “carnival is the people’s second life, organized on the basis of laughter. It is a festive life” (8). These spaces afforded opportunities to resist official culture and defy the boundaries of the closed and classical body. This idea is further clarified by Hall (1993) who states, in *Rabelais and His World*, Bakhtin (1984) argues that,

the popular resistance to social oppression created a counter-discourse, that of the ‘grotesque body’, to oppose to the hegemonic one with its sublimating lies. The carnival celebration of ‘the grotesque body,’ in words, gestures, costume,

and rituals, represented the millennial traditions of this counter-hegemonic deployment of signs, and there is a dialectic of resistance inscribed into its every gesture and word. (99)

Since these original writings, other scholars have taken up the idea of the 'grotesque' developing and adapting it to be applicable to today.²⁵ For example, Lupton (1999c) identifies the changes that we saw with the advent of modernity. She identifies the shift from "the open, 'grotesque' body to the closed or 'civilized' body" and states that, "by the nineteenth century, the 'grotesque' body – that which was seen to be unable to control its bodily boundaries – was greeted with disgust and horror, particularly on the part of the ruling and bourgeois classes" (Lupton, 1999c: 126). There were no longer the spaces of carnival and resistance that we saw in the Middle Ages. Further, Mackey (1999) outlines Lupton's (1999c) work on the grotesque, and argues that,

during the Middle Ages, people had a concept of the 'open body' – perceived as uncontrolled, sensuous, volatile, communal and open to the world. Later, the 'closed body', seen ideally as autonomous, controlled, orderly, 'individuated and closed off from other bodies', became the ideal. The transformation from the open 'grotesque' body to the closed 'civilized' body was accompanied by increased networks of regulations on how to manage, control, and self-discipline the body. (115)

Therefore, concepts of the body have changed over time (Mackey, 1999: 115), and the ideal body has become the autonomous controlled body, representative now of the neo-liberal order, and an emphasis is placed on the self-regulation of the body. As Lupton (1999c) argues, bodies are labeled as risky, "when its autonomy and integrity appears to be threatened" (147). Additionally, she states that,

because the dominant ideal notion of the body is that of the body as controlled, its boundaries policed and regulated and kept separate from other bodies and the outside world, anything which appears to flout these boundaries, to break them down and allow intermingling of properly separate entities, is considered threatening, or 'risky.' (Lupton, 1999c: 147)

Lupton (1999c) reveals that in contemporary Western society,

²⁵ See Stam (1989) for a comprehensive discussion of Bakhtin and the grotesque body.

it is typically members of stigmatized or marginalized groups – women, the working class, the poor and unemployed, non-white, injecting drug-users, gays and lesbians – who are constructed as '*grotesque bodies*' and therefore as 'risky' or 'at risk', needful of control, surveillance and discipline. (Lupton, 1999c: 147, emphasis added)

Such an assertion pushes us to ask why such groups are categorized as 'grotesque' and 'risky.' We might be inclined to think that such classifications are based on dominant ideas about what it is to be an ideal citizen, which often fail to include the diversity of society and recognize the impact of context (socio-economic-cultural) on individuals.

Further to the work of Lupton, others have also developed this notion of the 'grotesque.' For example, Mary Russo (1995) took on Bakhtin's ideas of the grotesque and discussed them along with the notion of abjection to create a "new aesthetic" about the female body (Covino, 2004: 30).²⁶ Russo (1995) draws on Julia Kristeva's original conception of the 'abject.' For Kristeva (1982), "the one by whom the abject exists is ... a *deject* who places (himself), separates (himself), situates (himself), and therefore *strays* instead of getting his bearings, desiring, belonging, or refusing" (8; emphasis in original). She asserts that, "it is ... not lack of cleanliness or health that causes abjection but what disturbs identity, system, order. What does not respect borders, positions, rules" (Kristeva, 1982: 4). Therefore, "the abject represents the hidden, unacknowledged, and feared parts of identity and society" and "stands for that which we most dread ..." (Ussher, 2006: 6). Therefore, the 'abject' very much relates to notions of the 'grotesque' since the advent of modernity, which point to a body that defies boundaries and threatens the order of general society. Pulling the concepts of the 'grotesque' and 'abject' together, Russo (1995) states,

[t]he images of the grotesque body are precisely those which are abjected from the bodily canons of classical aesthetics. The classical body is transcendent and monumental, closed, static, self-contained, symmetrical, and sleek; it is identified with the "high" or official culture of the Renaissance and later, with the

²⁶ See Creed (1993) for an interesting exploration of the monstrous, abject body.

rationalism, individualism, and normalizing aspirations of the bourgeoisie. The grotesque body is open, protruding, irregular, secreting, multiple, and changing; it is identified with non-official “low” culture or the carnivalesque, and with social transformation. (8)²⁷

Consequently, the ‘grotesque’ and ‘abject’ body stands in opposition to official standards and “emerges as a deviation from the norm” (Russo, 1995: 11).

To demonstrate these ideas and how they operate in the twenty-first century, we can turn to the media which has proved central to the distribution of such ideas (for example, see Sherman, 2004). What we see is a continuous quest for “the clean and proper body” (Covino, 2004: 35) being promoted quite thoroughly by the media. The notion of abjection, “permits an increasingly sophisticated makeover industry” (Covino, 2004: 35), which is related to viewers through a multitude of shows. This is exemplified, particularly through the reality TV genre which everyday, transforms, “abject realities into tidy materializations of conventional, individualistic, bourgeois desire and belief” (Covino, 2004: 65). Reality TV employs techniques which “explore consumption through abject imagery of the sick, grotesque body ...” (Biressi & Nunn, 2008: 22), and each show or story, “is about the desire to defeat or overcome abjection” (Covino, 2004: 65). We have seen the development of a whole genre of self-improvement shows – some involving surgical procedures to transform and ‘overcome abjection.’ These include such shows as, *What Not to Wear*, *The Biggest Loser*, *Extreme Makeover*, and *The Swan*. The idea that is certainly promoted widely in these shows, and other forms of media, is that “the *healthy* body becomes the corollary of the *beautiful* body” (Covino, 2004: 39; emphasis in original). If we become beautiful, we will simultaneously become healthy – which also indicates that the individual will no longer be a grotesque, risky body.

²⁷ See Presdee (2000) for a thorough discussion of Bakhtin’s concept of the carnival and the carnivalesque.

Of interest to this research is how such concepts relate to the regulation of pornography and whether they have implications for sexual citizenship. Considering the consumption and production of such material, how does the 'grotesque' factor in? With the rise of new technologies, do they contribute to (re)forming spaces for resistance and agency in order to disrupt or trouble the boundaries of neo-liberal self-hood and subjectivity? Is it possible to critique the 'clean and proper' self that is continually promoted through multiple venues?

Correcting the Self

Through the above discussion of the various selves, the role of the expert has been prevalent. What we have seen is not only a "proliferation of expertise" (Lunt, 2008: 538), but that it has also become the function of experts "to '*correct*' the individual" (Palmer, 2004: 186; emphasis added) according to neo-liberal ideals. As noted earlier, the current modes of governance rely on 'action at a distance,' and such a system has, "come to rely in crucial respects upon 'expertise': the social authority ascribed to particular agents and forms of judgement on the basis of their claims to possess specialized truths and rare powers" (Miller & Rose, 2008: 26). Expert knowledges and "the gaze of the expert" (Rose, 2001a: 33) are seen as central to governmentality, as they provide, "the guidelines and advice by which populations are surveyed, compared against norms, trained to conform with these norms and rendered productive" (Lupton, 1999c: 87). To demonstrate this, Rimke (2000) talks about self-help culture and contends that, "self-help entails the belief that professionals 'acting at a distance' can help in understanding and *correcting the self*" (62; emphasis added).

It is interesting to consider this "turn to the psychological" (Lunt, 2008: 537) and why we have developed such a dependence on experts and expert knowledges. This can in part be explained by the rise of our reliance on psychology in general, which has

occurred in parallel to this type of governing. Psychology now, “enjoys cultural authority as a form of expert knowledge” (Rimke, 2000: 63), and as Rose (1990) comments, “the spectacular expansion of the psychotherapeutic domain since the end of World War II has been intimately bound up with a profound mutation in the rationales and techniques of government” (213). In such a way, an understanding of the cause of societal and individual problems has shifted. As Moskowitz (2001) asserts, “problems that were once considered political, economic, or educational are today found to be psychological” (2). The psychological sciences have played a key role in defining the individual, primarily by providing, “the means for the inscription of the properties, energies, and capacities of the human soul” (Rose, 1990: 7). And the individual has gradually been pushed to subscribe to such narratives by internalizing the “normative discourses of the psychological” (Lunt, 2008: 538). This has led to the view that, “the modern subject comes into being through a combination of self-reflection, internalizing institutionally mediated norms of conduct in a society that is understood as a loosely connected network of institutions oriented to governance at a distance” (Lunt, 2008: 538).

The Impossibility of the Neo-Liberal Fantasy

This chapter has focused on developing an understanding of governmentality and how we govern citizens in a neo-liberal age. It has centered on the process of governing the ‘ideal’ and ‘normal’ citizen and how self-regulation plays a fundamental role in this. What has underlined this discussion are questions about who it is that can achieve the standards and goals that are promoted by a neo-liberal rationality, and who it is that will be classified as risky or grotesque through their failure to accept these normative values in society. Nadesan (2008) raises the issue of “the impossibility of the neo-liberal fantasy” (34), and suggests that it is the “risky populations who belie the neo-liberal fantasy” (Nadesan, 2008: 35). But who is this risky population? And how is it

defined in relation to matters of sex and sexuality? The current research intends to consider these questions while analyzing spaces of governance in Canada.

What this chapter has outlined is that neo-liberalism suggests that individuals supposedly, “possess the ability to *choose* happiness over unhappiness, success over failure, and even health over illness” (Rimke, 2000: 73; emphasis in original) and that the good, healthy citizen is, “the result of a magic that can be located, harnessed and exercised only once the self-changer acknowledges its ‘divine’ presence” (Rimke, 2000:64). This advances the idea that we all live on a level playing field and all have access to resources that enable us to measure up against “a normative ideal of citizenship” (Cruikshank, 1999: 24). Such thinking renders, “social relations of power invisible” and cultivates, “the illusion that the subject can escape from the constraints and regulation of social relations” (Rimke, 2000: 65). By conceiving of the self as autonomous, responsible, imbued with agency, and motivated by “the quick fix,” it “overlooks people’s diverse backgrounds, experiences, and ‘ways of reasoning’” (Petersen & Bunton, 2002: 156). In their discussion of crime, Garland and Sparks (2000) point to a trend of ignoring the larger social problems and constraints. They state that,

the political reaction of the 1980s and 1990s has shaped the public perception of these troubling issues, persuading us to think of them as problems of control rather than welfare; as the outcome of misguided social programmes; as a result of an amoral permissiveness and lax family discipline encouraged by liberal elites who were sheltered from their worst consequences; as the irresponsible behavior of a dangerous and undeserving underclass – people who abused the new freedoms and made life impossible for the rest of us. (Garland & Sparks, 2000: 199)

In such a way, those individuals who are seen to be dangerous, undeserving, and who have abused their freedoms are consequently labeled as “suffering a deficit, and as therefore requiring education or psychotherapeutic intervention ...” (Petersen & Bunton, 2002: 156). They are likely to be perceived of as ‘risky’ and perhaps even representative of the grotesque, abject body. By failing to live according to “a moral code

of individual responsibility and community obligation” (Miller & Rose, 2008: 105), they are unable to now achieve what is conceived of as citizenship. Cruikshank (1999) argues that as a result of these norms and codes, “the discourses of democratic citizenship tend to foreclose the ways in which it is possible to be a citizen rather than seeking to place the question of citizenship within the reach of ordinary citizens” (24). And in this vein, Rimke (2000) contends that, “citizenship itself disappears” (73). She argues that, “the public sphere and the public responsibility to which citizenship refers, the interidentified subjectivities to which citizenship has obligations, and on which it depends, are negated by a life of self-help” (Rimke, 2000: 73). Therefore, such scholars argue that this constant focus on the self alters and transforms what it is to be a citizen and have full citizenship rights. Isin (1998) agrees that citizenship has been altered, “from the possession of rights and duties to a kind of capacity to act as self-making agents. Excluded from this new citizenship are those who lack this capacity in the sense of not being connected to networks of enterprise and community” (37). Therefore, a discourse of ‘normative citizenship’ is created by and maintained by a neo-liberal agenda which can serve to generate and endorse inequality.

CHAPTER FOUR

GOVERNING THROUGH DISCOURSE: THE PRINCIPLES OF CRITICAL DISCOURSE ANALYSIS

Given the intentions of the research, it was felt that a critical approach should be adopted when analyzing the data. In such a way, critical discourse analysis was selected and its principles guided the current research agenda. This chapter will consider the meaning of 'discourse' and how Foucault delineated such a term. The origins and principles of critical discourse analysis will be reviewed and, through this, it was decided that an integrated framework was most suitable for researching neo-liberalism and citizenship. Consequently, key elements of critical discourse analysis and feminist critical discourse analysis will be identified as the basis of the framework employed in this research. This chapter also outlines the social problem focused on in the research and the discourse plane that is investigated on this basis. Further, discussion centres on how data sources were accessed, the data collection process, and data analysis. Commentary is also included on the limitations and contributions of the research.

Acquainting Ourselves with the Concept of 'Discourse'

Of interest in the current research are the emergent discourse(s) within spheres of governance in Canada. Before speaking specifically about the research, it is imperative to delineate the meaning of the concept discourse and how it will be detected in text through the use of critical discourse analysis. As can be seen from a review of 'discourse' related literature, there are multiple commentaries on its meaning, some of which will be discussed below. As Yell (2005) comments, there is often "a lack of

precision in how it is used and with what theoretical assumptions” (15; see also van Dijk, 1997a); therefore, it is the intention of this chapter to avoid such ambiguity.

To understand what discourses are, we can turn to Norman Fairclough (1995) who defines them as, “constructions or significations of some domain of social practice from a particular perspective” (94; see also van Leeuwen, 2008).²⁸ And they play a central role in “constituting or constructing selves” (Fairclough, 1992: 168; see also Blommaert & Bulcaen, 2000; Gauntlett, 2008). Discourses constrain how people make up themselves and they create, “the conditions for the formation of subjects and the structuring and shaping of societies” (Jäger, 2001: 35). Space is delimited in such a way that individual citizens are shown how to act, be, and speak, through these “highly regulated sets of statements” (Palmer, 2003: 5), which, “give people a vocabulary to speak about aspects of cultural experience and can act as means of legislating, policing, and normalizing types of human interaction” (Schauer, 2005: 46; see also Arthurs, 2004; Miller, 1993; Yell, 2005). In this vein, Sara Mills (2004) articulates that, “discourses are sets of sanctioned statements which have some institutionalised force, which means that they have a profound influence on the way that individuals act and think” (55). To demonstrate this, Mills (2004) gives an example of the discourse of middle-class femininity in the nineteenth century. She states that it,

consisted of the set of heterogeneous statements (i.e. those utterances, texts, gestures, behaviours which were accepted as describing the essence of Victorian womanhood: humility, sympathy, selflessness) and which constituted the parameters within which middle-class women could work out their own sense of identity. (56)

Other discourses, such as feminism, existed at the time that resisted this construction of womanhood; however, institutions did not sanction those but supported the concept of the ‘ideal’ female created in the discourse of femininity (Mills, 2004: 56). In fact, they

²⁸ Fairclough (1995) focuses on media discourse and media texts (see also Chouliaraki, 2006; Macdonald, 2003; Yell, 2005).

“acted together to produce boundaries of the possible forms of middle-class womanhood” (Mills, 2004: 56).

This is an important point when we consider the discourse of sexuality. For of interest here is how we regulate and talk about sex, particularly in spaces of governance. As Epstein (2003) argues, we have seen the emergence of “normalizing discourses of sexuality” which act to create a “normative sexual order” which delineates boundaries of appropriate sexuality (495). However, although, these may exist as the ‘official’ discourse(s), it does not mean that other alternative discourses do not exist, but as Mills (2004) identifies with notions of femininity, these ‘other’ discourses may not be sanctioned. For example, Gayle Rubin (1984) comments on the existence of a ‘sex hierarchy’ and argues the following,

[o]nly sex acts on the good side of the line are accorded moral complexity. For instance, heterosexual encounters may be sublime or disgusting, free or forced, healing or destructive, romantic or mercenary. As long as it does not violate other rules, heterosexuality is acknowledged to exhibit the full range of human experience. In contrast, all sex acts on the bad side of the line are considered utterly repulsive and devoid of all emotional nuance. The further from the line a sex act is, the more it is depicted as a uniformly bad experience. (282)

Discourse(s) can act as this ‘line’ which marks out what is suitable and correct behaviour for citizens to engage in.

From Mills’ (2004) work, two primary points emerge that need more discussion. Firstly, there is the idea that, within texts, there can be multiple discourses rather than, “homogenous discursive formations” (Yell, 2005: 16). As Macdonald (2003) maintains, “few texts offer a single, unified discursive position” (25) and may instead present a situation where, “various discourses are intertwined or entangled with one another like vines or strands” (Jäger, 2001: 35; see also Wodak, 2001). In Michelle Lazar’s 1993 article, she analyzes a set of government advertisements and identifies the existence of

different discourses, or “dual discourses” as she calls them, and finds that there are “competing discourses of gender relations” in the advertisements (Lazar, 2005: 14).

Secondly, Mills (2004) draws our attention to the idea of ‘official’ discourses. Through a consideration of ‘official’ discourse, we can identify, the “ruling social frames of consciousness” (Kinsman, 1995: 80), which can serve to constrain our activities and illuminate the position of those in power.²⁹ To understand conduct, we must pay attention to - and uncover - existing rules within regulatory systems. As Shapiro (1981) states,

because these systems reside in various discursive practices, the discourses selected in society can be the data whose interpretation would reveal policies that allocate and legitimate various kinds of control. (131)

By looking at ‘official’ discourse(s), we can decipher “ruling relations,” which are “the organizational processes that execute, control, regulate, inform, and order, in the various sites of governing, management, administration, discursive relations, professional organization, etc.” (Smith, 1990: 157). In his research, Kinsman (1995) considers official texts and discourses and maintains that, “texts are actively used within ruling relations to organize and coordinate social relations” and “critical analysis of official texts is crucial to explicating how sexual regulation is conceptually held together” (Kinsman, 1995: 82). Through such analysis, we can consider whose standpoint is being reflected and why one particular statement appears rather than another, which is consistent with Foucault’s (1972) ideas about the discursive, which will be discussed later on in this chapter.

What this discussion has highlighted is that discourses, texts and words have meaning and often power. Therefore, they provide rich data to explore the socio-cultural

²⁹ It is important to comment that we must not *only* focus on ‘official’ discourses as this will mean we will miss various voices of resistance and alternative discourses that can shed light on social and ruling relations. Larner (2000a) comments that research on neo-liberal projects often privileges official discourses, “with the result that it is difficult to recognise the imbrication of resistance and rule” (12). Therefore, this was kept in mind through the course of the current research.

landscape and in particular, the regulation of sexuality. I like the words of Dorothy Smith (1990) who emphasizes how texts can reveal and provide access to social and ruling relations. She articulates the following,

[t]exts are not seen as inert extra-temporal blobs of meaning, the fixity of which enables the reader to forget the actual back and forth work on the piece or pieces of paper in front of her that constitutes text as a body of meaning existing outside time and all at once ... The text is analyzed for its characteristically textual form of participation in social relations. The interest is in the social organization of those relations and in penetrating them, discovering them, opening them up from within, *through the text*. The text enters the laboratory, so to speak, carrying the threads and shreds of the relation it is organized by and organizes. The text before the analyst, then, is not used as a specimen or sample, but as means of access, a direct line to the relations it organizes. (Smith, 1990: 3-4; emphasis in original)

Discourse as Ideology

To further understand the concept of 'discourse,' we must consider the creation and (re)production of ideology in society. Often, the two terms are used interchangeably, which needs to be avoided. Instead, their relationship needs to be delineated, especially for the purposes of the current research.³⁰ A number of scholars argue that the concept of 'discourse' is intricately linked with that of 'ideology.' For example, Blommaert & Bulcaen (2000) maintain that, "discourse is seen as a means through which (and in which) ideologies are being reproduced" (450). Subsequently, "language is intricately related to beliefs, opinions and ideologies" (Wodak, 2007: 1; see also Wodak, 2001). Van Dijk (1995) argues that discourse contributes to the reproduction and development of ideology. He contends that, "discourse plays a prominent role as the preferential site for the explicit, verbal formulation and the persuasive communication of ideological

³⁰ Although the current research will be influenced by a Foucauldian perspective regarding discourse and texts, it will be diverging from his original work when we talk about the notion of 'ideology.' As Yell (2005) notes, Foucault rejected the term ideology, because he argued the term implied that there is a truth and that ideology masks it (19). He was more interested in what he called, 'truth effects.' Yell (2005) argues that it is a common slippage within research utilizing critical discourse analysis where both terms, discourse and ideology, are used, despite Foucault's arguments about 'ideology.' The current research will be delineating how discourses help to create and (re)produce ideology, particularly a neo-liberal ideology.

propositions” (van Dijk, 1995: 1; see also Fairclough & Wodak, 1997). Through van Dijk’s lens, he uses racism as an example of ideology, and comments on how it has appeared through a number of different discursive manifestations.

By utilizing Macdonald’s (2003) definition of ‘ideology’ as “a systematic framework of social understanding, motivated by a will to power, or a desire to be accepted as the ‘right’ way of thinking” (28; see also van Dijk, 1995),³¹ we can see how neo-liberalism functions as an ideology. In fact, it is the contention of this research that a neo-liberal ideology acts as an umbrella under which various discourses exist to help sustain and (re)produce it. Therefore, of interest, are these discourse(s) and how they operate within various spaces of governance to uphold a neo-liberal way of thinking.

Foucault and Discourse

More precisely still: what political status can you give to discourse if you see in it merely a thin transparency that shines for an instant at the limit of things and thoughts? Has not the practice of revolutionary discourse and scientific discourse in Europe over the past two hundred years freed you from this idea that words are wind, an external whisper, a beating of wings that one has difficulty in hearing in the serious matter of history? (Foucault, 1972: 209)

There are two main approaches to the concept of ‘discourse’ - linguistic or Foucauldian (Yell, 2005). As noted, this research incorporates a Foucauldian perspective into how texts are analyzed (for example, see Fairclough, 1992).³² The concept of ‘discourse’ is very much linked to Foucault and his work has served to popularize the term and the ideas around it (Fairclough, 1992; Macdonald, 2003; O’Farrell, 2005). Foucault’s earlier work focused on the concept of discourse. Within it, particularly *The Archaeology of Knowledge* (1972), he mounts an impassioned case in favour of the relevance of discourse and words.

³¹ Macdonald (2003) also comments that dominant ideologies, “often fail to be recognized as such and pass as ‘common sense’, or as self-evident truths” (28).

³² Fairclough (1992) provides a detailed account of Foucault and his concept of discourse (see also Jäger, 2001; Macdonald, 2003; Yell, 2005).

In his work, Foucault delineates a number of terms that develop his notion of 'discourse.' As O'Farrell (2005) maintains, Foucault develops "a whole series of categories to organize both discourse and its relation to other practices, events, and objects" (79). For Foucault (1972), discourse can be defined as, "a certain 'way speaking'" (193), as "the group of statements that belong to a single system of formation" (107) and as a "power/knowledge formation, which may be manifested in language (or other symbolic forms)..." (Yell, 2005: 15). In his discussion, he highlights the existence and development of 'discursive practices' and 'discursive formations' - the former being the actual practice of using a discourse for "to speak is to do something" (Foucault, 1972: 209). As O'Farrell (2005) clarifies, "each discursive practice deals with a field of objects, which are things presented to thought and are the occasion or the matter on which thought is exercised" (79). The latter, a discursive formation, is,

a complex group of relations that function as a rule: it lays down what must be related, in a particular discursive practice, for such and such an enunciation to be made, for such and such a concept to be used, for such and such a strategy to be organized. To define a system of formation in its specific individuality is therefore to characterize a discourse or a group of statements by the regularity of practice. (Foucault, 1972: 74)

This idea of 'discursive formation,' is not something easily identifiable within society. Instead, as Foucault argues, these formations "have made their own processes and even their own existence *invisible*, that is, have naturalised it. By identifying the ways in which discourses operate, we are able to make them '*visible*' and to reduce their degree of control" (Yell, 2005: 16; emphasis added). Therefore, research, such as this, aims to contribute to this process of making discourse visible so that we might determine its power and control and decipher how sex and sexuality are delineated within society.

Foucault sees these concepts of discourse, discursive practice and discursive formation as being interconnected. Foucault gives numerous examples of discourses

that represent this structure of words and texts. Of note to this research is his discussion of the discourse of sexuality. He argues that, in relation to sex and sexuality, there was,

the wide dispersion of devices that were invented for speaking about it, for having it be spoken about, for inducing it to speak of itself, for listening, recording, transcribing, and redistributing what is said about it: around sex, a whole network of varying, specific, coercive transpositions into discourse. (Foucault, 1990: 34)

Therefore, there were particular ways set out to speak of sex that were existent in discourse. What is of importance to mention here is that a researcher cannot apply determinations of discourse to future eras, but may only use them for the period investigated. O'Farrell (2005) elucidates this fact by stating, "one can only describe the rules of a past system of discourse, we cannot make those rules prescriptive and apply them in the future" (78).

A final point of interest in relation to Foucault and his concept of discourse pertains to the role of human individuality and agency in the formation of discourse. The question is what level of control do individuals have with respect to the creation of discourse? In Foucault's determination of the meaning of discourse, he finds that individuals, as in the general public, have little to do with their formation, and recognizes that this fact could cause discomfort. As Macdonald (2003) comments, Foucault distinguishes, "how difficult it is for people, used to thinking about their own ability to influence events, to cede authority to less clearly defined forces" (22). Such a sentiment is expressed in the following,

I understand the unease of all such people. They have probably found it difficult enough to recognize that their history, their economics, their social practices, the language (*langue*) that they speak, the mythology of their ancestors, even the stories that they were told in their childhood, are governed by rules that are not all given to their consciousness. (Foucault, 1972: 210-211; emphasis in original)

However, despite this lack of control, Macdonald (2003) draws our attention to the fact that, "even if we accept that the formation of discourse is often beyond individual control,

the role of individuals in perpetuating or challenging already existing discourses, and in shaping those of the future, needs to be acknowledged” (23). This is an important point, because, discourse can gain power through its dispersion and perpetuation and can lose power through resistance and challenges to its nature.

A group of linguists within the Critical Discourse Analysis (CDA) tradition “have integrated Michel Foucault’s definition of discourse with a systematic framework of analysis based on a linguistic analysis of the text” (Mills, 2004: 131). For example, Norman Fairclough provides, “working models and forms of practice from Foucault’s theoretical interventions, together with a description of the effects of discursive structures on individuals” (Mills, 2004: 133). Therefore, CDA has functioned to operationalize Foucault’s abstract concept of ‘discourse’ to make it workable, particularly in the current socio-political landscape. The next section will describe the CDA tradition in more detail.

Understanding Critical Discourse Analysis

The first question to consider is what does critical discourse analysis (CDA) represent? Is it a theory, method, both or neither? On Teun van Dijk’s website, he includes a section on misconceptions about CDA and clarifies that critical discourse studies (CDS) as he calls it, is not a method of analysis or research – but is, “an academic movement of a group of socially and politically committed scholars, or, more individually, a socially critical attitude of doing discourse studies” (van Dijk, 2007; see also van Dijk, 2001b). Although van Dijk does not want CDA to be considered as a theory or method, other scholars have argued differently. For example, Chouliaraki and Fairclough (1999) contend that CDA is “both theory and method: as a method for analysing social practices with particular regard to their discourse moments...” (16; see

also Fairclough, 2001).³³ In a way, I think that we can take account of both visualizations. CDA has certainly been, and continues to be an active academic movement that aims at challenging social and ruling relations. For example, it often pays attention to inequality and abuses of power, particularly in discourse (van Dijk, 2001b; Wodak, 2001). However, I do not think that we can discount both the theoretical and methodological framework it provides.

The CDA tradition has supplied a blueprint for the analysis of texts. The literature on CDA and utilizing such a tradition is vast. What has emerged are a number of different perspectives and variations on CDA. As Chouliaraki & Fairclough (1999) explain, “the contemporary field of critical analysis of discourse is itself quite diverse” (6). Therefore, what this section will do is briefly characterize CDA, drawing on some of the primary scholars within the field, and then I will delineate the adopted approach in the current research.

CDA is a school of discourse analysis that concerns itself with relations of power and inequality in language. CDA emerged in the late 1980s as a programmatic development in European discourse studies led by Norman Fairclough, Ruth Wodak, Teun van Dijk, and others³⁴ (see Blommaert & Bulcaen, 2000).³⁵ Since then, it has become one of the most influential and most visible branches of discourse analysis. By assuming that, “people’s notions of reality are constructed largely through interaction with others, as mediated by the use of language and other semiotic systems” the goal of CDA is to deconstruct language and illuminate the numerous ways that, “dominant forces in society construct versions of reality that favour the interest of those same forces” (Huckin, 1997: 1; see also Gill, 2007b). Therefore, the purpose of CDA is to

³³ Chouliaraki & Fairclough’s (1999) book, *Discourse in Late Modernity: Rethinking Critical Discourse Analysis*, made an important contribution to the field of CDA.

³⁴ Another key person within CDA is Theo van Leeuwen. For example, see van Leeuwen, 2008.

³⁵ Blommaert & Bulcaen (2000) give an excellent review of the CDA program.

analyze, “how language functions in, for example, constituting and transmitting knowledge, in organizing social institutions or in exercising power” (Wodak, 2001: 11).³⁶ In such a way, it pays attention to instances of social interaction and attempts to reveal the hidden motivations and politics behind a text. A number of scholars argue that we need to view text as ‘social practice.’ For example, Fairclough and Wodak (1997) contend that, “CDA sees discourse – language use in speech and writing – as a form of ‘social practice’” (258³⁷; see also Fairclough, 2001; Ostermann & Keller-Cohen, 1998; Wodak, 1997, 2001). By this, Fairclough and Wodak (1997) draw our attention to how discourse is, “socially constitutive as well as socially shaped: it constitutes situations, objects of knowledge, and the social identities of and relationships between people and groups of people” (258).

Calling the approach ‘critical’ is recognition of how social practices are intertwined with and shaped by relations of power. As Fairclough (1995) argues, “our social practice in general and our use of language in particular are bound up with causes and effects which we may not be at all aware of under normal conditions” (54; see also Fairclough, 1992). The ‘critical’ part of CDA sets this approach apart from more non-critical advances in theory and method. For example, it encourages researchers to consider texts in different ways. Through adopting critical discourse analysis, Huckin (1997) approaches the text in two stages,

First, I play the role of a typical reader who is just trying to comprehend the text in an uncritical manner ... Second, I then step back from the text and look at it critically. This involves revisiting the text at different levels, raising questions about it, imagining how it could have been constructed differently, mentally comparing it to related texts, etc. (3)

³⁶ Wodak (2001) gives a comprehensive account of the beginnings and development of critical discourse analysis.

³⁷ See also Fairclough and Wodak (1997) for a thorough discussion of the tradition of CDA.

Additionally, being critical means conducting a distinctive kind of research. The role of the researcher changes and it becomes the responsibility of him/her to be reflexive while collecting and analyzing data. Wodak (2008) argues that,

‘Critical’ means constant self-reflection by the researcher, distance from the data, defining one’s position and values as well as research interests explicitly, and being aware of multiple readings when analyzing specific texts. Being critical means not taking social phenomena and processes for granted, opening up alternative options, and de-mystifying power relations, latent beliefs and ideologies while de-constructing texts and discourses systematically and precisely in a retroductable way. (196; see also Lazar, 1993, 2005; Sunderland & Litosseliti, 2008)

Further, Lazar (1993) adds that a critical approach “cannot pretend neutrality or detached observation because in actively seeking to expose myths and ideologies it must take sides on issues” (448). This is an interesting comment which does set ‘critical’ research apart from ‘non-critical’ work. The act of demystifying discourse and ideology pushes a researcher to be critical and although there is a risk of bias in taking sides, the end result also has the potential to increase the power of the research and its ability to be a catalyst for change. Therefore, research such as this, purports to expose the connections between the use of language and the exercise of power. Additionally, key domains of CDA interest include institutional discourse (Blommaert & Bulcaen, 2000),³⁸ which is the focus of this study.

As noted above, CDA is an umbrella term covering a number of distinct but related approaches to the analysis of text that has to do with the social and/or political. Teun van Dijk has been prolific in his discussions of CDA (for example, see van Dijk, 1993, 1997a, 1997b, 2001a, 2001b). He is particularly well-known for his socio-cognitive

³⁸ For some good examples of critical discourse analysis – see Cramer, 2007; Lazar, 1993; Ostermann & Keller-Cohen, 1998; Phelan, 2007. See also Ehrlich (2002) who analyzes institutional discourse within the Canadian legal setting.

approach.³⁹ Van Dijk (1993) states that social cognitions, “explain the production as well as the understanding and influence of dominant text and talk” (257). In this way, we are able to start thinking about and understanding the nature of social power and dominance, and the role discourse plays in, “*the (re)production and challenge of dominance*” (van Dijk, 1993: 249; emphasis in original). Van Dijk (1993) focuses on elites and their discourses and reveals the top-down relations of dominance, where dominance is, “the exercise of social power by elites, institutions or groups that results in social inequality, including political, cultural, class, ethnic, racial, gender inequality” (249-250). A concentration on the manufacture of social inequality is fundamental to van Dijk’s approach, and in his work, he attempts to determine ways in which powerful groups limit the freedom of action of others. As commented on earlier, this idea of exclusion is definitely crucial to the work at hand; it is important to determine how factors of gender, race, class and sexuality play a role in individuals accessing and relating to the dominant discourse and how it might impact on their (sexual) citizenship. Van Dijk also brings our attention to the concept of ‘hegemony’ which is also central to his approach. Identifying with the idea that there is a ‘hegemonic thrust’ in social, political, economic and cultural matters, he comments that, “one major function of dominant discourse is precisely to manufacture such consensus, acceptance and legitimacy of dominance” (Herman & Chomsky, 1988, in van Dijk, 1993: 255; see also McGregor, 2003).

From his work, van Dijk identifies two key factors of CDA that are important to recognize. He asserts that it is vital to pay attention to *context*, primarily because, “discourses are a structural part of their contexts and their respective structures mutually and continually influence each other” (van Dijk, 1997b: 15; see also Huckin, 1997;

³⁹ The primary difference between Norman Fairclough’s and Teun van Dijk’s approach is the social-psychological element discussed by van Dijk.

McGregor, 2003). Therefore, we cannot ignore the current socio-political context in which the discourse(s) exist. As van Dijk (1997a) contends, “discourse should preferably be studied as a constitutive part of its local and global, social and cultural contexts” (29; see also van Dijk, 1997b, 2001a, 2001b). In such a way, we cannot separate one from the other; text “cannot be abstracted from notions of context” (Yell, 2005: 10).

Van Dijk also draws our attention to the access individuals have to discourse and how power plays a central role in who has access to certain discourse(s). As van Dijk (2001a) argues, “most people have active control *only* over everyday talk with family members, friends, or colleagues, and passive control over, e.g. media usage” (355; emphasis added). It is members of more powerful groups and institutions, who “have more or less exclusive access to, and control over, one or more types of public discourse” (van Dijk, 2001a: 356; see also van Dijk, 1993). Therefore, access stands as an important or even “‘symbolic’ resource” that divulges power to certain members of society (van Dijk, 2001a: 355). This relates to Foucault’s original ideas about an individual’s lack of control in forming and shaping discourse.

‘Unmasking the Written Word’

CDA offers “prescriptive ‘tool-kits’ which need to be “flexible and motivated by the questions to be asked” (Yell, 2005: 21). For the current research, I decided to build my own tool-kit based on the work of a number of well-known critical discourse analysts. I utilized an analytical framework for CDA modeled on the work of Norman Fairclough (2001), Siegfried Jäger (2001) and the principles of feminist critical discourse analysis first articulated by Michelle Lazar (see 1993, 2005). Van Dijk (2001b) recommends that, “good scholarship, and especially good CDA, should integrate the best work of many people, famous or not, from different disciplines, countries, cultures and directions of research. In other words, CDA should be essentially diverse and multidisciplinary” (95-

96). Through integration, it is felt that this is achieved in the current research. I will spend some time talking about the contributions to the field of CDA which I selected for the research at hand.⁴⁰

First, Norman Fairclough supplies the area of CDA with numerous articulations on how to conduct research within such a tradition, particularly when paying attention to media discourse. Of particular interest, are his assertions that CDA is problem-based. In such a way, Fairclough (2001: 125) proposes the following model of research:

1. Focus upon a social problem
2. Identify obstacles to it being tackled through analysis of discourse⁴¹
3. Consider whether the social order (network of practices) in a sense 'needs' the problem⁴²
4. Identify possible ways past the obstacles⁴³
5. Reflect critically on the analysis (1-4)

As can be seen, this method holds that, before engaging in critical discourse analysis, we need to identify the social problem that we want to investigate. Scollon (2001) advances that, "social problems in our contemporary world are inextricably linked to texts" and that "social problems are couched in public and private discourses that shape the definition of these problems as well as inhibit productive social change" (139-140). Therefore, analysis of text is a valuable means by which to identify discourse(s) that assist in (re)producing social problems in society. Through this approach, research is structured around a particular social issue or problem, and researchers attempt to deconstruct discourse(s) related to that problem to go some way in solving it and/or

⁴⁰ The title of this section is based on McGregor's (2003: 1) phrase, "unmasking the written word."

⁴¹ By 'obstacles', Fairclough (2001) is asking whether such representations are easily dispensed off or if they are difficult to change, primarily because of their pervasive nature (130).

⁴² In relation to this third point, Fairclough (2001) wants researchers to consider whether the social order generates "a range of major problems which it 'needs' in order to sustain itself" (126)?

⁴³ Fairclough (2001) suggests that "resistant texts" (134) are a possible way to get past the existent obstacles. He argues that, "alternative representations are located within an emergent counter-network of social practices which at least constitutes a possible resource for countering the obstacles..." (Fairclough, 2001: 134).

perhaps suggesting alternatives. Fairclough (2001) discusses the need for academic research to be translated into practice and action.

Fairclough (2001) uses a variety of texts related to neo-liberalism to demonstrate his analytical framework as discussed above.⁴⁴ In terms of a social problem related to a neo-liberal political rationality, he maintains the following,

[t]he social problem here is that feasible alternative ways of organizing international economic relations which might not have the detrimental effects of the current way (for instance, in increasing the gap between rich and poor within and between states) are excluded from the political agenda by these representations. (Fairclough, 2001: 129)

Through identification of the social problem, it serves to structure the research and give it a clear and defined focus.

In addition to the work of Fairclough (2001), Siegfried Jäger (2001) offers some useful concepts to help structure research within the CDA tradition. Jäger (2001) comments that a researcher's "discourse-analytical 'toolbox' can be filled with very various instruments according to the texture of the object to be investigated" (46). In such a way, Jäger (2001) delineates some ideas that are useful for the current research on neo-liberalism and citizenship. First, Jäger (2001) talks about 'discourse strands' (47) which point to the numerous dominant and sub-themes within an overarching discourse. For example, Jäger (2001) argues that, "in a given society discourse strands form the overall societal discourse in a state of entanglement" (Jäger, 2001: 50) and it is the role of the researcher to 'untangle this net' and understand how the various discourse strands relate to each other (50). For the current research, we can view neo-liberalism as presenting that general societal discourse (or as I maintain, 'ideology'), which is comprised of various discourse strands. Through using such a concept, we can

⁴⁴ Kosetzi (2008) utilizes Fairclough's framework as outlined above in her analysis of fictional media. In relation to the first step, she identified 'subtle sexism' as the social issue/problem.

investigate the effects that the many discourse strands have on the construction and constitution of citizenship.

Second, Jäger (2001) discusses the notion of 'discourse planes' (49). These point to the fact that,

the respective discourse strands operate on various discursive planes (science(s), politics, media, education, everyday life, business life, administrations, and so on). Such discourse planes could also be called societal locations from which 'speaking' happens. It can also be observed that these discursive planes impact on one another, relate to one another, use each other and so on. (Jäger, 2001: 49)

Within research, we can investigate several discourse planes at the same time (Jäger, 2001: 52). The current research chose to consider one discourse plane: the legal realm.⁴⁵ These concepts of 'discourse strands' and 'discourse planes' contributed to the structure of the current research and formed a part of the integrative framework that I chose to adopt. The final part of the selected approach relates to the work of feminist critical discourse analysis.

Feminist Critical Discourse Analysis

In 1998, Deborah Cameron asked, "why is language a feminist issue?" (1). Numerous scholars have investigated such a question and have an underlying consensus regarding the importance of paying attention to the practice of language. Through such awareness, it is possible to consider how it impacts on the construct of gender and how language may restrict its formation (see Wodak, 1997). For example, Ehrlich (2002) argues, "language is one important means by which gender – an ongoing social process – is enacted or constituted" (732; see also Sunderland & Litosseliti,

⁴⁵ I selected the concepts that are particularly useful for the current research. Jäger's (2001) article presents an accessible approach to conducting critical discourse analysis. Within his discussion, he also comments that quantitative methods can be helpful. For example, they can be used to numerate and record the frequency with which particular arguments emerge (Jäger, 2001: 52).

2008). In such a way, “a ‘feminist critique of language’ now exists” to consider the relationship between language and gender (Cameron, 1998: 1; see also Cameron, 1997). In her musings on feminist criticism, Elaine Showalter (1981) maintains that a central part of such criticism should be consideration of language,

[t]he appropriate task for feminist criticism, I believe, is to concentrate on women’s access to language, on the available lexical range from which words can be selected, on the ideological and cultural determinants of expression. The problem is not that language is insufficient to express women’s consciousness but that women have been denied the full resources of language and have been forced into silence, euphemism and circumlocution. (193)

Cameron (1998) places a primacy on considering these two areas in hopes that by exposing unequal relationships, there can be some hope of change. For example, consider Cameron’s following statement,

Theorizing gender and its relationship to language does not, in itself, dismantle the unequal and unjust social relations which are thereby revealed; one might hope, however, that in revealing them it contributes to the project of demystifying them, denaturalizing them, and so making it less difficult for feminists to change them. (Cameron, 1997: 35)

Although recognizing that it is difficult to ‘dismantle’ the structures themselves through analysis of language, it may result in bringing about some sort of societal upheaval by creating a space to challenge the discursive. As we have already seen in this chapter, discourse can play a central role in creating boundaries which delineate how identities are formed, and gender is certainly part of this. As West, Lazar and Kramarae (1997) contend, “gender is accomplished *in* discourse” (119; emphasis in original)⁴⁶ and in such a way, unequal relations may be (re)created through what is available for gender formation. West et al. (1997) argue that gender inequalities are (re)produced through language, and consequently, what we know about gender does not include any recognition of diversity and difference among individuals, particularly

⁴⁶ West, Lazar & Kramarae (1997) provide an excellent overview of research on gender and discourse (see also Wodak, 1997). Wodak (1997) also comprehensively discusses feminist contributions to the study of language.

women. Therefore, a primary goal of feminist criticism has been to reveal the multiple identities of women.

In relation to the tradition of critical discourse analysis (CDA), gender has not been totally ignored; however, there a number of scholars who point out the various gaps that are still in need of attention. For example, Sunderland and Litosseliti (2008) argue that,

[t]hough there have been studies of gender using CDA ... CDA has been accused of downplaying both gender concerns and feminist approaches to language study ... One question is whether CDA's conventional focus on social class, hierarchy and power relations, and on the 'dominant' and 'dominated', *enables* it to deal fully with gender. (10; emphasis in original; see also Kosetzi, 2008)

In response to comments such as this, we have seen an increasing amount of work that now pays attention to gender within CDA, including the development of feminist critical discourse analysis (FCDA), by such scholars as Michelle Lazar.

'Why a Feminist Critical Discourse Analysis?'

As one of the first scholars to develop a feminist strand of critical discourse analysis, ⁴⁷ Lazar (2005) points out that, "the marriage of feminism with CDA ... can produce a rich and powerful political critique for action" (3) and can address, "the need to theorize and analyse the particularly insidious and oppressive nature of gender as an omni-relevant category in most social practices" (3). Further, it enables us to challenge the traditional male-oriented nature of many disciplines and provide space to consider areas of concern that were not previously considered fully. To this effect, Lazar (2005) recognizes, "the need to identify and establish a feminist perspective in language and discourse studies" as a central part of "what feminists in the academia have for many years criticized and sought to change across male-stream disciplines in the humanities,

⁴⁷ Lazar (2005: 2) asks this question.

social sciences and sciences” (2). Through a realization of such goals, scholars such as Lazar (2005) identify such a technique as a mode to contest the social status quo, “in favour of a feminist humanist vision of a just society, in which gender does not predetermine or mediate our relationships with others, and our sense of who we are or might become” (6). By critiquing discourses that serve to maintain and preserve the dominant social order, it can reveal ruling relations as they pertain to issues around gender and other intersecting factors, such as sexuality, ethnicity and social location. Such an approach utilizes a Foucauldian sense of power, which highlights the often invisible nature of power and the discourses which function to maintain it. As Lazar (2005) contends, the task of feminist CDA is to consider, “the operation of a *subtle* and seemingly innocuous form of power that is substantively discursive in nature” (9; emphasis in original) and, “examine how power and dominance are discursively produced and/or resisted in a variety of ways through textual representations of gendered social practices, and through interactional strategies of talk” (10).

Michelle Lazar’s early work gives an excellent example of the use of feminist CDA. She conducts “an exercise in critical discourse analysis” and is concerned with showing “how gender relations are managed in and through the texts” (Lazar, 1993: 447). Through looking at a series of educational advertisements launched by the government in Singapore, Lazar (1993) considers the representation of gender in discourse – and focuses on “*discursive* practices of representation” (448; emphasis in original). Of key interest in this article is Lazar’s (1993) assertion that,

[t]his domain of study, which is concerned with exposing all forms of social injustices, focuses on the role of *discourse* in constructing and maintaining dominance and inequality in societies. The significance of discourse cannot be overemphasized for it is a powerful means of controlling the minds, and therefore the actions, of dominated groups. The influencing of minds through language is a way of generating consent among people to ‘voluntarily’ subscribe to dominance. (447; emphasis in original)

She reveals the importance of taking on such a task and highlights the power of language. Lazar (1993) argues that, “critical awareness is the first step in the struggle for social change and liberation” (448).

As the above discussion uncovers, a major part of feminist CDA is to focus on gender and how “gendered relations of power are (re)produced, negotiated and contested in representations of social practices” (Lazar, 2005: 11). Although celebrating such a development in CDA, Wodak (2008) brings to light some concerns she has in isolating gender in this way. She asserts that, “gender is inherently linked to other identities and subject positions” (Wodak, 2008: 197) and that it is important to acknowledge difference and recognize the multiple identities of women. Wodak (2008) argues that,

FCDA seems to focus on and define its focus mainly as *gender*; other identities seem to be ignored, other discursive and material practices too. The complex relationship(s) between the many important social factors and phenomena constituting our identities are rarely mentioned, even neglected. (Wodak, 2008: 195; emphasis in original)

Wodak (2008) suggests that we elaborate on Lazar’s proposals to avoid “accusations of reductionism” (195). For example, consideration needs to be given to ethnicity, economic status and sexual orientation. Wodak (2008) addresses this need in her own work through a consideration of the discourses that emerged from focus groups with migrant women, where she contextualizes gender in order to avoid neglecting, “salient dimensions of migration in Europe” (209).

As demonstrated in the current research, it is important to recognize all of these intersecting factors. However, I would argue that Michelle Lazar does not fail to articulate the importance of these in her discussions of feminist CDA. For example, she implies that feminist CDA should be “comparativist rather than universalizing” to ensure that researchers pay attention to “the discursive aspects of the forms of oppression and

interests which divide as well as unite groups of women” (Lazar, 2005: 11). Although gender is certainly used as a powerful rubric to view identity through, Lazar (2005) makes it clear that we cannot ignore other factors key to the (re)production of self. As she states, “gender as a category intersects with, and is shot through by, other categories of social identity such as sexuality, ethnicity, social position and geography” (Lazar, 2005: 1). And perhaps, it is important to reiterate that all research working within the feminist CDA frame should incorporate these considerations.

In relation to the current research, feminist CDA is useful when considering the discourses around neo-liberalism and feminism. For example, Lazar (2005) contends that “the global neo-liberal discourse of post-feminism” is of concern to feminist CDA (17). Earlier it was outlined how post-feminism has particularly emerged in a neo-liberal age. In such a way, it is assumed that a certain level of equality has been achieved, but as a number of scholars highlight, “women’s rights and freedoms cannot be assumed as a given, for these can be contested through backlash discourses and changing public policies” (Lazar, 2005: 17). Consequently, the discourse of post-feminism, along with those related to neo-liberalism, need to be delineated and critiqued. Lazar (2005) argues that such a task is required because the post-feminist discourse “lulls one into a thinking that struggles over the social transformation of the gender order have become defunct in the present time” (17). Without critique, the “self-focused ‘me-feminism’” that has emerged and established itself over the last 20-30 years can remain, which serves to damage the “collective ‘we-feminism’ needed for a transformational political program” (Lazar, 2005: 18).

Of concern to the current research is to pay attention to such discourse – revealing gendered discourse and how it intersects with race/ethnicity and sexual orientation in hopes to consider the existence of (hetero)sexist discourse that ultimately

impacts on an individual's ability to attain full (sexual) citizenship rights. Further, it will be considered how it relates to and intersects with the broader neo-liberal ideology.

Researching Neo-Liberalism and Citizenship: Employing an Integrated Framework

Having laid a basis for my research in the previous chapters, a clear research question emerges around the topics of neo-liberalism and citizenship that demands attention. In this section, I outline the data collection and analysis processes utilized to respond to the chosen question that represents an under-researched social problem in Canada. Consistent with the methodological perspective adopted, the methodology seeks to reveal the 'discursive practices', both explicit and implicit, within a 'discourse plane.' Through a discussion of discourses within the legal sphere, it was hoped that I would be able to decipher the impact of a neo-liberal ideology on citizenship. An integrated framework for the analysis of discourse was employed - combining elements of critical discourse analysis and feminist critical discourse analysis - to facilitate an investigation of the discourses around sexuality and citizenship. Additionally, commentary is made that delineates the limitations of the chosen research direction and framework. As will be discussed, the current research is exploratory in nature, utilizing primarily a qualitative approach, but it is also interdisciplinary, which is in line with the goals of feminist research (Hesse-Biber, Gilmartin & Lydenberg, 1999).

Exposing a Social Problem

Following the recommendations of Fairclough, this research is centred on the consideration of a 'social problem' within Canada. As demonstrated in the previous chapters, the area of interest and importance is neo-liberal governance and its impact on citizenship, particularly as it pertains to sex and sexuality, and to identify whether the

courts in Canada utilize this neo-liberal mindset in their decision-making processes. The detailed discussion of neo-liberalism in chapter two spent time articulating what neo-liberalism is and how it promotes ideas such as 'governing at a distance' and the creation of 'active citizens.' Some examples were given of how these ideas have been evident in the US, UK, and Canada. However, it was discussed primarily as "an 'ideal type' ...a purely theoretical model apart from its actual empirical manifestations or historical configurations" (Huey, 2007: 17). Consequently, it is important to go beyond the theoretical and ascertain whether a neo-liberal agenda has been realized in Canada. As Huey (2009) highlights, "the West has not been experiencing a singular, uniform rise in ... neoliberalism" (262). Therefore, we have to be careful of making broad generalizations and pay attention to varying modes of governance. Huey's (2009) work demonstrates this, as she makes use of "'smaller picture' analyses" (264) in her consideration of policing practices in Edinburgh, San Francisco, and Vancouver (2007), and homelessness in San Francisco and Edinburgh (2009).

For that reason, the goal of this research was to consider whether the courts contribute to a neo-liberalization of Canada and decipher what it means for the individual Canadian citizen. Commentary has been made about cuts to welfare programs, increasing support for corporations and market values, but how does this translate in the legal realm? Although this research is not paying attention to specific locales in its identification of trends, it does contribute to establishing whether neo-liberalism is evident on a national level. The research considers the existence of a neo-liberal model of law and asks whether it results in the creation of possibilities and opportunities or restrictions and constraints; and whether it leads to inclusions and/or exclusions. Thus, the key research question was as follows:

- How has governance in a neo-liberal era reframed the discursive conditions of what constitutes full sexual citizenship?

With such a question, the hope was to explore whether the emergence of a neo-liberal socio-political context has led to more or less regulation of sexually explicit materials and whether it has led to more or less access to representations of diverse sexuality. The intention was to consider both the advantages and disadvantages of a neo-liberal mode of governance.

Discourse Plane

Through an adoption of Jäger's approach to research, the objective was to explore the stated social problem within a discourse plane, which he maintains are, 'societal locations from which 'speaking' happens.' In this way, the legal system was chosen as the site of interest and as a vital 'sphere of governance' within Canadian society. The interest of this research was to contemplate how this site acts as an effective tool in the regulation and monitoring of behaviour through the production of discourse. Through the review and analysis of legal cases before and after the emergence of a neo-liberal political rationality, the hope was to draw attention to shifts in discourse within obscenity law and comment on how various 'discourse strands' may operate to control or enable access to sexually explicit materials. As a result, the focus of the research is on the 'operations' of discourse. Through the current research, I am not able to assume or make any conclusions about the 'effects' of them. I did not interview people about the impact of certain discourse. However, it is possible for me to talk about how the discourse in obscenity law structures our response to pornography and how that can impact on what is available for consumption. In such a discussion, the intention was to analyze all cases retrieved from the data collection process, but focus on key and symptomatic moments within obscenity law which have crystallized Canada's approach to obscenity, particularly pornography, in the legal realm.

Therefore, to assist answering the research question as detailed above, the focus of this research was within the legal realm and specifically Canadian legal decisions between 1959 and 2009. The year 1959 was selected as this was the year that brought amendments to the obscenity provisions within the *Criminal Code* which instituted a shift away from the courts use of the *Hicklin* rule, a test developed in England in the 1800s. This time frame also afforded the possibility of considering judgments before and after the emergence of neo-liberalism.

As is clear from the preceding discussion, the focus of this research was on Canada. We have certainly seen academic interest in the legal regulation of pornography in Canada. For example, the cases of *Butler* and *Little Sisters* have generated considerable debate and analysis. Due to this wealth of information, the intention of the current research was to move beyond the common arguments and foci. Through a consideration of 'context,' it was hoped that this would be accomplished. There has been little exploration of the impact of neo-liberalism on obscenity law or on the access and consumption of pornography. By contemplating the key moments and reflecting on them in light of the socio-political context, it was intended that this research would breathe new life into an area that has somewhat become tired. The plan was to develop new insights in this area of law, particularly as it relates to (sexual) citizenship, and therefore, contribute to social knowledge.

Data Collection

To access Canadian legal decisions between 1959 and 2009, I utilized three legal databases accessible in the public domain: (1) Quicklaw; (2) CanLII; and (3) Westlaw Canada. All three are comprehensive and searchable databases that include the full-text of all reported legal decisions in Canada. Two searches were conducted in

all three databases focusing on all Canadian decisions, in all jurisdictions. I used the following search terms:

- Obscenity & pornography
- 'Undue exploitation of sex'

It was also thought that I would conduct a search using the relevant *Criminal Code* section numbers but this was difficult because the numbers have changed over the years. I began my searches using Quicklaw and then I moved on to the other databases to retrieve cases that were not included in Quicklaw's list of results. As I went through the list of results in all three databases, cases were selected on the basis that they discussed obscenity law, particularly in reference to adult pornography. They were excluded if they focused on child pornography (n=349) or issues that did not relate to the current research focus (n=110).⁴⁸ The final sample comprised of 218 cases.⁴⁹ Once I had all cases, I proceeded to import them into the software program, *NVivo*, which is designed to assist a researcher in conducting qualitative analysis through the management of data.

Data Analysis

Initially, I approached the analysis of the texts in an uncritical manner where I considered the various attributes of the cases and went onto delineate and code the dominant and sub-dominant themes within the case law. I reflected on the language used and established "a set of categories" (Silverman, 2000: 128), which assisted in the creation of these themes. As I progressed through the case law, I began to see commonalities and key concepts that were being discussed, such as, the definition of

⁴⁸ Lists of these cases are included in Appendix C.

⁴⁹ The final sample included criminal proceedings brought *in rem* (against the material itself) as well as criminal prosecutions of individuals. A full list of the selected cases is included in Appendix A. Further, details regarding each of the decisions are included in Appendix B.

the 'undue exploitation of sex', the use of a community standard test of tolerance, the emergence of a harm-based approach, and the impact of the *Canadian Charter of Rights and Freedoms* and its entrenchment of expressive freedom. As I identified these, I was then able to see which judgments fell into each category, and subsequently, demarcate similarities and differences between the cases, and sketch out a history of Canadian obscenity law. Through using *NVivo*, I was able to organize my themes and maintain examples of them through case quotations, which was particularly useful when it came to writing the analysis. A discussion of these themes and a contemplation of the historical development of obscenity law are discussed in chapter five. The chapter involves an analysis and critique of obscenity law between 1959 and 2009.

During this stage, I was able to take a glance at the data and see what it looked like numerically. This helped not only in the discussion of the development of obscenity law and what the focus of the courts has been over the course of fifty years, but also in the delineation of the larger picture and contemplating the trends that emerged out of this area of law. By considering the numbers, it helped develop my final conclusions of where we are now and how society approaches adult pornography in a neo-liberal context. The following charts assisted with this. Figure 4-1 shows the distribution of cases across the fifty year time frame. What was noticed is that there is a gradual increase in the amount of cases from the 1960s to the 1980s and then a decline in the amount of cases as we moved into the 1990s and 2000s.

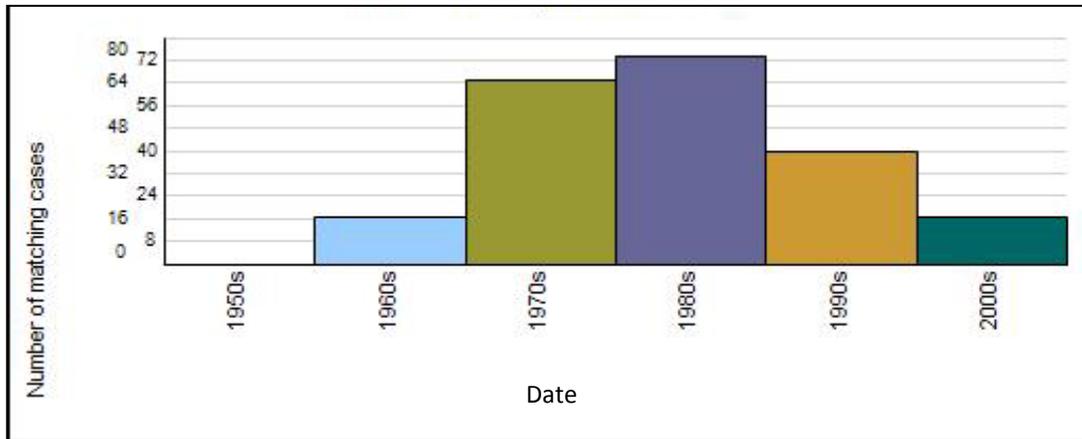


Figure 4-1 Distribution of Cases by Decade

Figure 4-2 demonstrates the gender of the accused in the cases. As is shown, the accused in the vast majority of the cases was either male (n=88) or a business/corporation (n=98). In terms of the latter, these cases were primarily criminal proceedings brought *in rem* (against the material itself) which does not affect the liberty of the individual citizen, but rather may result in the material being returned to the sender.

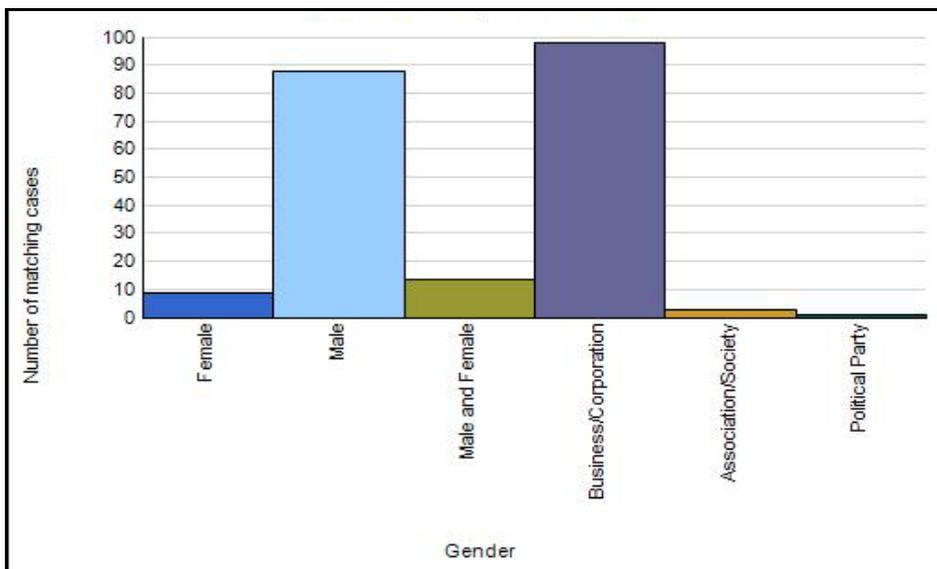


Figure 4-2 Distribution of Cases by Gender

Figure 4-3 denotes the distribution in relation to provinces. As is evident, almost half of the case law was within Ontario with the rest of the cases spread out across the other provinces, and with British Columbia having slightly more cases than the others.⁵⁰ The cases selected did not only include the final disposition of a case, but all court levels (from trial to the decision of the highest court), that were available through the databases.

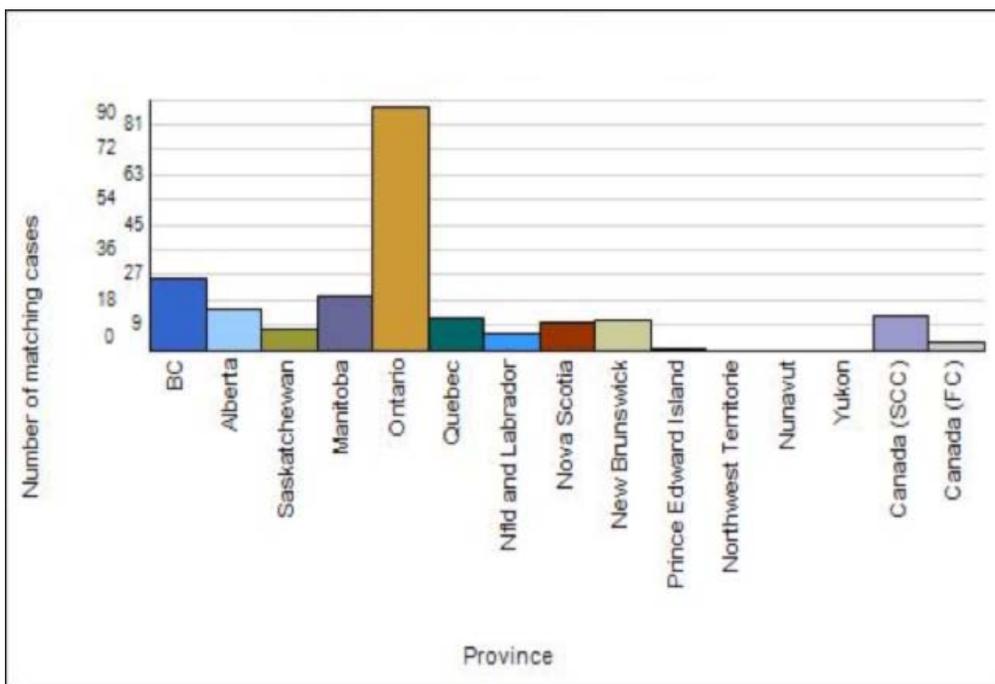


Figure 4-3 Distribution of Cases by Province

In relation to the type of material which was at issue in the cases, figure 4-4 includes this information. However, this particular chart focuses on the primary issues or material discussed in the case law. Over the fifty years there were a number of different obscenity cases and a variety of materials and conduct commented on. The below chart

⁵⁰ I have not included a chart delineating the type of case. Most cases related to the trial or appeal process or included an application of some sort. Few focused on sentencing. Of those that did make a comment on sentencing, fines were primarily imposed, based on the goal of deterrence. An attempt was being made by the courts to 'make the penalty fit the profit.' See *R. v. Action Sales and Rentals Ltd.*, [1987] N.J. No. 271. For further details regarding each of the cases, please refer to Appendix B.

provides imagery of what was most frequently considered in the case law. As is demonstrated, films and magazines were the primary target.

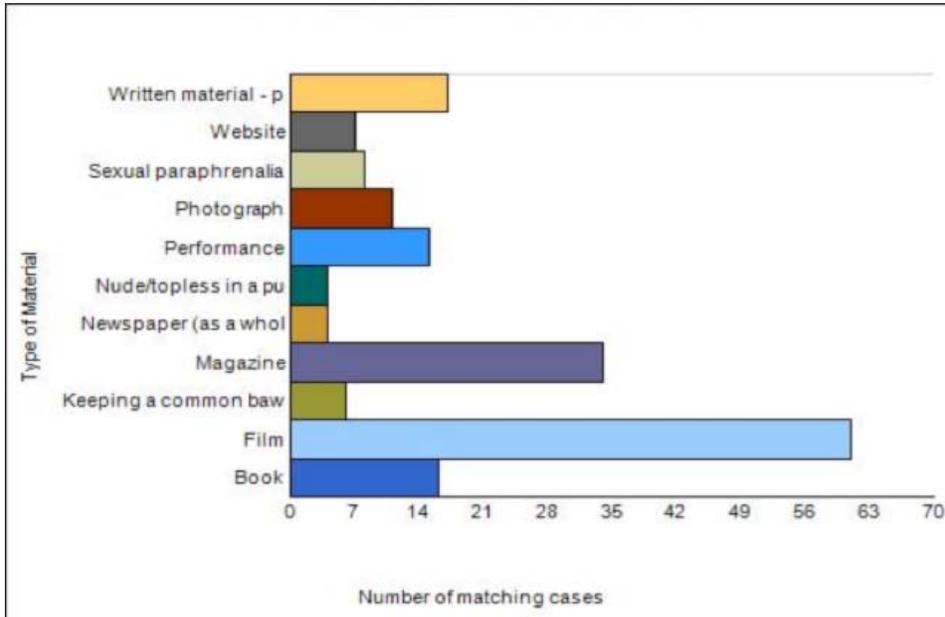


Figure 4-4 Distribution of Cases by Type of Material

In terms of how the material or conduct was distributed over the course of the fifty years, Figure 4-5 provides a snapshot of this in relation to some of the primary media forms and types of conduct focused on. As is demonstrated, there was a sharp increase in the numbers of films in the 1980s, primarily due to the emergence of the ‘sex video.’

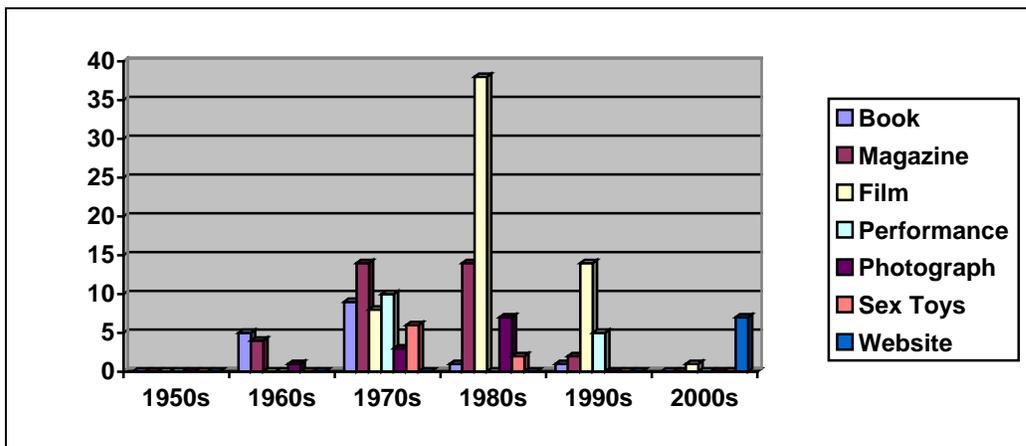


Figure 4-5 Distribution of Cases by Date and Type of Material

Finally, figure 4-6 provides a visual of the type of pornography the courts have focused on over the fifty years. What is evident is that adult pornography was the primary focus in the obscenity case law from the 1960s to the 1980s with a gradual decline from then until 2009. On the other hand, there has been a steady increase in the numbers of child pornography cases since the 1990s. What must be mentioned is that there were no specific child pornography provisions until 1993. Therefore, prior to this year, there was no separation according to type as there is now. However, during my data collection, all cases pertaining to obscenity and pornography were reviewed and in doing so, it was possible to see what related to adult and child pornography. Only two cases occurred prior to the child pornography provisions that would have been classed as child pornography rather than adult pornography. Subsequently, it is possible to say that the focus has shifted from adult to child pornography over the course of fifty years, particularly since the end of the 1990s.

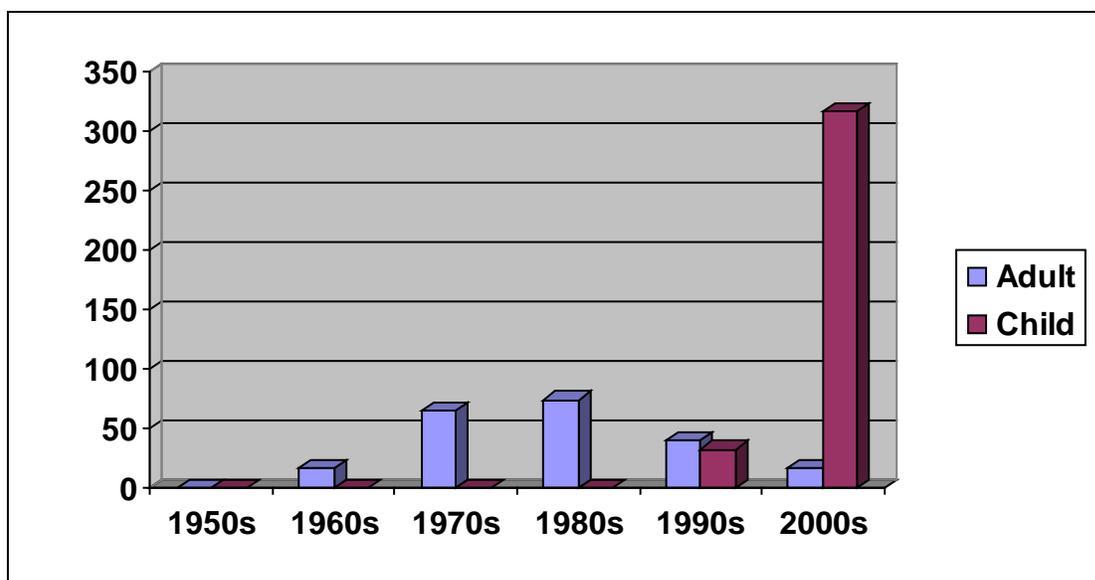


Figure 4-6 Adult and Child Pornography Cases 1959-2009

Following this stage, I approached my findings and analysis in a critical manner, using concepts from critical discourse analysis to consider the emergent themes within

'context' and deconstruct the texts that have played a key role in official discourse within the legal realm. I revisited these texts to consider them in light of the social problem and I contemplated whether there existed a web of discourse strands that constituted an ideology of neo-liberalism. In order to do this, I had the various concepts in mind that were delineated in my discussion of neo-liberalism, post-feminism, and governmentality. Using conceptual categories such as, 'governing at a distance,' 'the post-feminist female subject,' 'a will to health,' 'the risky body,' and 'exclusionary/discriminatory practices,' I was able to chart how these various discourse strands emerged in the case law. To do this, I used *NVivo* to map out the cases that included commentary on them and retain examples of each through the use of quotations. Language such as 'individual responsibility,' 'autonomy,' and 'personal choice' provided indicators of these different strands; along with the overarching trends in the case law that depicted a gradual shift away from the regulation of adult pornography.

Additionally, I considered concepts of (sexual) citizenship, and through the analysis of the case law, contemplated how the concept of citizen has been constructed along with a delineation of inclusions and exclusions. In such a way, I paid attention to how Diane Richardson defined sexual citizenship as, 'sexual rights granted or denied to various social groups' and how this was evident in the judicial discourse. Through the analysis, I was aware of Richardson's question, 'how are we entitled to express ourselves sexually?' and how this related to the regulation of adult pornography. I used *NVivo* again to manage exemplary quotations from cases that demonstrated these ideas and helped delineate the role of sexual orientation in the judgments. Consequently, it was possible to provide an empirical basis for my conclusions that Canadian obscenity law has increasingly depicted a 'neo-liberal model of law' and has served to create concepts of normativity and 'good' citizenship.

Limitations

Finally, before moving onto a discussion of the analysis, it is important to recognize the restrictions of my data and research intentions. As noted, I selected to focus on legal cases. However, the structured nature of these documents from the legal institution needs to be considered. I am limited to what is included in this 'official' document and am not privy to, for example, the larger thinking process that was involved in the case. This type of dialogue is not accounted for in full in these judgments, and it may have had an impact on my reading of the texts. Consequently, the data represents 'official discourse' within this area of law. It is primarily the voice of the judges and their interpretation of the proceedings. Therefore, through this, the focus is on 'ruling social texts' rather than examples of marginal discourse.

Further, through a use of the legal databases, I only had access to those cases that are 'reported' and so those that are 'unreported' (a number of which I do not know) are left unaccounted for.⁵¹ However, in terms of this point, as I went through the process of data collection and data analysis, it did become clear that I had retrieved key obscenity cases within my sample. As judges are prone to do, they refer to previous case law that has had an impact on subsequent decisions and that are important to the area. All those referred to are included in my sample of 218 cases.

Final limitations relate to my chosen methodology, which van Dijk himself, recognizes is a challenging method and not necessarily that easy to implement. Critics have commented on the vagueness of terms and concepts within such an approach which serve to give minimal advice on how to 'do' CDA. However, the benefits of such an approach outweigh these concerns. CDA affords a researcher an analytical toolbox from which to draw from and speak about data. By focusing on the work of Fairclough,

⁵¹ Since most cases started posting cases on the Internet, there are few 'unreported' cases – although, not every province post provincial court cases on the Internet.

Jäger and the work of feminist scholars within CDA, it provided some direction in how it was to be used within this research. Through this, it allowed me as a researcher to consider the larger implications of the dominant and sub-dominant themes that emerged. In the current research, this meant a more critical analysis of obscenity law and the adoption of an approach that varied from previous work in this area.

Therefore, despite the above limitations, this project provides some interesting data and analysis, which will cause readers to think about issues around governance and citizenship. It is hoped that this study fills in some gaps that exist within social knowledge and contributes to important debates that are happening on neo-liberalism in various academic spaces.

CHAPTER FIVE

EXPLORING LEGAL GOVERNANCE IN CANADA 1959-2009

The area is treacherously subjective. Yet all organized societies have sought in one manner or another to suppress obscenity. The right of the state to legislate to protect its moral fibre and well-being has long been recognized, with roots deep in history. It is within this frame that the courts and judges must work. (Dickson, J.A. in R. v. Great West News Ltd., [1970] M.J. No. 1, para. 1)

This chapter will focus on delineating obscenity law in Canada. Through the analysis of legal cases between 1959 and 2009, it is possible to outline the key moments in legal history which have contributed to how we view obscenity - in particular, pornography. Through this examination of Canadian obscenity law, it becomes clear that governmentality affords an appropriate framework and lens through which to examine and comprehend neo-liberal politics and their impact on society and citizenship. Resulting from the research, it is possible to articulate that neo-liberalism provides a context for understanding the ways in which pornography has come to be regulated in Canada. The legal realm, particularly since the 1980s, begins to act as a 'capillarylike' technology (Nadesan, 2008), to assist people in governing themselves, particularly through its rejection of a community standards test of tolerance and its adoption of a harm-based approach. In terms of the latter, the Supreme Court of Canada in *Labaye* plays a central role in articulating and establishing this test particularly through its requirement of evidence to demonstrate harm.

Through the courts attention to 'harm,' there has been a gradual reduction of cases pertaining to adult pornography. As this chapter will illustrate, this decline can be explained as operating in accordance with a free-market mentality, leaving the

pornography industry and ultimately the consumers alone to self-regulate. The argument being made in this research is that, the changes in legal governance can be seen as playing a central role in a greater move towards neo-liberalism in Canada. As one of many 'spheres of governance' in Canada (Greene and Breshears, 2004), the courts and the judiciary have contributed to how we constitute identity and functioned to guide Canadian society about what they can lawfully distribute and ultimately consume. This has served to define boundaries and normative standards, and demarcate areas of risk.

In order to exemplify this trend and consider the ways in which governance in a neo-liberal era reframes the discursive conditions of what constitutes full sexual citizenship, this chapter will outline the historical development of obscenity law and discuss those cases that have crystallized how we govern obscenity. Through a discourse analysis of the cases, it has been possible to identify the dominant themes related to how the courts have viewed and dealt with obscenity and the primary approaches it has adopted within the course of fifty years.

The Emergence of an Exhaustive Test

Until 1959, the Canadian courts relied upon Britain's *Hicklin* test for a judicial articulation of the notion of obscenity. Chief Justice Cockburn first wrote in *R. v. Hicklin* (1868), L.R. 3 Q.B. 360 that "the test of obscenity was whether the tendency of the matter charged is "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"" (cited by Kerwin, C.J. in *R. v. Brodie*, [1962] S.C.R. 681, para. 3). This case "crystallized the law into the form in which it was to remain for almost a century" (Schultz, J.A. in *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 24). It had a long political life, "for nearly a hundred years, from 1868 to 1959, the Canadian Courts, following the Courts in England" were guided by this rule (Fauteux, J., *ibid.*, para 31). Amendments to the

Canadian *Criminal Code* provisions with respect to obscenity were not focused upon revising the *Hicklin* definition, until 1959. A Special Committee of the Senate, headed by E.D. Fulton, presented its recommendations to the House of Commons regarding the *Hicklin* test and these ultimately became part of Bill C-58, that became law in 1959 (Johnson, 1995). Therefore in 1959, we saw significant amendments through the introduction of section 150(8) (now section 163(8)) which remains unchanged to date.⁵²

It reads as follows:

(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.⁵³

The consequent response to this amendment was whether it provided the courts with an exhaustive definition of obscenity, or whether they were still expected to rely on the *Hicklin* test.

The first case to deal with this issue was that of *Brodie*. In 1959, several copies of a particular edition of *Lady Chatterley's Lover* were seized from Larry Brodie's premises on the allegation that the book was obscene under s.150(8). The book was

⁵² Due to amendments to the *Criminal Code*, section numbers change. In this way, the section numbers of importance for the current research vary across the years. The section to be most cited in this research is section 150, which became 159, and ultimately 163. To view the full language of the obscenity provisions, please see Appendix D.

⁵³ Through the case law, a number of *Criminal Code* sections are considered. Two that gain much discussion are ss.163 and 164 (as they are now). In relation to the former, key issues that are raised include the distinction between subsections (1) and (2). What emerges as the primary difference is that (1) relates to distribution/circulation which points to the wholesaler; whereas (2) points to the retailer, who sells or exposes to public view the material at issue. Therefore, he/she has contact with 'the ultimate consumer.' Further, subsection (2) includes a requirement of knowledge, for example, of the subject matter (see *R. v. Jorgensen*, [1995] 4 S.C.R. 55). The latter section, s.164, on the other hand, "is not concerned with the conduct of the individual offender" but, instead, its concern is, "the material itself and has as one of its purposes the prevention of the dissemination of material found to be obscene" (Borins, Co.Ct.J. in *R. v. Nicols*, [1984] O.J. No. 3475, para. 35). The result of such a case would be an order of forfeiture. For further information on these issues, see the following cases: *Regina v. Cameron*, [1966] O.J. No. 1047; *R. v. Erotica Video Exchange Ltd.*, [1994] A.J. No. 1008; *Regina v. Hawkshaw*, [1982] O.J. No. 3544; and *Regina v. Sudbury News Service Limited*, [1978] O.J. No. 2713.

determined to be obscene at trial and his appeal was dismissed, which led Brodie to go to the Supreme Court of Canada. What emerged from this case was a difference of opinion, but a number of the judges, including Judson, J., held that s.150(8) provides an exhaustive test of obscenity. He stated that, through the introduction of s.150(8),

[a]ll the jurisprudence under the Hicklin definition is rendered obsolete by the enactment of the new and exclusive definition of obscenity contained in subs. (8) of s. 150. Under this definition it must be found that all four elements of obscenity are present before there can be a condemnation of the book. There must be a characteristic which is dominant and this dominant characteristic must amount to an exploitation of sex which is undue. If any of these elements is missing, the charge fails. (Judson, J. in *R. v. Brodie*, [1962] S.C.R. 681, para. 44)

Judson, J. disapproved of the opinion in other cases at the time, such as *Regina v. Munster*, [1960] N.S.J. No. 2, which argued otherwise. In his judgment in *Munster*, Ilseley, C.J. stated that s. 150(8), "does not purport to be a definition of "obscene." Matters not included in its provisions may be obscene. And whether such matter is obscene or not is, in my opinion, determined by the test in *Regina v. Hicklin* (1868), L.R. 3 Q.B. 360" (para. 6). In response, Judson, J. asked, "why define obscenity for the purposes of the Act, if it is still permissible for the Court to take a definition of the crime formulated 100 years ago and one that has proved to be vague, difficult and unsatisfactory to apply?" (in *R. v. Brodie*, [1962] S.C.R. 681, para. 46). Although, "it has been argued that the statutory definition of "obscene" was really designed to supplement the "Hicklin" test and not designed to supplant it" (MacDonald, J.A. in *R. v. Ariadne Developments Ltd*, [1974] N.S.J. No. 199, para. 22), Judson, J. was clear that for him, it made no sense to continue on with any kind of application of the *Hicklin* test.

S.150(8) initiated a trend away from a more subjective approach which was supported by the ongoing use of the *Hicklin* test. The new statutory definition promoted a move towards a more objective test, where the Court was given an opportunity,

to apply tests which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the

idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury. We are now concerned with a Canadian statute which is exclusive of all others. (Judson, J. in *R. v. Brodie*, [1962] S.C.R. 681, para. 46-47)

It was thought by both Taschereau, J. and Fauteux, J. that such a Parliamentary move was aimed at being more effective in such matters, and tightening up the regulation of obscenity. For example, Taschereau, J., in his dissenting comments, argued that,

[b]efore the enactment of this section the law was far from being clear and left the door open to subtle distinctions, to fine niceties, that too often allowed publishers to continue a wide diffusion of obscene and immoral literature. It is common knowledge that the 1959 amendment was to eliminate the distribution of obscene material and to call a halt to what may be rightly termed legalized assault against morality. The aim of the Act was without doubt to clean up all news stands of this lewd, filthy literature, published surely not to serve the public good but merely for pecuniary gain. (Taschereau, J. *ibid.* at para. 12)

Judges have queried whether Taschereau's optimism regarding the intention of the 1959 amendment has played out. For example, Cormack, D.C.J. contended,

[t]he optimism of the learned Justice unfortunately has not been borne out by the turn of events since he penned these words in 1962, for it is equally common knowledge that newsstands now have publications considered by many to be "lewd" and "filthy" and published "not to serve the public good but merely for pecuniary gain." (in *Regina v. Beaudoin*, [1971] A.J. No. 92, para. 9)

And certainly, over thirty years later, we can question whether the amendment had such an effect at all, particularly in relation to heterosexual pornography.

The Supreme Court of Canada decision in *Brodie* certainly marked a shift in the courts approach to obscenity. However, due to it not being an unanimous decision,⁵⁴ subsequent cases considered its comment on s.150(8) and continued the variance in response as to whether it provided an exhaustive test. As Dickson, J stated, in *Re Application under Section 160 of the Criminal Code of Canada*, [1980] N.B.J. No. 106, it

⁵⁴ The varied opinion on this issue is nicely exemplified by Monnin, J.A. who stated, that, "the net result is that four of the learned justices held the section to be exhaustive, two that it was not, one expressed no view, one expressed the view that it was not necessary to determine the question, and one reserved his decision on the matter for future consideration. Therefore the question has not been finally disposed of by the highest tribunal in the land" (*Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 11).

was still an issue that was, “left somewhat in the air,” but was finally resolved by the Supreme Court of Canada in its unanimous decision in *R. v. Dechow*, [1978] 1 S.C.R. 951, where the Court held that, “the Hicklin test has been wholly displaced by the new provision of the Code insofar as determining the obscenity of publications is concerned” (Dickson, J., *ibid.*, para. 3). In *Dechow*, Laskin, C.J. recognized that the Court, “should resolve the dilemma revealed by the case law and say whether s. 159(8) exhaustively defines obscenity where exploitation of sex is concerned” (para. 15). In such a way, he contended that,

I am not only satisfied to regard s. 159(8) as prescribing an exhaustive test of obscenity in respect of a publication which has sex as a theme or characteristic but I am also of the opinion that this Court should apply that test in respect of other provisions of the code, such as ss. 163 and 164, in cases in which the allegation of obscenity revolves around sex considerations. Since the view that I take, in line with that expressed by Judson J. in the Brodie case, is that the Hicklin rule has been displaced by s. 159(8) in respect of publications, I would not bring it back under any other sections of the Code, such as ss. 159, 163 and 164, to provide a back-up where a sexual theme or sexual factors are the basis upon which obscenity charges are laid and the charges fail because the test prescribed by s. 159(8) has not been met. (Laskin, C.J., *ibid.* at para. 18)

In the above quote, Laskin, C.J. stated that s.159(8) should apply widely and that the term ‘publication’ should be given a liberal interpretation. In such a way, he argued that we should not resort to another test when dealing with other sections of the Code, where the issue pertains to sexual factors or themes. This point has been debated since then by a number of cases. The courts have questioned the application of s.159(8) in this sense and queried the meaning of the word ‘publication.’ Although, as with many of the issues related to obscenity, there has been wide debate and varied opinions expressed, a consensus has emerged that there is no justification for applying different tests. Individual courts have contended that ‘publication’ includes such things as films,⁵⁵

⁵⁵ For example, see *Regina v. Daylight Theatre Company Limited*, [1972] S.J. No. 302, and *R. v. Doug Rankine Company Ltd. And Act III Video Productions Ltd.*, [1983] O.J. No. 3339 where films are considered a ‘publication.’ In the latter case, this included video cassette tapes.

performances,⁵⁶ and sex toys⁵⁷ – matters that do not immediately conjure up the traditional sense of the word. As Borins, Co.Ct.J. asserted, “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 *R. v. Doug Rankine Company Ltd. And Act III Video Productions Ltd.*, [1983] O.J. No. 3339, para. 13). A number of judges have expressed their preference for Laskin’s position,⁵⁸ and have argued that, “consistency is desirable” (Osler, J. in *Regina v. Hawkshaw*, [1981] O.J. No. 3116, para. 17) and that, “serious inconsistency and uncertainty would arise if obscenity were determined by different standards in the various sections of this part of the *Criminal Code*” (Wheelton, Prov. CT. in *Regina v. Murphy*, [1972] O.J. No. 2095, para. 19). For example,

if it were otherwise, a curious situation might arise where the seller of an obscene play, in book form, could be found guilty while the producer of the same play, in its stage version, would escape prosecution. (Nemetz, J.A. in *Regina v. Small et al.*, [1973] B.C.J. No. 783, para. 34)

Therefore, from this point on, the courts were satisfied that s.150(8) had supplanted the *Hicklin* test and that it could be applied to a variety of matters, not only those ‘in print.’

‘The Thorny Question of Obscenity’: Classifying ‘Undue’ Exploitation of Sex

It is sometimes difficult to draw a line between that which is obscene and that which is not. It is not unlike having to draw a line between night and day. There is dusk. (Dickson, J.A. in *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32, para. 23)

One cannot study the history and jurisprudence of the area of obscene publications without concluding that it will on occasion be difficult to draw a bright line distinction between the obscene and the non-obscene. (Hall, J.A. in *Little*

⁵⁶ For example, see *Regina v. Campbell*, [1974] O.J. No. 2288 where performances are considered a ‘publication.’

⁵⁷ For example, see *R. v. Dechow*, [1978] 1 S.C.R. 951 where sexual paraphernalia, including sex toys, are considered a ‘publication.’

⁵⁸ See Chouinard, J. & La Forest, J. in *R. v. Germain*, [1985] 2 S.C.R. 241; Osler, J. in *Regina v. Hawkshaw*, [1981] O.J. No. 3116; Nemetz, J.A. in *Regina v. Small et al.*, [1973] B.C.J. No. 783.

Sisters Book and Art Emporium v. Canada (Minister of Justice), [1998] B.C.J. No. 1507, para. 132)

Central to the introduction of s.150(8) (now s.163(8)) was its inclusion of the words, 'undue exploitation of sex.'⁵⁹ From 1959 to 2009, the courts have spent numerous hours on articulating and identifying what counts as 'undue.' Such a determination has not been free from difficulties. As the above quotes highlight, the complexity of determining the 'undue' nature of materials, and the variance in opinion has been rife during these last fifty years. Harper, Prov. Ct.J. highlighted this, when he asserted, "the "nub" of the difficulty that the courts have perceived has been the interpretation given to the phrase "undue exploitation of sex" (in *R. v. Neil's Ventures Ltd.*, [1985] N.B.J. No. 123, para. 7). Further, the fact that the Supreme Court of Canada decisions have not been unanimous,⁶⁰ "is an indication that whether a publication is obscene is not a matter that is free of reasonable doubt (Isman, Prov.CT.J. in *Regina v. Georgia Straight Publishing Ltd. and Mcleod*, [1969] B.C.J. No. 332, para. 4).

Through an analysis of the cases, it has been possible to identify and trace the key trends within the legal governance of obscenity, which I intend to highlight through the rest of this chapter. Before discussing the interpretation of s.163(8) and the various workable tests, an important theme that emerged through analysis was the impact of technology on what we consume.

Technology and the Regulation of Pornography

Between 1959 and 2009, we saw in the previous chapter the various forms of media that were subject to the legal gaze. Viewing this chronologically, we have seen

⁵⁹ "The Thorny Question of Obscenity" is used by P.Ferg, J. in *R. v. Ramsingh et al.*, [1984] M.J. No. 408, para. 8.

⁶⁰ Although split decisions are authoritative in terms of the doctrine of stare decisis, the fact that there is division indicates some level of difficulty in reaching an agreed upon definition of the 'undue exploitation of sex.'

that the first cases involved primarily books and magazines and as we entered into the 1980s, we saw the rise of the 'sex video,'⁶¹ and more recently we have seen the impact of the Internet. The Courts focus has certainly changed over the years, and with new technologies, we have seen new challenges.

Books were certainly the focus of some of the earliest cases, for example, *R. v. Brodie*, [1962] S.C.R. 681 and *Regina v. C. Coles Co. Ltd.*, [1964] O.J. No. 891. What emerges out of the case law regarding the prohibition of books, is that it has been harder to "make the case of obscenity against a book" as it is, "a medium perhaps less likely to be conducive to harm and more likely to be protected by the artistic merit ... defence" (Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 65).⁶² We have seen various unsuccessful prosecutions of books in Canada, exemplified by the case of *Brodie*. This is in part due to an importance placed on "the freedom to write books, and thus to disseminate ideas, opinions, and concepts of the imagination" which are seen as, "fundamental to progress in a free society" (Porter, C.J.O. in *Regina v. C. Coles Co. Ltd.*, [1964] O.J. No. 891, para. 12).⁶³

We have seen more successful prosecutions in relation to the other mediums at issue in the case law, such as magazines and films⁶⁴ (including the 'sex video').⁶⁵

⁶¹ Harper, Prov. Ct.J. highlights this when he says that, "the first cases decided under S. 159(8) of the Code involved mainly books or magazines as video tapes had not as yet been perfected" (in *R. v. Neil's Ventures Ltd.*, [1985] N.B.J. No. 123, para. 11).

⁶² The difficulty in this case was demonstrated by Canada Customs and how they dealt with the books. More often than not, Customs officers failed to consider the books in their entirety when making their decisions, which is necessary to make a determination of obscenity.

⁶³ See also, *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32, where the court noted that community tolerance of the printed word is greater than that of pictorial presentations, primarily because, as Freedman, J.A. stated, "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" (para. 36).

⁶⁴ Two interesting cases that differ from the onslaught of the 'sex video' are those that deal with the films, *Last Tango in Paris (R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6), and *Caligula (R. v. Towne Cinema Theatres (1975) Ltd.*, 1981 CarswellAlta 300. Both films were seen to hold more merit, despite their excessive sexual content which at times was combined

Magazines were the subject of the obscenity cases primarily in the 1970s and 1980s. A magazine of much debate was *Penthouse*, and although it could brag of a world-wide distribution of over three million copies at the time, and a readership of approximately 10 million people, it did not escape from the legal gaze and remained the subject of many prosecutions.⁶⁶ In one particular case, the senior editor for *Penthouse* was a witness for the defence and it was his opinion that, “many readers of *Penthouse* purchased the magazine because of its high standards of investigative reporting and not because of any interest in the sexual feature” (Misener, C.C.J. in *R. v. Penthouse International Ltd.*, 1977 CarswellOnt 1268, para. 41). In most cases, however, the courts, including in this case, thought otherwise, until we moved into the 1990s where any prosecution of magazines dropped dramatically and to nothing in the millennium.

In the 1980s, we also saw the growing use of the ‘sex video’ which continued on into the 1990s. The use of the VCR and video cassette tapes generated a lot of debate in the courts during this time. Many courts recognized that there was, “a very substantial and sustained market for explicit sex videos (Cole, Prov. DIV.J in *R. v. Ronish*, [1993] O.J. No. 608, para. 9), which was primarily based on “the presence of the VCR in our homes” (Payne, Prov.J. in *R. v. Findlay*, 1987 CarswellOnt 2565, para. 29). This created a shift in the jurisprudence, because films of a sexual nature could now be consumed within the comfort of the home. In 1983, the case of *Doug Rankine* represented the beginning of the courts’ focus on video cassette tapes and there began a flurry of

with violence. In the *Odeon Morton* case, Freedman, C.J.M. made a distinction between *Last Tango in Paris* and ‘skin-flicks’ which he defined as obscene.

⁶⁵ Of note, in a number of cases, they talk about the difference between mediums and how they should each be dealt with by the court, in relation to questions of obscenity or indecency. For commentary on the difference between books and magazines, see *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5; *R. v. Enriquez*, [2009] A.J. No. 943; and *R. v. NOP Ltd.*, [1991] O.J. No. 1474). In relation to books and performances, see *Regina v. Small et al.*, [1973] B.C.J. No. 783. And for a statement on the differences between sexual acts on television and those that are live, see *R. v. Mara*, [1996] O.J. No. 364.

⁶⁶ See Martin, J.A. in *Regina v. Metro News Ltd.*, [1986] O.J. No. 826, para. 3, for a comment on distribution and readership.

attention for almost two decades to once again dissipate once we reached the end of the 1990s and the year 2000. A number of issues that were raised as the courts considered these tapes were that this technology allowed for “unlimited private viewing” (Matas, J.A. in *R. v. Video World Ltd.*, [1985] M.J. No. 143, para. 37). This meant that there were no age restrictions with respect to persons who could access the tapes once they reached the home. Borins, Co.Ct.J. outlined this when he said,

[i]n 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. (in *R. v. Doug Rankine Company Ltd. And Act III Video Productions Ltd.*, [1983] O.J. No. 3339, para. 32)⁶⁷

Despite this concern, it was held by some courts that objections to the viewing of sexual activity may not necessarily apply to the private viewing of such activity ‘through the medium of a VCR.’ This is exemplified by P. Ferg, J. who stated that, “home video tape viewing is a fairly recent, yet extremely popular and widespread activity in Canada. And tolerance of one’s neighbours’ private video viewing proclivities is now very much a fact of our way of life” (P. Ferg, J. in *R. v. Ramsingh et al.*, [1984] M.J. No. 408, para. 18).⁶⁸ Such a statement highlights that the test at that time was whether the average Canadian would tolerate other Canadians having access to such materials – not whether the average Canadian personally tolerated viewing such materials.

This raises a debate that pervades through the case law of the difference between public and private spaces, and the consequent tolerance afforded to sexual activity in each.⁶⁹ This is particularly reflected on when the courts are pushed to consider

⁶⁷ See also, *R. v. Neil's Ventures Ltd.*, [1985] N.B.J. No. 123.

⁶⁸ See also, *R. v. Findlay*, 1987 CarswellOnt 2565.

⁶⁹ See *Regina v. Hawkshaw*, [1982] O.J. No. 3544; *Labaye v. R.*, [2004] J.Q. no 7723; *Regina v. Sutherland, Amitay, Bowie*, [1974] O.J. No. 2283; and *R. v. Tremblay*, [1993] 2 S.C.R. 932.

context and surrounding circumstances, which is of relevance in cases to do with indecency. This will be discussed in more detail later on.

The third important shift to recognize in technology is of course, the Internet and the impact that it has had on the pornography industry. The significance of the development and entrance of the Internet is something that cannot be overlooked. As Low, Prov.Ct.J. commented,

Since 1995 world wide communication has been fundamentally altered by the development of people's ability to communicate with each other through their personal computers. There is now an international network of interconnected computers called the Internet. The Internet enables people to communicate instantaneously with any number of people at any time, any where in the world using a variety of communication and information retrieval systems. (in *R. v. Price*, [2004] B.C.J. No. 814, para. 11)

Further, he contended that, while the Supreme Court in *Butler* noted that there was a “‘burgeoning pornography industry’ they could not contemplate, the impact, the Internet, since 1995, has had on this industry and on Canadian society generally” (ibid. at para. 93).⁷⁰ However, despite this influence, and the growth in production, distribution and consumption that the Internet has afforded this industry, it is not reflected in the case law. In this regard, there are few cases that pertain to the Internet and adult pornography. Between 1995 and 2009, there were two cases retrieved in the databases.⁷¹ On the other hand, there are numerous cases related to the Internet and child pornography. Since the end of the 1990s and into the millennium that has been the

⁷⁰ The Supreme Court in *Butler* noted that “the burgeoning pornography industry” allows them to conclude that the objective of avoiding harm associated with such an industry is a pressing and substantial concern, “to warrant some restriction on full exercise of the right to freedom of expression” (Sopinka, J. in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 92).

⁷¹ See *R. v. Price*, [2004] B.C.J. No. 814; and the case of *Smith*. There are a number of stages to this latter case which makes the number of internet-related cases look higher than it is. These are, *R. v. Smith*, 2002 CarswellOnt 6152; *R. v. Smith*, [2002] O.J. No. 5018; *R. v. Smith*, 76 O.R. (3d) 435; *R. v. Smith*, [2007] O.J. No. 3074; *R. v. Smith*, [2007] O.J. No. 3075; *R. v. Smith*, [2007] O.J. No. 3076; and *R. v. Smith*, [2008] O.J. No. 740.

focus of the case law, and the computer, and more specifically the Internet, play a key role in how child pornography is made, accessed and distributed.⁷²

A final theme that emerges out of the case law regarding the medium, relates to the practice of comparing the material at issue in the case with what is available for purchase and consumption in the community. For example, in the case of *Before and After*, the defence counsel presented various magazines that were widely available to the public, to the court for the purposes of comparing its content with that of the films on trial.⁷³ This practice is critiqued in a number of cases, primarily with reference to the case of *C. Coles. Co.* In the opinion of Porter, C.J.O, he found this practice to be wrong and disagreed with the contention that it is useful or advisable. In making such a statement, he contended that,

[n]o two publications are the same. When the Court is required to rule whether or not a certain publication is obscene the proper course is to apply the definition of obscenity contained in s. 150(8) of the Code to that particular publication and never mind what some Court may have held concerning some other one nor should the Court attempt to compare the two in any way. (in *Regina v. C. Coles Co. Ltd.*, [1964] O.J. No. 891, para. 20)

Therefore, this court emphasized that attention must be paid to the *particular* material at issue, and should not entail a consideration of any other book, magazine and so forth. As Monnin, J. A. maintained, “what is before us is a specific film and nothing else” (in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 58).⁷⁴

More recently, however, this opinion has perhaps shifted. In the case of *Price*, the court relied fairly heavily on a consideration of fictional materials available to the

⁷² The Supreme Court of Canada has wrestled with the influence of the Internet in other areas of criminal law. For example, in the case of *R. v. Hamilton*, [2005] 2 S.C.R. 432, the court considered its influence with respect to counselling the commission of offences. In the dissenting judgment, Charron, J. contended that, “the Internet poses particular risks because of the ease with which mass communications may be disseminated worldwide” (para. 81).

⁷³ *R. v. Before and After* (1982) Ltd., [1982] N.J. No. 121.

⁷⁴ See also, *R. v. Emery*, [1992] O.J. No. 640; and *North American News and Deputy Minister of National Revenue for Customs and Excise*, (1974), 1 O.R. (2d) 200.

public. Low, Prov.Ct.J. considered the eleven videos at issue in light of these materials, which included such things as *American Psycho*.⁷⁵ He concluded that,

the contents of the Fictional Materials, coupled with their wide spread availability, satisfies me that Canadians, for better or for worse, tolerate other Canadians viewing explicit sexual activity coupled with graphic violence which is more or less indistinguishable from the Eleven Videos. (Low, Prov.Ct.J. in *R. v. Price*, [2004] B.C.J. No. 814, para. 99)

In such a way, he found the videos to be not obscene despite the portrayal of sexual violence, including, the depiction of bondage and discipline, dominance and submission, and sadism and masochistic activities (BDSM). Such a decision is perhaps reflective of a larger trend which will be discussed in more detail in the final chapter.

‘Undueness’ and the Case of *Brodie*

As exemplified above, the *Brodie* case had a significant impact on this area of law, and in relation to the determination of ‘undue,’ it laid, “the groundwork for the interpretation of s. 163(8) by setting out the principal tests which should govern the determination of what is obscene for the purposes of criminal prosecution” (Sopinka, J. in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 38). In the case, it was recognized that the term ‘undue’ was what the courts needed to focus on and decipher. As Fauteux, J. indicated in his judgment in *Brodie*, with the phrasing of the subsection, Parliament recognized that exploitation of sex was not in and of itself illegal,

Parliament recognizes that, within some limits, exploitation of sex in a publication is by no means illegal and never was indeed so considered. Common in literature, moving pictures and other forms of entertainment, and even in commercial publications, exploitation of sex, within or beyond these limits, would entirely be banned by subs. (8) were it not for the presence of the word "undue" in the provision. (Fauteux, J. in *R. v. Brodie*, [1962] S.C.R. 681, para. 36)

⁷⁵ This film is a vicious satire about American values (particularly, those in business) and a subtle spoof of slasher films. Although it is impossible to demonstrate the content of a movie through a quote, one line from the movie by the main character, Patrick Bateman, gives an indication of the visual content, “You’re a fucking ugly bitch. I want to stab you to death, and then play around with your blood” (www.imdb.com/title/tt0144084/quotes).

Therefore, in the obscenity case, the courts must first determine if there is an exploitation of sex in the alleged obscene matter, and then go on to consider whether such exploitation is 'undue.'

When establishing whether an exploitation of sex is present, the courts have conceded that although it must be 'dominant' within the 'publication,' it only has to be 'a' dominant characteristic rather than 'the' dominant characteristic, as long as the exploitation is undue.⁷⁶ This is demonstrated by the words of Judson, J. who contended that, any inquiry regarding obscenity must begin with, "a search for a dominant characteristic of the book. The book may have other dominant characteristics. It is only necessary to prove that the undue exploitation of sex is a dominant characteristic" (in *R. v. Brodie*, [1962] S.C.R. 681, para. 48).⁷⁷ Further to this, Judson, J. argued that to establish this, the courts must consider the work 'as a whole.' In *Brodie*, he outlined that,

[s]uch an inquiry necessarily involves a reading of the whole book with the passages and words to which objection is taken read in the context of the whole book. Of that now there can be no doubt. No reader can find a dominant characteristic on a consideration of isolated passages and isolated words. Under this definition the book now must be taken as a whole. It is not the particular passages and words in a certain context that are before the Court for judgment but the book as a complete work. The question is whether the book as a whole is obscene not whether certain passages and certain words, part of a larger work, are obscene. (para. 48)

This statement was adopted by many courts from this point on. For example, in talking about *Fanny Hill – Memoirs of a Woman of Pleasure*, by John Cleland, Porter, C.J.O. maintained that the book must be considered as a whole, and by doing this, the court is able to assess and get a better idea of the author's purpose (*Regina v. C. Coles Co. Ltd.*, [1964] O.J. No. 891).⁷⁸ Further, Freedman, C.J.M., who has contributed greatly to the area of obscenity, contended that when considering a publication, "to isolate

⁷⁶ See Freedman, J.A. in *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 64.

⁷⁷ See also, Kent, D.C.J. in *R. v. Marshall*, 1962 CarswellNfld 13, para. 18.

⁷⁸ See also, McQuaid, J. in *R. v. H. H. Marshall Ltd. et al.*, [1982] P.E.I.J. No. 63, para. 10. He maintained that a publication must be considered as a whole, not just selective aspects of it.

particular portions of it and to found a conclusion on those portions alone would be unfair” (in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 23). The subject of this case was *Last Tango in Paris*, a movie which at one time created controversy and was alleged to be obscene. In talking about this issue of considering a work in its entirety, Freedman, C.J.M used a skilful analogy to demonstrate the importance of considering context,

I find assistance in a homely image presented by John Hirsch during the course of his testimony. It consisted of the relationship between a coat and its buttons. "Last Tango in Paris" - the film in its entirety - may be regarded as the coat. The sexual scenes are the buttons. Now buttons have an essential role to play in a coat. But they are not the coat, and it would be transparent error to treat them as if they were. The viewer who condemns "Last Tango" merely on the basis of its sexual episodes has judged the buttons and not the coat. (Freedman, C.J.M. in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 25)

Resulting from this need to consider the work as a whole, this led judges to read and watch the material at issue in their entirety. Something of interest that emerged in the analysis of these cases was that this task was not considered a joyful or pleasant pursuit by the judges themselves. By many, the experience of having to watch alleged obscene films, for example, was viewed as “cruel and unusual punishment” (Borins, CO.CT.J. in *R. v. Doug Rankine Company Ltd. And Act III Video Productions Ltd.*, [1983] O.J. No. 3339, para. 29).⁷⁹ Such a sentiment was also expressed in the words of Lismer, J., “I viewed all the films in my office with consent of both counsel. The approximately eight hours that it took was eight hours too long for me (Lismer, J. in *R. v. Video World Ltd.*, [1985] M.J. No. 303, para. 7).⁸⁰

In terms of the word itself, the case of *Brodie*, particularly in the judgment of Judson, J., articulated on what ‘undue’ means. The case drew a distinction between a publication having a ‘base purpose’ (implying obscenity) and a ‘serious purpose’

⁷⁹ An opinion shared by Payne, Prov.J. in *R. v. Findlay*, 1987 CarswellOnt 2565.

⁸⁰ See also, Matlow, Dist.CT.J. in *R. v. Kornylo*, 1985 CarswellOnt 1723, para. 20; and P.Ferg, J. in *R. v. Ramsingh et al.*, [1984] M.J. No. 408, para. 19).

(implying non-obscenity). In such a way, Judson, J. argued that what is aimed at with the word 'undue' is, "excessive emphasis on the theme for a base purpose" (Judson, J. in *R. v. Brodie*, [1962] S.C.R. 681, para. 54). This 'base purpose' has been defined as "dirt for dirt's sake, the leer of the sensualist, depravity in the mind of an author with an obsession for dirt, pornography, an appeal to a prurient interest, etc." (Judson, J. in *R. v. Brodie*, [1962] S.C.R. 681, para. 54). Further, it has been argued that it means, "sex is dealt with to no useful purpose, suggestively, unnecessarily, without rhyme or reason, and overstepping the bounds that anyone of goodwill and good judgment could normally tolerate (Monty, J. in *Regina c. Standard News Distributors, Inc.*, [1960] J.Q. no 10, para. 29).⁸¹

Internal Necessities Test

In terms of the meaning of 'serious purpose,' commentary on it in the case of *Brodie* began the utilization of the 'internal necessities test' or the artistic merit defence, which is considered as one of the workable tests in determination of obscenity. With the introduction of the 1959 amendment to the obscenity provisions, we not only saw that a departure from the *Hicklin* rule meant a new legal test of obscenity, but it also led to the courts taking into consideration other types of information.⁸² Under the *Hicklin* rule, "no allowance was to be made for the object and purpose of a literary work; these, indeed, might be wholly praiseworthy, but such considerations were not to be considered relevant" (Schultz, J.A. in *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 25). Such a position was disputed in the judgment of Judson, J., who recognized the importance of considering the author's or artist's purpose when he said, "I do not think

⁸¹ MacDonald, J.A. added that 'base purpose' means, "to vilify sex and to treat it as something "less than beautiful" or to write in a manner calculated to serve aphrodisiac purposes" (in *R. v. Ariadne Developments Ltd*, [1974] N.S.J. No. 199, para. 28.

⁸² See Laskin, J.A. in *Regina v. Cameron*, [1966] O.J. No. 1047, para. 65.

that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness” (in *R. v. Brodie*, [1962] S.C.R. 681, para. 54) – there began the court’s interest in the intention of the author/artist in their production of the work.

It has been recognized that determining the artistic merit of various works is, at times, not an easy task. As Smith, J. commented, “the internal necessities test is easily stated but complex and difficult to apply” (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 226). This is due in part to the fact that, “the line dividing the indecent or obscene from art is frequently not precise and unclouded” (Lampert, Prov.Ct.J. in *R. v. Yorke*, [1997] N.B.J. No. 24, para. 43). However, although problematic it may be, the courts, since *Brodie*, have shown concern with the artistic integrity of the material and included it as the final step in the analysis of whether there is ‘undue exploitation of sex’ and thus, obscenity.⁸³ As Sopinka, J. stated, “even material which by itself offends community standards will not be considered “undue,” if it is required for the serious treatment of a theme” (in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 54). A prime reason for its utilization is that, the defence, “ensures minimal intrusion on an author’s freedom of expression” (Lang, J.A. in *R. v. Smith*, 76 O.R. (3d) 435, para. 53), which, particularly since the emergence of the *Canadian Charter of Rights and Freedoms*, has been afforded great importance.

In attempts to flesh this test out a little more, we have seen the courts take time in their consideration and application of the internal necessities test. In developing an approach, the test has been interpreted to assess whether the exploitation of sex has a justifiable role in advancing the plot or the theme and, in considering the work as a whole, does not merely represent “dirt for dirt’s sake” but has a legitimate role when

⁸³ See *R. v. Butler*, [1992] 1 S.C.R. 452; and *R. v. Pereira-Vasquez* (B.C.C.A.), [1988] B.C.J. No. 799.

measured by the internal necessities of the work itself (Sopinka, J. in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 55).

Further, it is clarified that such a deliberation does *not* entail judging the creative talent of the author or the artist, instead, the courts must consider “the intention of the author or publisher” (*Re Regina and Provincial News Co. Ltd.*, [1973] A.J. No. 111, para. 24). Kerans, D.C.J elucidated this point, by saying that, “an author of considerable talent may publish a work with a base purpose. An author with no talent may publish a work with a serious purpose. The Court will not allow itself to be an arbiter of aesthetic standards. Intent, on the other hand, is a discoverable fact” (*ibid.* at para. 24). In such a way, this involves a determination of,

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. (Freedman, C.J.M. in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 26)

As we might reflect here, this is certainly no easy task, as commented on earlier.

One other point raised in the case law regarding this subject is that in cases where the material at issue falls into a “gray area of doubt” in relation to whether or not it exceeds community standards of tolerance, “artistic merit may well weigh the scales against the prosecution and in favour of the defence” (Aylesworth, J.A. in *Regina v. Cameron*, [1966] O.J. No. 1047, para. 15). However, in those cases, where there is no doubt as to the ‘obscene’ nature of the work and a clear offence against community standards has been established, “artistic merit will not obliterate it” (*ibid.* at para. 15). In such cases, literary or artistic merit cannot save an obscene item; instead it is

“submerged” (Roach, J.A. in *Regina v. C. Coles Co. Ltd.*, [1964] O.J. No. 891, para. 29). If obscenity is there, it is not erased by artistic merit.⁸⁴

Following this consideration of one of the workable tests that emerged from the case of *Brodie*, it seems appropriate to move onto a discussion of the test that has been seen as primary amongst these tests, the community standard of tolerance test, which has been subject to extensive judicial analysis. In his judgment, Judson, J. indicated support for such an approach when he said,

Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion - - and even that must be subject to some influence from *contemporary standards* -- or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think that the second is the better choice. (Judson, J. in *R. v. Brodie*, [1962] S.C.R. 681, para. 57; emphasis added)

From this point on, the courts worked with this idea of a ‘community standard’ and it emerged as “the yardstick by which “undueness” is measured” (Legg, D.C.J in *Regina v. Coles Book Stores Ltd.*, [1974] A.J. No. 200, para. 21).

Community Standards Test – ‘The Pornographic Pulse of the Nation’

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. (Borins, Co.Ct.J. in *R. v. Doug Rankine Company Ltd. And Act III Video Productions Ltd.*, [1983] O.J. No. 3339, para. 35; emphasis added)

This quote sets the tone for this discussion of the ‘community standards test.’

Countless hours have been spent by the courts analyzing and applying such a standard,

⁸⁴ See Monnin, J.A. in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 56. See also, *Regina v. Goldberg and Reitman*, [1971] O.J. No. 1634; *Regina v. Metro News Ltd.*, [1986] O.J. No. 826; *R. v. Metro Toronto News*, 1977 CarswellOnt; *Regina v. O'Reilly and four others*, [1970] O.J. No. 1553; and *R. v. Tremblett*, [1975] N.J. No. 47.

and what emerges from these discussions is a general dissatisfaction by many judges, with a test based on the idea that the courts can have their fingers on ‘the pornographic pulse of the nation.’⁸⁵ In various judgments, the difficulties inherent in the judicial application of the community standards test were made clear. Before examining some of the critiques, it is important to spend some time on how the test has been developed and deciphered.

The Freedman Rule

In making a determination about community tolerance and subsequently ‘undueness,’ there are certain aids which a judge can use. For example, “resort can be had to previous decided cases” (Jewers, J. in *R. v. Arena Recreations (Toronto) Ltd.*, [1987] M.J. No. 51, para. 12).⁸⁶ Through the current analysis of the cases, there was a definite tendency for the judges to refer to and consider earlier decisions, and often quote passages, sometimes at length, to exemplify their position. One case that was cited extensively was *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, in particular the dissenting judgment of Freedman, J.A. His judgment was adopted unanimously by the Supreme Court of Canada in [1964] 3 C.C.C. 1. His commentary on community standards has come to be known as the ‘Freedman rule.’⁸⁷ There are a number of key points that he highlighted in his judgment that have been considered and adopted by the courts. Similar to the courts themselves, I will take the liberty of quoting fairly extensively from Freedman’s judgment.

⁸⁵ Such a phrase has had an impact on consequent cases, and judges have referred to Borins’ notion of ‘the pornographic pulse of the nation.’ For example, O’Driscoll, J., in his judgment, mentions that he ‘doesn’t pretend to suggest that he has his fingers wrapped around the pornographic pulse of the nation’ (*R. v. NOP Ltd.*, [1991] O.J. No. 1474).

⁸⁶ See also, Anderson, J.A. in *R. v. Red Hot Video Ltd.*, [1985] B.C.J. No. 2279, who contended that, “while the decided cases do deal with questions of fact, which differ to some degree in each case, these cases do offer when viewed as a whole, a national consensus as to the “Canadian standard of tolerance” (para. 21).

⁸⁷ See Fogarty, CO.CT.J. in *Regina v. Campbell*, [1974] O.J. No. 2288, para. 23.

The material at issue in the *Dominion News* case consisted of two magazines that were deemed obscene by the trial court. While considering them, Freedman, J.A. drew attention to the dangers of invoking personal opinion when determining issues of obscenity. When contemplating whether there was an 'undue exploitation of the sex' in the magazines, he stated,

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. (Freedman, J.A., in *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 60)

This is certainly a central theme within the cases when talking about the determination of a community standard. Judges must do what they can to avoid basing their decisions on their own personal standards. These early comments of Freedman were maintained and highlighted again and again through the case law. For example, Howland, C.J.O. asserted that, for judges, "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 (in *Regina v. Sudbury News Service Limited*, [1978] O.J. No. 2713, para. 14).⁸⁸ And the ideas were reaffirmed by the Supreme Court of Canada in the *Towne Cinema Theatres* case in 1985. Dickson, C.J. emphasized that it is 'tolerance not taste' when he stated,

[w]hat matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it. (in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 34)

⁸⁸ See also, Greco, Prov.Ct.J. in *R. v. Smith*, [1987] O.J. No. 1967, para. 11, who affirmed, that personal standards are not relevant in these types of situations; and Riley, J. in *Regina v. Johnson*, [1972] A.J. No. 59, who stated that, when "applying these principles to the case at hand one must be especially vigilant not to convert personal tastes or prejudices into legal principles" (para. 15).

He contended that “the trier of fact’s subjective opinions about the tastelessness or impropriety of certain publications” must be distinguished from “an objective determination of the community’s level of tolerance and whether the publication exceeds such level of tolerance...” (Dickson, C.J. in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 53).

In his judgment, Dickson, C.J. also maintained that, “contemporary Canadians are to be the touchstone of “community standards”” (in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 28). In terms of deciphering this idea of the ‘contemporary Canadian’ and who the court is to consider, Freedman, J.A. asserted that,

[t]hose 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. (in *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 60)

This pushes the court to “avoid the extremes” (Laskin, J.A. in *Regina v. Cameron*, [1966] O.J. No. 1047, para. 72) and steer away from just considering the ideas of the ‘puritan’ or the ‘libertine.’ Instead, it is necessary for the court to decipher “a norm which for the purposes of the statute can be said to be reasonably representative of the ordinary, well-intentioned, moderate individual” (Porter, C.J.O. in *Regina v. C. Coles Co. Ltd.*, [1964] O.J. No. 891, para. 32).

This proposition of the ‘contemporary Canadian’ also reminds us of another of Freedman’s central ideas which highlights the fact that these standards are not static but are ever changing. He stated that,

[c]ommunity 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. (Freedman, J.A., in *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 61)

Therefore, the court is obliged to consider what contemporary society tolerates, and not be stuck with standards that are no longer valid or relevant to the current age. As was demonstrated continuously in the case law, our collective values and standards regarding the representation of sex and sexuality are in "a constant state of flux" (Lampert, Prov.Ct.J. in *R. v. Yorke*, [1997] N.B.J. No. 24, para. 46).⁸⁹ These shifts will be discussed more in the final chapter, but for the moment, it is useful to also consider the words of Casey, J in the 1961 case of *Brodie*. He commented that, "the last fifty years have witnessed great changes and we have seen a marked relaxation in the standards that were once applied rigorously to dress, speech and action" (in *Brodie v. The Queen*, [1961] Q.J. No. 14, para. 33). Such a comment was made in 1961, and we are another 'fifty years later,' where the standards have relaxed even more. Casey, J. was right when he contended that, "as we draw the line we must face the fact that some things that were black yesterday may be white today" (ibid. at para. 32) – and that is certainly the case when we consider the book, *Lady Chatterley's Lover* that was the alleged obscene material at trial.

The final element of the 'Freedman rule' to be recognized is the notion that the community standard that we consider must be a national one. Rather than considering the standards of the local community and that of the Province where the trial is being held, it must take into account an average sense of the attitudes that exist within Canada as a whole. Freedman, J.A. contended that,

⁸⁹ See also, McGowan, J. in *R. v. Arnold*, [1993] O.J. No. 471, para. 31; and Jaspersen, Magistrate, in *Regina v. Salda*, [1968] O.J. No. 1292, para. 11.

[c]ommunity 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. (in *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 62)

Therefore, the court must be careful to consider not just their local surroundings but standards on a much larger scale. King, J.M.C highlighted this when he said that, “the standard is that of the whole Canadian community, not a local or provincial standard” (in *Regina v. Daylight Theatre Company Limited*, [1972] S.J. No. 302, para. 42). Further, it is not appropriate for the courts when making the determination of obscenity, to just regard a small segment of the population, and base decisions on their tolerance for sexual content. This was raised in the case of *Goldberg and Reitman*, where a film was shown on a university campus. The court stated that, “no exception is to be made for those in the university community even if it be viewed as having standards differing from those of the Canadian community about it” (McGillivray, J.A. in *Regina v. Goldberg and Reitman*, [1971] O.J. No. 1634, para. 9).⁹⁰ The hope was always that by relying on a national standard, this would lead to higher levels of objectivity and consistency across the Provinces. However, at times, we have seen a clear divergence in the opinions of the different courts in Canada – a point of contention from those who critique the Courts’ reliance on this standard.

An ‘Indecent’ Proposal

Another key trend within the cases was to not only talk about obscenity but there were a number of cases considering levels of indecency.⁹¹ What emerged from these cases was the consensus that the community standard of tolerance test also applies to a

⁹⁰ See also, *R. v. Kiverago*, [1973] O.J. No. 16; and *Regina v. Sudbury News Service Limited*, [1978] O.J. No. 2713.

⁹¹ For example, see the following cases: *R. v. Jacob*, [1996] O.J. No. 4304; *Kouri v. R.*, [2004] J.Q. no 7724; *R. v. Mara*, [1996] O.J. No. 364; *R. v. Mara*, [1997] 2 S.C.R. 630; *Labaye v. R.*, [2004] J.Q. no 7723; *R. v. Labaye*, [2005] 3 S.C.R. 728; *Regina v. Pink Triangle Press et al.*, [1979] O.J. No. 4557; and *R. v. Tremblay*, [1993] 2 S.C.R. 932.

determination of indecency.⁹² As noted by Dubin, C.J.O in the case of *Mara*, we can see similar language being adopted as that discussed above in the ‘Freedman rule’. He contended that, when making a determination about indecency, similar to obscenity cases,

[i]t is not a matter of one's taste, but it is whether the conduct exceeds the standard of tolerance in contemporary Canadian society. The standard must be contemporary because attitudes relating to sexual behaviour are constantly changing, and it is the standard of the community as a whole that must be considered. (Dubin, C.J.O. in *R. v. Mara*, [1996] O.J. No. 364, para. 23)

However, there is a distinction to be made between obscenity and indecency cases in this regard. Contrary to the approach in obscenity cases, the courts have tended to adopt a contextual approach when considering issues of indecency. As Sopinka, J. highlighted, “indecency, unlike obscenity, entails an assessment of the surrounding circumstances in applying the community standards test” (in *R. v. Mara*, [1997] 2 S.C.R. 630, para. 32). As a number of courts underlined, such a consideration of the surrounding manner and circumstances is not relevant within obscenity cases and therefore, the contextual approach is not applicable.⁹³ As Proulx, J.A. stated, in one of the more recent and notable indecency cases, “pornographic material must be inherently obscene in order to fall under the provisions prohibiting obscenity; it cannot become obscene simply because it is shown before an uninformed audience” (in *Labaye v. R*, [2004] J.Q. no 7723, para. 38). Therefore, the court considers whether a work is obscene by paying attention to “the internal attributes of the work” (Weiler, J.A. in *R. v. Jacob*, [1996] O.J. No. 4304, para. 64). A magazine, for example, “does not become obscene by reason of the place or manner in which it is shown” (ibid.) and does not become any less obscene, “by putting on the cover a sticker bearing the word “Adult” and enclosing it in a plastic dust cover” (Dickson, J.A. in *R. v. Great West News Ltd.*,

⁹² See *R. v. Glassman*, [1986] O.J. No. 2620.

⁹³ See *Labaye v. R*, [2004] J.Q. no 7723.

[1970] M.J. No. 1, para. 30). In such a way, “it is the nature of the product rather than the location and circumstances of its production” (Esson, J.A. in *R. v. Pereira-Vasquez* (B.C.C.A.), [1988] B.C.J. No. 799, para. 57). This is different when the court is faced with a charge of indecency.

In these cases, it is important that the courts pay attention to context and the surrounding circumstances. As demonstrated in the words of Cory, J.,

[i]n any consideration of the indecency of an act, the circumstances which surround the performance of the act must be taken into account. *Acts do not take place in a vacuum*. The community standard of tolerance is that of the whole community. However just what the community will tolerate will vary with the place in which the acts take place and the composition of the audience. For example, entertainment which may be tolerated by the community as appropriate for the patrons of a bar may well be completely inappropriate for an audience of high school students. (in *R. v. Tremblay*, [1993] 2 S.C.R. 932, para. 60; emphasis added)

This idea that ‘acts do not take place in a vacuum’ is central to the determination of indecency. In such a way, the audience plays a key role. For example, if an act is carried out in private, it may be considered to be decent, however, if that same act were to be made public, it would become indecent because of its ‘public’ circumstances.⁹⁴

Therefore, unlike obscenity, “indecency is not a function of the behaviour itself but rather of the circumstances in which it takes place” (Boilard J. in *R. v. Pelletier* (1985), cited by Dubin, C.J.O. in *R. v. Mara*, [1996] O.J. No. 364, para. 21).⁹⁵ As with issues of obscenity, this has come to involve an assessment of risk and harm, which will be discussed in a moment.

⁹⁴ See *R. v. Ludacka*, [1996] O.J. No. 743; *R. v. Mara*, [1996] O.J. No. 364; and *Regina v. Sudbury News Service Limited*, [1978] O.J. No. 2713.

⁹⁵ One point of interest regarding this relates to the idea of consent. For even in situations where there is consent of the parties, this will not “render decent what is otherwise indecent” (Dubin, C.J.O. in *R. v. Mara*, [1996] O.J. No. 364, para. 30).

The Elusive Standard

As indicated earlier, a general theme within the cases regarding the community standard of tolerance test is one of dissatisfaction. This is not to say that all judges have rejected such a test but many have highlighted the difficulty of applying such an elusive and ill-defined standard.⁹⁶ This is revealed in the words of Laskin, J.A. who suggested that, “a community standard is a will-o'-the-wisp, an unknown, and perhaps even an unknowable quantity,” but at the same time, affirmed that the courts, “are obliged ... to attempt a distillation” (in *Regina v. Cameron*, [1966] O.J. No. 1047, para. 70).

The idea that the community standard holds this elusive nature is viewed by some as a benefit and a fundamental part of our system.⁹⁷ Cormack, D.C.J. showed this type of support in his judgment in the *Beaudoin* case, where he favoured the flexibility that such standards offer. He maintained that, “this lack of rigidity or precision is the very essence of our system of jurisprudence” (Cormack, D.C.J. in *Regina v. Beaudoin*, [1971] A.J. No. 92, para. 27). Further, Cormack, D.C.J recognized that some may view this as equivalent to, “pulling a rabbit out of a hat,” but argued that,

[w]hile it has not the tidiness and concise structure of a formula, its very elasticity is what accommodates the many individual instances that would arise in a manner unforeseen by the architects of a formula. It gives to the law that ability to protect the populace against the onslaughts that ingenious pornographers devise to circumvent a formula. (ibid. at para. 23)

Despite this support for a flexible approach, many judges have noted the difficult task they face in attempting to determine the community standard. As Charron, D.C.J contended, “the determination of the community standard of tolerance is certainly not an easy one to make” (in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para. 17).

⁹⁶ See *R. v. Cinema International Canada Ltd.*, [1981] M.J. No. 458; and *R. v. Ramsingh et al.*, [1984] M.J. No. 408.

⁹⁷ Later on in this chapter, commentary will be made on the fact that, despite our legal statutes being filled with vague terminology, the relevant obscenity laws have rarely been found invalid or unconstitutional.

At the start of our discussion on the community standard of tolerance test, a quote from Borins, Co.Ct.J was included, where he pointed out the requirement of the trier of fact to have their finger on ‘the pornographic pulse of the nation.’ This phrase was reflected on in a number of consequent cases, where judges highlighted the difficulty of determining this ‘pulse.’ For example, Harper, Prov.Ct.J contended that such a requirement is ‘ridiculous,’ and that, “it goes without saying that judges by virtue of their occupation are hardly in a position to have their fingers on the "*pornographic pulse*" of all Canadians from coast to coast” (Harper, Prov. CT.J. in *R. v. Neil's Ventures Ltd.*, [1985] N.B.J. No. 123, para. 21; emphasis added). This is exemplified in the words of Payne, Prov.J., who commented that due to this expected role, judges exist in an ‘unusual state.’ He contended that,

the judge is simply left in this what I consider to be unusual state, where a person sitting in Guelph is required to know what someone in Vancouver, Toronto or Montreal, may or may not consider acceptable. It has been pointed out in one case, the judge by the nature of his calling is not visiting the bars each night, and is not going to the local sex shows to see what's happening and what people are enjoying. And just [missing text] what means the judge is expected to suddenly be aware of what the Canadian standard is, I am really not sure. It's some form of *osmosis*, I suppose, that's directed by the Supreme Court of Canada, that a judge is supposed to acquire this knowledge. (Payne, Prov.J. in *R. v. Findlay*, 1987 CarswellOnt 2565, para. 23; emphasis added)

Payne, Prov.J. makes a comment, somewhat tongue in cheek, that the knowledge about the community standard may be gained by ‘some form of osmosis’ or as Harris, Prov.Div.J asserts by some “osmotic process” (in *R. v. Mawson*, [1992] O.J. No. 670, para. 12).⁹⁸ Such a term implies, that knowledge is achieved by “a gradual, often unconscious process of absorption”⁹⁹ which, we may query as to whether this is an appropriate means to judge obscenity.

⁹⁸ See also, *R. v. Kornyllo*, 1985 CarswellOnt 1723.

⁹⁹ Definition retrieved from ‘The Free Dictionary.com.’

The difficulty of the task, according to a number of judges, has much to do with the standard being vague and indefinable. This contrasts with the earlier position that such vagueness creates flexibility. Instead, from a critical standpoint, it is questioned whether it is advisable to have reliance on such an ill-defined standard. Obscurity results from the complex nature of determining the line between what does or does not exceed Canadian community standards of tolerance.¹⁰⁰ This was highlighted in the words of Wilson, J. who asked the following in her judgment,

How is the Court to determine where the line is drawn? By guidelines read into the definition as a matter of interpretation of the word "undue"? By consideration of the presumed social ills sought to be avoided by restrictions on freedom of publication? By statistics showing what people are prepared to look at and what they are not? The courts have said that the test is an objective one and clearly that must be so. But objectivity requires criteria and the courts have not been too successful in evolving them. Yet this is a criminal offence and it is basic to our system of criminal justice that the public know what conduct is criminal and what is not. (in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 74)¹⁰¹

The promotion of an 'intelligible standard' in law is a requirement, and as Wilson's quote demonstrates, she questioned whether this exists with the community standard. As noted earlier, this has not affected the constitutionality of the obscenity provisions, but it is important to comment on the critiques of such a system, for they laid the basis for a fundamental change in the court's approach in more recent cases, such as the Supreme Court of Canada decision in *Labaye*.

Wilson, J. also commented on the existence of objectivity. Since the amendment to the obscenity provisions in 1959, the courts have argued that there has been a trend away from subjectivity towards objectivity. However, even from the earliest case of *Brodie*, we can question how easy it is to be 'objective,' especially in regards to issues

¹⁰⁰ See *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519.

¹⁰¹ Despite these difficulties, particularly in relation to ascertaining a national standard, the courts did not turn to empirical evidence as to community attitudes. They could have required the Crown to lead empirical evidence but they did not do so. Ironically, when defence counsel introduced survey evidence, it was rejected as not being sufficiently representative of national standards.

such as obscenity. As Casey, J. contended, “we may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own (Benjamin N. Cardozo, cited in *Brodie v. The Queen*, [1961] Q.J. No. 14, para. 43). This draws our attention to who is judging these standards.¹⁰² As Lismer, J. asked,

Is it safe and proper in a free and democratic society to permit an elite group of persons appointed for life or retirement time, whichever first occurs, whose tastes and sensibilities are not necessarily representative of the Canadian people generally, to fix what they perceive to be the contemporary Canadian community standard? I have very strong reservations about that. (Lismer, J. in *R. v. Video World Ltd.*, [1985] M.J. No. 303, para. 32)

And there has been support for this reservation, particularly by individuals who have suffered from discriminatory decisions regarding their forms of sexual expression. This will be discussed more in the final chapter.

This questioned notion of objectivity is highlighted further when we consider how the cases have determined the community standard and how they have dealt with alleged obscene material. What we have often seen is a difference of opinion, and as Hughes, D.C.J. contended, “there is anything but uniform enforcement of the law across the country” (in *Daylight Theatre Company Limited v. The Queen*, [1973] S.J. No. 354, para. 30). In this regard, he asserted that, “a more localized approach might soon have to be considered” due to the manifestation of “a clear divergence of level of tolerability” (Hughes, D.C.J., *ibid.* at para. 31). On reviewing the case law, it is possible to see why there was a growing support for an alternative approach. If we take one example and consider it in this light, we can look at the courts’ response to what was labeled ‘skin-flicks’ and see that there was not a consistent reaction to such films, particularly in regard to whether they were considered to contain an ‘undue exploitation of sex.’

¹⁰² This is also discussed by McDermid, Co.Ct.J. who asked, “who is to judge such standards?” (in *Regina v. E and F*, [1981] O.J. No. 3262, para. 18).

As *The Fraser Commission* (Vol.1, page 117) suggested, when dealing with some of the conflicts in the decisions, “the differences of opinion in this area are particularly apparent in cases involving material containing nothing more than explicit sex...” (cited by Meldrum, J. in *R. v. Saint John News Company Ltd.*, [1985] N.B.J. No. 253, para. 14), especially when the material at issue is devoid of any violence or cruelty. We have seen this in the divided response to ‘skin-flicks.’ We can turn again to Freedman, C.J.M., this time in the case of *Odeon Morton Theatres*, for a definition of ‘skin-flicks.’ He contended that,

the basic 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.” (Freedman, C.J.M. in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 27)

For him, these films were to be deemed obscene, with an ‘undue exploitation of sex.’ As Esson, J.A. commented, it is implicit in Freedman’s definition and the case as a whole, that, “skin-flicks should, without necessity for any extensive analysis, be held obscene” (in *R. v. Pereira-Vasquez* (B.C.C.A.), [1988] B.C.J. No. 799, para. 28).¹⁰³ He in fact, held that it is significant and of weight that such a definition and decision is made by Freedman, C.J.M. Esson, J.A. stated,

That great judge, who had contributed so much to the development of the jurisprudence relating to the law of obscenity, saw in the case nothing worthy of serious discussion. Once the films were identified as skin-flicks, it followed that they constituted an undue exploitation of sex. (ibid. at para. 30)¹⁰⁴

¹⁰³ See also, the judgments in *R. v. Cinema International Canada Ltd.*, [1981] M.J. No. 458; and *R. v. Cinema International Canada Ltd.*, [1982] M.J. No. 272.

¹⁰⁴ It must be noted here, that through the current research and analysis, I was impressed with the judgments of Freedman, C.J.M. In fact, I looked forward to reading them for, as we have seen, his decisions have played a key role in the jurisprudence of obscenity.

Therefore, from this perspective, these types of films, in representing 'dirt for dirt's sake' and nothing else, should be restricted and considered obscene. However, a different position emerged in a number of other cases, where such films were judged to be within the community standards of tolerance. Key exceptions to the decision exemplified by Freedman, C.J.M. and Esson, J.A. were in the cases of *Doug Rankine* and *Ramsingh*.¹⁰⁵ In his judgment in the former case, Borins, Co.Ct.J. stated,

[i]n 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. (in *R. v. Doug Rankine Company Ltd. And Act III Video Productions Ltd.*, [1983] O.J. No. 3339, para. 37)¹⁰⁶

Thus, this brief comparison exemplifies the potential for a difference of opinion on such issues, and the possible impracticability of ascertaining a national community standard.

It is interesting to note, that a year later, Borins, Co.Ct.J himself questions the approach the courts were taking. As a result of his own review of the case law, he argued that, "the time may have come when the appellate courts may wish to reconsider the interpretation of s.159(8)" (Borins, Co.Ct.J. in *R. v. Nicols*, [1984] O.J. No. 3475, para. 4). In such a way, he considered the accepted approach of ascertaining the meaning of 'undue' through a consideration of the Canadian contemporary community standards of tolerance, to lead the courts to an attempt at clarifying a 'nebulous' standard. He commented that the courts have stepped away from the plain meaning test of statutory interpretation, which has led to difficulties inherent in the judicial application of the community standard test.

¹⁰⁵ *R. v. Ramsingh et al.*, [1984] M.J. No. 408. This position was also exemplified in other cases. For example, Cumming, P.C.J commented in his judgment that, "tolerance may be extended generally to those films often referred to as "skin-flicks"" (in *R. v. Mercer*, 1988 CarswellNB 106, para. 18).

¹⁰⁶ In the case of *Pereira-Vasquez*, Esson, J.A. critiqued the positions taken by the judges in the cases of *Doug Rankine* and *Ramsingh* – and considered their judgments, a brief detour in the law.

This position is supported by Harper, P.C.J. who, in the cases of *Neil's Venture Ltd.* and *Lynnco Sound Ltd.*, perhaps provided the strongest attack against the community standard of tolerance test. In his judgments, he outlined his support for adopting the plain and statutory meaning of the words in subsection (8), which he saw as a more practical approach. He talked about "the nebulous "standards of the community" test" (Harper, P.C.J. in *R. v. Lynnco Sound Ltd.*, [1985] N.B.J. No. 157, para. 18), and suggested respectfully that, the test or rule "is not now nor was it ever justifiable in interpreting the wording of Section 159(8) of the Code" (in *R. v. Neil's Ventures Ltd.*, [1985] N.B.J. No. 123, para. 32). Harper, Prov.Ct.J. critiqued the idea that the trier of fact can attempt to 'wear the shoes' of the average Canadian to ascertain the contemporary community standard, and asserted that,

many courts across the country have been in error in their interpretation of the meaning of Section 159(8) of the Criminal Code and that instead of utilizing *figments of their imagination* in order to conjure up a non-existent "Canadian Standard of Tolerance" they should be examining the wording of the section itself whereby it is submitted that Parliament has clearly set the simple tests which all those subject to the laws of Canada are bound to follow. (Harper, Prov. CT.J. in *R. v. Neil's Ventures Ltd.*, [1985] N.B.J. No. 123, para. 38; emphasis added)

He commented that to do otherwise, and to resort to the presumption that a court can determine a national community standard, "boggles his mind" (*ibid.* at para.34). In fact he stated in his critique, "each time I consider the phrase "community standard of tolerance" I am reminded of the facetious definition of a camel as "a horse designed by a committee"" (*ibid.* at para. 36). Such a comment is telling of his position. Although, it seems the courts have not taken his advice and reinvented its approach to utilizing the plain and ordinary meaning of the words in the subsection, it is clear that they have opted for an alternative in its search for objectivity.

The Search for Objectivity

The persons who participated in the production and recording of these videos -- specifically, "I Want It All" and "Afternoon Delites" -- have turned human beings into sexual machines, cranking out sexual acts and stimulations for their own base sakes -- sans love, sans grace, sans dignity, sans sensitivity. Women accepting penises in all of their bodily orifices, with casual disregard of any relationship with their owners, degrade not only themselves but the men as well. Men who perform as though prompted by Priapus and without concern for the receptacles of their emissions -- male or female -- degrade themselves and those with whom they lay. Degradation of the participants and by extension of the sexual personas of women and men generally is obscene within the meaning of Section 159. (Harris, Prov.Ct.J. in *R. v. Beeston*, [1987] O.J. No. 1932, para. 21)

The above quote highlights the growing recognition that was given to a consideration of whether material exploits sex in a 'degrading or dehumanizing' manner. Such a concern started to arise in the 1980s, where cases began to deliberate and assess whether a film, for example, included content that degraded women (and sometimes men), to a point where they were portrayed "in positions of subordination, servile submission or humiliation" (Sopinka, J. in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 49). If this was deemed to be present, the courts started to consider this as a reason for a determination of obscenity; therefore, a film could exceed community standards on this basis, even if there was an absence of violence and cruelty. In such a way, this led to the creation of the 'degradation or dehumanization' test.

The Manipulation of Automatonlike Bodies

There are a number of key cases that began to explore this idea¹⁰⁷ and include a consideration of it in their judgments. Starting in 1983, the case of *Doug Rankine* included language indicative of this new emergent test. Borins, Co.Ct.J. contended,

[i]n 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

¹⁰⁷ The title of this section is based on the words of Harris, Prov.Ct.J. in *R. v. Beeston*, [1987] O.J. No. 1932, para. 23).

deliberately or otherwise, most of the films portray degradation, humiliation, victimization and violence in human relationships as normal and acceptable behaviour. (in *R. v. Doug Rankine Company Ltd. And Act III Video Productions Ltd.*, [1983] O.J. No. 3339, para.31)

What we see here is not a description of violence or cruelty *per se*, but instead Borins, Co.Ct.J critiqued the normalization of the encouraged passivity and humiliation of women, which he maintained was demonstrated in some of the films at issue in his case. In such a way, this created a middle category between the non-violent depiction of explicit sex and the violent – a categorization that becomes part of the jurisprudence in later cases. Standing in agreement with this judgment is P.Ferg, J. in the case of *Ramsingh*, who concurred with the contention that community standards are exceeded in situations where people, particularly women, are degraded or dehumanized, even if the material at issue is viewed in one's own 'private' home.¹⁰⁸ In considering the films alleged to be obscene in his case, P.Ferg, J. asserted that,

Women are portrayed in these films as pining away their lives waiting for a huge male penis to come along, on the person of a so-called sex therapist, or window washer, supposedly to transport them into complete sexual ecstasy. Or even more false and degrading one is led to believe their *raison d'etre* is to savour semen as a life elixir, or that they secretly desire to be forcefully taken by a male. (in *R. v. Ramsingh et al.*, [1984] M.J. No. 408, para. 21)¹⁰⁹

Both of these cases clearly incorporate a consideration of degradation or dehumanization in their assessment of community standards, and consequently 'undueness.'

In a further case, we saw the greater development of these ideas, to the point where the court adopted a classification scheme of pornography proposed by one of the expert witnesses in the case. The court in *Wagner* accepted the categorization of pornography set out by Dr. James Check, who testified that in the past, pornography

¹⁰⁸ These two cases are often discussed together – as we saw with the discussion of 'skin-flicks.'

¹⁰⁹ I take the liberty of including lengthy quotes in this discussion, for they exemplify this issue of degradation or dehumanization so well that it would be a shame to limit or edit them.

was determined to be either violent or non-violent; however, “more modern research establishes three types ... sexually explicit with violence; sexually explicit without violence, but dehumanizing or degrading; and explicit erotica” (Shannon, J. in *R. v. Wagner*, [1985] A.J. No. 570, para. 56).¹¹⁰ Such a scheme incorporates the earlier ideas in *Doug Rankine* and *Ramsingh*, and recognizes this additional category. The acceptance of this was entrenched in the obscenity jurisprudence in the Supreme Court of Canada decision in *Butler*.

The final case that contributed significantly to this discussion was the Supreme Court of Canada decision in *Towne Cinema Theatres*. Within this case, we saw the introduction of a two-part community standard of tolerance test, which provided the first clear articulation of the relationship between obscenity and harm in Canadian jurisprudence. In his judgment, Dickson, C.J. asserted that, “a breach of community standards is simply one measure of ... undueness” (in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 30), and that “a legal definition of “undue” must also encompass publications harmful to members of society and, therefore, to society as a whole” (ibid. at para. 24); therefore, a recognition of harm to society that the material at issue might pose was included into a determination of ‘undueness.’ This contention was supported in the dissenting remarks of Wilson, J. who stated, that “it is this line between the mere portrayal of human sexual acts and the dehumanization of people that must be reflected in the definition of “undueness” (in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 73).

¹¹⁰ These categories of pornography were also discussed by Charron, D.C.J. in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265. The case had one of the same expert witnesses – Dr. James Check.

These decisions had an impact on consequent cases, where degradation and dehumanization were increasingly taken into account.¹¹¹ The most significant of these was the Supreme Court of Canada's decision in *Butler*, where we saw the emergence of the harm-based approach.

Calculating a Substantial Risk of Harm

It is interesting to note that, prior to the emergence of the degradation or dehumanization test; the courts did not factor in a question of harm when determining the 'undue exploitation of sex' in the material at issue. In fact, Freedman, J.A. contended in 1970 that, "it is not for the court to determine whether publications of this kind hurt anyone or do any demonstrable harm" (in *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32, para. 33). However, as we saw above, this started to change in the 1980s, where we saw a gradual shift to a harm-based rationale. Prior to the Supreme Court of Canada decision in *Butler*, we saw a furtherance of this notion of harm by the Manitoba Court of Appeal in the 1990 *Butler* case, exemplified by the court's discussion of harm. Twaddle, J.A. recognized that when considering the question of obscenity, Parliament is, "entitled to have a *reasoned apprehension of harm* resulting from the desensitization of individuals exposed to books or movies which portray sex with any dehumanizing feature" (in *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519, para. 118; emphasis added). This was extended in the 1992 *Butler* case, where the Supreme Court of Canada declared a new legal framework for the determination of obscenity. This decision led to a move away from harm merely being just one of the criteria in the assessment of obscenity to it playing a much more central role. As Proulx, J.A. noted,

¹¹¹ See *R. v. Alter*, [1985] O.J. No. 2045; *R. v. Kornylo*, 1985 CarswellOnt 1723; *R. v. Emery*, [1991] O.J. No. 1433; and *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.)* (Ont. Ct. (Gen. Div.)), [1992] O.J. No. 1466.

[s]ince *Butler*, the degree of harm is no longer assessed separately from the community standard of tolerance, but rather according to this standard as an *underlying principle*. This is simply because it is impossible to apply standards of tolerance in an objective manner if there is no reliable way to take the pulse of society.¹¹² (in *Labaye v. R.*, [2004] J.Q. no 7723, para. 49; emphasis added)

Therefore, this shift to a harm-based rationale was completed in the Supreme Court decision in *Butler*.¹¹³ In reference to the earlier decisions of *Towne Cinema Theatres* and *Wagner*, the two-part test was resolved into a single test with reference to ‘a substantial risk of harm’ and the court adopted a three-part classification scheme of types of pornography and the harm attached to each.

The Supreme Court was responding to the growing reference to degradation and dehumanization, and consequently harm in the case law, but it also found that the jurisprudence interpreting s.163(8) failed to specify the relationship between the three tests that had been formulated to determine ‘undueness.’ According to Sopinka, J., “this hiatus in the jurisprudence ... left the legislation open to attack on the ground of vagueness and uncertainty,” and that “the lacuna in the interpretation of the legislation” needed to be filled (in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 56). In such a way, the court went about formalizing ‘harm’ as an underlying principle to the interpretation of the ‘undue exploitation of sex.’

The court did this by qualifying the meaning of degradation and dehumanization by the inclusion of such terminology as, ‘substantial risk of harm.’¹¹⁴ This meant that not all materials that are degrading or dehumanizing would be considered as obscene, only

¹¹² This idea of the ‘pulse of society’ is reminiscent of the ‘pornographic pulse of the nation’ discussed by Borins, Co.Ct.J. in *R. v. Doug Rankine Company Ltd. And Act III Video Productions Ltd.*, [1983] O.J. No. 3339.

¹¹³ See *R. v. Labaye*, [2005] 3 S.C.R. 728.

¹¹⁴ See *R. v. Labaye*, [2005] 3 S.C.R. 728.

those where it is proven that they pose a substantial risk of harm to society.¹¹⁵ Sopinka, J. demonstrated this when he said,

[t]he courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standards is desirable but not essential. (in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 59)

We can see from this quote that the court intended there to be a focus on attitudinal harm, particularly as it pertained to the treatment of women.¹¹⁶ And Sopinka, J. contended, the court is not just paying attention to harm, but that which, “rises to the level of being incompatible with the proper functioning of Canadian society” (Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 59).

Additionally, he noted that ‘the stronger the inference of a risk of harm the lesser the likelihood of tolerance’ which indicates that harm is inversely proportional to community tolerance. This meaning that, “the greater the harm that may flow from a particular exposure, the less the community will tolerate others being exposed to it (Osborne, J.A. in *R. v. Jacob*, [1996] O.J. No. 4304; para. 36).¹¹⁷ In such a way, the concept of harm becomes central to an analysis of the community standard of tolerance,

¹¹⁵ See *R. v. Hawkins*, [1993] O.J. No. 2572; and *Kouri v. R.*, [2004] J.Q. no 7724.

¹¹⁶ For some, this shift related to a larger feminist awareness around sexual objectification and was demonstrative of “signs of feminist-inspired influence” which began to be felt in the 1970s and 1980s in regard to the issue of degradation and dehumanization in pornography (Ryder, 2001: 215). In such a way, it was argued that it represented a feminist take on notions of harm and pornography and an adoption of the perspective of feminists who oppose pornography. However, for others, it was merely a ‘feminist gloss,’ as consequent cases did not follow through with the idea of ‘protecting women’ from the harms of pornography (see Moon, 1993).

¹¹⁷ See also, *Labaye v. R.*, [2004] J.Q. no 7723.

and “tolerance cannot be assessed independently of harm” (ibid. at para. 36).¹¹⁸ Proulx, J.A. summarized the judgment of *Butler* nicely when he said that, “harm provoking intolerance has two elements: (1) it must be serious (2) to the point of being incompatible with the proper functioning of society” (in *Labaye v. R.*, [2004] J.Q. no 7723, para. 46). Further, Sopinka, J. commented on how harm is to be adjudicated, and contended that,

Because this is not a matter that is susceptible of proof in the traditional way and because we do not wish to leave it to the individual tastes of judges, we must have a norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole. (in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 58)

In addition to this, there is an extensive discussion of the use of evidence in this regard, and what is required to prove existence of harm; this will be discussed in a moment.

The other significant finding of the court in *Butler* was its adoption of the pornographic classification scheme. As noted earlier, the court in *Wagner* embraced the work of Dr. James Check and his cataloguing of pornography – and in *Butler*, the Supreme Court of Canada implemented this three-part categorization as a further attempt to deal with the uncertainty and vagueness of the law. As demonstrated in the judgment of Sopinka, J., he stated,

Pornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing. (in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 57)

Further, the court determined how each category is to be dealt with, particularly in relation to issues of harm. Sopinka, J., contended that, when making a determination with respect to the three categories of pornography,

¹¹⁸ See also, *R. v. Yorke*, [1997] N.B.J. No. 24.

the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production. (in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 60)

This judgment had a significant effect on the cases in the ‘post-*Butler*’ era as courts began to spend time determining which category applied to the material at issue in their case and consequently, the degree of harm that it posed.

In the case of *Hawkins*, Misener, J. reflected on the difference the inclusion of harm has made to whether materials are considered obscene or not. He considered the difference in law before and after 1982, and concluded that ten years later, in 1992, material that would have once been seen as ‘obscene’ can no longer be found so, because of the implementation of ‘harm’ as an underlying principle in the obscenity jurisprudence. As he stated,

the law now is not what I understood it to be in 1982. As I understood the judgment in *Butler* ... the exploitation of sex as a dominant characteristic will only be undue within the meaning of the section when in all of the circumstances there is at minimum a risk of harm arising from that exploitation. (Misener, J. in *R. v. Hawkins*, [1992] O.J. No. 1161, para. 17)

For him, and others, this has had a dramatic affect on obscenity law.

Another matter that was found in the case law relating to the issues of harm was its application to indecency. As with the community standards of tolerance test as a whole, it is found in the case law, that they also adopt the same test of harm, as it is adjudicated in the obscenity cases.¹¹⁹ As McLachlin, C.J. commented, “grounding criminal indecency in harm represents an important advance in this difficult area of the

¹¹⁹ See *R. v. Mara*, [1996] O.J. No. 364; and *R. v. Ludacka*, [1996] O.J. No. 743. This approach has been critiqued as it does not reflect the feminist interests that were supposedly adopted in *Butler*. Instead of being concerned with whether the performances in question are harmful to women, the *Mara* decision, presents a more “male-centred conception of what was wrong with the performance in question” (Acorn, 1997: 259), through its concern for the spectators and not the performers.

law” (in *R. v. Labaye*, [2005] 3 S.C.R. 728; para. 24). What we have primarily seen in cases pertaining to indecency is a concern for attitudinal harm, as commented on by Sopinka, J. in the judgment of *Butler*. For example, in the context of an alleged indecent performance, the court is interested in the harm as it pertains to the spectators, rather than the performers. As Sopinka, J. noted in the Supreme Court of Canada decision in *Mara*,

[a] finding of an indecent performance depends on a finding of harm to the spectators of the performance as perceived by the community as a whole. The potential harm to the performers themselves, while obviously regrettable, is not a central consideration under s. 167. (in *R. v. Mara*, [1997] 2 S.C.R. 630, para. 37)¹²⁰

Therefore, the court is concerned with the attitudinal harm on those watching the performances, thus requiring, “a concern with the effect of each person's acts on others and the danger that these acts might predispose the others to act in an antisocial manner” (Proulx, J.A. in *Labaye v. R.*, [2004] J.Q. no 7723, para. 78). This concept of harm was further elaborated on in the seminal Supreme Court of Canada decision of *Labaye* in 2005. This will be discussed more in a moment.

The Use of Evidence - ‘I Am Left On My Own’

The use of expert evidence has never been actively encouraged for very long. (McGowan, J. in *R. v. Arnold*, [1993] O.J. No. 471, para. 32)

When considering the case law, it is impossible to ignore the commentary in each case on the use of evidence.¹²¹ It has a fascinating history, one that has been chronicled by a number of people.¹²² What emerges from an analysis is as McGowan, J. stated, evidence and its use has never, ‘been actively encouraged for long.’ As this

¹²⁰ See also, *R. v. Mara*, [1996] O.J. No. 364.

¹²¹ “I am left on my own” appears in Hughes, D.C.J. decision in *Daylight Theatre Company Limited v. The Queen*, [1973] S.J. No. 354, para. 13 in reference to the lack of evidence brought forward by the defence and Crown to assist him in his decision.

¹²² For example, see Christopher Nowlin’s (2003) comprehensive analysis of the use of expert testimony in obscenity and indecency cases.

discussion will show, most cases highlight that the trier of fact does not need expert testimony or scientific proof when determining the community standard, the risk of harm, and consequently ‘undueness.’ The following discussion will highlight the key points in regards to the use of evidence before and after the focus on ‘the risk of harm.’

Prior to the inclusion of harm in the adjudication of ‘undueness,’ a review of decisions suggests that the courts did not find it necessary to call upon expert testimony to describe the community standards. The consensus was that such testimony is admissible but not essential, and therefore, “not a sine qua non to conviction” (Dickson, J.A. in *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32, para. 2).¹²³ In fact, the majority in the Supreme Court of Canada decision in the *Towne Cinema Theatres* case added that, “to impose on the Crown a positive requirement to adduce expert evidence as to community standards would be unrealistic” (Dickson, C.J. in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 48). Therefore, in this regard, the courts found that it was not necessary for the Crown to adduce evidence of community standards,¹²⁴ instead, they could rely on the material at issue, itself. This was initially stated in 1961 by the court in *Brodie*, where Casey, J. quoting Lord Cooper, said, “the book ... itself provides the best evidence of its own indecency or obscenity or of the absence of such qualities” (in *Brodie v. The Queen*, [1961] Q.J. No. 14, para. 21). In consequent cases, the courts went on to support this, stating that the Crown can, for example, “let the book speak for itself” with no other requirement to produce further evidence (Hawkins, D.C.J.

¹²³ See also, *R. v. Great West News Ltd.*, [1970] M.J. No. 1; and *Regina v. Sudbury News Service Limited*, [1978] O.J. No. 2713.

¹²⁴ A number of cases have commented on this and stated that the Crown need not adduce this evidence – clarifying that it is certainly admissible, but not essential. For example, see *R. v. Ariadne Developments Ltd.*, [1974] N.S.J. No. 199; *Regina v. Denomme and Braga*, [1979] O.J. No. 4577; *R. v. Graham and Hewitt*, [1977] A.J. No. 746; *McDougall's Drug Store Ltd. (Re)*, [1982] N.S.J. No. 146; *R. v. Mercer*, 1988 CarswellNB 106; *R. v. Saint John News Company Ltd.*, [1985] N.B.J. No. 253; *Regina v. Sidey*, [1979] O.J. No. 4572; *Regina v. Sutherland, Amitay, Bowie*, [1974] O.J. No. 2283; *R. v. Towne Cinema Theatres (1975) Ltd.*, 1981 CarswellAlta 300; *R. v. Tremblett*, [1975] N.J. No. 47; and *R. v. Yorke*, [1997] N.B.J. No. 24.

in *Glad Day Booksop Inc. v. Deputy Minister of National Revenue (Customs & Excise)*, 1987 CarswellOnt 2604, para. 4).¹²⁵ Although, the defence has often appealed against this, where the Crown has simply relied on the production of the book, the film or the magazine, for example, and brought in no other evidence, the courts have rarely supported such an argument. This position is nicely summed up by Monnin, J.A. who asserted that, “what the literary or cinema pundits think of it is of much less importance than the film itself (in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 49).

In such a way, the court will accept evidence of the material itself, but because, as Hawkins, D.C.J. noted, “the book cannot really speak for itself” (*Glad Day Bookshop Inc. v. Deputy Minister of National Revenue (Customs & Excise)*, 1987 CarswellOnt 2604, para. 5), the judges will spend time summarizing, sometimes in more detail than others, the content of the book, magazine, film, or other type of material which is at issue in the case. What was found in the current analysis was that this commentary was often the most fascinating part of the case. The way that the judges chose to describe the content, often led to the best turn of phrase, particularly in regard to pornographic films. For example, Harper, Prov.Ct.J in the case of *Neil’s Ventures Ltd*, included some of the best descriptions, when summarizing the video cassettes at issue,

The cinematography is excellent and worthy of praise in that it is clinically sharp and depicts with an almost unreal accuracy each and every pubic hair on the perineal region of each male and female caught by its erotically aimed super-sharp lense. In point of fact it is difficult to imagine the contortions of the camera operator and the special equipment necessary to so thoroughly expose both male and female genitalia. (in *R. v. Neil’s Ventures Ltd.*, [1985] N.B.J. No. 123, para. 40)

The plot is non-existent and the script of no consequence and consisting in the main in grunts and groans that one is apparently supposed to accept as unrestrained ecstasy but are more reminiscent of the noises emanating from a group of starving piglets at feeding time. (ibid. at para. 41)

¹²⁵ See also, *Regina v. C. Coles Co. Ltd.*, [1964] O.J. No. 891; *R. v. Jorgenson*, [1992] O.J. No. 2889; *R. v. NOP Ltd.*, [1991] O.J. No. 1474; and *Regina v. Provincial News Co., Penthouse International Ltd. and Guccione*, [1974] A.J. No. 146.

The acting, however, is dull and unemotional--the men appearing to be in such agony in their prolonged attempts to achieve orgasm and the women appear passively voracious (if I may coin a phrase) ever eager to accept a phallus orally while maintaining the unblushing gaze of an Egyptian sphinx. (ibid. at para. 42)

the female is flipped from one position to another with all the passionate expertise of a short order cook tossing pizza. (ibid. at para. 44)

Although at times, such inclusion by the judges is entertaining, we have to ask whether a reliance on the 'personal' examination of the material by the trier of fact is appropriate. As defence counsel has often argued, would it not be better for the court to also have access to evidence to assist them in making a determination of 'undueness'?

However, the courts have, time and again, commented that, as early as the Supreme Court of Canada decision in *Brodie*, that, "while it is true that his decision in either case must be a subjective one and will of necessity be coloured in some degree by his own predispositions on such questions, this is not a unique position for a judge under our system of law" (Ritchie, J. in *R. v. Brodie*, [1962] S.C.R. 681, para. 69). In such a way, the courts have affirmed that, "it is the Judge's task, and his alone, to decide whether the impugned film exceeds the contemporary community standards" (Monnin, J.A. in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 69) and, it is "the duty and responsibility of the court ... to determine the issue with or without evidence being led concerning the community standard of tolerance" (King, J.M.C. in *Regina v. Daylight Theatre Company Limited*, [1972] S.J. No. 302, para. 37). From the analysis, this is the view that seemingly dominates Canadian case law.¹²⁶

When considering the question of obscenity, we have seen that evidence is admissible, but the court, is "under no obligation to accept such evidence" (Fogarty, Co.Ct.J. in *Regina v. Campbell*, [1974] O.J. No. 2288, para. 15), either from the defence

¹²⁶ See also, *R. v. Great West News Ltd.*, [1970] M.J. No. 1; *Regina v. Mason*, [1981] O.J. No. 3263; *R. v. Red Hot Video Ltd.*, 1983 CarswellBC 2076; and *R. v. Universal News Ltd.*, [1972] S.J. No. 235.

or the Crown.¹²⁷ In fact, it is the duty of the court, “to determine what weight should be put upon any expert evidence that may be tendered” (Porter, C.J.O. in *Regina v. Coles Co. Ltd.*, [1964] O.J. No. 891, para. 10),¹²⁸ and in such a way, the court may decide to “accept or reject” it (Nemetz, J.A. in *Regina v. Small et al.*, [1973] B.C.J. No. 783, para.42),¹²⁹ depending on the weight assigned. It seems that the only requirement is that the judge may not reject evidence “without good reason” (Dickson, C.J. in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 56).¹³⁰

As we saw earlier, from the 1980s on, the courts began to place importance on the harm to society that the material posed. This however, did not change the situation as it pertained to the requirement of evidence. Prior to the 1992 *Butler* decision, we saw this exemplified by Charron, D.C.J. when she said,

"What is harm?" is not a question which can be answered solely on the basis of scientific evidence: it calls for a *value-judgment*. Harm is not only a descriptive

¹²⁷ See also, *Pei-Yuan v. The Queen*, [1972] B.C.J. No. 671. It is important to comment here that this admissibility has led to a vast amount of expert testimony being heard in the courtroom. In relation to the topic at hand, a lot of attention has been given to the question of whether pornography causes harm. What emerges is a difference of opinion – with witnesses such as Dr. James Check advancing that it creates a substantial risk of harm, with others, such as Dr. Edward Donnerstein questioning the supposed causal link and highlighting that the work of Dr. Check has built in methodological flaws. In this way, a number of the cases comment on the limitations of social science data, and remark on the growing body of valid scientific evidence that watching pornography is not harmful to adults. However, there is also the suggestion that a link may exist but the research tools available are not yet able to provide adequate measurement. Finally, a recent trend in the discussion of testimony has been to consider the impact of the internet. Here again, we see a diverse response with some arguing that its use has not resulted in an increase in harm and violence, where others have said that it acts as a powerful medium which has the capacity to fuel “a poison in society” (Pierce, J. in *R. v. Smith*, [2002] O.J. No. 5018, para. 31). See also, *R. v. Erotica Video Exchange Ltd.*, [1994] A.J. No. 1008; *R. v. Fringe Product Inc.*, [1990] O.J. No. 265; *R. v. Price*, [2004] B.C.J. No. 814; *R. v. Red Hot Video Ltd.*, 1983 CarswellBC 782 (6 C.C.C. (3d) 331); *R. v. Red Hot Video Ltd.*, 1983 CarswellBC 2076 ([1983] B.C.W.L.D. 1626); *R. v. Ronish*, [1993] O.J. No. 608; *R. v. Saint John News Company Ltd.*, [1985] N.B.J. No. 253; *R. v. Smith*, 76 O.R. (3d) 435; and *R. v. Wise*, [1990] O.J. No. 1416.

¹²⁸ See also, *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32. In this case, some time is dedicated to considering the admissibility of public opinion polls as evidence. The court delineated the requirements needed for admissibility. This is also discussed in *Regina v. Times Square Cinema Ltd.*, [1971] O.J. No. 1697; and *Regina v. Pipeline News*, [1971] A.J. No. 48.

¹²⁹ See also, *Regina v. Sudbury News Service Limited*, [1978] O.J. No. 2713.

¹³⁰ See also, *R. v. Scobey* (N.S. Co. Ct.), [1989] N.S.J. No. 330.

term it is an evaluative one. The government may restrict the freedom of an individual where the exercise of the freedom undermines or subverts important social values and policies even though there may not be proof that the conduct in question causes direct, demonstrable harm to others. (in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para 53; emphasis added)

By the inclusion of the words ‘value judgment,’ it stresses that courts are allowed, if not encouraged to make assumptions regarding harm, in such a way that supports the 1990 decision of *Butler* and its declaration of the Parliament’s entitlement to have ‘a reasoned apprehension of harm.’ This is in line with the Supreme Court of Canada decision in *Butler* which contended that, “scientific proof is not required, and reason and common experience will often suffice” (Gonthier, J. in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 158). This was also demonstrated above in the words of Sopinka, J, when he said that the inference of harm, ‘may be drawn from the material itself’ and that ‘evidence as to the community standards is desirable but not essential.’¹³¹

With the release of the Supreme Court of Canada decision in *Labaye*, we saw a departure from this case law and the commencement of another new era in the jurisprudence of obscenity.

The Shattering of an Established System: The Introduction of a Theory of Harm

The Supreme Court of Canada decision in *Labaye* provided Canada with a reconfiguration of the test of obscenity and indecency. In some ways, this case seems to be the grand finale in the jurisprudence, as there have been few cases pertaining to adult obscenity and indecency since. What was at issue in the case, was whether Jean-Paul Labaye could be found guilty of ‘keeping a common bawdy house’ contrary to s.210(1). The real question addressed was whether he, as a proprietor of a licensed establishment, could organize, for a fee, group sexual activities (or ‘swinging’) for

¹³¹ See also, *R. v. Jorgensen*, [1995] 4 S.C.R. 55.

informed and consenting adults.¹³² In their decision, the majority reconstituted the test of ‘undueness’ through their theory of harm, which made harm the single most important factor for the courts to consider. One of the primary intentions was to increase the level of objectivity in such cases. In doing this, the majority used language in their harm-based approach from earlier decisions, such as *Butler*, but went further in what the courts were required to consider when faced with an issue of obscenity or indecency. For example, McLachlin, C.J. stated, “to ground criminal responsibility, the harm must be one which society *formally recognizes* as incompatible with its proper functioning” (in *R. v. Labaye*, [2005] 3 S.C.R. 728, para. 32; emphasis in original). It was this requisite that the majority felt would make the test objective, primarily because it is, “not based on individual notions of harm nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential” (ibid. at para. 33). It considered that this requirement would ensure that, “people will not be convicted and imprisoned for transgressing the rules and beliefs of particular individuals or groups” (ibid. at para. 35). In this way, the court deciphered three types of harm that,

have thus far emerged from the jurisprudence as being capable of supporting a finding of indecency: (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct. (ibid. at para. 36)

McLachlin, C.J. stated that this list is not exhaustive, and that over time, other types of harm may be recognized. What is interesting when we consider the existing list is that it goes beyond just considering attitudinal harm as discussed by earlier cases, such as *Butler* and *Mara*, and therefore, further than just paying attention to the impact on the audience.

¹³² See also, *Kouri v. R.*, [2004] J.Q. no 7724, which is another important case on this particular topic.

The majority not only transformed how harm was to be considered but also what was required to prove its existence. This judgment demonstrates support for earlier murmurings that evidence should not only be admissible, but that it should be *essential* to an adjudication of harm.¹³³ For example, in her dissenting judgment in *Towne Cinema Theatres*, Wilson, J. argued that it is necessary for the Crown to adduce evidence and stated, “in my view it is naive to think that a judge, drawing on his own experience alone, can determine the objective standard against which impugned conduct is to be measured” (in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 84).¹³⁴ In doing so, she referred to the dissenting judgment in the case of *Cameron*, where Laskin, J.A. held that, “expert evidence to assist the Judge or Magistrate or Judge and jury is ... indispensable” (in *Regina v. Cameron*, [1966] O.J. No. 1047, para. 72). In such a way, the majority in *Labaye* held that,

these are matters that can and should be established by evidence, as a general rule. When the test was the community standard of tolerance, it could be argued that judges or jurors were in a position to gauge what the community would tolerate from their own experience in the community. But a test of harm or significant risk of harm incompatible with the proper functioning of society *demands more*. The judge and jurors are generally unlikely to be able to gauge the risk and impact of the harm, without assistance from expert witnesses. (McLachlin, C.J. in *R. v. Labaye*, [2005] 3 S.C.R. 728, para. 60; emphasis added)

Through a greater reliance on evidence, the majority contended that it will assist in making the test more objective, but also more likely that the court will be able to determine real risk of harm, rather than rely on an assumption. Therefore, the court held that, “only if the impact of the acts in degree of harm poses a real risk of damaging the

¹³³ This requirement stems from that fact that, “harm” is a very elusive concept since it is very difficult to operationalize such terms as “degrading” or “dehumanizing.”

¹³⁴ See also, *R. v. Penthouse International Ltd.*, 1977 CarswellOnt 1268; and *R. v. Scobey* (N.S. Co. Ct.), [1989] N.S.J. No. 330. *R. v. Butler*, [1989] M.J. No. 404 also includes an interesting argument on the difficulties posed if the court does not use evidence.

autonomy and liberty of members of the public, judged by contemporary standards, can indecency be established” (ibid. at para. 55).¹³⁵

The dissenting judges in the case argued that this new approach to indecency is, “neither desirable nor workable” and it, “constitutes an unwarranted break with the most important principles of our past decisions regarding indecency” (Bastarache & Lebel, J.J. in *R. v. Labaye*, [2005] 3 S.C.R. 728, para. 75). By stepping away from a more contextual analysis which considered the Canadian community standard of tolerance, they commented that it transformed the concept of indecency, which they did not favour. Instead, they recommended that, “despite the difficulties, the original test for tolerance should not be set aside” (ibid. at para. 135), and that social morality should still be allowed to play a role in both obscenity and indecency jurisprudence. However, five years after the majority’s decision, it still stands, and it has had a dramatic impact on obscenity and indecency law. For example, in the analysis of the case law, there was a minor amount of cases that followed its decision – and we have seen instead a shift of focus away from adult pornography to child pornography, where it is perhaps easier to indicate and prove levels of harm. This will be discussed further in the final chapter.

¹³⁵ The reliance on the concept of “harm” embedded in negative attitudes was paralleled in other case law, where the courts determined that no-one can consent to being deliberately hurt. For example, in the case of *R. v. Jobidon*, [1991] 2 S.C.R. 714, the Supreme Court of Canada ruled that a person cannot consent to deliberate infliction of non-trivial bodily harm. The decision was based on “public policy” and part of the rationale was that permitting individuals to consent to fist fights would negatively affect public attitudes to violence (e.g., by anaesthetizing them to the effects of violence). Furthermore, in the case of *R. v. Welch*, [1995] O.J. No. 2859, a similar decision was made by the court when considering ‘sadistic sexual activity.’ Griffiths, J.A. found that, “the consent of the complainant, assuming it was given, cannot detract from the inherently degrading and dehumanizing nature of the conduct. Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour” (para. 88).

The *Charter* and the Constitutional Entrenchment of the Freedom of Expression

A man who considers a woman nothing but throbbing tissue can easily be led to consider other men as chunks of meat. And that is how a man thinks who can whip, mutilate, defile, humiliate and finally kill, as the Nazis did, thousands of people in concentration camps. That there is such danger in true obscenity is the reason why we have, and need, a law against it. (quoted by O'Hearn, Co.Ct.J. in *Regina ex rel Murphy v. Adams*, [1966] N.S.J. No. 1, para. 78)

When considering the historical development of obscenity law and legal governance between 1959 and 2009, another key trend and theme surfaces, the emergence of the *Canadian Charter of Rights and Freedoms*, and the constitutional entrenchment of the freedom of expression. When viewed in relation to the current topic, there has been much debate on pornography,¹³⁶ in light of these shifts that took place in the 1980s. The quote above demonstrates one view of obscenity, particularly pornography, where the idea that it is an expression that should be protected is refuted. However, there are those who stand on the other side of the spectrum, who argue that it is an expression that does convey meaning, and should not automatically exist within the space of regulated freedoms. It is fascinating to contemplate the debate but also the court's reaction to these "strong and vociferous reactions" (Matlow, Dist.Ct.J. in *R. v. Kornylo*, 1985 CarswellOnt 1723, para. 1),¹³⁷ with one side favouring more state interference and control in such an area, and the other, holding a heightened concern for freedom of expression. The following discussion will explore what the case law has said about the entrance of the *Charter*, the issues this has raised, particularly with regard to the obscenity provisions, and commentary on the freedom of expression.

¹³⁶ Although the focus of much of this research is pornography, it must be noted that, this is not the only issue that the obscenity provisions were created to regulate. This is exemplified by Monnin, J.A. when he stated, "pornography or hard-core pornography is not the only type of obscenity towards which this Section of the Code is directed" (in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 43). In this way, there are a number of cases that point to other types of obscenity that were excluded from the discussion in the current research.

¹³⁷ See also, *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519.

The Canadian Charter of Rights and Freedoms

The cases highlight the passing of the *Constitution Act* in 1982 and the implementation of the *Canadian Charter of Rights and Freedoms*. They emphasize this significant moment in Canadian history and exemplify the impact that it has had on the courts themselves, and the legal governance of obscenity. The *Charter* declares that Canadians are entitled to various fundamental rights and freedoms, one of which is the freedom of expression. Through the *Charter*, the courts are handed a greater role in government, primarily because they have the ability to disallow legislation on the basis of a *Charter* violation.¹³⁸ A range of cases draw attention to how the courts have dealt with their increased role and the criteria that they have developed to assist the judges in dealing with *Charter* issues.¹³⁹

In such a way, the Constitution “has radically changed the rules of the game”(Chief Justice Deschene, quoted by Collins, P.C.J. in *R. v. Red Hot Video Ltd.*, 1983 CarswellBC 782, para. 14). It has “added a new dimension to the role of the courts” (Collins, P.C.J. in *R. v. Red Hot Video Ltd.*, 1983 CarswellBC 782, para. 20), by expanding the range of judicial review. As Harper, P.C.J. maintained,

Since the passing of the Constitution Act 1982, the Courts have been given even more authority; i.e. if a present statute be at variance with or repugnant to the Canadian Charter of Rights and Freedoms the Court has the right (and indeed the duty) to declare such law (or portion thereof as may be so repugnant to said

¹³⁸ Although the courts have this power, they rarely strike down legislation *per se* – rather they may declare phrases to be invalid or “read in” or “read down” in order to preserve constitutionality. For example, in the case of *R. v. Ferguson*, [2008] 1 S.C.R. 96, McLachlin, C.J. ruled that, “while the availability of constitutional exemptions for mandatory minimum sentencing laws has not been conclusively decided, the weight of authority thus far is against them and sounds a cautionary note” (para, 48).

¹³⁹ Following the introduction of the *Charter*, it drew the spotlight and became the subject of much debate. However, an interesting comment made by Galligan, J., drew our attention to the idea that the courts should not deal with the *Charter* in their judgments, unless specific *Charter* issues are raised. He contended in his own case, “obviously, in these circumstances it would be most inappropriate for me to comment upon this fascinating issue. Therefore, I decline to do so (in *Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto Re Canadian Periodical Publishers Association and Municipality of Metropolitan Toronto*, [1984] O.J. No. 3365, para. 58).

Charter) inoperable and unconstitutional. To this extent, the Court may now override Parliament and in certain cases declare statutory law enacted by the government itself to be of no force or effect. (in *R. v. Lynnco Sound Ltd.*, [1985] N.B.J. No. 157, para. 7)

Therefore, we can see that this is a noteworthy shift that has enabled the Courts to have a greater role and voice in such areas as legislation; an area that was previously reserved for Parliament. And indeed for the accused, it unleashes a whole other realm of law and legal defence, where the individual citizen or corporation, “may defend a criminal charge on the ground that the law under which the charge is brought is constitutionally invalid because it contravenes the Charter” (Martin, J.A. in *Regina v. Metro News Ltd.*, [1986] O.J. No. 826, para. 21). A number of cases exemplify that this avenue has been adopted by a number of accused, who have questioned the constitutionality of s.163 and most have argued that it is invalid due to a violation of their freedom of expression (s.2(b) of the *Charter*).

The (Un)Regulated Areas of Freedom of Expression

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.

As was noted earlier, with the entrance of the *Charter*, we saw the establishment of a constitutional guarantee of a fundamental freedom of expression. In such a way, the concept and entrenchment of freedom of expression is central to the *Charter* itself, but also to the topic of this research. The history of this guaranteed freedom is remarkable and a number of cases have contributed to how it is deciphered and utilized within the court room. They have assisted us in understanding the scope of the guarantee and have delineated a framework of analysis through which to identify what constitutes an infringement of it. Through this, the cases have commented on what are to be deemed,

regulated and unregulated areas of freedom of speech or expression. This serves to determine what is permissible and impermissible in these spaces. As Huband, J.A. contended,

there is a *regulated* area of freedom of speech, which includes restrictions for the purposes of decency and public order, while there will be an *unregulated* area within which all modes of expression and speech are permissible. (in *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519; para. 21; emphasis added)

The range of these defined spaces will be reflected upon later when the framework for analysis is outlined.

Although the *Charter* brought the ‘freedom of expression’ firmly to our attention, it did not mean that it was not considered prior, in the pre-*Charter* era, by the various court levels.¹⁴⁰ In fact, the ‘Freedman Rule’ extended into this area, where Freedman, J.A. commented on those cases that exist in a grey area and how the courts should deal with them. In another well-cited quote,¹⁴¹ he stated,

I think I should add my view that, in cases close to the borderline, 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. (in *Regina v. Dominion News & Gifts Ltd.*, [1963] M.J. No. 5, para. 63)

Therefore, he argues for ‘tolerance over proscription’ in borderline cases and highlights the importance of ‘creative impulses and endeavours’ which points to the respect that he thought should be given to the freedom of expression.

¹⁴⁰ It is important to comment here that prior to the *Charter*, the *Canadian Bill of Rights* existed which included a protected right of ‘freedom of speech.’ This was a federal statute that was instituted in 1960; however, its’ guarantee of rights was not constitutional, and it was criticized for being ineffective. It did set the stage for some discussion around the freedom of expression, as might be indicated by these early cases.

¹⁴¹ For example, see *R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd.*, [1983] O.J. No. 3339.

Freedman, J.A. is not alone in these early comments on freedom of expression and other cases point to the interpretation of the freedom of expression and the meaning of it for individual citizens. For example, Graburn, Co.Ct.J contended that,

freedom of expression is a hallmark of a free society. Curtail and erode such freedom, and liberty withers away. Censorship is an attribute upon which totalitarianism in all its forms flourishes. However, there cannot be unbridled freedom of expression. (in *Regina v. The MacMillan Company of Canada Ltd.*, [1976] O.J. No. 2268, para. 132)¹⁴²

His last comment indicating that it is not possible to have an absolute freedom, pre-empted the direction that the *Charter* took, in placing some limits on it, as will be demonstrated below.

These brief examples refer to the growing value being placed on the freedom of expression, in the court room, which increased over the years. However, as Dickson, C.J. argued, “while the pre-Charter era saw a role for the freedom of expression,” with the *Charter*, there was not only an increased importance, “but also a more careful and generous study of the values informing the freedom” (in *R. v. Keegstra*, [1990] 3 S.C.R. 697, para. 26). In fact, according to Borins, Co.Ct.J, a “heightened respect for freedom of expression” was “guaranteed by the Constitution” (in *R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd.*, [1983] O.J. No. 3339, para. 26).¹⁴³ However, with

¹⁴² See also *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32; and O’Hearn, Co.Ct.J who commented that, society is aware of the need for free expression, and is in fact, “a bit braver in our day, about allowing it, as long as it can be conceived of as an honest attempt to express an idea in appropriate form” (in *Regina ex rel Murphy v. Adams*, [1966] N.S.J. No. 1, para. 102). This statement was made in the 1960s and we can consider the changes that have been made since then in terms of society’s ‘bravery.’

¹⁴³ With saying this, he also noted that the court is not to “lose sight of the limits upon freedom of expression which may be demonstrated pursuant to s.1 of the Charter” (Borins, Co.Ct.J. in *R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd.*, [1983] O.J. No. 3339, para. 26). Regarding the importance of freedom of expression and the freedom to express ourselves, see also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507; and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120. In this latter case, Iacobucci, J. commented that, “it is important that all Canadians have the freedom to criticize and challenge the dominant culture” (para. 220). In this way, P. Ferg, J. contended that, “women of this country, quite legitimately,

saying this, it did not mean for him, that s.2(b) opened, “the way to the establishment ... of a new test for the measurement of ‘undue exploitation,’” which on review of the case law, seems to have been the consensus (ibid. at para. 26).

With a ‘heightened respect’ comes the need to develop a framework for analysis for the determination and evaluation of the freedom of expression. The courts were pressed to delineate what was to be included and excluded from the (un)regulated spaces. Cases such as *Irwin Toy Ltd.* contributed and assisted greatly in these decisions. The Supreme Court of Canada judgment in *Irwin Toy Ltd.* (1989) demarcates the proper interpretation of the scope of freedom of expression and presents the appropriate route to be taken when entering into an inquiry as to whether legislation constitutes an unwarranted infringement of s.2(b). The court laid out a two-step analysis, which the lower courts have followed since.

This analysis includes a consideration of two questions: (1) whether the activity falls within the guaranteed ‘freedom of expression’ and (2) whether the purpose or effect of the government action in question was to restrict ‘freedom of expression.’ The first question prompts the courts to consider the ‘nature of the proscribed activity,’ and determine whether it reflects a form of expressive content. For the Court in *Irwin Toy Ltd.*, this means that it ‘conveys meaning.’ As quoted by Dickson, C.J., the Court outlined this by saying, “activity is expressive if it attempts to convey meaning” (in *R. v. Keegstra*, [1990] 3 S.C.R. 697, para. 30), and in terms of what that means, Sopinka, J. contributes to an understanding of this notion of meaning, when he contended,

the meaning of the work derives from the fact that it has been intentionally created by its author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression. The same would

have a right to demand that some limitation be imposed by government on freedom of pornographic expression” (in *R. v. Ramsingh et al.*, [1984] M.J. No. 408, para. 35).

apply to the depiction of persons engaged in purely sexual activity. (Sopinka, J. in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 72)¹⁴⁴

The Court in *Irwin Toy Ltd.* maintained that, unless in well-justified situations, “all content of expression falls under the constitutional guarantee of freedom” (Charron, D.C.J. in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para. 7),¹⁴⁵ and no exclusions are to be made, “on the basis of the content or meaning being conveyed” (*Irwin Toy Ltd.*, *ibid.* at para.7). The Court deems that, “meaning sought to be expressed need not be “redeeming” in the eyes of the court to merit the protection of s.2(b), whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure” (Sopinka, J. in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 69).¹⁴⁶ Therefore, forms of sexual activity, such as pornography, are seen to be encapsulated in this notion of ‘expression’ as long as it is communicated in a non-violent manner. This is demonstrated in the words of Robins, J.A. who stated,

Non-obscene "adult books and magazines," no matter how tasteless or tawdry they may be, are entitled to no less protection than other forms of expression; the constitutional guarantee extends not only to that which is pleasing, but also to that which to many may be aesthetically distasteful or morally offensive; it is indeed often true that "one man's vulgarity is another's lyric." (in *Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto Re Canadian Periodical Publishers Association and Municipality of Metropolitan Toronto*, [1985] O.J. No. 2667, para. 37)¹⁴⁷

However, as indicated by the Court in *Irwin Toy Ltd.*, the extension of this protection can be limited, in well-justified circumstances.¹⁴⁸ For example, the key exception noted by the Court is when the expression is communicated in a physically

¹⁴⁴ See also, *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519.

¹⁴⁵ Those activities that have, “no expressive content would fall outside the scope of s.2(b)” (Charron, D.C.J. in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para. 7).

¹⁴⁶ See also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

¹⁴⁷ See also, *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519.

¹⁴⁸ See *R. v. Butler*, [1989] M.J. No. 404.

violent form. This would validate it as being an objectionable form, falling outside the protection of s.2(b). This is demonstrated in the words of the Court, when they stated,

[w]hile the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. (quoted by Dickson, C.J. in *R. v. Keegstra*, [1990] 3 S.C.R. 697, para. 38)¹⁴⁹

Thus, the Court demarcates its restrictions based on an understanding that the form of expression may cause harm through the way it is created or communicated and, therefore, it is afforded no protection.¹⁵⁰

The second step includes a consideration of the legislation and its purpose or effect. The court is required to judge whether the purpose or effect of “the government action in question was to restrict freedom of expression” (Charron, D.C.J. in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para.8). As indicated by the Court in *Irwin Toy Ltd*, this prompts an inquiry into whether the governmental intention when articulating the impugned legislation was to restrict a particular kind of expression. As they asserted,

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. (ibid. at para.8)

Therefore, if the purpose is deemed to be to control a certain kind of expression, the court will find the legislation to be an infringement on the *Charter's* guarantee of freedom of expression. If, however, the court finds that it is the effect of the action, as opposed to the purpose that restricts an activity,

¹⁴⁹ See also, *R. v. Ludacka*, [1996] O.J. No. 743; and *R. v. Zundel*, [1992] 2 S.C.R. 731.

¹⁵⁰ See, *R. v. Red Hot Video Ltd.*, [1985] B.C.J. No. 2279.

s. 2(b) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based. (Dickson, C.J. in *R. v. Keegstra*, [1990] 3 S.C.R. 697, para. 31)¹⁵¹

In terms of this latter statement, where the Court remarks on the ‘principles and values upon which freedom of expression is based,’ the case law points to agreed-upon convictions that are thought to fuel freedom of expression. It is the Court in *Irwin Toy Ltd.* again, which verbalizes these primary tenets, and Dickson, C.J. includes a summary of them in his judgment. He stated that the convictions promoting freedom of expression are,

(1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed. (Dickson, C.J. in *R. v. Keegstra*, [1990] 3 S.C.R. 697, para. 27)¹⁵²

Therefore, if the accused is able to prove that their activity supports these beliefs and ideals, it would be determined that s. 2(b) should, in fact, come into play.

From this discussion of the two-step analysis, it is clear that s. 2(b) has been given a broad, wide-ranging and inclusive interpretation.¹⁵³ As noted by Dickson, C.J., “the reach of s. 2(b) is potentially very wide” (in *R. v. Keegstra*, [1990] 3 S.C.R. 697, para. 27), and what we notice in the quote above is that the courts have articulated that protection extends to those who ‘convey a meaning,’ those who make and communicate it, those “to whom meaning is conveyed,’ and those who receive and consume it. In determining that the creators are protected in this way, it has been noted that the scope

¹⁵¹ See also, *K.I.S. Films Inc. v. Vancouver (City)*, [1992] B.C.J. No. 1342; *R. v. Ludacka*, [1996] O.J. No. 743; and *R. v. Zundel*, [1992] 2 S.C.R. 731.

¹⁵² See also, *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519; *R. v. Butler*, [1992] 1 S.C.R. 452; *It's Adult Video Plus Ltd. v. McCausland*, [1991] B.C.J. No. 3004; and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71.

¹⁵³ See *R. v. Butler*, [1989] M.J. No. 404.

of s. 2(b) even extends to include those who are engaged in the expression for profit¹⁵⁴.

For example, Robins, J.A. conveys this, when he contended that,

[f]reedom of expression is a fundamental freedom protected by s. 2(b) of the Charter. The protection applies to all phases of expression from writer, artist and photographer through to distributor and retailer and on to reader and viewer. (in *Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto Re Canadian Periodical Publishers Association and Municipality of Metropolitan Toronto*, [1985] O.J. No. 2667, para. 37)¹⁵⁵

Consequently, the suggested protection that s. 2(b) offers is relatively expansive:

however, as noted above, it is not unconditional. As illustrated in the case law, if the courts determine that an infringement of s.2(b) has occurred, it may be acceptable, if the limits created by the legislation are shown to be ‘demonstrably justified in a free and democratic society’ as articulated in s.1 of the *Charter*. The section states,

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

Beaudry, J. highlighted this, when he said, “the right to freedom of expression provided by section 2(b) is very broad, and should be interpreted in a large and liberal manner. It is not, however, absolute, and may be limited in the manner permitted by section 1 (in *Sex Party v. Canada Post Corp.*, [2008] F.C.J. No. 45, para. 35).¹⁵⁶ In the cases that are subject to analysis in this research, a number of key cases consider the constitutional validity of s.163 and whether it constitutes an invalid infringement on the guarantee of freedom of expression for Canadian citizens. For example, *R. v. Fringe Product Inc.*, [1990] O.J. No. 265 and *R. v. Butler*, [1992] 1 S.C.R. 452.¹⁵⁷ The courts in these cases determined that the impugned obscenity provision limits the freedom of expression of

¹⁵⁴ See, *R. v. Video World Ltd.*, [1985] M.J. No. 303.

¹⁵⁵ See also, *R. v. Glad Day Bookshops Inc.*, [2004] O.J. No. 1766; *R. v. Glassman*, [1986] O.J. No. 2620; and *R. v. Video World Ltd.*, [1985] M.J. No. 303.

¹⁵⁶ See also, *R. v. Hawkins*, [1992] O.J. No. 1161; and *Irwin Toy Ltd. c. Québec (procureur general)*, 1986 CanLII 186.

¹⁵⁷ See also, *R. v. Emery*, [1991] O.J. No. 1433; *R. v. Red Hot Video Ltd.*, [1984] B.C.J. No. 3125; and *R. v. Red Hot Video Ltd.*, [1985] B.C.J. No. 2279.

certain individuals to a certain extent and state that constitutional protection extends to non-violent sexually explicit expression. However, they find the legislation to be saved by s.1 in light of its valid objective.¹⁵⁸ As noted by Charron, D.C.J., she stated, “the restrictive effect on the individual's freedom of expression does not outweigh the importance of the objective” (in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para. 77). This is also exemplified in the words of Locke, D.C.J. who reflects on the importance of the Parliamentary objective. He contended,

Section 163(1) certainly does limit freedom of expression. In that regard it is in conflict with the relevant section in the Charter of Rights. However, the limitation is proportional to the objective as I say. That objective is much too important to be left solely in the hands of pornographers and others who, for money, for example, cater to the lowest wrung [*sic*] of the market by graphically pictorially extolling the dubious joys of unbridled sexual fellatio with unknown strangers as partners through the "glory hole" in the partitioned wall of men's toilets in public washrooms. (Locke, D.C.J. in *R. v. Wise*, [1990] O.J. No. 1416, para. 129)¹⁵⁹

As with the scope and interpretation of s. 2(b), we have also seen the development of legal criteria for the application of s.1 in order to enable the courts to make such determinations on the validity of legislation. The primary case that is cited most often in the case law is the Supreme Court of Canada decision in *Oakes*, which is seen as the authority on illuminating the procedure to follow when considering impugned legislation.¹⁶⁰ Subsequent to this decision, it became known as the *Oakes* test, indicating that the courts need to apply the test in order to make a judgment on the constitutionality of legislation.

¹⁵⁸ For a detailed discussion of the Supreme Court of Canada in *Butler*, see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

¹⁵⁹ Locke, D.C.J. is referring to a specific exhibit at issue in the case when he mentions the ‘glory hole.’

¹⁶⁰ *R. v. Oakes*, [1986] 1 S.C.R. 103.

The Oakes Test – Determining the Constitutionality of Legislation

As noted, the relevant criteria are set out by the Court in *Oakes*. The test that is delineated prompts the courts to consider the legislative objective, and the means chosen to obtain the objective – a process which involves the application of a three-part proportionality test. The test, as a whole, is nicely summarized by the Supreme Court of Canada in *Edwards Books and Art Ltd. v. R.* (1986), 28 C.R.R. 1, which Charron, D.C.J. quoted in her decision,

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern." Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. The court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the court has been, careful to avoid rigid and inflexible standards. (in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para. 56)¹⁶¹

Although the Court in *Oakes* intended to 'avoid rigid and inflexible standards' when it laid out the relevant test, there is a consensus that implicit in the *Oakes* test is a fairly stringent and rigorous standard of justification that is required when judging the constitutionality of legislation. Therefore, in response to this, we can see demonstrated in the cases at issue in this research, a desire for an approach which deals with issues on a more case-by-case basis. In such a way, the analysis of section 1 has evolved and continuously changed, within this rubric of the *Oakes* test. For example, Juriansz, J. commented that, "there has been a trend away from a rigorous or mechanical approach towards a more contextual approach" (in *R. v. Glad Day Bookshops Inc.*, [2004] O.J. No.

¹⁶¹ See also, *R. v. Glad Day Bookshops Inc.*, [2004] O.J. No. 1766; *R. v. Ramsingh et al.*, [1984] M.J. No. 408; and *Sex Party v. Canada Post Corp.*, [2008] F.C.J. No. 45.

1766, para. 107), which reflects the attitude of a number of judges who reason that, “Charter adjudication must be sensitive to the special facts of each case” (Donald, J. in *K.I.S. Films Inc. v. Vancouver (City)*, [1992] B.C.J. No. 1342, para. 35).

When analyzing the methods that the courts use and their decisions regarding legislation, two primary themes emerge which relate to the legislative objective and the means chosen to obtain the objective. In terms of the latter, there is a lively debate regarding the ‘supposed’ vagueness of the obscenity provisions, which for some, equate with invalidity. These themes will be discussed in more detail.

Clarifying Legislative Objective

In recent months the obscenity sections have been before the courts at all levels, repeatedly. Judges, and juries, have wrestled with the problem, as has the Fraser Royal Commission on Pornography and Prostitution in Canada. The matter has been wrestled, but I fear never pinned! (Meldrum, J. in *R. v. Saint John News Company Ltd.*, [1985] N.B.J. No. 25, para. 4)

As we have seen in the above discussion, the *Charter* led to a great debate within the courtroom in regards to freedom of expression along with the constitutionality of the obscenity provisions in the legislation.¹⁶² As Meldrum, J. indicated, it is a problem that has been ‘wrestled’ but, in his opinion, ‘never pinned.’ However, with the Supreme Court of Canada’s decision in *Butler* in 1992, it could be argued that it settled a number of issues that had been queried since the entrance of the *Charter*. The judgment in this case, remained the authority on obscenity issues, until the Court’s majority decision in *Labaye*. Both of these cases can be seen as central in an effort to pin down matters of obscenity and indecency in Canadian law.

¹⁶² Of interest, the courts comment that, “although the impugned legislation is directed at those who create the message and those who publish it, the legislation also affects those who wish to obtain books, movies and gadgets in order to explore sexuality and make their own decision as to what is valuable to them” (Twaddle, J.A. in *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519, para. 103). Therefore, the legislation indirectly effects consumers and their consumption of various forms of sexual expression.

In relation to the current discussion of the *Oakes* test and the validity of legislation, the Court in *Butler* spent time considering the objective of the obscenity provisions and whether they are vague and uncertain in what they claim to control. When we consider the time frame of interest to this research, 1959-2009, a shift of focus is apparent, which was demonstrated earlier in this chapter. And we certainly see this in how the legislative objective is demarcated. Prior to *Butler*, in the 1960s, it is clear that the objective is conceived of in relation to morality and the protection of societal morals. Aylesworth, J.A. demonstrated this in the case of *Cameron*, when he stated,

Some sense of morality is essential to the well-being of a country and to its healthy life as a community; anything that tends to offend that sense of morality by the exploitation of sex as a dominant characteristic of the work constitutes an undue exploitation of the subject. (in *Regina v. Cameron*, [1966] O.J. No. 1047, para. 16)

In a number of early judgments, the courts delineate the legislative objective as morality. The judges comment on the importance of a 'moral foundation' and how it is vital for a Government to attempt to proscribe those activities that go against the "preservation of a strong moral fibre" (Grabur, Co.Ct.J. in *Regina v. The MacMillan Company of Canada Ltd.*, [1976] O.J. No. 2268, para. 133). As Graburn, Co.Ct.J. stated, "it is a legitimate exercise of responsible Government to deter corruption and create a climate in which healthy attitudes are nourished and encouraged within the community" (ibid. at para. 133).¹⁶³ As we moved into the 1980s and we saw the passing of the *Charter* and the constitutional entrenchment of freedom of expression, the language, as expressed in these earlier cases, altered, to a point where the prevention of harm was increasingly viewed as the valid legislative objective of the obscenity provisions.

We particularly see this in the Supreme Court of Canada decision in *Butler*. As Sopinka, J. highlights, speaking in the 1990s, it is no longer possible to justify having

¹⁶³ See also, *Regina v. C. Coles Co. Ltd.*, [1964] O.J. No. 891; and *Regina ex rel Murphy v. Adams*, [1966] N.S.J. No. 1.

legislation on the basis of morals and taste as it is adverse to the guarantees set out in the *Charter*. For example, he asserted,

To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. (Sopinka, J. *R. v. Butler*, [1992] 1 S.C.R. 452, para. 79)

In this way, he clarifies that the legislation is directed at harm when he stated, “the overriding objective of s.163 is not moral disapprobation but the avoidance of harm to society” (ibid. at para. 82).¹⁶⁴ Therefore, there is an alteration in focus in the courts’ articulation of legislative objective. However, Sopinka, J. asserts that in saying this, he is not arguing that there has been a clear and distinct shift from one, morality, to the other, harm. In response to this, the appellant argues that to accept that the objective of the legislation is now ‘harm to society,’ would be to adopt the ‘shifting purpose’ doctrine, which was rejected by the Supreme Court in *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295. To this effect, it is argued that the court is responsible for considering the intent of those who drafted the legislation at the time and should not enable that intent to be altered or shifted depending on the year or court. In considering this argument, Sopinka, J. rejects it and does not agree that one has to resort to this doctrine to identify the objective as one related to harm. He stated, at length,

I do not agree that to identify the objective of the impugned legislation as the prevention of harm to society, one must resort to the “shifting purpose” doctrine. First, the notions of moral corruption and harm to society are not distinct, as the appellant suggests, but are inextricably linked. It is moral corruption of a certain kind which leads to the detrimental effect on society. Second, and more importantly, I am of the view that with the enactment of s. 163, Parliament explicitly sought to address the harms which are linked to certain types of obscene materials. The prohibition of such materials was based on a belief that they had a detrimental impact on individuals exposed to them and consequently on society as a whole. Our understanding of the harms caused by these materials has developed considerably since that time; however this does not detract from the fact that the purpose of this legislation remains, as it was in

¹⁶⁴ See also, *R. v. Fringe Product Inc.*, [1990] O.J. No. 265; *R. v. Laliberte*, [1992] O.J. No. 1346; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120; and *R. v. Wise*, [1990] O.J. No. 1416.

1959, the protection of society from harms caused by the exposure to obscene materials. (Sopinka, J. in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 85)

Further, the Court asserted that, “a permissible shift in emphasis was built into the legislation when, as interpreted by the courts, it adopted the community standards test. Community standards as to what is harmful have changed since 1959” (ibid. at para. 86). Therefore, “the Court is not limited to a 1959 perspective in the determination of this matter” (Charron, D.C.J. in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265; para. 67). Consequently, through such a statement, the Court finds that the obscenity provision is constitutional owing to the avoidance of harm, particularly as it pertains to the physical and psychological mistreatment of women, and being judged as an acceptable justification and objective for legislation that infringes on the guarantee of expressive freedom.¹⁶⁵

As we saw earlier in this chapter, the Supreme Court of Canada’s decision in *Butler* led to the establishment of a harm-based approach. Through its commentary on harm being viewed as the legitimate legislative objective of s.163, we have seen some groups query as to whether the courts have entirely moved away from a morality-based approach. For example, the appellants in the *Little Sisters* case argued that what we see is ‘merely morality in disguise.’ They asserted that, “while the Court in *Butler* purported to move away from the morality-based approach, a harm-based test effectively rests on the same discredited moral foundation” (discussed by Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 61). They maintained this, primarily because of the systemic targeting of gay and lesbian material by Canada Customs, and the subsequent response by the courts. The appellants argued that such judgments still reflect issues of taste and morality – values expressed

¹⁶⁵ See *R. v. Glad Day Bookshops Inc.*, [2004] O.J. No. 1766; and *R. v. Hawkins*, [1993] O.J. No. 2572.

in those early comments above. The argument of this research is that, instead of these decisions being based on morality, they reflect the growing influence of neo-liberal ideas, which on the one hand, ascribe to greater individual freedoms and responsibilities and less state interference, but on the other hand, promote the confinement of those activities that are assumed to be harmful or risky to others. These ideas will be discussed more in the following chapter.

The Doctrine of Vagueness

there are no clear lines in the law in this area. This is not something that has bright lines thou shalt not kill. I mean, when I read that I know I don't kill. But in this area, you know, an awful lot depends upon Judgments by Courts. (Greenspan (defence counsel), in *R. v. McKeigan*, 2000 CarswellOnt 1577, para. 34)¹⁶⁶

The second theme that emerges from the courts discussion of the *Oakes* test and the constitutionality of legislation relates to the doctrine of vagueness and the imprecision of obscenity law, as noted in the above quote. Throughout the case law, primarily since the 1980s, are arguments that the obscenity provisions are vague in their language and intent. In their discussions of Parliament's objective and the means chosen to achieve it, the courts contemplate whether they selected the appropriate measure or whether there exist more suitable alternatives that are more certain and defined and which do not infringe on the constitutional guarantee of rights and freedoms, such as s. 2(b).¹⁶⁷ Prior to the *Charter*, "courts had no mandate to refuse to apply a duly-enacted statute simply on the grounds that it was vague and uncertain" (Harris, Prov.Ct.J in *R. v. Glassman*, [1986] O.J. No. 2620, para. 65); however, that changed in

¹⁶⁶ See also, *R. v. NOP Ltd.*, [1991] O.J. No. 1474.

¹⁶⁷ This points also to the requirement of minimal impairment as noted in the *Oakes* test. Two interesting comments in relation to this are that, "an important governing principle on this leg of the analysis is *judicial deference* to the law making body (Donald, J. in *K.I.S. Films Inc. v. Vancouver (City)*, [1992] B.C.J. No. 1342, para. 45); and that "it is not necessary for the respondent to demonstrate that the *least restrictive means* have been adopted. There may be a range of limits that satisfy the requirement of minimal impairment" (Beaudry, J. in *Sex Party v. Canada Post Corp.*, [2008] F.C.J. No. 45, para. 59).

1982 when it became the courts' responsibility to assess the validity of legislation, if it is so questioned.

What is clear from the case law is that, when it comes to law, there has to be a certain amount of precision and definition in what it is attempting to control and prohibit. As noted by Charron, D.C.J., "it is well-established that law cannot be vague, undefined and totally discretionary" (in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para. 13). Thus, "the law must be precise enough that it sufficiently describes the boundaries of unlawful conduct and delineates 'an area of risk to allow for substantive notice to citizens'" (Smith, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 154; emphasis added). This requirement that citizens must be given "adequate notice of risky conduct" (Dubin, C.J.O. in *R. v. Mara*, [1996] O.J. No. 364, para. 14),¹⁶⁸ and enough information to ascertain what is permissible and impermissible behaviour, is highlighted as important by the courts because, if it is unclear or vague, it can lead citizens, "to 'steer far wider of the unlawful zone than ...if the boundaries of the forbidden areas were clearly marked'" (quoted by Harris, Prov.Ct.J. in *R. v. Glassman*, [1986] O.J. No. 2620, para. 66).¹⁶⁹ Therefore, greater regulation and self-censorship can ensue from vague and ill-defined legislation.

However, having said this, in referring to the Court in *Irwin Toy Ltd*, Charron, D.C.J. stated that, "there is room for some flexibility and discretion" (in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265, para. 13), and that, "standards which escape precise technical definition, such as "undue," are an inevitable part of the law" (Sopinka, J. in *R.*

¹⁶⁸ See also, *R. v. Glassman*, [1986] O.J. No. 2620; and *Pelletier c. R.*, [1985] J.Q. no 662.

¹⁶⁹ The *Little Sisters* case also comments on the notion that unclear rules or boundaries push citizens to censor themselves. For example, Smith, J. contended that through the targeting of their material, "Mr. Deva and Ms. Fuller must be very circumspect in their ordering" and "they are uncomfortable with this self-censorship" (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 99). See also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

v. Butler, [1992] 1 S.C.R. 452, para. 76)¹⁷⁰; but this level of imprecision does not necessarily equate with vagueness.¹⁷¹ The Court in *Irwin Toy Ltd* argued that, “absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an *intelligible standard* according to which the judiciary must do its work” (quoted by Charron, D.C.J. in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265 at para. 13; emphasis added).¹⁷² Such a requirement indicates that the standard must enable the ‘well-intentioned citizen’ to comprehend what is allowable within society, according to the law.¹⁷³

The courts discuss a key argument for the maintenance of a certain amount of flexibility in the law. They commented on the fact that, although certainty is highly desirable, precision is more restrictive and, therefore, legal provisions are “more difficult to change” (Anderson, Co.Ct.J. in *Luscher v. Canada (Deputy Minister, Revenue Canada Customs and Excise)*, [1983] B.C.J. No. 1076, para. 23), which does not enable the law to keep pace with changing circumstances.¹⁷⁴ As we have already seen, levels of tolerance and attitudes shift each year. As noted by P. Ferg, J., “our society and its attitudes is constantly changing and what was not reasonable ten years ago, may now be quite acceptable” (in *R. v. Ramsingh et al.*, [1984] M.J. No. 408, para. 36). Therefore, the courts argue that to be exhaustive in delineating exactly what counts as obscenity is

¹⁷⁰ We see similar discussion in the case law regarding the words, ‘indecent’ and ‘immoral.’ For example, McLachlin, C.J. stated that, defining indecency, “is a notoriously difficult enterprise” (in *R. v. Labaye*, [2005] 3 S.C.R. 728, para. 2). See also, *R. v. Mara*, [1996] O.J. No. 364; *Regina v. Pink Triangle Press et al.*, [1979] O.J. No. 4557; *Priape Enrg. et al. c. Dep. M.N.R.*, [1979] Q.J. No. 199; and *R. v. Yorke*, [1997] N.B.J. No. 24. In addition to this, the case of *Glassman* considers the meaning of ‘disgusting’ and argued that there is no way in which the accused can know what is meant by the term and what behaviour is prohibited. Despite the Court’s disapproval of its inclusion in the obscenity provisions, it still exists. See also, *R. v. Isaac’s Gallery Ltd*, 1975 CarswellOnt 1057.

¹⁷¹ See *R. v. Emery*, [1991] O.J. No. 1433.

¹⁷² See also, *Sex Party v. Canada Post Corp.*, [2008] F.C.J. No. 45.

¹⁷³ See *R. v. Ramsingh et al.*, [1984] M.J. No. 408.

¹⁷⁴ See also, *R. v. Red Hot Video Ltd.*, 1983 CarswellBC 782.

not advantageous because it then becomes impossible for the provisions to shift with the changing tides of attitudes, which as we have seen, is integral to this area of law.

The courts have rarely found the obscenity provisions to be unconstitutional on the basis of vagueness and uncertainty. As noted by Anderson, Co.Ct.J., “the law is not perfect. We cannot do perfect justice. The courts have, however, devised a reasonable workable standard in this area of the law” (Anderson, Co.Ct.J. *R. v. Red Hot Video Ltd.*, [1985] B.C.J. No. 2279, para. 25). Further, the court in the *Fringe Product Inc.* case comments that the provisions are within constitutional parameters, and that, “Parliament has provided an *intelligible standard* for the judiciary to work with” (Charron, D.C.J. in *R. v. Fringe Product Inc.*, [1990] O.J. No. 265 at para. 21; emphasis added).¹⁷⁵ In its own contemplation of s. 163, the Supreme Court of Canada in *Butler* is of a similar opinion. Sopinka, J. stated,

[t]he attempt to provide exhaustive instances of obscenity has been shown to be destined to fail (Bill C-54, 2nd Sess., 33rd Parl.). It seems that the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed. In my view, the standard of “undue exploitation” is therefore appropriate. The intractable nature of the problem and the impossibility of precisely defining a notion which is inherently elusive makes the possibility of a more explicit provision remote. In this light, it is appropriate to question whether, and at what cost, greater legislative precision can be demanded. (in *R. v. Butler*, [1992] 1 S.C.R. 452, para. 114)

Therefore, as Sopinka, J. highlights, difficult as it may be, a more precise and restrictive provision is not likely to succeed in this area of law. In such a way, the concept of an ‘undue exploitation of sex’ is found by the courts to be precise enough to afford proper application. And, although we saw a increasing level of criticism for the community standard test, prior to the *Labaye* case, it continued to be found constitutional, despite varying levels of elusiveness deemed existent by some courts.

¹⁷⁵ See also, *R. v. Ramsingh et al.*, [1984] M.J. No. 408.

Neo-liberalism and the Freedom to Choose

freedom of expression protects an open exchange of views, thereby creating a competitive market-place of ideas which will enhance the search for the truth. (Professor Sharpe, quoted by Helper, J.A. in *R. v. Butler* (Man. C.A.), [1990] M.J. No. 519, para. 145)

Before moving into the next chapter, where the historical development of obscenity law will be considered in light of the research question in further detail, it is interesting to think about the *Charter* in a neo-liberal context. As we have seen in earlier chapters, the ideas of neo-liberalism started to emerge in the 1980s. In such a way, it could be argued that, the emergence of the *Charter* and its constitutional guarantee of expressive freedom reflects these socio-political ideas that were gaining favour at that time. The *Charter*, as already indicated, promotes less state interference and protects individual rights and freedoms. In terms of s.2(b), it guards freedom of expression. Therefore, it instituted the choice of consumption of sexually explicit content being increasingly left within the hands of individual citizens. As demonstrated in the quote above, the *Charter* has led to the protection of 'an open exchange of ideas' within the marketplace. Citizens are progressively given the freedom to consume within the marketplace. And the regulation of pornography has been moving out of the courts into the market, where the success and acceptance of material depends on levels of consumption. These ideas point to 'pure neo-liberalism.'

However, as noted, there are zones of regulated and unregulated freedoms; therefore, s. 2(b) is subject to some limitations. This causes us to think beyond the exception of violent expression as articulated by the Court in *Irwin Toy Ltd.*, to what else may be included in the regulated space, and therefore, excluded from the unregulated area. In this way, as briefly indicated above, the minority voice has often been captured within the regulated space. In the case law, the courts have assumed to a certain degree, levels of harm and risk in relation to gay and lesbian sexual expression. Such

bodies have been envisaged as risky, and engaging in risky sexuality and expression. These are ideas that grow out of a neo-liberal perspective. We are free to a certain point; some bodies are conceived of as healthy and normal, whereas others are regarded as risky, grotesque and problematic. These notions of 'risk' and 'grotesque' in relation to the regulation of gay and lesbian materials will be explored further in the subsequent chapter.

The Responsibilization Strategy

This chapter has illustrated the historical development of obscenity law in Canada and the consequent impact it has had on the regulation of pornography. Through this discussion, it has become evident that the courts and judiciary play a role in the larger shift towards neo-liberalism in Canada. David Garland (1996) talks about the development of "a new mode of governing crime" which, he would characterize as "a *responsibilization strategy*" (452; emphasis in original) where citizens themselves are persuaded to make the 'right' choices and "act appropriately (452). Such governance accords with the wider trend of neo-liberal governmentality that has been identified in this analysis of obscenity cases in Canada.

Subsequent to a decline in the regulation of adult pornography, it serves as illustrative of the emergence of a bio-political conception of power, where the courts and judiciary delineate 'tools for societal *self-governance*' (Nadesan, 2008). The legal realm creates conditions for citizens to govern themselves and make the 'right' choices regarding sexual content. Through their decisions, the courts demarcate ways to maximize individual well-being and minimize risk, particularly through its articulation of ideal notions of citizenship ('healthy' and 'enterprising' selves). Therefore, neo-liberalism acts as a mode of governance that impacts on how the state, the individual, and social institutions interact, in this case, in regards to pornography.

The shifts in legal governance that this chapter highlights reveal the fundamental alteration in Canada's approach to the regulation of pornography. Regardless of neo-liberalism being challenged in economics and politics, particularly evident in the most recent financial crisis, it seems to be thriving in the regulation of the 'grotesque.' The courts are promoting a free-market mentality that constructs a framework in which individuals are encouraged to self-regulate and police their own behaviour and consumption. Further, this neo-liberal mindset quickly perceives and defines risk in sexual content using a harm-based approach. Consequently, neo-liberalism seems to be working when it comes to the regulation of pornography in Canada. A reduction in cases of adult pornography seems to be demonstrative of this trend. The following chapter will consider these ideas in more depth and delineate specific discourse strands that exemplify a neo-liberal ideology and display the ways in which such a rationality has reframed the discursive conditions of possibility regarding sexual citizenship.

CHAPTER SIX

DISCUSSION AND CONCLUSION: OBSCENITY AND THE 'NEO-LIBERAL MODEL OF LAW'

In a marketplace of ideas, to use that classic metaphor, pornographic imagery is there for the taking, and it finds without any doubt many takers. (Gonthier, J. in R. v. Butler, [1992] 1 S.C.R. 452, para. 132)

This chapter¹⁷⁶ critically examines the history of obscenity law, as discussed in chapter five, and further considers it in light of the socio-political context. As we have seen earlier, van Dijk (1997a) contends, “discourse should preferably be studied as a constitutive part of its local and global, social and cultural contexts” (29), and so through an analysis of the key discourses, it has been possible to identify how such discourse strands have played a role in perpetuating neo-liberal ideals regarding sexuality and citizenship. By approaching the topic in such a way, it allows a diversion away from the common legal analysis of obscenity cases that we have seen over the years, which serves to provide a comprehensive articulation of the case law through analysis and synthesis, but may not place it within the larger socio-political context. Therefore, this approach may fail to answer pertinent questions about the influence of the cultural and political economy. The current research contributes a different analysis and assists us in seeing the influence of neo-liberalism and its’ emphasis on ‘governing at a distance.’

Through this analysis of a particular discourse plane, the legal realm, it is possible to shed light on the social problem articulated in chapter four. The focus of this research has been to consider whether neo-liberalism reframes the discursive conditions

¹⁷⁶ This chapter title is based on a phrase used by Kohm (2006) in his discussion of models of law and American reality-based courtroom television shows.

of what constitutes full sexual citizenship. What emerges from the case law, between 1959 and 2009, is the rise of neo-liberal language and goals, which are demonstrated through a number of discourse strands, which can be organized into the following areas: (1) 'Governing at a distance': The emergence of 'a responsible and informed citizenry'; (2) The post-feminist porn star; (3) Sexual citizenship; (4) Risky business; (5) The Customs regime; (6) 'A will to health'; and (7) Neo-liberalism and the harm-based approach. These strands, both implicit and explicit, combine to make up a neo-liberal ideology. Therefore, this research exemplifies that via the legal realm and judicial discourse, the courts have contributed to the neo-liberalization of Canada. A neo-liberal mindset has had an impact on sexual citizenship, which is particularly demonstrated by the (de)regulation of pornography in Canada. This will be established below in a discussion of the various discourse strands, and commentary will also be made on the shifts that we have seen regarding sexually explicit content.

'Sexplosion': The Mainstreaming of Adult Pornography

If the scenes of fornication in "The Stewardesses" were "play acting," then if and when the smut wing of the movie industry holds an Oscar night the participants in "The Stewardesses," air hostesses, air crew and passengers alike, have every right to anticipate a call from the stage to come forward to receive a deserving award. (Hughes, D.C.J. in *Daylight Theatre Company Limited v. The Queen*, [1973] S.J. No. 354, para. 33)¹⁷⁷

It is not likely that Judge Hughes really thought that at one point, there would be an award show for 'the smut wing of the movie industry.' However, just eleven years after the above case, the first *Adult Video News* (AVN) award ceremony was held which is sponsored and presented by the American adult video industry trade magazine (*Adult Video News*) to honour exceptional performance in various aspects of the creation and making of American pornographic movies, including awards for 'best all-girl sex scene.'

¹⁷⁷ Hughes, D.C.J. uses the term "sexplosion" in *Daylight Theatre Company Limited v. The Queen*, [1973] S.J. No. 354, para. 20.

In fact, they have been called, the ‘Oscars of Porn.’¹⁷⁸ This clearly indicates the shifts that society has witnessed over the last fifty years.

Shifting attitudes and tolerance are continually evident in the case law. The judges in a number of cases comment on changing levels of acceptance and tolerance of sexually explicit material,¹⁷⁹ and we see just from the cases themselves that material that was classified as obscene in one year may well be considered a classic years later. We only have to look at the case of *Brodie* and its focus on *Lady Chatterley’s Lover* to see that. In 1962, Taschereau, J. commented,

[n]obody would seriously think that this novel could be shown on television or that any respectable publisher would make available to the public in a newspaper or a magazine the complete story of "Lady Chatterley's Lover," without shocking the feelings of normal citizens. (in *R. v. Brodie*, [1962] S.C.R. 681, para. 21)

However, as we know, the book has been made into a film a number of times. Harper, Prov.Ct.J indicates this change in attitude, when he said,

[t]o those who have read the unexpurgated version of this D.H. Lawrence classic the book seems tame indeed when compared with the present-day explicit hardcore pornography that is prevalent in the modern video tapes. (in *R. v. Neil’s Ventures Ltd.*, [1985] N.B.J. No. 123, para. 14)¹⁸⁰

To say that ‘things change’ is not a surprise. In fact, Riley, J. contended that, “it is trite to say that tolerance today, particularly regarding sex, is very different than in former

¹⁷⁸ See ‘The Oscars of Porn’ (Jan 9, 2006) in the *Sydney Morning Herald* – accessed at : <http://www.smh.com.au/news/film/the-oscars-of-porn/2006/01/09/1136655116166.html>

¹⁷⁹ For example, see *Re Application under Section 160 of the Criminal Code of Canada*, [1980] N.B.J. No. 106; *R. v. Arnold*, [1993] O.J. No. 471; *R. v. Cinema International Canada Ltd.*, [1981] M.J. No. 458; *Daylight Theatre Company Limited v. The Queen*, [1973] S.J. No. 354; *Dechow v. R.*, 1974 CanLII 45; *R. v. Emery*, [1991] O.J. No. 1433; *R. v. Findlay*, 1987 CarswellOnt 2565; *Regina v. McLeod and Georgia Straight Publishing Ltd.*, [1970] B.C.J. No. 581; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2004] B.C.J. No. 1241; *Regina v. O’Reilly and four others*, [1970] O.J. No. 1553; *R. v. Pereira-Vasquez (B.C.C.A.)*, [1988] B.C.J. No. 799; *Priape Enrg. et al. c. Dep. M.N.R.*, [1979] Q.J. No. 199; *Regina v. Provincial News Co., Penthouse International Ltd. and Guccione*, [1974] A.J. No. 146; *R. v. Red Hot Video Ltd.*, 1983 CarswellBC 2076; *R. v. Universal News Ltd.*, [1972] S.J. No. 235; and *R. v. Yorke*, [1997] N.B.J. No. 24.

¹⁸⁰ See also, *Regina v. Mason*, [1981] O.J. No. 3263; and *R. v. Ronish*, [1993] O.J. No. 608.

years” (in *Regina v. Johnson*, [1972] A.J. No. 59, para. 17). However, this does not change the explicit commentary by the judges on this issue and the implicit indicators that point to the gradual ‘sexing of society’ and the broad sexualization of culture.¹⁸¹ Judges include comments on “the pornographic progression in publications” (expert witness quoted by, Misener, C.C.J. in *R. v. Penthouse International Ltd.*, 1977 CarswellOnt 1268, para. 33), and “the relaxation of standards” (ibid. at para. 47), evident in Canadian society. O’Hearn, C.C.J. includes a fascinating comment on societal changes when he commented on the work of Victor Papanek in 1970, who,

wrote a brief satirical piece “that tried to show how the combination of irresponsible design, male chauvinism, and sexual exploitation ... in a society that views women as objects for sexual gratification, an enterprising manufacturer might well begin tuning up for the production and marketing of artificial women.” Upon publication of the satire “The Lolita Project” he was surprised (and I think a bit shocked) to receive letters taking it seriously and to realize that it was quickly put into practice.” (in *R. v. Harris*, [1977] N.S.J. No. 687, para. 14)

In this he is referring to the creation and production of the blow up doll which is widely available now. Further, in 1963, we saw the case of *Dominion News* and the seminal judgment of Freedman, J.A., which was discussed in depth in chapter five. One of the quotes included in the ‘Freedman Rule’ incorporated a comment on ‘the relative freedom with which the whole question of sex is discussed.’ A number of cases reflect on this and consider the situation years later. For example, Ferg, C.C.J. contended, “and that truth was expressed almost 20 years ago and I think that freedom of expression has

¹⁸¹ An example of an implicit indicator is demonstrated in the judgment of Isman, Prov.Ct.J. in the *Georgia Straight Publishing* case. In relation to one of the counts, he stated the following, “I will deal first with count two which deals with the advertisement using the word “muffdiving.” I have no evidence whatsoever as to the meaning of that word and it is not a word the meaning of which I can take judicial notice. I must confess that while I’ve heard a lot of words, particularly in these Courts and elsewhere, I do not think that I can take judicial notice of a word that I have not heard. Therefore, count two is dismissed” (in *Regina v. Georgia Straight Publishing Ltd. and Mcleod*, [1969] B.C.J. No. 332, para. 1). If such an issue were before the courts today, it is unlikely that a similar judgment would be made. Now, through a simple search on the Internet, you can get 807,000 hits on Google when you search the term – one example being, a YouTube video on how to do muffdiving (an instructional video).

increased measurably in those 20 years” (*R. v. Barr*, [1982] M.J. No. 303, para. 13).¹⁸²

And here we are, almost 30 years later since the judgment in *Barr*, and we cannot avoid the mainstreaming of pornography and the widespread availability of sexually explicit entertainment. As Harris, Prov.Ct.J. noted, “different times bring different limits of tolerance” (in *Regina v. Pink Triangle Press et al.*, [1979] O.J. No. 4557, para. 52).

However, the question is, have we reached ‘unlimited permissiveness’? Since 1959, have we been on a continuum to gradual acceptance of all sexually explicit material? These are questions that various cases consider. Freedman, C.J.M. comments on this in the case of *Odeon Morton Theatres*, and critiques the idea that at that time he was making his judgment, we were moving all in one direction. He stated, “it is wrong to think that the trend is all one way, in the direction of virtually unlimited permissiveness ... There has not been a step by step movement in one direction only” (in *R. v. Odeon Morton Theatres Ltd.*, [1974] M.J. No. 6, para. 9).¹⁸³ And Hughes, D.C.J. comments in a similar vein that, he cannot, “envisage liberalization advancing with the rapidity of the past to the point where what I have suggested is below the line would rise above it” (in *Daylight Theatre Company Limited v. The Queen*, [1973] S.J. No. 354, para. 39). In this, he is commenting that we will not reach a point where everything is permissible.

Nevertheless, other judges have seen fit to indicate that we live in an increasingly permissive society with rapidly changing values. For example, Harper, P.C.J. stated,

I think it can safely be said that obscenity (especially as presented in the mode of video cassettes) is raging rampant across the nation with the producers gradually

¹⁸² See also, *Regina v. Kleppe*, [1977] O.J. No. 2562; and *Regina v. The MacMillan Company of Canada Ltd.*, [1976] O.J. No. 2268.

¹⁸³ See also, Philp, C.C.J. in *R. v. Cinema International Canada Ltd.*, [1981] M.J. No. 458. In his judgment, he agrees with Freedman, C.J.M. and comments that the community standards do no tolerate unlimited permissiveness.

becoming each time more daring as more and more courts look to material which has previously been found to be within the "standard tolerated by the community" and then come to the conclusion --"well, that one was adjudged O.K. and this is only a little bit worse and those other ones were decided in 1984 and this is 1985 so--and the point at which no line can possibly be drawn is quickly reached." (Harper, P.C.J. in *R. v. Lynncoco Sound Ltd.*, [1985] N.B.J. No. 157, para. 34)¹⁸⁴

His last line contends that there will be a point, 'at which no line can possibly be drawn,' and it seems that through an analysis of the case law and consideration of what is currently available, this is a valid statement. The case of *Price* helps us to come to such a conclusion, where the judge, on considering the BDSM content of various videos, decides that there is tolerance in society for explicit sexual activity coupled with graphic violence and therefore, acquitted Price.¹⁸⁵ This was not the case in 1959.

This growing acceptance of adult pornography and the mainstreaming of sex reflect this paradigm shift where academic and legal attention has gradually moved away from an analysis of adult pornography in the traditional way. Academic attention has shifted from a consideration of the effects of pornography and from being centered on the binary of the pro- and anti- arguments, to an analysis of pornography as cultural texts within a new field of porn studies, as discussed in the introduction. What we have seen is an increased role of pornography in the 'academic marketplace' as courses are listed in University calendars and a subsequent decrease in our attention to the 'problematic' place of pornography in society. Consequently, this shift has 'flattened all our opposition to pornography' (as stated by Feona Attwood) to a point where violent pornography is largely ignored, and 'abusive and consumption practices largely disappear from the agenda' (as stated by Karen Boyle). This indicates a fundamental

¹⁸⁴ See also, *Regina v. McLeod and Georgia Straight Publishing Ltd.*, [1970] B.C.J. No. 581; *R. v. Penthouse International Ltd.*, 1977 CarswellOnt 1268; and *R. v. Video World Ltd.*, [1985] M.J. No. 303.

¹⁸⁵ *R. v. Price*, [2004] B.C.J. No. 814. This decision contrasts with earlier decisions such as, *R. v. Scythes*, [1993] O.J. No. 537, where displays of bondage were deemed harmful and thus, intolerable.

change of focus and concern which is also, demonstrated in the legal realm and the case law analyzed in this research.

The underlying question to this is, why such a dramatic shift? As with most things, our values are ever-changing and technological innovations certainly contribute to this. But I think we can turn to the socio-political context to give us some answers to this. As demonstrated by Angela McRobbie in the introduction, she notes that an important challenge for young female scholars is to consider the impact of ‘a changing regime of sexuality within the context of an increasingly neo-liberal global culture,’ and in such a way, she points to the necessity of considering the dominance of a neo-liberal ideology and how it impacts on the (re)production of sex and sexuality. Therefore, it is essential to consider the rise of neo-liberalism and how it has impacted on our relationship with pornography. Further, we need to look at in relation to the emergence of a harm-based approach and our shifting conceptions of risk and harm. The following discussion considers the various discourse strands that emerge from the case law and display neo-liberal ideals and a focus on ‘governing at a distance.’

‘Governing at a Distance’: The Emergence of ‘A Responsible and Informed Citizenry’

From the case law, what emerges is a gradual reliance on the individual citizen to self-regulate and self-police.¹⁸⁶ Through the judgments, conditions are increasingly set to allow citizens to govern themselves in relation to adult pornography. From the 1980s on, a trend towards personal choice and individual responsibility emerges, which is demonstrated by the decline of pornography-related cases in the time frame at issue in this research. The decline indicates neo-liberal values of diminished state interference

¹⁸⁶ Lamer, C.J. speaks to “a responsible and informed citizenry” in *R. v. Jorgensen*, [1995] 4 S.C.R. 55, para. 29.

and governance at a distance. Therefore, the larger societal movement towards a self-policing state has spilled over into our regulation of pornography. With the changes in technology and the rise of the Internet, it has become clear that prohibition of adult pornography does not work in a global culture. The Internet reflects the ultimate exchange of ideas and ultimate consumerism, which is difficult to regulate. As we have seen in the case law with only two Internet-related cases, it is almost impossible to regulate the creation and distribution of adult pornography on the Internet, to the point that it is left up to the consumer. The consumer is encouraged to take responsibility for themselves and their own actions. Pornographic material is subject to the regulations of a competitive marketplace, where consumers decide what will stand through their consumption habits. The case law demonstrates this trend towards a consumption-based culture and consumer sovereignty. For example, we know that the obscenity provisions primarily target the creation and distribution of pornography, rather than the possession of it. However, as noted earlier this impacts on what is available to the ultimate consumer. In recent years, demonstrated by the decline in cases, the consumer has been imparted with almost limitless access due to such content or conduct rarely being halted or criminalized. Thus, the consumer is viewed through a lens of individual responsibility, autonomy, and choice – key words of a neo-liberal ideology.

In this way, we can reflect on the words of Darling, Co.Ct., who stated,

In my view the law intends to protect society from these unwarranted abuses until, if ever, all parts of society reach the degree of responsibility which may be described as complete maturity. (Darling, Co.Ct.J. in *Regina v. McLeod and Georgia Straight Publishing Ltd.*, [1970] B.C.J. No. 581, para. 44)

From this analysis, it seems possible to comment that we have reached that degree of responsibility – or the neo-liberal state has envisaged Canadian citizens as no longer in need of protection from adult pornographic content and that they are able to be ‘active citizens’ who judge for themselves what to consume. This does not mean that they are

not provided with some tools to make such decisions. For example, a number of the cases talk about the various Provincial film boards that have as one of their responsibilities to classify and rate films. As “an arm of the Department of the Attorney General” (James, Prov.Ct.J. in *R. v. Erotica Video Exchange Ltd.*, [1994] A.J. No. 1008, para. 4), these boards through the classification process help to, “enhance the public’s ability to make informed viewing choices” (Juriansz, J. in *R. v. Glad Day Bookshops Inc.*, [2004] O.J. No. 1766, para. 96).

The cases that solidify this trend and the impact of the neo-liberal ideology are *Kouri v. R.*, [2004] J.Q. no 7724 and *R. v. Labaye*, [2005] 3 S.C.R. 728. In the case of *Kouri*, Otis, M.J. contended that,

a pluralist and tolerant Canadian society does not condemn modes of sexual expression that vary from those of the majority, as long as they do not constitute a source of social harm and are not offensive. Outside these limits, individuals are *self-determining* and *make personal choices* regarding their mode of sexual expression for themselves, according to their own values and ethics. (Otis, M.J. in *Kouri v. R.*, [2004] J.Q. no 7724, para. 51; emphasis added)

Further, the Supreme Court of Canada decision in *Labaye* places primacy on individual choice through its judgment on ‘swinging’ and its realization of the harm-based approach. McLachlin, C.J. demonstrates this when she says in the conclusion of her judgment, “consensual conduct behind code-locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society” (in *R. v. Labaye*, [2005] 3 S.C.R. 728, para. 71). Such a sentiment is also expressed in the dissenting judgment of Proulx, J.A. in the 2004 judgment in *Labaye*. He commented that,

It seems to me difficult to speak of the abasement of a woman or her use as a sexual object for the gratification of others when she has entirely *preserved her autonomy* and considers swinging to be her *personal choice*. These women are not exploited; they participate in swinging activities as the others do or will. (Proulx, J.A. in *Labaye v. R.*, [2004] J.Q. no 7723, para. 74; emphasis added)

These cases highlight the importance placed on individual responsibility and choice. Through ultimately deciding that 'swinging' is not indecent and therefore, tolerable, these cases signify the fundamental changes that we have seen and the impact of neo-liberal ideals regarding the role of the state and citizenship. Further, the quote from the 2004 *Labaye* case presents a different perspective on women and *their* choices regarding sex and sexual expression, which veers away from ideas that women need to be protected. This is part of larger trend within the case law.

The Post-feminist Porn Star

The quote in *Labaye* points to a widespread trend in the cases in relation to women and pornography which demonstrates the emergence of post-feminism and the post-feminist female subject. Through various judgments, there is commentary that points to the ideas of Rosalind Gill, as discussed in chapter two. Gill talks about the movement away from sexual objectification towards sexual subjectification and sexual agency, which demonstrates the surfacing of individual choice and autonomy. Gill argues that women are positioned as making *choices* to be sexy, rather than doing so as a consequence of objectification and the male gaze. Subsequently, women are 'can-do' girls who are 'active desiring female subjects.' However, she critiques this through querying whether they are in fact *choices*. Gill evaluates the discourse of neo-liberalism and post-feminism and through questioning these assumptions of freedom and choice, highlights the need to deconstruct these assumptions. From the case law, these ideas of freedom and choice, particularly as they pertain to women in the pornography industry, are implicitly established through the observations of the judges. They emerge through judicial comments on the rise of the pornography industry and the growing acceptance of it, and serve to contribute to the subsequent decline of the regulation of pornographic content within the legal realm.

The growth and success of the industry is commented on in a number of cases. The consequences of such success, is highlighted by Payne, Prov.J. who remarks on the rising fame and star quality of those involved in these films, along with the increasing 'attractiveness' of its participants. He stated that,

there appears certainly to be an *upgrading* of the participants in such movies, in that both male and female persons who are involved are at least physically attractive. The women, in particular, are quite physically attractive and it may be some advancement in the industry, that these people now permit their names to be attached to these movies and they are described as starring, and the names of the director and the producer of this type of movie are shown with what appears to be a great deal of pride. As I recall, the old eight millimetre movies on this subject, they were all filmed in bad light, by a lot of scrawny individuals who didn't bother to identify themselves. (in *R. v. Findlay*, 1987 CarswellOnt 2565, para. 11; emphasis added)¹⁸⁷

This statement reflects a change in tone of the films themselves, and subsequently the type of comments made by the judges. The focus seemingly moves away from a consideration of degradation and dehumanization towards a male appreciation of the 'porn stars' and their physical appearance. Through such a judicial discourse, it serves to diminish questions about harm and instead support the idea of the 'active, desiring female subject' within the pornographic industry.

Further, from the 1980s on, it is clear that the judges begin to notice women playing a more dominant and aggressive role in the films. As Payne, Prov.J noted, "it does appear as a general trend throughout all the movies that the women in the respective movies were the aggressors, and men, while they were active participants, seemed to be involved only for the use of the women in the particular scenes (ibid. at para. 11). For Misener, J., this seems to be indicative that women "at last are *asserting their equality*, if not their superiority. And not surprisingly, the male participants seem to be delighted with this new found assertion" (in *R. v. Hawkins*, [1992] O.J. No. 1161,

¹⁸⁷ See also, See also, *R. v. Doug Rankine Company Ltd. and Act III Productions Ltd.*, [1983] O.J. No. 3339.

para. 14 emphasis added). What this seems to point to is the growing assumption of equality that women now ‘supposedly’ enjoy. The judges indicate that this is reflected in pornographic movies by the women taking charge. In this way, we have seen the entrance of the post-feminist porn star who, *chooses* to be involved in the industry and enjoys it.¹⁸⁸ The notion that we should be spending time considering the negative consequences and effects of the pornographic industry declines – even if we might question whether being the dominant sex in a porn movie really indicates that women have equality and are able to assert it.¹⁸⁹

The lack of prohibition implicitly indicates this trend and the notion that women no longer need to be ‘protected.’ Clearly, one of the goals of the obscenity provisions, particularly since it was viewed through a harm perspective, was to protect women from degradation and dehumanization. This is indicated by Anderson, J.A. who stated that,

If true equality between male and female persons is to be achieved it would be quite wrong in my opinion to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above. As I have said, such material has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women. (Anderson, J.A. in *Red Hot Video*, 1985, 32)

Therefore, he exemplifies the view that women need not be portrayed in such a way and should be protected from such depictions.¹⁹⁰ Further, Dickson, C.J. commented that, “it is not likely that at a given moment in a society’s history, such publications will be

¹⁸⁸ The idea of women willingly being involved, enjoying their profession and being well-paid is exemplified by the argument of the accused in the *Kornylo* case, and by an expert witness in the *Wagner* case: *R. v. Kornylo*, 1985 CarswellOnt 1723 and *R. v. Wagner*, [1985] A.J. No. 570.

¹⁸⁹ The intention of this argument is not to dismiss the male gaze as it certainly still exists. For example, Philp, C.C.J. comments that, “the sexist approach should not be overlooked. The scenes of masturbation involved females, not males; the homosexual scenes involved females and not males; and in the scenes involving sexual activities with three participants, two were female and one was male” (in *R. v. Cinema International Canada Ltd.*, [1981] M.J. No. 458, para. 12). However, more often than not, the trend has been to view women as willingly *choosing* to take part in these activities.

¹⁹⁰ See also, *R. v. Alter*, [1985] O.J. No. 2045; and *R. v. NOP Ltd.*, [1991] O.J. No. 1474.

tolerated” (in *R. v. Towne Cinema Theatres Ltd.*, [1985] 1 S.C.R. 494, para. 25). Despite such comments and the support for continued prohibition and regulation, the gradual inclination has been towards tolerance. The absence of cases in more recent years points to the neo-liberal discourse of choice that holds that women have achieved equality and no longer need legal protection from something that they are now *choosing* to be involved in. However, as noted earlier, some feminist scholars suggest that this might not be an accurate set of assumptions about women’s rights and equalities.

As indicated in chapter two, it is not that easy to critique post-feminism and its celebration of equality and female choice. It is difficult to deny that a move away from a strict paternalistic idea that women need to be protected is not desirable. However, it has to be done in a way that recognizes that a level playing field does not exist for all women. The discourse in the case law errs towards a misplaced optimism that all women are able to ‘have it all’ and make choices to be ‘sexy’ within ideal notions of femininity. Such a perspective, ‘erases real-life difference’ (as stated by Dawn Heinecken), and creates, ‘an equalitarian utopia in which sexual, racial, and ethnic differences among consumers recede’ (as stated by Linda Mizejewski). ‘Successful femininity’ as demonstrated by the concept of the ‘post-feminist porn star’ is coded as normal and universal; even though it is not likely to contribute to *all* women’s notion of sexual citizenship.

Sexual Citizenship

As indicated in the preceding discussion, the trend in obscenity law has been to follow the larger socio-political context and affirm a ‘neo-liberal model of law.’ In such a way, there has been a gradual decline of obscenity-related cases since the 1980s and adult pornography has been enabled to flourish without direct state control, in a neo-liberal context. Therefore, this facilitates Canadian citizens to access forms of sexual

expression that they choose to consume, contributing to their sexual citizenship. However, what is demonstrated in earlier chapters is that this freedom is often subject to boundaries: within neo-liberalism, there are ideals of citizenship and normative standards, indicating that people are free up until a certain point. There are certain exclusions that citizens may face if they are constructed as a 'risk' to society. As O'Malley (2009) states, "neo-liberalism shapes risk" (10), and if a citizen is unable to or fails to conform, they are likely to be seen as a risk and subject to legal intervention.¹⁹¹

What emerges from the case law is that societal notions of risk are defined and viewed through a heterosexual matrix. There are a number of cases that demonstrate that certain types of pornography have not been able to flourish in quite the same way, and are in fact, subject to differential treatment and differing levels of tolerance. For example, Nowlin (2003) agrees that we have seen increased tolerance but that, "heightened tolerance" is "largely limited to the world of heterosexual pornography" (110). Therefore, there is a discourse strand of heterosexism that emerges from the regulation of gay, lesbian, bisexual and transgender expressions. Cases such as *Glad Day Bookshops*, *Little Sisters*, and *Scythes* point to such a trend, demonstrating a "blanket surveillance" of gay and lesbian erotica and pornography that has not existed in the same way for heterosexual content (Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 11).

In a number of cases, there is commentary on shifts and changes in public attitudes and tolerance toward 'homosexuality.' For example, in the case of *Mason*, it highlights the Parliamentary changes to the *Criminal Code* in 1969 and the enactment of

¹⁹¹ A point of interest regarding notions of citizenship that is only commented on in one case relates to cultural citizenship and the creation and consumption of rap music. In the judgment of the *Emery* case, there is a dismissal of the artistic, cultural and social value of rap music which rejects ideas that such music could contribute to the constitution of identity for some members of the population. See *R. v. Emery*, [1991] O.J. No. 1433; and *R. v. Emery*, [1992] O.J. No. 640.

s.158 under the Pierre Trudeau government.¹⁹² Charles, Prov.Ct.J. makes reference to Trudeau's memorable speech where he asserted that, "the State had no business in the bedrooms of its citizens" (in *Regina v. Mason*, [1981] O.J. No. 3263, para. 17). In such a way, s.158 was introduced that declared the following:

158(1) Sections 155 and 157 do not apply to any act committed in private between

(a) a husband and his wife, or

(b) any two persons, each of whom is twenty-one years or more of age,

both of whom consent to the commission of the act.

(cited by Charles, Prov.Ct.J. in *Regina v. Mason*, [1981] O.J. No. 3263, para. 17).

Sections 155 and 157 are related to acts of gross indecency, and prior to the creation and enactment of section 158 acts of anal sex between two consenting males were captured within the definition of this.

Therefore, such a Parliamentary move contributed to a change in attitude towards gay sexuality and a striking down of a law that served to discriminate against a certain portion of the population. In more recent years, as commented on by Paris, Prov.Div.J.,

many courts and tribunals have struck down laws and practices held to discriminate against gays. This is an indication that our society has moved beyond tolerance to the actual recognition that homosexuals form an essential part of our community. It follows then that as members of a sexual minority they have the right to communicate publicly on the subject that binds them together. (in *R. v. Scythes*, [1993] O.J. No. 537, para. 6)

¹⁹² The case of *Mason* was the first case to deal with group sex/swinging – and the only case to do so before the cases of *Kouri* and *Labaye*. In his judgment, Charles, Prov.Ct.J. stated that, the reasonable person would tolerate such acts because they take place in private.

However, this increased recognition has not necessarily led to tolerance similar to that given to heterosexual material and in such a way, there continues to be less acceptance of gay and lesbian expression.¹⁹³

Risky Business

What emerges from the case law is recognition that gay and lesbian erotica and pornography play a central role in the assertion and expression of sexuality. Such content and material is fundamental to the constitution of identity within the gay and lesbian community and, therefore, contributes to achieving sexual citizenship. A number of judges comment on the importance of gay and lesbian literature in this way, or at least refer to those who do, such as expert witnesses. In the Supreme Court of Canada decision in *Little Sisters*,¹⁹⁴ Binnie, J. commented that the appellants in the case contended that,

homosexual erotica plays an important role in providing a positive self-image to gays and lesbians, who may feel isolated and rejected in the heterosexual mainstream. Erotica provides a positive celebration of what it means to be gay or lesbian. As such, it is argued that sexual speech in the context of gay and lesbian culture is a core value ...” (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 53)

Thus, it provides support for a sexual identity that has historically been marginalized and a space that allows for “self-affirmation and empowerment through expression” (Pat

¹⁹³ For example, see *Priape Enrg. et al. c. Dep. M.N.R.*, [1979] Q.J. No. 199. Additionally, it is interesting to consider the judgment of Misener, C.C.J. He includes the opinions of an expert witness who describes the change in public attitude towards homosexuality, noting that, “the community now treats the subject in an open way and with *sympathy*” (in *R. v. Penthouse International Ltd.*, 1977 CarswellOnt 1268, para. 52; emphasis added). The idea that it is treated with ‘sympathy’ does not necessarily indicate a positive shift in attitude or recognition.

¹⁹⁴ The Little Sisters Bookstore has played an important role in attempting to provide such expression. One of the store owners describes the store as, “a nerve centre for the homosexual community” (quoted by Macfarlane, J.A. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507, para. 18). See also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507; and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120. The *Little Sisters* case draws our attention to how gay and lesbian citizens have been denied access to sexually explicit materials.

Califia quoted by Smith, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 229). Further, Professor Becki Ross commented that, “lesbian-made sexual materials validate lesbian sexuality as healthy, as meaningful, and as empowering,”¹⁹⁵ and she noted that “access to producing and consuming our own sexual images is crucial to interrupting both the stubborn invisibility of lesbians in the culture at large and also the negative problematic stereotyping of lesbians...” (quoted by Smith, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 230). Through this, she highlights the need to (re)present the lesbian body as healthy rather than risky which would serve to increase access to such imagery. This type of language causes us to think about constructs of citizenship within a neo-liberal context. The claims to access and to consumption of such expression and imagery do serve to reshape citizenship as consumerism. We can reflect on this in relation to the words of Brenda Cossman (2002), who stated,

The demand in *Little Sisters* was also a demand that the lesbian and gay public be entitled to access sexual materials. It was a claim to citizenship as consumerism, a right to public access to private goods, a right to buy and consume ... It is a claim to citizenship that fits all too well with shifts in the prevailing conception of citizenship, from social citizen to neo-liberal citizen. (499)

Therefore, this highlights that sexual citizenship has very much become equated with consumerism and our ability to access and consume the materials that we want.¹⁹⁶ In

¹⁹⁵ A number of the cases talk about depictions of lesbian sexual activities but most often, these are activities enacted or created in magazines or film for the heterosexual male gaze. For example, in reference to an expert witness, Misener, C.C.J. stated, “he expressed the view that the reader of *Penthouse* is the ordinary heterosexual male Canadian who is curious about the actions of female homosexuals and that this accounts for the emphasis placed by the editors on such activity” (in *R. v. Penthouse International Ltd.*, 1977 CarswellOnt 1268, para. 48). In this way, this type of content rarely contributes to the sexual citizenship of lesbian women.

¹⁹⁶ See also Maddison (2010) who comments that, there has been a growing tendency to “equate commodity choice with sexual emancipation” (2).

this way, we have another example of the sovereignty of the consumer in a neo-liberal age.

Despite commentary on the importance of this type of expression, gay and lesbian sexuality has been targeted as more dangerous through a discourse strand of risk and risky business.¹⁹⁷ In the cases, we see that the courts and such governmental bodies as Canada Customs have played a role in this, and to an extent, there has been a discriminatory enforcement of the law.¹⁹⁸ In a number of cases, gay and lesbian sexuality is often constructed as risky, dangerous, perverted and disgusting.¹⁹⁹ Such constructions seem to fuel comments that position anal sex as abnormal and, therefore, perverted. For example, Locke, D.C.J. stated,

This film explicitly portrays various conventional sexual acts and some not so conventional sexual activity. The object of the film is to explicitly depict simultaneous oral, anal and normal, if I can use that term, sexual intercourse. (Locke, D.C.J. in *R. v. Wise*, [1990] O.J. No. 1416, para. 17)²⁰⁰

Contrasting anal sex with 'normal' sex contributes to heterosexual sex being constituted as the 'single normative standard'²⁰¹ and, therefore, to lower levels of tolerance for that which differs. As commented on by Cory, J., "any perception of what would be tolerated will very properly be influenced by what is perceived as normal" (in *R. v. Tremblay*, [1993] 2 S.C.R. 932, para. 71). Further when describing the content of gay and lesbian material, judges have often classified it as displaying 'no real meaningful human

¹⁹⁷ See Gwilliam (2002).

¹⁹⁸ Binnie, J. commented that the appellants in the *Little Sisters* case argued that, in many ways they have been treated by Customs officials as, "sexual outcasts" (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 36).

¹⁹⁹ See Nowlin (2003) for some commentary on gay and lesbian sexuality and the use of derogatory terms within some of the legal judgments. See also, *Glad Day Bookshop Inc. v. Deputy Minister of National Revenue (Customs & Excise)*, 1987 CarswellOnt 2604; *Regina v. Pink Triangle Press et al.*, [1979] O.J. No. 4557; and *Regina v. Salida*, [1968] O.J. No. 1292.

²⁰⁰ See also, *R. v. Penthouse International Ltd.*, 1977 CarswellOnt 1268.

²⁰¹ See Dickson, J.A. in *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32, para. 11.

dimension' and, therefore, presenting harm to society. As Hayes, J. maintained in his description of 'Spartan's Quest,'

This is a succession of grotesque drawings of three males engaged in various forms of sexual activity one of the men having emerged from the sea in a fishing net. It is a sexual encounter *without any real meaningful human relationship*. The manner in which the conduct is depicted would not be recognized as compatible with the proper functioning of society. It is degrading. There is a *strong inference of harm*. The community would not tolerate others being exposed to this gross material. I find it to be obscene. (in *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) (Ont. Ct. (Gen. Div.))*, [1992] O.J. No. 1466, para. 73; emphasis added)

Through such a judgment, there is an assumption of risk and harm being made. The homosexual body is being constructed as a 'risky body.' Harm is inferred from the conduct in question without direct knowledge that harm flows from such representations.

As the defence counsel in *McKeigan* stated,

[t]he Supreme Court of Canada has recognized that there is a substantial body of opinion with respect to the degradation and objection of women and the resulting social harm. But the same cannot be said for harm arising from performances which involve only men and are aimed for only male homosexual male audiences. (Greenspan in *R. v. McKeigan*, 2000 CarswellOnt 1577, para. 45)

Such a statement draws our attention to this concept of harm as originally conceived of in the Supreme Court of Canada decision in *Butler*. Arguments have often been made by the accused or appellant that the test developed in *Butler* should not be applied universally. Instead, there should be a utilization of 'special standards' when the courts are dealing with gay and lesbian material. However, there has been a consensus in the courts that the same standard should be applied, that it is in no need of modification, and that, therefore, is the proper approach. As Macfarlane, J.A. argued,

Harm is not to be determined by the standard of the gay/lesbian community but by application of a general community standard. The question is not whether harm will be caused to the gay/lesbian community by the importation of obscene material, but whether harm to society generally may be caused by importation and proliferation of such material. The objective of the legislation is not to prohibit non-obscene gay/lesbian literature, but to prohibit importation of obscene material as defined in s. 163(8) of the Criminal Code. (in *Little Sisters Book and*

Art Emporium v. Canada (Minister of Justice), [1998] B.C.J. No. 1507, para. 77)²⁰²

Such an approach has often led to the assumption and reasoned apprehension that homosexual obscenity causes harm to society aside from the fact that most of the social science evidence presented in court relates to heterosexual or child pornography. Finch., J.A. in his dissenting judgment, commented that, in his view, there is, "an open question as to whether homosexual pornography would meet the "reasoned apprehension of harm" test discussed by Mr. Justice Sopinka" (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507, para. 191).

Gay and lesbian citizens have been impacted by this approach in the courts and in such bodies as Canada Customs.²⁰³ Their ability to access material is limited by this discourse strand of risk, which alters the discursive conditions of what constitutes full sexual citizenship. Through this neo-liberal reframing of sexual citizenship, normative ideas of 'appropriate' and risk-free sexual content are delineated. Consider the words of Iacobucci, J. who recognized the important role that pornographic materials play in gay and lesbian communities, but stated, "gay and lesbians remain able to access pornographic materials that do not create a substantial risk of harm" (in *Little Sisters*

²⁰² See also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71; and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

²⁰³ The most recent *Little Sisters* judgment related to their request for advance costs in order to pursue further legal action. In their judgment stating that the proposed appeal is not 'special enough' to justify an award of advance costs, Bastarache & Lebel, JJ. refer to the Court of Appeal decision when making the following remarks, "the public has not appointed Little Sisters to this role" as a watchdog, and he was "not satisfied that it is necessary for Little Sisters to be the instrument of reform of Customs" (in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, para. 31). Their judgment causes us to consider, what makes a case special enough? How is such a judgment made? In this type of case, is it based on normative ideas of sex and sexuality? The idea that the case is not special enough is critiqued in the dissenting judgment. Binnie, J. stated, "whether a case though special is not "special enough" or fails to "rise to the level" of compelling public importance is a subjective test whose outcome will inevitably depend to a significant extent on the eye of the beholder" (Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, para. 154).

Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120, para. 201). We have to ask how this concept of harm is determined and whether it is free from normative heterosexual standards.²⁰⁴

The Customs Regime

Parliament is entitled to intervene in the public interest against a trafficker who attempts to dump into Canada for crass commercial gain the publications in question. (Grossberg, Co.Ct.J. in *North American News and Deputy Minister of National Revenue for Customs and Excise*, (1974), 1 O.R. (2d) 200, para. 23)²⁰⁵

As the above quote states, Canada Customs has the right to control what enters the country and control its borders. However, as demonstrated in the case law, Canada Customs has often engaged in discriminatory practices that have impacted on the lives of gay and lesbian citizens. Owing to the lack of training and time to make informed decisions about content, gay and lesbian material is often classified as a risk and, therefore, prevented from entering the country. It is interesting to consider the commentary on the Customs regime in relation to its history and practices. What emerges is that Customs acts as an arm of the State, thereby facilitating governance at a distance. Although the original *Customs Act* was enacted in 1867, more recently,

[m]odern society has come to rely on administrative decision-making as essential to proper government and to recognize that specialized tribunals and administrative decision-makers are particularly well-suited to deal with routine decisions requiring specialized knowledge. Customs officers can fill that role. (Smith, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 243)²⁰⁶

²⁰⁴ This brings us back to the recognition that harm is a normative concept and difficult to operationalize. How can we determine the concept of harm in the context of assessing the impact of viewing images? Lab-based studies have obvious problems with external validity, and yet, these are the studies on which the assertions of harm are based.

²⁰⁵ See also, *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) (Ont. Ct. (Gen. Div.))*, [1992] O.J. No. 1466.

²⁰⁶ See also, *R. v. Mood Video Ltd.*, [1987] N.J. No. 90.

These bodies are afforded a fair amount of discretion in their day-to-day duties and responsibilities, even if matters affect *Charter* rights.²⁰⁷

The Customs Act is a “quasi criminal statute” that, “sets up a regulatory scheme to control what substances or materials can be imported into Canada” (Hayes, J. in *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.)* (Ont. Ct. (Gen. Div.)), [1992] O.J. No. 1466, para. 19).²⁰⁸ Similar to s.164 of the *Criminal Code*, it is an *in rem* procedure, which means that it “does not affect the liberty of the person” but may result in the material being returned to the sender (ibid. at para. 21).²⁰⁹ Following the case of *Luscher* in 1985, the definition of obscenity (s.163(8)) was imported into the provisions of the *Customs Act* in response to arguments that the language in the Act was vague and ill defined.²¹⁰ For example, in the 1983 *Luscher* case, the appellant observed that, ‘immoral’ and ‘indecent’ are words that, “have lost so much of their former clarity and precision that they are almost impossible to define and virtually incomprehensible to the ordinary citizen” (Anderson, Co.Ct.J. in *Luscher v. Canada (Deputy Minister, Revenue Canada Customs and Excise)*, [1983]

²⁰⁷ See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

²⁰⁸ An important point to recognize here is that in making the decisions, Customs does not make a distinction between whether the material is for private or public use. See *Pei-Yuan v. The Queen*, [1972] B.C.J. No. 671.

²⁰⁹ See also, *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.)* (Ont. Ct. (Gen. Div.)), [1992] O.J. No. 712. This case also includes descriptions of the ‘Minister of National Revenue’ and the ‘Deputy Minister’ and their roles within Canada Customs.

²¹⁰ See *Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.)* (Ont. Ct. (Gen. Div.)), [1992] O.J. No. 1466; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507; *North American News and Deputy Minister of National Revenue for Customs and Excise*, (1974), 1 O.R. (2d) 200; and *Pei-Yuan v. The Queen*, [1972] B.C.J. No. 671.

B.C.J. No. 1076, para. 7). Therefore, it was hoped that the importation of s. 163(8) into the Act would help to give citizens ‘adequate notice of risky conduct.’²¹¹

Central to the Customs provisions is Memorandum D 9-1-1 which governs Customs officials and their view of obscenity. It is the “key working tool” (Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 83), and acts as an “internal administrative aid” (ibid. at para. 85), which describes what types of materials are to be deemed obscene by Customs.²¹² For a long time, it was “not generally available to the public” (Iacobucci, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 179), and remained an internal document. Owing to this requirement of privacy for key internal documents, Customs failed to alert citizens as to what was prohibited. However, as a consequence of various legal battles, including the *Little Sisters* case, D 9-1-1 is now posted online and available to citizens (see Appendix E). In this way, it contributes to creating ‘a responsible and informed citizenry’ that is educated about the boundaries of unlawful conduct so that they can better self-regulate themselves.

What emerges from the case law is that this ‘working tool’ has been central to many of the problems and discrimination that we have seen. For a number of years, D 9-1-1 was a “defective guide” (Binnie, J. in *Little Sisters Book and Art Emporium v.*

²¹¹ Canada Customs is guided by the definition of obscenity in the *Criminal Code* along with decisions handed down by the courts. See *R. v. Arena Recreations (Toronto) Ltd.*, [1987] M.J. No. 51.

²¹² An important comment to make here is that a common argument that emerges out of the case law relates to citizens reliance on the Customs decisions. What the courts have said is that the decisions do not confer immunity from the consequences of the legal obscenity provisions. For example, Freedman, J.A. stated, “If, somewhere along the way, someone (no matter how highly placed, and whether in the Customs Department or elsewhere) expressed an opinion that a publication was not obscene, would remain just that, an opinion and no more. It would not confer on the distributor of the publication an immunity from the consequences of the obscenity provisions of the Criminal Code even if he believed the opinion and accepted it as sound” (in *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32, para. 47). See also, *R. v. Before and After (1982) Ltd.*, [1982] N.J. No. 121; *Regina v. Metro News Ltd.*, [1986] O.J. No. 826; *Priape Enrg. et al. c. Dep. M.N.R.*, [1979] Q.J. No. 199; and *R. v. Saint John News Company Ltd.*, [1985] N.B.J. No. 253.

Canada (Minister of Justice), [2000] 2 S.C.R. 1120, para. 85), because, despite the opinion of the Department of Justice that depiction of anal intercourse was not as such to be seen as obscene, it was “ignored for at least two years while imported materials depicting anal intercourse continued to be prohibited on the basis of the outdated Memorandum D9-1-1” (Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 84).²¹³ Therefore, a group of the population, “suffered differential treatment” (ibid. at para. 116), and gay men were consequently seen as ‘risky.’ Decisions were being made on the basis of sexual orientation, which pointed to a degree of “systemic targeting” (ibid. at para. 1) where there was “special scrutiny of shipments” (Smith, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 106), and publications were being denied entry to Little Sisters, but “often successfully imported and sold by other stores” (ibid. at para. 99). Although, in response to the legal battles, Canada Customs said that they altered their practices, Little Sisters maintain that changes have not taken place and there is continual targeting.²¹⁴ This was the reason for their attempt to receive advance costs to continue the battle.²¹⁵

In relation to the argument that gay and lesbian material has been systemically targeted by Canada Customs, the courts seem to indicate that the ability of Customs officials to make decisions about such content is limited. Despite the courts not fully finding in favour of bookstores such as Little Sisters, they have recognized that the system is flawed and that Customs officials are not qualified to make decisions regarding obscenity and not able to determine artistic or literary merit. Binnie, J. quotes

²¹³ See also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 266).

²¹⁴ See *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2004] B.C.J. No. 1241.

²¹⁵ It is noted in his dissenting opinions that, “very few people have the time, energy or resources to challenge Customs’ frequent initial determinations of obscenity” (Finch, J.A. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507, para. 223).

the Minister of National Revenue, who stated, “I really think that we are much better qualified to deal with increasing the seasonal tariff on cabbages and cucumbers than to pass moral judgment on literature coming into the country” (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 15). Therefore, what we have seen is “a rough and ready border screening procedure” (ibid. at para. 80), where “untrained Customs officials” have been “too quick to equate homosexuality with obscenity” (referring to the judgment of the trial judge, ibid. at para. 37).²¹⁶ This is primarily so, because they are “unaware of the cultural practices of various sexual minorities” (Iacobucci, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 265).

Therefore, there is an alleged failure of Canada Customs to properly apply the legal test for obscenity.²¹⁷ And this is certainly due in part to the practices that officials have tended to adopt that result from a lack training, time and evidence to make such decisions²¹⁸. For example, one of the requirements to make a decision of obscenity is that a ‘questionable’ book must be read from cover to cover or a video must be watched in its entirety. However, in the case law, there is commentary on the short cuts taken, where “decisions are made by such expedients as thumbing through books, choosing pages at random to read, and fast-forwarding videotapes to count the number of

²¹⁶ See also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71; and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507.

²¹⁷ See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507; and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2004] B.C.J. No. 1241.

²¹⁸ Smith, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71. In relation to the question of evidence, in talking about suggestions for improvements, Smith, J. comments that the importer should have the opportunity to place evidence before the Custom’s officer. He stated that, “in a system that relies on inspection and detection of illegal importations at the border, it is essential that the importer be afforded an opportunity to place relevant evidence before the classifying officer to facilitate an informed decision. There is presently no formal procedure in place for achieving that” (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 259). See also, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1998] B.C.J. No. 1507.

offending scenes” (Smith, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 115).²¹⁹ Such procedure is not likely to allow for an informed decision regarding the content and as we have seen, such practices have led to discriminatory enforcement of the provisions.

Despite these inherent flaws in the Customs regime, the majority in the Supreme Court of Canada’s decision in *Little Sisters* maintained that, “the Customs legislation is quite capable of being applied in a manner consistent with respect for *Charter* rights” (Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 133). Therefore, the legislation does not need to be declared void, Customs officials just need to receive more specialized training. For example, reference is made to this by Smith, J. who commented that, “it is essential that those officers designated to classify goods pursuant to code 9956(a) have sufficient training and experience to be able to make reasonable assessments of artistic and literary merit” (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, para. 258). However, the dissenting opinion in the Supreme Court case finds that the Customs regime is not minimally intrusive and consequent to the flaws in it, Iacobucci, J. argued that, “the whole regime must fall” (in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 214). He commented that, “patchwork measures aimed at various symptoms will not cure the underlying ailment” (ibid. at para. 266) and reduce the “high rate of error” (ibid. at para. 246), and the over-censorship resulting from the regime. He contended that a better approach, “would be to have Customs officers alert the proper authorities when

²¹⁹ A further point regarding the procedures followed is that in making a determination of obscenity, “no reasons are typically given by Customs for a prohibition beyond a tick in one of eight boxes entitled “Sex With Violence,” “Child Sex,” “Incest,” “Bestiality,” “Necrophilia,” “Hate Propaganda,” “Anal Penetration,” and “Other.” The box “Other” is followed by a short line on which the inspector could write one or two words to describe the ground for prohibition, but rarely did so in sufficient detail to be informative” (Binnie, J. in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 76).

questionable materials come to their attention, and leave the obscenity determination to prosecutorial discretion and the courts” (ibid. at para. 280). As a result, it would involve the courts more in decisions related to what may cross the border. This, however, is not an approach that has been adopted, and Canada Customs continue to make decisions regarding obscenity, but it is argued that they have reduced the tendency for discrimination. The fact that Little Sisters was still in court in 2007 raises questions about this – and that the reason we have not seen further cases is most likely due to a lack of resources.²²⁰

‘A Will to Health’

A further discourse strand that plays a role in the furthering of a neo-liberal ideology relates to health and public hygiene. This strand was delineated through the analysis of cases in the sample and the subsequent identification of judicial commentary on the topic of sexually transmitted diseases and safe sex practices. What emerges from the case law is a growing focus on the risk of disease and risks to public health. In the 1990s, the courts start to demarcate HIV and AIDS as cautionary factors when deciding cases on issues of obscenity and indecency.²²¹ In such a way, there is a concentration on minimizing societal risk and maximizing individual well being through the promotion of safe sex practices. As indicated earlier by Richardson (2000), sex is part of ‘the realms in which healthy citizenship is constituted’ and citizens are required to make the right choices. Consequently, using protection becomes a matter of personal choice and a marker of good citizenship. Through such a choice, harms can be averted, minimized or

²²⁰ As noted earlier in this chapter, the Supreme Court of Canada’s decision in 2007, denying the store’s request for advance funding, led Little Sisters to discontinue their fight, due to their subsequent lack of financial resources.

²²¹ We began to see a growing focus in the larger society on HIV and AIDS in the 1980s when the first case was reported. The silence around it was gradually broken and an epidemic broke out in the late 1980s/1990s.

managed. However, the wrong choice can lead to the exclusion of individuals on the basis of their risk level.

Therefore, the courts began to comment on this through recognition of the risk of spreading/contracting sexually transmitted diseases. One of the first examples of this was by Locke, D.C.J. in the case of *Wise*. In talking about one of the materials at issue that portrayed sexual fellatio with unknown strangers through the 'glory hole' in the partitioned wall of men's toilets in public washrooms, he said,

[i]t is difficult to think of a better and quicker way for gullible members of the public to catch aids only to then slowly die all to the general detriment of themselves and the public. Surely, for example, to restrict that type of publication in a free and democratic society is fair and proportionate to this obvious public danger in publications the smut pedlars attempt to propagate. (in *R. v. Wise*, [1990] O.J. No. 1416, para. 130)

In this, Locke, D.C.J. draws attention to 'risky' sexual practices and the risk of disease. He aligns the depiction of such materials with a lack of tolerance and a need for regulation.²²²

The Supreme Court of Canada comments on this in their decision in *Tremblay*. At issue in this case were the activities that happened in the 'Pussy Cat' club where nude dancers would perform in individual cubicles for their clients and would assume a variety of suggestive positions. Central to the rules of the performances was the 'no touching' policy. Therefore, there was no physical contact between the clients and dancers. The Court commented that although this policy, "is not determinative of the issue, it is nonetheless highly significant" (Cory, J. in *R. v. Tremblay*, [1993] 2 S.C.R.

²²² See also, *R. v. Mawson*, [1992] O.J. No. 670. The risk of spreading infectious diseases by oral and genital contact is also considered in *R. v. Mara*, [1996] O.J. No. 364; *R. v. Ludacka*, [1996] O.J. No. 743; and *R. v. Yorke*, [1997] N.B.J. No. 24.

932, para. 83).²²³ The rule ensured that “the transmission of infectious sexual diseases was prevented” (ibid. at para. 83). Cory, J. asserted,

[i]n these times when so many sexual activities can have a truly fatal attraction, these acts provided an opportunity for safe sex with no risk of any infection. The absence of any risk of harm could properly be taken into account in assessing community tolerance for the act. (ibid. at para. 88)

In response to this quote, Rayle, J.A. commented that this opinion, as expressed in 1993, “is just as relevant today, eleven years later” (in *Labaye v. R*, [2004] J.Q. no 7723, para. 169).²²⁴ What is particularly interesting with the decision in *Tremblay* is how risk is constructed by the court. It is being viewed purely through the lens of societal harm or that which harms the viewing audience. This stands in contrast to a wider definition that feminists, such as Gail Dines, have articulated, that pay attention to the “economic, social, and cultural factors” that impact on women involved in the industry and the “exploitative conditions of these women’s lives” (Dines & Jensen, 2008: 4). For example, it is suggested that harm is not just in relation to those who watch, but also relates to the social, economic, emotional and physical risk to the women themselves. In such a way, it is important to pay attention to the differing definitions of harm and how we might query the legal response to pornography and indecency in Canada on this basis.

These various cases exemplify this focus on health that emerged in the 1990s. Although not all of the decisions find this matter to be determinative on the issue of obscenity or indecency, the fact that the concern materialized reproduces neo-liberal

²²³ The Supreme Court in the *Mara* case found such an issue to be marginally relevant to a determination of indecency. The Court also considered this issue in the *Labaye* case. The majority held that “the risk of disease ... is not logically related to the question of whether conduct is indecent” (McLachlin, C.J. in *R. v. Labaye*, [2005] 3 S.C.R. 728, para. 51); whereas as the dissenting judgment held that attention must be paid to the risk of physical and psychological harm, including the risk of spreading sexually transmitted diseases, when making decisions about indecency.

²²⁴ Although how we perceive the threat to life from HIV/AIDS has changed radically in the last 20 years, the courts still demonstrate a concern for sexually transmitted diseases, as exemplified in the case of *Labaye v. R*, [2004] J.Q. no 7723.

ideals. The individual responsibility of citizens to engage in safe sex began to be reflected in the case law, as demonstrated by this discourse strand of ‘a will to health.’ The larger societal concern of sexually transmitted diseases was mirrored in this discourse plane, to the effect that it at times increased the harm likely to flow from certain material, acts and behaviours. The decisions delineate the desirability of safe sex practices as fundamental to notions of healthy and risk free citizenship. In this way, safe sex becomes the duty of ‘responsible and self-governing citizens’ (Richardson, 2000). Further, the courts support governing such an issue at a distance and find that, “it is not necessary for all activities that are dangerous to health and likely to engender social costs to become legitimate objects of regulation by the criminal law” (Otis, M.J. in *Kouri v. R.*, [2004] J.Q. no 7724, para. 49). Consequently, the Court argues that we cannot legislate something that we hope all citizens will engage in. Instead, “wearing a condom” is conceived of as a personal choice (Proulx, J.A. in *Labaye v. R.*, [2004] J.Q. no 7723, para. 82), and “left solely to the initiative” of citizens or in the case of *Labaye*, members of the private club (Rochon, J.A. in *Labaye v. R.*, [2004] J.Q. no 7723, para. 127).²²⁵ Therefore, such a perspective promotes individual responsibility and for citizens to demonstrate their own ‘will to health.’

²²⁵ This is what emerged from the case law in the sample; however, other influential Supreme Court of Canada decisions need to be commented on here, such as *R. v. Cuerrier*, [1998] 2 S.C.R. 371, which ruled that, in the case of an individual who knowingly lives with HIV/AIDS, the failure to wear a condom becomes an aggravated assault if there is no prior disclosure of HIV/AIDS status to the sexual partner. This is demonstrated in the words of Cory, J. He contended that, “an individual who knows he is HIV-positive and has unprotected sexual intercourse without disclosing this condition to his partner may be found guilty of contravening the provisions of s. 265 of the *Criminal Code*. The section provides protection by way of deterrence for those in the position of the complainants. This section like so many provisions of the *Code* is designed to protect society and this protective role must be recognized and enforced. It is right and proper for Public Health authorities to be concerned that their struggles against AIDS should not be impaired. Yet the *Criminal Code* does have a role to play. Through deterrence it will protect and serve to encourage honesty, frankness and safer sexual practices. If the application of the *Criminal Code* really does impede the control of AIDS it will be for Parliament to determine whether the protection afforded by the *Code* should be curtailed in the interests of controlling the plague solely by public health measures” (para, 147).

Neo-liberalism and the Harm-Based Approach

I am satisfied that the average Canadian in contemporary Canadian society views kiddie porn, as it is often called, in an entirely different light from that in which the average Canadian views a great deal of adult pornography. (Greco, Prov.CT.J. in *R. v. Smith*, [1987] O.J. No. 1967, para. 20)²²⁶

As we saw in chapter five, particularly since the 1980s, there has been increased focus on the harm that may flow from pornographic material. In 1992, this was firmly established in law with the Supreme Court of Canada decision in *Butler*. The question of whether the courts completely moved away from a morality-based approach, in my opinion, was answered with the *Labaye* case. The Supreme Court of Canada decision in this case set the obscenity provisions decisively within the context of harm, to the point where harm has to be proved if the material or conduct at issue is to be judged obscene or indecent. This decision has contributed to greater levels of individual freedom and responsibility afforded to Canadian citizens in regard to adult pornography, primarily because it is extremely difficult to prove harm and consequently prosecute adult pornography in an age where a growing amount of sex and sexuality is accepted and where harm is less likely to be proven.²²⁷

Despite commentaries such as those by Richard Jochelson (2009, 2010) who critiques whether this decision actually led to a higher requirement,²²⁸ this research argues that, due to the dramatic decline in cases pertaining to adult pornography, the *Labaye* case was successful in delineating a stricter evidentiary test for proving harm

²²⁶ For similar commentary, see *R. v. Red Hot Video Ltd.*, 1983 CarswellBC 782.

²²⁷ In my opinion, this is certainly true for heterosexual content. However, it too may also be true for gay and lesbian forms of expression. As noted earlier, decisions regarding harm from gay and lesbian material has been assumed with little reference to specific social scientific evidence. If the courts are no longer able to make such inferences, perhaps this approach will also enable gay and lesbian pornography to be accessed at a greater level, allowing individuals to achieve sexual citizenship.

²²⁸ Jochelson (2009) highlights how the court in *Labaye* “was quick to describe *Butler* and *Little Sisters* as examples of a harm test properly applied” (764). Therefore, despite articulating a higher evidentiary standard, the court refers to cases where there was more of an emphasis on an assumption of harm versus evidentiary proof.

and the consequent need for experts in this pursuit. This requirement of proof fits within the larger neo-liberal trend of the importance of the expert and the 'turn to the psychological' that is evident in many areas of society. The idea that we can no longer just have a 'reasoned apprehension of harm' moves us closer to using the authority of experts on this issue. As discussed above, the courts have not always placed primacy on the use of experts, however, in this latter case the requirements validate the wider reliance on experts trumpeted by neo-liberalism. Expert knowledges and 'the gaze of the expert' (Rose, 2001a) are central to governmentality and assist citizens in 'correcting the self.' 'Experts' are viewed as capable of helping us delineate 'healthy' and 'risky' practices and determining the individuals who are to be conceived of as 'failed' citizens due to their 'harmful' consumption practices and choices.

What has emerged in the case law since the late 1990s has been a dramatic increase in the number of child pornography cases.²²⁹ With greater emphasis being placed on individual responsibility, personal choice, and governance at a distance in relation to adult pornography, to the point where the number of cases have considerably declined, the courts have adapted their approach. As was seen in the chart in chapter four, as adult pornography cases have gone down, child pornography cases have gone

²²⁹ Prior to 1993, there were no particular provisions to deal with child pornography. Cases such as *McGowan* demonstrate the difficulties that this caused. This case dealt with whether 14 year old boys were considered to be 'children.' It was in 1993, where the courts began to specifically deal with child pornography cases after the introduction of the child pornography provisions which demarcated the meaning of 'child.' J.W. Bovard, Prov.Ct.J. commented that, "as things stand today, by passing s. 163.1, Parliament has spoken clearly that it wants to extend its protection via the *Criminal Code* to all young persons under 18" (in *R. v. McGowan*, [1995] O.J. No. 5110, para. 46). Although the *McGowan* case was in 1995, the child pornography provisions did not exist when the accused was alleged to have committed the offences. Therefore, the judge was unable to use the definition therein against him. Two cases in the sample that would have come under the child pornography provisions if they had existed at the time are: *R. v. McGowan*, [1995] O.J. No. 5110; and *R. v. Smith*, [1987] O.J. No. 1967. It is interesting to note that, the provisions coincide with the emergence of the Internet, which has contributed dramatically to the production, distribution and possession of child pornography.

up.²³⁰ As a result, child pornography has become the target of a harm-based approach.²³¹ In a neo-liberal society, pornographic material is enabled to flourish, as long as it does not cause harm. Consequent to this, the only reason why we can police forms of sexual expression in this current socio-political context, is because of the risk and harm it produces. It is no longer possible to prosecute adult pornography with any ease; instead, child pornography has drawn the attention because harm is much more evident and there is common agreement that such material causes harm.²³² As stated by Lang, J.A., “in furtherance of the goal of protecting children, the Code criminalizes *all* child pornography because *all* child pornography harms children (in *R. v. Smith*, 76 O.R. (3d) 435, para. 36; emphasis added). The right to police such expression has developed because of the real victims involved in the production of child pornography. Thus, this type of pornography is created from a criminal act. Even without the use of children, such material supports a mentality which fosters the sexualization and abuse of children.²³³ Therefore, this type of material falls outside the protection of notions of

²³⁰ In some ways this presents a paradox. Although we have seen a greater regulation of the production, distribution, and possession of child pornography – the cultural climate is one that promotes the sexualization of children in advertising and entertainment. These forms of media do not receive the same kind of focus.

²³¹ This shift is also displayed in the academic realm. On conducting a search of recent work on pornography, most of the materials retrieved relate to child pornography.

²³² This statement is echoed by Murray (2009) who comments that, “the criminalisation of the possession of child pornography under the direct harm approach is uncontroversial” (76).

²³³ A larger debate on child pornography is beyond the scope of this research. However, if interested, the Supreme Court of Canada’s decision in *Sharpe* is good starting place. Additionally, there is a growing amount of scholarly research on the area of child pornography law and its application. For example, Sara M. Smyth (2009) considers the breadth of the current provisions. She argues that, “it makes little sense to extend section 163.1 beyond real child abuse images to subject fictional representations, which bear little or no resemblance to actual child sex abuse images, to the same highly punitive and stigmatizing regime as images depicting the sexual victimization of real people” (70). She asserts this mainly from a practical perspective, because such a legislative direction “distracts us from the urgency of combating the circulation of real child sex abuse images on the Internet and places the legislation at constitutional risk” (70-71). In this regard, Smyth (2007, 2009) sets out recommended provisions to reduce the breadth of the legislation in Canada. It is becoming increasingly necessary to consider the net cast by child pornography legislation as we witness new technologies evolving. Attwood (2011) discusses the phenomena of the texting of nude pictures between teenagers, which has led to charges of ‘self-produced child pornography’ (18). These developments and alterations in how individuals are engaging with technology

personal choice and individual responsibility and within a space of 'regulated freedom' that denotes the concepts of risk and harm.

Concluding Remarks

This research began with an interest in how governance in a neo-liberal era has reframed the discursive conditions of what constitutes full sexual citizenship. This work has attempted to pay heed to Angela McRobbie's recommendation that scholars need to consider sex and sexuality within a neo-liberal context. Through an analysis of case law between 1959 and 2009, it is evident that such a socio-political context has affected the way we regulate pornography in Canada. Although at times, there was not a straight continuum towards 'unlimited permissiveness,' it seems that we now view the individual as capable of regulating their own consumption habits, when it comes to adult pornography.

Since the 1980s, there has been a gradual trend in the direction of limited state intervention which was prompted by the emergence of neo-liberalism. Within such a context, the passing of the *Canadian Charter of Rights and Freedoms* and the entrenchment of freedom of expression along with a greater emphasis being placed on the risk of harm have contributed to this development. Concepts of individual choice, responsibility and autonomy have allowed adult pornography to flourish. Canadian citizens are encouraged to self-regulate and self-police their behaviours and consumption within this model.

Further, although the obscenity provisions were often thought of in the light of protecting women in society, with the emergence of neo-liberal ideals and post-

require further investigation and draw our attention to questions about "how technology complicates pre-existing cultural narratives of sexual predators and prey" (Soderlund, 2008: 70); therefore, prompting a legal rethinking of the child pornography provisions in light of the impact of new technologies and how individuals are constituting identity. See also Stapleton (2010) for detailed commentary on how child pornography is classified and conceptualized.

feminism, a protectionist approach has been discarded in favour of the notion of the post-feminist female subject or the post-feminist porn star. Women have now achieved equality within this frame, and are able to express it through *choosing* to be sexy and *choosing* to be in porn films. However, we have to be careful of such an easy celebration of notions of post-feminism and the post-feminist female subject. Assumptions of equality ignore the real differences and inequalities that exist between women in society as a whole and, the idea that women can 'have it all' is rendered problematic.

We have seen this movement where individuals are enabled to achieve a greater sense of sexual citizenship through the consumption of sexually explicit content in an unregulated space of freedom. However, as indicated, this has not always been available to everyone. Concepts of normativity have emerged where 'good' citizenship has been viewed through a heterosexual matrix. In this way, there have been a number of cases where gay and lesbian material has been targeted and prohibited from entering Canada resulting from assumed ideas of risk and harm. Consequently, gay and lesbian citizens have been (re)produced as risky populations who belie the neo-liberal fantasy and have often been classified as 'grotesque' and risky. This has impacted on the rights of sexual citizenship, particularly because with neo-liberalism, citizenship has become equated with consumerism.

In recent years, particularly with the impact of the Supreme Court of Canada decision in *Labaye*, we have moved away from a concern with adult pornography towards the production and consumption of child pornography.²³⁴ As a result, the risky (or 'grotesque') population has been altered. Instead of gay and lesbian citizens being captured within this concept, they have been replaced with the child pornographer and

²³⁴ In addition to the moral zeal directed at child pornography, public perception of risk also shifted in a dramatic way to the threat of terrorism (not an empty threat after 9/11). It could be argued that adult pornography moved rapidly down the list of state priorities once terrorism became the focus of attention. This is something that demands further consideration.

the child pornography consumer. With the establishment of the harm-based approach as delineated in *Labaye*, child pornography is targeted because it is easier to prove the harm and risk that flows from such conduct. Therefore, the protectionist approach focuses on children and their victimization and sexualization through such practices. Notions of individual choice and responsibility are rarely extended to this population due to their failure to conform to societal norms within a neo-liberal context.

Such a fundamental shift in how we deal with adult pornography reflects the trend in academia where we have seen the emergence of a new 'porn studies.' Instead of focusing on the effects of pornography and spending time delineating the pro- and anti- discourse on censorship, scholars have moved their attention to the texts themselves and now engage in analysis of pornographic content, such as films and magazines. Further, pornography as a topic has moved into the classroom, and is now offered as a course within the academic marketplace. Similar to the case law, violence is largely ignored and the opposition to adult pornography is flattened.

As this research draws to a close, we are prompted to consider a question. Do we agree or disagree with such a paradigmatic shift within the academic and legal spheres? In attempting to answer, no easy solution emerges. The decreased regulation of adult pornography and the consequent free flow of it within the consumer marketplace is neither good or bad. For in this current environment, there is no other alternative. Whether we want more state interference or not in this area, the reality is that it is not possible. What the case law has proved is that this is a messy area of law, and that there is an acceptance that the prohibition of adult pornography is fruitless and ineffective. Within a neo-liberal socio-political context, consumer sovereignty exists, which promotes the idea that, if an individual wants something, they can get it. In this

way, primacy is placed on the viewer or consumer's choice.²³⁵ We have reached a point where technological advances, such as the Internet and mobile technologies, create a situation where anyone can make, distribute or possess sexually explicit content. Therefore, it is impossible to regulate on any other basis, but a strict harm-based model as demarcated in the *Labaye* case. In this societal context, with the widespread mainstreaming of sex, the Criminal Justice System can only approach areas which are within the realms of possibility. Child pornography presents the system with a clear indication of harm and so it has been targeted. Consequently, a wide net has been cast on all activities involving child pornography and in such a way this is certainly an area that demands scholarly attention. For example, it would be very interesting to consider if there has been such a clear shift to child pornography regulation in other international contexts.

What will be of interest is where things go from here. As demonstrated by the 2008 economic crisis, a flaw was identified within the conceptual framework of neo-liberalism and its emphasis on an individualistic ethos. Although such a discovery has not led to a more progressive era, it did highlight the potential problems with a system based on self-regulation and self-policing. In relation to such areas as adult pornography and the Internet, we are left with the question: can we rely on individuals to act in their own best interests? And if not, what will be the consequences?

²³⁵ In regards to the neo-liberal logic and consumer sovereignty, as articulated in this research, there are often inclusions and exclusions. For example, the pornography industry is still primarily run by and for men's consumption which serves to limit women's ability to produce and therefore access different forms of materials. Consequently, the persistent political economy of the pornography industry may alter and infringe on women's sexual citizenship in varied ways.

Where To From Here?

This analysis of the obscenity case law has produced an enormous amount of information which has been contemplated in light of socio-political shifts in Canadian society. To now ask, where to from here is a somewhat trite question, but necessary in order to guide future research. As this research has focused on Canada, it would be particularly valuable to explore the regulatory systems and 'spheres of governance' in other countries, such as the United States of America and the United Kingdom.²³⁶ In terms of the latter, we have witnessed some very interesting developments around the regulation of pornography. The enactment of the *Criminal Justice and Immigration Act 2008* is of particular relevance. This Act introduced a new offence, 'possession of extreme pornographic images,' serving to criminalize the possession of the following:

- (a) an act which threatens a person's life
- (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals
- (c) an act which involves sexual interference with a human corpse, or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal is real.²³⁷

The Act was created in response to concerns that the consumption of pornographic images, particularly via the Internet, leads to the normalization of perverted sexual pleasures and could then result in actual sexual violence (Attwood & Smith, 2010). The

²³⁶ In 2005, the Obscenity Prosecution Taskforce (OPTF) of the U.S. Department of Justice was created. The taskforce "investigates and prosecutes the producers and distributors of hardcore pornography that meets the test for obscenity, as defined by the Supreme Court of the United States" (www.justice.gov/criminal/optf/). However, aside from a couple of high profile prosecutions, such as that of the commercial pornographer Max Hardcore, who was sentenced to four years in prison (see Attwood, 2011 & Maddison, 2009 for some commentary), there have been few obscenity prosecutions which seems to indicate a trend similar to that identified in Canada. It would be very interesting to conduct further research to investigate this.

²³⁷ This summary is provided by Attwood & Smith (2010: 172). The full text of the Act is available at <http://www.legislation.gov.uk/ukpga/2008/4/content>.

Act is an attempt to criminalize access and possession of such imagery which is considered to be harmful. What is particularly interesting about this is that it marks, a “shift from attempting to regulate media content to attempting to regulate the behaviour of *media users*” (Petley, 2009: 430; emphasis added). It authorizes the surveillance of individual users and their consumption habits.

Consequent to the controversial nature of this legislation, there is a growing amount of research on this area that considers the costs and benefits of such an approach (Attwood & Smith, 2010; Johnson, 2010; Jones & Mowlabocus, 2009; McGlynn & Ward, 2009; Maddison, 2009, 2010; Murray, 2009; Petley, 2009). Additionally, scholars are debating whether the legislation demonstrates increased state intervention and surveillance (Petley, 2009) or whether it is supportive of a neo-liberal mentality. According to Maddison (2010), this criminalization of consumers “accords with the wider trend in neo-liberal governmentality” and imposes “disciplinary measures that determine the conditions of selfhood within approved forms” (10). Therefore, the Act could be viewed as “an attempt to instill specific forms of ‘responsibilization’ in ‘free’ and ‘rational’ subjects” (Maddison, 2010: 10). In this vein, the logic behind the Act is to normalize “more ‘acceptable’ kinds of sexual activity” which individuals are permitted to consume, while “more challenging forms are demonized and criminalized” (Attwood & Smith, 2010: 187). Such a system could be viewed as setting up boundaries and delineating what citizens may access freely in order “to *manage* what are *perceived* to be risks” (Attwood & Smith, 2010: 187; emphasis in original). Unfortunately, the way in which the legislation has been put into practice is impacting consensual practices such as BDSM (Attwood & Smith; Murray, 2009).

Resulting from this legislative approach and the consequent reactions, it would be very interesting to consider them in light of the questions raised in the current

research. Illustrated by the varied responses in the US and UK, we cannot assume 'a singular, uniform rise in neo-liberalism' (Huey, 2009) and therefore, it is important to pay attention to the manifestation of modes of governance in varying locations. Different countries have different standards and so a comparative analysis would be both interesting and potentially powerful, depending on the findings.

As indicated early on in this research, the intention was to consider 'spheres of governance.' Therefore, it would be very valuable to consider the other sites of governance that operate within Canada and potentially other countries. For example, I would like to engage in an analysis of the mass media, as media forms act as 'technologies of power' and involve their own strategies of regulation. Television, for example, is a site which can promote modes of self-governance through such programming as reality TV. Further, it is interesting to consider how television broadcasting is regulated itself. Demonstrative of a neo-liberal ideology, in 1991, the broadcasting industry shifted to a system of self-regulation, where an association of broadcasters created guidelines which the industry follows. The *Canadian Broadcast Standards Council* (CBSC) became responsible for enforcing these guidelines and for dealing with the public's complaints. Thus, it would be interesting to consider this system. It would be important to think about television's place in the processes of governance, and how television, like the legal realm, may recommend the ways in which we should, "conduct ourselves in the diverse spheres of our lives" (Palmer, 2003: 1). How is the conduct of Canadian citizens impacted on by discourse that emerges from the television regulatory system? And how are notions of good citizenship and the risky population delineated?

As we saw with the increased focus by the courts on issues of health and public hygiene, it would also be interesting to consider this in more detail. The area of health

research and policy has become a key matter of attention and funding in Canada, exemplifying the importance of healthy citizenship within a neo-liberal context. Such ideas of health could be researched in relation to the promotion of safe sex practices, information about the spreading/contracting of sexually transmitted diseases, and sex education in schools and other institutions. Further, it would be interesting to contemplate the discourse strand of 'a will to health' beyond the legal sphere and how it manifests in other areas of society. Consequent to the primary focus of this research, it would be interesting to contemplate both of these suggested directions for future research, in regards to televisual and health governance, to the concerns identified here in relation to sexual citizenship and post-feminist motifs of femininity.

Finally, it seems essential to comment on how feminists might respond to this work and subsequently move forward. What stands out in this research is the continued reliance on notions of post-feminist subjecthood and ideals of femininity which have been used within the legal realm as a reason for reducing regulation. Although it was suggested that within a neo-liberal socio-political context, it is difficult to maintain a system of legal regulation of adult pornography, it does seem important to query representations of women and assumptions made about 'choice.' As noted in chapter two, there is a vast amount of literature on post-feminism; however, since the 1990s there has been "little direct political engagement" in relation to pornography (Dines & Jensen, 2008: 5). It is vital to negotiate and critique these models of neo-liberal subjectivity, in order to disrupt and trouble the boundaries of the 'ideal' self. There is potential for feminist action and resistance in the current Canadian context regarding this and the need to create spaces for agency, resistance and critique. Further, as noted, the paradigm shift witnessed within the academic and legal realm has served to 'flatten all our opposition to pornography,' but this does not mean that we should not draw attention

to the varying definitions of harm and the political economy of pornography that can, at times, serve to exploit and marginalize women. These are issues that require attention and should be addressed inside and outside the academy.

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APPENDIX A: LIST OF SELECTED CASES

286880 *Ontario Ltd. v. Parke et al.*, [1974] O.J. No. 2177

913719 *Ontario Ltd. v. Mississauga*, [1996] O.J. No. 2357

Benjamin News (Montreal) Reg'd. and Penthouse International Ltd. V. R., [1978] Q.J. no 192

Brodie v. The Queen, [1961] Q.J. No. 14

Cabaret Sex Appeal Inc. c. Montréal (Ville) (C.A. Qué.), [1994] J.Q. no 603

Cabaret Sex Appeal Inc. c. Montréal (Ville), [1992] J.Q. no 1600

Daylight Theatre Company Limited v. The Queen, [1972] S.J. No. 299

Daylight Theatre Company Limited v. The Queen, [1973] S.J. No. 354

Dechow v. R., 1974 CanLII 45 (ON C.A.)

Delorme c. La Reine, [1973] J.Q. no 34

Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) (Ont. Ct. (Gen. Div.), [1992] O.J. No. 712

Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) (Ont. Ct. (Gen. Div.), [1992] O.J. No. 1466

Glad Day Bookshop Inc. v. Deputy Minister of National Revenue (Customs & Excise), 1987 CarswellOnt 2604 (Ontario District Court, 1987)

Gordon Magazine Enterprises Ltd. (Re), [1965] O.J. No. 180

Gordon's Variety (Re), [1982] N.S.J. No. 145

Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto Re Canadian Periodical Publishers Association and Municipality of Metropolitan Toronto, [1984] O.J. No. 3365

Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto Re Canadian Periodical Publishers Association and Municipality of Metropolitan Toronto, [1985] O.J. No. 2667

Irwin Toy Ltd. c. Québec (procureur general), 1986 CanLII 186 (QC C.A.)

It's Adult Video Plus Ltd. v. McCausland, [1991] B.C.J. No. 3004

K.I.S. Films Inc. v. Vancouver (City), [1992] B.C.J. No. 1342

Kouri v. R., [2004] J.Q. no 7724

Labaye v. R., [2004] J.Q. no 7723

Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), [2004] B.C.J. No. 1241

Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), [2007] S.C.J. No. 2

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [1996] B.C.J. No. 71

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [1998] B.C.J. No. 1507

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120

Luscher v. Canada (Deputy Minister, Revenue Canada Customs and Excise), [1983] B.C.J. No. 1076

Marquis Video Corp. v. Ontario Times Square Book Store v. Ontario, [1984] O.J. No. 477

McDougall's Drug Store Ltd. (Re), [1982] N.S.J. No. 146

Medi-Data Inc. v. Canada (Attorney General), [1972] F.C. 469

Minas Music Sales Ltd. (Re), [1982] N.S.J. No. 144

Montreal Newsdealers Supply Co. v. Quebec (Board of Cinema Censors), 1967 CarswellQue 185 ([1969] C.S. 83)

North American News and Deputy Minister of National Revenue for Customs and Excise, (1974), 1 O.R. (2d) 200

Pei-Yuan v. The Queen, [1972] B.C.J. No. 671

Pelletier c. R., [1985] J.Q. no 662

Positive Action Against Pornography v. M.N.R. (F.C.A.), [1988] 2 F.C. 340

Prestige Video Productions (1982) Ltd. v. Victoria (City), [1982] B.C.J. No. 1746

PRIAPE ENRG. et al. c. DEP. M.N.R., [1979] Q.J. No. 199

R. c. Tremblay, 1991 CanLII 3166 (QC C.A)

R. v. Action Sales and Rentals Ltd., [1987] N.J. No. 271

R. v. Alter, [1985] O.J. No. 2045

R. v. Arena Recreations (Toronto) Ltd., [1987] M.J. No. 51

R. v. Ariadne Developments Ltd., [1974] N.S.J. No. 199

R. v. Arnold, [1993] O.J. No. 471

R. v. Barr, [1982] M.J. No. 303

R. v. Bartman and Bartman, [1980] M.J. No. 510

R. v. Beeston, [1987] O.J. No. 1932

R. v. Before and After (1982) Ltd., [1982] N.J. No. 121

R. v. Brodie, [1962] S.C.R. 681

R. v. Butler (Man. C.A.), [1990] M.J. No. 519

R. v. Butler, [1989] M.J. No. 404

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R. v. Butler, [1993] M.J. No. 165

R. v. C. Coles Co., [1964] O.J. No. 464

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R. v. Cinema International Canada Ltd., [1981] M.J. No. 458

R. v. Cinema International Canada Ltd., [1982] M.J. No. 272

R. v. Cornwall News Distributors Ltd., [1976] O.J. No. 1209

R. v. Crosbie, [1988] M.J. No. 661

R. v. Dechow, [1974] O.J. No. 345

R. v. Dechow, [1978] 1 S.C.R. 951

R. v. Dickson, [1987] N.J. No. 160

R. v. Dorosz, [1971] O.J. No. 196

R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd., [1983] O.J. No. 3339

R. v. Emery, [1991] O.J. No. 1433

R. v. Emery, [1992] O.J. No. 640

R. v. Enriquez, [2009] A.J. No. 943

R. v. Erotica Video Exchange Ltd., [1994] A.J. No. 1008

R. v. Findlay, 1987 CarswellOnt 2565 (Ontario Provincial Court, 1987)

R. v. Fringe Product Inc., [1990] O.J. No. 265

R. v. Gabrielle, [1977] M.J. No. 295

R. v. Gardner, [1975] M.J. No. 152

R. v. Germain, [1985] 2 S.C.R. 241

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R. v. Glassman, [1986] O.J. No. 2620

R. v. Graham and Hewitt, [1977] A.J. No. 746

R. v. Great West News Ltd., [1970] M.J. No. 1

R. v. H. H. Marshall Ltd. et al., [1982] P.E.I.J. No. 63

R. v. Harris, [1977] N.S.J. No. 687

R. v. Harris, 1987 CanLII 181 (ON C.A.)

R. v. Hawkins, [1992] O.J. No. 1161

R. v. Hawkins, [1993] O.J. No. 2572

R. v. Herremans, [1998] O.J. No. 355

R. v. Huhn, [1987] O.J. No. 757

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R. v. Jacob, [1996] O.J. No. 4304

R. v. JeBailey, [1980] N.S.J. No. 51

R. v. Johnson, [1975] 2 S.C.R. 160

R. v. Jorgensen, [1995] 4 S.C.R. 55

R. v. Jorgenson, [1992] O.J. No. 2889

R. v. Jorgenson, [1994] M.J. No. 95

R. v. Keegstra (Alta. C.A.), [1994] A.J. No. 652

R. v. Keegstra, [1990] 3 S.C.R. 697

R. v. Kiverago, [1973] O.J. No. 16

R. v. Kornyllo, 1985 CarswellOnt 1723 (Ontario District Court, 1985)

R. v. Labaye, [2005] 3 S.C.R. 728

R. v. Laliberte, [1992] O.J. No. 1346

R. v. Ludacka, [1996] O.J. No. 743

R. v. Lynnco Sound Ltd., [1985] N.B.J. No. 157

R. v. Mara, [1996] O.J. No. 364

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R. v. Marshall, 1962 CarswellNfld 13 (48 M.P.R. 64)

R. v. Mawson, [1992] O.J. No. 670

R. v. McAuslane, [1971] O.J. No. 1769

R. v. McAuslane, [1973] O.J. No. 1336

R. v. McGowan, [1995] O.J. No. 5110

R. v. McKeigan, 2000 CarswellOnt 1577 (Ontario Court of Justice, 2000)

R. v. Mercer, 1988 CarswellNB 106 (88 N.B.R. (2d) 140)

R. v. Metro Toronto News, 1977 CarswellOnt 1269 (Ontario Provincial Court, 1977)

R. v. Miller, [1990] O.J. No. 2750

R. v. Mood Video Ltd., [1987] N.J. No. 90

R. v. Neil's Ventures Ltd., [1985] N.B.J. No. 123

R. v. Nicols, [1984] O.J. No. 3475

R. v. NOP Ltd., [1991] O.J. No. 1474

R. v. Odeon Morton Theatres Ltd., [1974] M.J. No. 6

R. v. Ott (Alta. Q.B.), [1989] A.J. No. 803

R. v. Penthouse International Ltd., 1977 CarswellOnt 1268 (Ontario County Court, 1977)

R. v. Pereira-Vasquez (B.C.C.A.), [1988] B.C.J. No. 799

R. v. Pereira-Vasquez, [1985] B.C.J. No. 2698

R. v. Prairie Schooner News Ltd., [1970] M.J. No. 32

R. v. Price, [2004] B.C.J. No. 814

R. v. Provincial News Co., [1976] 1 S.C.R. 89

R. v. Ramsingh et al., [1984] M.J. No. 408

R. v. Red Hot Video Ltd., [1984] B.C.J. No. 3125

R. v. Red Hot Video Ltd., [1985] B.C.J. No. 2279

R. v. Red Hot Video Ltd., 1983 CarswellBC 2076 ([1983] B.C.W.L.D. 1626)

R. v. Red Hot Video Ltd., 1983 CarswellBC 782 (6 C.C.C. (3d) 331)

R. v. Rhyno, [1989] N.B.J. No. 374

R. v. Rodney, [1970] O.J. No. 796

R. v. Rollins, [1972] S.J. No. 241

R. v. Ronish, [1993] O.J. No. 608

R. v. Ronish, 1993 CarswellOnt 133 (26 C.R. (4th) 75)

R. v. Saint John News Co. Ltd., [1976] N.B.J. No. 74

R. v. Saint John News Co. Ltd., [1982] N.B.J. No. 429

R. v. Saint John News Company Ltd., [1984] N.B.J. No. 381

R. v. Saint John News Company Ltd., [1985] N.B.J. No. 253

R. v. Schell, [1973] O.J. No. 1328

R. v. Scobey (N.S. Co. Ct.), [1989] N.S.J. No. 330

R. v. Scythes, [1993] O.J. No. 537

R. v. SFK Holdings Ltd (c.o.b. Readers Paradise), [1972] S.J. No. 233

R. v. SFK Holdings Ltd. (c.o.b. Book End), [1972] S.J. No. 234

R. v. Sham, [1991] O.J. No. 3534

R. v. Smith, [1987] O.J. No. 1967

R. v. Smith, [2002] O.J. No. 5018

R. v. Smith, [2007] O.J. No. 3074

R. v. Smith, [2007] O.J. No. 3075

R. v. Smith, [2007] O.J. No. 3076

R. v. Smith, [2008] O.J. No. 740

R. v. Smith, 2002 CarswellOnt 6152 (Ontario Superior Court of Justice, 2002)

R. v. Smith, 76 O.R. (3d) 435

R. v. Telford Investments Ltd. (c.o.b. Super Love Boutique), [1982] A.J. No. 468

R. v. Times Square Book Store, [1985] O.J. No. 177

R. v. Tompkins, [1981] N.S.J. No. 347

R. v. Towne Cinema Theatres (1975) Ltd., 1981 CarswellAlta 300 ([1982] 1 W.W.R. 512)

R. v. Towne Cinema Theatres Ltd., [1985] 1 S.C.R. 494

R. v. Tremblay, [1993] 2 S.C.R. 932

R. v. Tremblett, [1975] N.J. No. 47

R. v. Universal News Ltd., [1972] S.J. No. 235

R. v. Vancouver Magazine Service Ltd. (B.C. Co. Ct.), [1989] B.C.J. No. 343

R. v. Video World Ltd., [1985] M.J. No. 143

R. v. Video World Ltd., [1985] M.J. No. 303

R. v. Wagner (Alta. C.A.), [1986] A.J. No. 113

R. v. Wagner, [1985] A.J. No. 570

R. v. Win-Cans Hollywood Connection, [1987] M.J. No. 658

R. v. Wise, [1990] O.J. No. 1416

R. v. Yorke, [1997] N.B.J. No. 24

R. v. Zundel, [1992] 2 S.C.R. 731

Re Application under Section 160 of the Criminal Code of Canada, [1980] N.B.J. No. 106

Re Board of School Trustees of School District No. 34 (Abbotsford) and Shewan et al., [1986] B.C.J. No. 3256

Re Regina and Provincial News Co. Ltd., [1973] A.J. No. 111

Re Winkler and Deputy Minister of National Revenue for Customs and Excise, [1973] O.J. No. 2371

Regina c. Standard News Distributors, Inc., [1960] J.Q. no 10

Regina ex rel Murphy v. Adams, [1966] N.S.J. No. 1

Regina v. Beaudoin, [1971] A.J. No. 92

Regina v. C. Coles Co. Ltd., [1964] O.J. No. 891

Regina v. Cameron, [1966] O.J. No. 1047

Regina v. Campbell, [1974] O.J. No. 2288

Regina v. Carty, [1972] A.J. No. 51

Regina v. Coles Book Stores Ltd., [1974] A.J. No. 200

Regina v. Daylight Theatre Company Limited, [1972] S.J. No. 302

Regina v. Denomme and Braga, [1979] O.J. No. 4577

Regina v. Dominion News & Gifts Ltd., [1963] M.J. No. 5

Regina v. Duthie Books Limited, [1966] B.C.J. No. 70

Regina v. E and F, [1981] O.J. No. 3262

Regina v. Fraser, Harris and Fraser Book Bin Ltd. Regina v. Fraser, Poirier and Fraser Book Bin Ltd. Regina v. Fraser and Fraser Book Bin Ltd., [1965] B.C.J. No. 74

Regina v. Georgia Straight Publishing Ltd. And Mcleod, [1969] B.C.J. No. 332

Regina v. Goldberg and Reitman, [1971] O.J. No. 1634

*Regina v. Hawkshaw**, [1982] O.J. No. 3544

Regina v. Hawkshaw, [1981] O.J. No. 3116

Regina v. Householders T.V. and Appliances Ltd. et al., [1984] O.J. No. 3474

Regina v. Johnson, [1972] A.J. No. 59

Regina v. Kleppe, [1977] O.J. No. 2562

Regina v. Lambert, [1965] B.C.J. No. 104

Regina v. Mason, [1981] O.J. No. 3263

Regina v. McFall et al., [1975] B.C.J. No. 1007

Regina v. McLeod and Georgia Straight Publishing Ltd., [1970] B.C.J. No. 581

Regina v. Metro News Ltd., [1986] O.J. No. 826

Regina v. Munster, [1960] N.S.J. No. 2

Regina v. Murphy, [1972] O.J. No. 2095

Regina v. O'Reilly and four others, [1970] O.J. No. 1553

Regina v. Penthouse International Ltd. et al., [1979] O.J. No. 4139

Regina v. Pink Triangle Press et al., [1979] O.J. No. 4557

Regina v. Pipeline News, [1971] A.J. No. 48

Regina v. Provincial News Co., Penthouse International Ltd. and Guccione, [1974] A.J. No. 146

Regina v. Salida, [1968] O.J. No. 1292

Regina v. Sidey, [1979] O.J. No. 4572

Regina v. Small et al., [1973] B.C.J. No. 783

Regina v. Sudbury News Service Limited, [1978] O.J. No. 2713

Regina v. Sudbury News Service Ltd., [1977] O.J. No. 2376

Regina v. Sutherland, Amitay, Bowie, v. [1974] O.J. No. 2283

Regina v. The MacMillan Company of Canada Ltd., [1976] O.J. No. 2268

Regina v. Times Square Cinema Ltd., [1971] O.J. No. 1697

Scorpio Rising Software Inc. v. Saskatchewan (Attorney General), [1986] S.J. No. 295

Sex Party v. Canada Post Corp., [2008] F.C.J. No. 45

Shewan v. Abbotsford School District No. 34 (B.C.C.A.), [1987] B.C.J. No. 2495

Small et al. v. The Queen, [1972] B.C.J. No. 660

Video Movies Ltd. v. R., [1984] N.B.J. No. 354

APPENDIX B: DETAILED LISTING OF SELECTED CASES

Case Name/Citation	Summary	Decision
<i>286880 Ontario Ltd. v. Parke et al.</i> , [1974] O.J. No. 2177	Plaintiff (private film club) seeks an interim injunction against the several defendants who are with the morality squad (re. seizures etc.)	Application dismissed. Nothing in the material indicating that the plaintiff is being prevented from exhibiting 'adult' films or operating an adult film club – only prevented from showing certain films considered to be obscene.
<i>913719 Ontario Ltd. v. Mississauga</i> , [1996] O.J. No. 2357	Applicant calls into question the validity of and seeks to quash By-Law No. 589-92 of the City of Mississauga - which purports to be for the purposes of 'licensing, regulating, & governing of adult video tape stores ...'	The by-law was deemed valid - except for the licensing fee which was deemed discriminatory because it was only applied to adult video store businesses. This section could be severed and dealt with so as to not make the whole bylaw invalid.
<i>Benjamin News (Montreal) Reg'd. and Penthouse International Ltd. V. R.</i> , [1978] Q.J. no 192	Appeal from a judgment which ordered the forfeiture of 200 copies of the December 1975 issue of <i>Penthouse</i> magazine on the ground that it was obscene according to s.159(8).	Appeal allowed, trial judge's decision reversed, the order of forfeiture set aside. Magazine deemed not obscene. The exploitation of sex in the publication is not 'undue' in light of contemporary Canadian community standards.
<i>Brodie v. The Queen</i> , [1961] Q.J. No. 14	Appeal by accused. Copies of a book entitled <i>Lady Chatterley's Lover</i> by D.H. Lawrence, were seized on the accused's premises on the allegation that the book was an obscene publication under s.150(8) of the <i>Criminal Code</i> . The trial judge found the book to be obscene and ordered its confiscation.	Appeal dismissed. The trial judge's decision was unanimously affirmed.
<i>R. v. Brodie</i> , [1962] S.C.R. 681	The accused was granted leave to appeal to the Supreme Court of Canada.	Appeal allowed. The book <i>Lady Chatterley's Lover</i> deemed not an obscene publication.
<i>Cabaret Sex Appeal Inc. c. Montréal (Ville)</i> , [1992] J.Q. no 1600	Applicants are proprietors of establishments dealing in eroticism - who advertised their wares (nude dancers) by display, outside their establishments, of images representing the human body, generally models of scantily	The court struck down the bylaw - declared it ultra vires, unconstitutional and inoperative.

Case Name/Citation	Summary	Decision
	clad and well endowed women. The bylaw prohibited such advertising. This is a motion for declaratory relief - alleging that the statute was invalid in that it violated S.2(b).	
<i>Cabaret Sex Appeal Inc. c. Montréal (Ville) (C.A. Qué.)</i> , [1994] J.Q. no 603	The City appeals the 1992 judgment where the bylaw was struck down and found to be ultra vires, unconstitutional and inoperative.	This judge agrees with that judgment and declares that the impugned legislation violates S.2(b) and cannot pass the <i>Oakes</i> test to be saved by S.1 Appeal dismissed.
<i>Regina v. Daylight Theatre Company Limited</i> , [1972] S.J. No. 302	Accused company charged that it did unlawfully present an obscene entertainment, <i>The Stewardesses</i> , contrary to sections 163(1) and 165(b) of the <i>Criminal Code</i> .	Accused company found guilty as charged. There was in this film an undue exploitation of sex.
<i>Daylight Theatre Company Limited v. The Queen</i> , [1972] S.J. No. 299	Appeal from conviction on the charge that the company did present an obscene entertainment – a showing of the motion picture <i>The Stewardesses</i> .	Appeal allowed. The conviction is quashed, the appellant is adjudged not guilty of the charge and the fine that has been paid is to be returned to the appellant together with costs assessed at the first trial and paid by the appellant.
<i>Daylight Theatre Company Limited v. The Queen</i> , [1973] S.J. No. 354	Further appeal later in the case's history. Appeal by accused. Primary issue to determine whether the film is or is not an obscene entertainment under the Code.	The film is judged to be an obscene entertainment and the judge affirms the adjudication made in the first instance by the judge of the Magistrate's Court. Determined that the film is not fit for public exhibition.
<i>Delorme c. La Reine</i> , [1973] J.Q. no 34	Appeal from conviction – related to the book <i>Histoire d'O</i> . The key argument was that the public good was served by making such a work available in Canada.	Appeal dismissed. The judge finds that the trial judge did not err when he disposed of the public good defence. Judge supports the declaration of guilt and finds that the material is obscene and should be confiscated.
<i>Glad Day Bookshop Inc. v. Deputy Minister of National Revenue (Customs & Excise)</i> , 1987 CarswellOnt 2604 (Ontario District Court, 1987)	Appeal from a decision made by the Deputy Minister of National Revenue (Customs & Excise) to detain a book entitled, <i>The Joy of Gay Sex</i> .	The judge found the book to not be obscene - and so allowed the appeal.
<i>Glad Day Bookshop Inc. v. Canada (Deputy Minister of</i>	Motion for an order declaring the appeal (from the decision	The judge rules on the standard of proof required and

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<i>National Revenue, Customs and Excise - M.N.R.) (Ont. Ct. (Gen. Div.), [1992] O.J. No. 712</i>	of the Deputy Minister) be governed by procedural rules applicable to criminal proceedings. The respondents, by cross motion, request an order that it proceed with the rules applicable to civil proceedings.	a regime of discovery - and so allows both motions in part
<i>Glad Day Bookshop Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise - M.N.R.) (Ont. Ct. (Gen. Div.), [1992] O.J. No. 1466</i>	Appeal from a determination of the Deputy Minister of National Revenue for Customs & Excise - re. the importation of publications (books and magazines) which were prohibited because they were classified as obscene.	The appeal judge found that all material was obscene in light of the <i>Butler</i> decision - a strong inference of a risk of harm. Appeal dismissed.
<i>R. v. Glad Day Bookshops Inc., [2004] O.J. No. 1766</i>	Appeal by Glad Day Bookshop & John Scythes from conviction for distributing an adult sex film that was not approved by the Ontario film board. They challenged that the Act and its provisions violated S.2(b).	The judge found that they did infringe on S.2(b) and that it was not demonstrably justified as a reasonable limit - so was declared of no force and effect. Appeal allowed and charges dismissed.
<i>Gordon Magazine Enterprises Ltd. (Re), [1965] O.J. No. 180</i>	Appeal from judgment that declared certain magazines and pockets novels forfeited to Her Majesty the Queen pursuant to section 150A(4) of the <i>Criminal Code</i> .	Appeal dismissed. Magazines and pocket novels at issue were deemed obscene.
<i>Gordon's Variety (Re), [1982] N.S.J. No. 145</i>	Application by the Crown for an order declaring certain publications (numerous adult magazines) alleged to be obscene to be forfeited pursuant to S.160.	Application dismissed. The materials were to be returned to the owner. The publications did not constitute an undue exploitation of sex and therefore were not obscene within the meaning of section 159(8) of the Code.
<i>Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto Re Canadian Periodical Publishers Association and Municipality of Metropolitan Toronto, [1984] O.J. No. 3365</i>	Two applications relate to parts of the Metropolitan Toronto By-Law 107-78 which regulates the sale of books and magazines appealing to erotic or sexual inclinations.	Judge allowed the applications - S.1 (1a)(a) is void for vagueness and S.2 (27a) is of no force and effect because its enactment is not authorized by any provincial legislation.
<i>Information Retailers Association of Metropolitan Toronto Inc. and Municipality of Metropolitan Toronto Re Canadian Periodical</i>	The Municipality of Metro Toronto appeals from the 1984 judgment quashing the parts of the bylaw.	The judge in this case varies the order of the Divisional Court slightly - but dismisses the appeal.

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<i>Publishers Association and Municipality of Metropolitan Toronto</i> , [1985] O.J. No. 2667		
<i>Irwin Toy Ltd. c. Québec (procureur general)</i> , 1986 CanLII 186 (QC C.A.)	The province of Quebec passed legislation that prohibited commercial advertising directed at persons under thirteen years of age. The company originally sought a declaration that sections of this legislation were ultra vires the Quebec legislature and that they infringed on the <i>Quebec Charter of Rights and Freedoms</i> . The Superior Court dismissed the action. This is an appeal from that decision. The respondent invoked the <i>Canadian Charter of Rights and Freedoms</i> .	Appeal allowed. The court held that the challenged provisions infringed on s.2(b) of the <i>Charter</i> and that the limit imposed was not justified by s.1.
<i>It's Adult Video Plus Ltd. v. McCausland</i> , [1991] B.C.J. No. 3004	The petitioner seeks a declaration that the <i>BC Motion Picture Act</i> is ultra vires the Province of BC and of no effect insofar as it purports to regulate the distribution of motion picture films by the petitioner to persons outside of BC.	Judge was satisfied that the Act was not ultra vires or a limitation on lawful expression. Petition dismissed.
<i>K.I.S. Films Inc. v. Vancouver (City)</i> , [1992] B.C.J. No. 1342	Petitions deal with the constitutional validity of a City of Vancouver by-law which restricts the hours during which an adult theatre located near a school may exhibit pornographic movies. Petitioner claims the by-law infringes on its S.2(b) right. The City petitions for a declaration of validity.	The judge finds that the by-law does infringe on S.2(b) but is saved by S.1. Therefore, he dismisses the petition and declares the by-law constitutionally valid.
<i>Kouri v. R.</i> , [2004] J.Q. no 7724	Appellant seeks the reversal of a judgment of the Municipal Court in which the appellant was found guilty of - illegally keeping a common bawdy house for the purpose of the practice of acts of indecency. Relates to 'swinging' or 'partner swapping.'	The majority of judges did not deem that there was indecency - and allowed the appeal (quashing the conviction).
<i>Labaye v. R.</i> , [2004] J.Q. no 7723	Ruling on the appeal of a judgment by the Municipal Court who found the appellant	The majority determined that the sexual activities were indecent and were

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	guilty of keeping a common bawdy house contrary to S.210(1) - 'swinging.'	substantially harmful. They dismissed the appeal.
<i>R. v. Labaye</i> , [2005] 3 S.C.R. 728	Appeal from a judgment of the Quebec Court of Appeal, upholding the accused's conviction on a charge of keeping a common bawdy house - 'swinging.'	The majority developed a harm-based approach - and in so doing determined that the conduct could not be seen as harmful. Appeal allowed (conviction set aside).
<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , [1996] B.C.J. No. 71	The plaintiffs applied for declarations that (1) Schedule VII and section 114 of the <i>Customs Tariff</i> and sections 58 and 71 of the <i>Customs Act</i> were of no force or effect; and (2) the subject legislative provisions were construed in a manner contrary to sections 2(b) and 15(1) of the <i>Canadian Charter of Rights and Freedoms</i> .	Action allowed in part. Declaration granted that the legislative provisions had, from time to time, been construed and applied by customs officials in a manner contrary to the <i>Charter</i> . However, this limitation was prescribed by law pursuant to section 1 of the <i>Charter</i> .
<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , [1998] B.C.J. No. 1507	Appeal by Little Sisters from a decision regarding the constitutionality of Customs Legislation. The <i>Customs Act and Tariffs</i> prohibited the importation of books and other representations deemed to be obscene under section 163(8) of the <i>Criminal Code</i> . Custom officers determined whether goods were obscene.	Appeal dismissed. There was a violation of s.2(b) but it was saved by section 1. To prevent harm to society, there was a pressing and substantial reason for prohibiting the importation of obscene material.
<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , [2000] 2 S.C.R. 1120	Appeal by Little Sisters from the decision of the Court of Appeal for British Columbia.	Appeal allowed in part. The 'reverse onus' provision under s.152(3) of the <i>Customs Act</i> cannot constitutionally apply to put on the importer the onus of disproving obscenity. An importer has a <i>Charter</i> right to receive expressive material unless the state can justify its denial.
<i>Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)</i> , [2004] B.C.J. No. 1241	Application by Little Sisters for an order for advanced costs in order to pursue further litigation.	Application allowed. There was evidence that Little Sisters had only a small amount of money and the issues raised were too important to forfeit the litigation because of lack of funds.

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<i>Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)</i> , [2007] S.C.J. No. 2	Appeal by Little Sisters from a decision by the British Columbia Court of Appeal, setting aside an advance costs order for an appeal and systemic review proceedings.	Appeal dismissed. The court determined that an award of advance costs was an exceptional measure not warranted in these particular circumstances.
<i>Luscher v. Canada (Deputy Minister, Revenue Canada Customs and Excise)</i> , [1983] B.C.J. No. 1076	Appeal from the decision of the Deputy Minister that a magazine (<i>Flying High</i>) imported into Canada by the appellant was properly classified as being a prohibited good and was of an 'immoral or indecent character.'	Judge agreed with this decision and dismissed the appeal.
<i>Marquis Video Corp. v. Ontario Times Square Book Store v. Ontario</i> , [1984] O.J. No. 477	Applications to set aside search warrants - applicants include Marquis Video Corporation and the Times Square Book Store (materials include videotapes and magazines).	Judge made an order to quash the search warrants (save with respect to the magazine <i>Mistress Magenta's Phonebook</i> , No. 1).
<i>McDougall's Drug Store Ltd. (Re)</i> , [1982] N.S.J. No. 146	The Crown sought orders declaring certain publications, alleged to be obscene, to be forfeited to Her Majesty pursuant to S.160. At issue were a number of different magazines seized from seven separate locations.	The judge determined that all magazines were not obscene (except for <i>Family Affairs</i>). He also said that <i>Bedside Advisor</i> would be obscene but it was not included in the warrant and so was not properly before him.
<i>Medi-Data Inc. v. Canada (Attorney General)</i> , [1972] F.C. 469	The Postmaster General made interim prohibitory orders under section 7 of the <i>Post Office Act</i> prohibiting mail service to two United States firms on the ground that they were committing offences by transmitting obscene material through the mails (brochures). Application for judicial review of the decisions and recommendations of the Boards of Review and the final prohibitory orders.	Applications dismissed.
<i>Minas Music Sales Ltd. (Re)</i> , [1982] N.S.J. No. 144	Application by the Crown for an order declaring certain publications, alleged to be obscene, to be forfeited pursuant to S.160 (Dec 1981 - <i>The World of Velvet</i> , Dec 1981 - <i>Hustler</i> , Sept 1981 - <i>Elite</i>).	Application dismissed. The material ordered to be returned to owner. The publications did not constitute an undue exploitation of sex and were therefore not obscene within the meaning of section 159(8) of the <i>Criminal</i>

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		<i>Code.</i>
<i>Montreal Newsdealers Supply Co. v. Quebec (Board of Cinema Censors)</i> , 1967 CarswellQue 185 ([1969] C.S. 83)	Petitioner seeks by way of prohibition to have declared unconstitutional the Act respecting publications and public morals assented to March 29, 1950, and proclaimed by the Lieutenant-Governor in Council on May 1, 1950. Consequent to the Act, the magazine <i>Cavalier</i> was declared an immoral publication and therefore it was not to be owned or distributed.	The Court declared section 4 and 9 inclusive of the Act to be ultra vires, unconstitutional and illegal and therefore null and void; declared further that the order issued by the Board of Censors to have been illegally rendered and therefore null and void.
<i>North American News and Deputy Minister of National Revenue for Customs and Excise</i> , (1974), 1 O.R. (2d) 200	Appeal by the accused from the decision of the Deputy Minister of National Revenue upholding the ruling of a Customs appraiser that certain publications were immoral or indecent.	Appeal dismissed - affirms the decision of the Deputy Minister with respect to each of the publications. The judge states that, the right of free press and free speech does not include the right to distribute lewd, obscene, immoral and indecent publications.
<i>Pei-Yuan v. The Queen</i> , [1972] B.C.J. No. 671	Appeal to a judge of the County Court from a decision of the Deputy Minister of National Revenue for Customs & Excise – the prohibition of two wood block print folders and 127 photographs (classified as immoral/indecent).	Appeal dismissed. Judge accepts and confirms that the material has been correctly classified as prohibited goods by Customs - material deemed indecent.
<i>Pelletier c. R.</i> , [1985] J.Q. no 662	Appellant found guilty of showing an indecent film - and acquitted of having in his possession an obscene item for the purposes of circulation a videocassette <i>Fore Play</i> . He appeals the conviction.	Appeal allowed. Judgment of guilt rescinded and appellant is acquitted.
<i>Positive Action Against Pornography v. M.N.R. (F.C.A.)</i> , [1988] 2 F.C. 340	Appeal from the respondent's (Minister of National Revenue) decision denying the appellant registration as a 'charitable organization.'	Judge agreed with the respondent and stated that the appellant fails eligibility as a 'charitable organization' - primarily because its purpose and activities are primarily of a political nature. Appeal dismissed.
<i>Prestige Video Productions (1982) Ltd. v. Victoria (City)</i> ,	A petition to the Court for a declaration that the <i>Indecent</i>	Court decided that it did encroach on existing criminal

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[1982] B.C.J. No. 1746	<i>Films Prohibition By-Law</i> (in the City of Victoria) is invalid, illegal and of no force and effect.	law and directed the by-law be quashed.
<i>Priape Enrg. Et al. c. Dep.M.N.R.</i> , [1979] Q.J. No. 199	An appeal against a decision of the Deputy Minister (Customs) determining that 58 magazines sought to be imported into Canada by the appellants are 'prohibited' goods under 99201-1.	Appeal allowed in part. All of the magazines (except for nine of them) were declared to be immoral or indecent and the determination of the Deputy Minister to that effect is confirmed. For the nine – they were declared not to be immoral or indecent and must be permitted entry into Canada.
<i>R. v. Action Sales and Rentals Ltd.</i> , [1987] N.J. No. 271	Appeal against the quantum of a \$4,500 fine imposed by the Provincial Court on the accused for possession for the purpose of circulation of nine obscene video cassettes (contrary to S.159(1)(a)).	Judge found that the penalty imposed was inordinately high and so set it aside and replaced it with a reasonable fine of \$900.
<i>R. v. Alter</i> , [1985] O.J. No. 2045	Charged that he did unlawfully distribute and have in his possession for the purpose of distribution various obscene videocassette tape movies.	All the movies were found to be obscene.
<i>R. v. Arena Recreations (Toronto) Ltd.</i> , [1987] M.J. No. 51	Charged that it did unlawfully distribute obscene matter - December 1984 issue of <i>Penthouse</i> Magazine. The 'Sakura' photographs were particularly at issue.	The judge found that the Crown failed to prove the case beyond a reasonable doubt and so found the accused not guilty.
<i>R. v. Ariadne Developments Ltd.</i> , [1974] N.S.J. No. 199	Appeal by both appellants from conviction & by the corporate appellant from sentence (fine of \$12,500). 21,509 books were seized.	Appeal from conviction dismissed - Appeal from sentence allowed (fine reduced from \$12,500 to \$7,500)
<i>R. v. Arnold</i> , [1993] O.J. No. 471	Accused women were charged with commission of an indecent act by baring their breasts. The charge arose out of the conduct of the accused at a protest rally held to protest the conviction of another woman who had earlier been convicted for engaging in similar conduct.	Behaviour not seen to be harmful - the Crown did not prove beyond a reasonable doubt that the accused committed an indecent act. Accused found not guilty.
<i>R. v. Barr</i> , [1982] M.J. No. 303	Appeal from conviction - exposed to public view t-shirt	Appeal allowed. Convictions on both counts set aside,

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	and badges with the slogan - If it ain't stiff it ain't worth a fuck.	verdicts of acquittal entered.
<i>R. v. Bartman and Bartman</i> , [1980] M.J. No. 510	Appeal from convictions and sentence. Jointly charged and convicted of unlawfully, knowingly and without justification or excuse possessing obscene matters for the purposes of sale – t-shirts.	Appeals allowed, convictions quashed. Does not deal with the issue of obscenity - because the judge finds that failure to include the word 'written' in specifying the kind of obscene matter referred to in the informations amounted to a nullity.
<i>R. v. Beeston</i> , [1987] O.J. No. 1932	Charged that he made and sold obscene videotapes - focused on <i>I Want It All</i> and <i>Afternoon Delites</i> .	Charges of circulation were quashed. Judge found both of these tapes to be obscene.
<i>R. v. Before and After (1982) Ltd.</i> , [1982] N.J. No. 121	Application under S.160(2) to show cause why two films should not be forfeited as obscene (<i>Images IM-208</i> - and - <i>Wife Swapping</i>).	The Court decided that both films were obscene and that in their totality they clearly constituted an undue exploitation of sex – an exploitation that went beyond the limits of tolerance.
<i>R. v. Butler</i> , [1989] M.J. No. 404	The accused owned a shop selling and renting "hard core" videotapes and magazines as well as sexual paraphernalia. He was charged with 250 counts related to the selling of obscene material for the purpose of distribution and sale, exposing obscene material to public view, contrary to s.159 (now s.163) of the <i>Criminal Code</i> .	Butler was convicted on eight counts relating to eight films and acquitted on the remaining charges.
<i>R. v. Butler (Man. C.A.)</i> , [1990] M.J. No. 519	Appeal by Crown regarding the acquittals. Accused cross-appealed convictions relative to eight offences.	The Crown's appeal was allowed and convictions entered with respect to all counts. The majority concluded that the materials in question fell outside the protection of the <i>Charter</i> since they constituted purely physical activity and involved the undue exploitation of sex and the degradation of human sexuality.
<i>R. v. Butler</i> , [1992] 1 S.C.R. 452	Appeal from the judgment of the Manitoba Court of Appeal, allowing the Crown's appeal	Appeal allowed and new trial directed on all charges to allow further consideration of the application of section 1 of

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	from the accused's acquittals.	the <i>Charter</i> in light of the new definition. The Court redefined the term 'obscenity' as contained in the <i>Criminal Code</i> and specified relationships between the various tests.
<i>R. v. Butler</i> , [1993] M.J. No. 165	The Crown preferred a new indictment against the accused. Charged with possession of a number of video cassettes deemed to be obscene.	Accused found guilty. Satisfied beyond a reasonable doubt that most of the films are obscene under the definition of that term in the <i>Criminal Code</i> or as redefined following the decision of the Supreme Court of Canada in <i>Butler</i> .
<i>R. v. C. Coles Co.</i> , [1964] O.J. No. 464	Application for the confiscation of copies of an obscene book, <i>Fanny Hill, Memoirs of a Woman of Pleasure</i> , under s. 150A of the <i>Criminal Code</i> .	Judge satisfied that the book is obscene within the terms of s.150(8). Makes an order that the material be forfeited to Her Majesty for disposal as the Attorney-General may direct.
<i>Regina v. C. Coles Co. Ltd.</i> , [1964] O.J. No. 891	Appeal by accused from above judgment.	Appeal allowed and seized copies of the book ordered to be restored to the appellant forthwith.
<i>R. v. Canadiana Recreational Products Ltd.</i> , [1984] O.J. No. 1444	Application for an order quashing the warrant to search the business premises of Canadiana Recreational Products Ltd.	The search was found to be illegal and the judge ordered that the tapes be returned to the owner.
<i>R. v. Cinema International Canada Ltd.</i> , [1981] M.J. No. 458	The Crown appeals the acquittal of the respondent by a provincial court judge on charges of distributing and exposing to public view two allegedly obscene films (<i>Always up - and - The Other Side of Julie</i>).	Appeal allowed - verdict of guilty entered - the films are obscene.
<i>R. v. Cinema International Canada Ltd.</i> , [1982] M.J. No. 272	Appeal from the 1981 case where the films were deemed obscene.	Appeal dismissed. All films, in their totality, deemed to constitute an undue exploitation of sex within the meaning of section 159(8) of the <i>Criminal Code</i> .
<i>R. v. Cornwall News Distributors Ltd.</i> , [1976] O.J. No. 1209	The appellant was charged that it did distribute an obscene monthly newspaper and the appellant was acquitted. The Crown appealed by way of trial de novo to a County Court judge	Leave to appeal refused. The judge was entitled to reject the evidence from the defence expert and conclude that the publication was offensive to him and to Canadian

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	who convicted the appellant. Leave to appeal from conviction was sought by the appellant. Two points of law regarding use of evidence were raised by the appellant.	community standards.
<i>R. v. Crosbie</i> , [1988] M.J. No. 661	Charged that he was in possession of five obscene video cassette tapes for the purpose of distribution contrary to S.159(1)(a).	Judge stated that Crosbie couldn't properly be convicted under this section - more applicable to large scale operations. Therefore, he was acquitted - charges dismissed.
<i>Dechow v. R.</i> , 1974 CanLII 45 (ON C.A.)	Appeal from conviction (trial de novo) – obscene materials (written matter, pictures, models, preparations, tape recordings and other devices, equipment and sexual paraphernalia). Does not appeal sentence (\$250 fine or 5 days in jail plus 1 year of probation).	Appeal dismissed – articles are obscene (undue exploitation of sex and an offence to community standards).
<i>R. v. Dechow</i> , [1974] O.J. No. 345	Leave to appeal to the Ontario Court of Appeal was given in the trial de novo decision to deal with the question of whether S.159(8) applies to the articles within this case. Appellant argued that s.159(8) does not apply to articles such as those in this case and is confined to printed material only.	Appeal dismissed – s.159(8) does extend to objects such as these.
<i>R. v. Dechow</i> , [1978] 1 S.C.R. 951	Appeal from a judgment of the Court of Appeal dismissing an appeal from the judgment upholding the convictions on charges involving unlawful possession for distribution of obscene materials. Noted that the Court should resolve the dilemma revealed by the case law as to whether s.159(8) exhaustively defines obscenity regardless of whether or not a 'publication' is involved.	Appeal dismissed. All judges agreed that appeal should be dismissed but difference of opinion regarding s.159(8) (e.g. Laskin argued that it is exhaustive; Ritchie stated the s.159(8) is to be construed as referring only to publications and it would be straining the language to construe it as being directed to any other form of expression).
<i>R. v. Dickson</i> , [1987] N.J. No. 160	An exotic dancer employed in a bar was charged with being nude in a public place (S.170(1)(a)). The trial judge acquitted the accused on the ground that she had a	The judge found that the trial judge erred in finding that Dickson had a lawful excuse and he also applied the wrong test. Appeal allowed and new

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	reasonable excuse for her actions. This is the Crown's appeal.	trial directed.
<i>R. v. Dorosz</i> , [1971] O.J. No. 196	Appeal by accused from conviction of unlawfully having in his possession for the purpose of distribution, obscene written matter, paperback novels, contrary to the <i>Criminal Code</i> .	Appeal allowed primarily due to errors in law – and matter remitted to the original court to reconsider the issues.
<i>R. v. Doug Rankine Company Ltd. and Act III Video Productions Ltd.</i> , [1983] O.J. No. 3339	Doug Rankine and Act III Video are charged jointly with the distribution of numerous obscene publications, namely motion pictures recorded on video cassette tapes.	Eleven films considered to be obscene. As some of the obscene films were the subject of both counts in the indictment, accused found to be guilty as charged.
<i>R. v. Emery</i> , [1991] O.J. No. 1433	Charged that he did knowingly and without lawful justification or excuse sell obscene material, to wit: an audio cassette entitled <i>As Nasty as They Wanna Be</i> by 2 Live Crew - contrary to S.163(2)(a). There were two <i>Charter</i> complaints.	The judge dismissed both <i>Charter</i> complaints and found the tape to be obscene.
<i>R. v. Emery</i> , [1992] O.J. No. 640	Appeal from conviction (2 Live Crew's <i>Nasty as They Wanna Be</i> was deemed obscene).	The judge considered the appellant's grounds of appeal and did not agree with them. He sided with the trial judge and found the tape to be obscene - and dismissed the appeal.
<i>R. v. Enriquez</i> , [2009] A.J. No. 943	Charged that he did unlawfully sell, expose to public view or have in his possession for such purpose obscene written matter to wit, magazines (contrary to S.163(2)(a)); did unlawfully ... do an indecent act in a public place (contrary to S.173(1)(a); and did willfully obstruct...the lawful use of a city bus (contrary to S.430(1)(c)).	Accused found guilty that he did do an indecent act (masturbated on a public bus) - but not guilty of other counts (magazine not obscene).
<i>R. v. Erotica Video Exchange Ltd.</i> , [1994] A.J. No. 1008	The three corporate accused (Erotica Video Exchange, Roger Communications Inc, After Dark Enterprises) were charged with possession of videotapes for the purpose of rental/sale to the public.	Although the films were found to be obscene - the court determined that the latter two accused had lawful excuse based on the approval of the films by the BC Film Board and so were acquitted.

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		However, Erotica Exchange did not have the same lawful excuse and so was found guilty (S.163(2)(a)).
<i>R. v. Findlay</i> , 1987 CarswellOnt 2565 (Ontario Provincial Court, 1987)	Charged that he did knowingly and without lawful justification or excuse have in his possession for the purpose of exposing to public view obscene publications, to wit: VHS video cassette tapes.	Judge found that all the tapes were not obscene (adopted the view of Borins in the <i>Rankine</i> case) and also found that the movies were not displayed for public view. Charge dismissed.
<i>R. v. Fringe Product Inc.</i> , [1990] O.J. No. 265	Charged with one count of unlawfully distributing obscene material and one count of unlawfully possessing obscene material for the purpose of distribution contrary to S.163(1)(a) - audio (phonographs & tapes). Prior to jury selection, a motion was brought by the accused arguing that S.163(1)(a), S.163(3) & (4) were unconstitutional.	Judge found that both S.163(1)(a) and (8) were saved - but did agree that S.163(3) was unconstitutional.
<i>R. v. Gabrielle</i> , [1977] M.J. No. 295	Accused did unlawfully, knowingly and without lawful justification or excuse, expose to public view an obscene film called <i>3 A.M</i> (described as hardcore pornography).	The film is unduly exploitative of sex and goes beyond current Canadian community tolerance levels. Film deemed obscene, accused found guilty.
<i>R. v. Gardner</i> , [1975] M.J. No. 152	Appeal against both conviction and sentence (9 months in prison – repeat offenders). Related to possession of obscene matter – pictures, films and tape recordings.	The appeals against conviction and sentence were both dismissed.
<i>R. v. Germain</i> , [1985] 2 S.C.R. 241	Appeal from conviction (appeal dismissed at Quebec C of A and the Montreal Superior Court). The accused was found guilty of committing an offence under S.159(2)(a) - obscene articles (sexual paraphrenalia).	Appeal dismissed.
<i>R. v. Glassman</i> , [1986] O.J. No. 2620	Charged of publicly exhibiting a disgusting object, namely a display of red-stained feminine sanitary napkins and plaster penises contrary to S.159(2)(b).	Argument that the section is ambiguous and vague - the judge agreed. Charges dismissed.

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<i>R. v. Graham and Hewitt</i> , [1977] A.J. No. 746	On a summary conviction trial, they were found guilty. They appealed by way of trial de novo and were found guilty. They now appeal to this court. Jointly charged that they did unlawfully perform in an immoral, indecent or obscene performance.	Appeal dismissed. The judge stated that there was ample evidence upon which the trial judge could find that the performance was obscene by the community standards it was his duty to determine and uphold.
<i>R. v. Great West News Ltd.</i> , [1970] M.J. No. 1	Charged with having obscene written matter in their possession for the purpose of publication, distribution or circulation. An appeal was taken to the County Court where the judge found the appellants guilty. This is an appeal from that finding.	Appeal dismissed.
<i>R. v. H. H. Marshall Ltd. et al.</i> , [1982] P.E.I.J. No. 63	The issue before the Court is the proper interpretation to be placed on S.159(8).	Guidelines are issued which are to be used when the magazines and novels seized are assessed in trial.
<i>R. v. Harris</i> , [1977] N.S.J. No. 687	Appeal from conviction and sentence (s.159(1) and s.159(2)). Appellant opened up a sex shop with various sexual toys/paraphrenalia available for purchase.	Appeal from conviction dismissed. Articles considered to be obscene.
<i>R. v. Harris</i> , 1987 CanLII 181 (ON C.A.)	The appellants appeal against their conviction and the corporate appellant also appeals against the sentence imposed on it. Charged that they had in their possession for the purpose of distribution obscene movie films reduced to video cassette, also charged with distributing and making (S.159(1)(a)). A number of questions were considered, including whether the search and seizure was reasonable.	Appeal from conviction dismissed, appeal from sentence allowed, sentence varied accordingly.
<i>R. v. Hawkins</i> , [1992] O.J. No. 1161	Charged with distributing, possessing for the purpose of circulation, and exposing to public view obscene matter, to wit: ten video tapes - which the Crown alleged were obscene.	Although he makes his judgment with regret because of the changes we have seen since 1982 - he finds all the videos not obscene and therefore acquits Hawkins.

Case Name/Citation	Summary	Decision
<i>R. v. Hawkins</i> , [1993] O.J. No. 2572	Five appeals (Hawkins, Ronish, Jorgensen (x2) and Smeenk) - were heard together. The key issue was whether the videotape films in question were obscene within the meaning of S.163(8).	Appeals dismissed in all cases - except for Jorgensen-Hamilton.
<i>R. v. Herremans</i> , [1998] O.J. No. 355	Appeal by the accused (Herremans & Pfeiler) from convictions related to an immoral theatrical performance (S.167(1) & (2)).	Judge agreed with the determination that the performance was immoral (particularly in reference to the contact between the audience member and the dancer). Appeals dismissed.
<i>R. v. Huhn</i> , [1987] O.J. No. 757	Relates to video cassette tapes. Application to quash a search warrant and to quash the order of Justice of the Peace authorizing that the items listed continue to be detained.	Judge found that the Justice of the Peace acted appropriately. Applications dismissed.
<i>R. v. Isaac's Gallery Ltd</i> , 1975 CarswellOnt 1057 (19 C.C.C. (2d) 570)	Appeal from the order dismissing its motions for mandamus and prohibition with respect to five counts of knowingly... publicly exhibiting a disgusting object contrary to s.159(2)(b). The previous judge denied the motion to declare s.159(2)(b) inoperative because it was contrary to the <i>Canadian Bill of Rights</i> . The accused argued that what constitutes a 'disgusting object' is not defined and is vague.	Appeal dismissed (in agreement with original judge). The judge noted that the language was no more vague than other undefined expressions in the Code. Trial ordered to be held – but the Crown never proceeded to trial with the case
<i>R. v. Jacob</i> , [1996] O.J. No. 4304	Appeal from a decision of a summary conviction appeal court affirming the conviction of the appellant of willfully doing an indecent act in a public place - exposing her bare breasts - contrary to S.173(1).	All judges determined that she did not engage in an indecent act and that her conduct did not exceed the community standards of tolerance. Appeal allowed (set aside conviction, and acquittal entered).
<i>R. v. JeBailey</i> , [1980] N.S.J. No. 51	Nova Scotia Family Court - Accused charged with supplying juveniles with an obscene publication (an adult magazine) thereby promoting or contributing to their juvenile delinquency.	Accused convicted. In his judgment, the judge confirmed that the magazine was indeed obscene.

Case Name/Citation	Summary	Decision
<i>Regina v. Johnson</i> , [1972] A.J. No. 59	Appeal from conviction. Johnson appeared in an immoral performance (danced in the nude in a theatre before a paying audience).	Appeal allowed and conviction quashed.
<i>R. v. Johnson</i> , [1975] 2 S.C.R. 160	Appeal from Alberta Supreme Court decision which allowed Crown's appeal and restored conviction.	Appeal allowed. Order to restore the quashing of conviction.
<i>R. v. Jorgensen</i> , [1995] 4 S.C.R. 55	Appeal from a judgment of the Ontario Court of Appeal dismissing the accused's appeal from their conviction under S.163(2) - videotapes.	Appeal allowed - appellants entitled to an acquittal (no evidence to suggest any knowledge on the part of the appellants).
<i>R. v. Jorgenson</i> , [1992] O.J. No. 2889	Jorgenson-Scarborough trial. Charged that they did knowingly and without lawful justification or excuse sell obscene material with respect to nine videotapes contrary to S.163(2).	Six of the tapes were deemed not obscene - whereas three were deemed obscene. Accused found to be guilty.
<i>R. v. Jorgenson</i> , [1994] M.J. No. 95	Applicant seeks an order quashing certain search warrants issued on the basis that the informations sworn and filed to obtain each warrant were inadequate or insufficient for the purpose.	Judge determined that there was some evidence sufficient to satisfy both magistrates. Application dismissed.
<i>R. v. Keegstra</i> , [1990] 3 S.C.R. 697	Charged under s.281.2(2) for promoting hatred against an identifiable group by communicating anti-semitic statements to his students. Issue before this court was whether the section violated s.2(b) and s.11(d) of the <i>Charter</i> .	The court determined that the section violated s.2(b) as it was legislation to suppress expression. However, the majority found the violation to be justified under s.1.
<i>R. v. Keegstra (Alta. C.A.)</i> , [1994] A.J. No. 652	Keegstra found guilty of wilful promotion of hatred against an identifiable group contrary to s. 319(2) of the <i>Criminal Code</i> . Appeal by accused from conviction.	Appeal allowed on the ground that the trial judge erred in law in his response to questions from the jury. New trial ordered.
<i>R. v. Kiverago</i> , [1973] O.J. No. 16	Appeal from conviction – poster deemed to be obscene. Ground for appeal – the trial judge tested the question of obscenity according to the standards of Sault Ste. Marie instead of the contemporary	Appeal dismissed. The court did not think the case had to be sent back for re-trial because judge erred in his application of the community standard test. Poster considered to be obscene and

Case Name/Citation	Summary	Decision
	standard of the Canadian community.	the court argued that no judge would consider it not to be so.
<i>R. v. Kornyllo</i> , 1985 CarswellOnt 1723 (Ontario District Court, 1985)	Kornyllo & Watterson were charged that they did distribute and have in their possession for the purpose of distribution, obscene magazines (36 different titles).	Judge finds that they are not obscene.
<i>R. v. Laliberte</i> , [1992] O.J. No. 1346	Charged with using the mail for purpose of transmitting obscene materials, selling obscene materials, & possession of obscene materials for the purpose of sale - comic books (fanzines).	The judge found without question that the materials in question were not obscene. Applied the <i>Butler</i> decision and was clear that there was no explicit sex or an indication that any harm would flow from the publications. Charges dismissed.
<i>R. v. Ludacka</i> , [1996] O.J. No. 743	Crown appeals from acquittal. Ludacka was the owner and manager of Babies Hotel - he was charged that, being the person in charge of a theatre, did allow to be presented an immoral performance (two female performers) contrary to S.167(1).	The judge found that the performances did exceed the accepted standards of tolerance and were immoral. Appeal allowed (acquittal set aside and conviction entered).
<i>R. v. Lynnco Sound Ltd.</i> , [1985] N.B.J. No. 157	Charged in relation to a video cassette - <i>Neon Nights</i> . Same judge as in <i>Neil Venture's</i> . He clarifies his reasons that have led him to the conclusion that the so-called 'community standard of tolerance' test is neither practicable nor proper.	The film is deemed obscene.
<i>R. v. Mara</i> , [1996] O.J. No. 364	Patrick Mara and Allan East were charged that, being the manager or agent or person in charge of the theatre, they did allow to be presented an indecent performance, contrary to S.167(1). At trial, both were acquitted - this is an appeal by the Crown from the acquittals.	This judge found that the performances exceeded what is acceptable and were indecent. Therefore, he allowed the appeal (set aside the acquittals and entered convictions).
<i>R. v. Mara</i> , [1997] 2 S.C.R. 630	Appeals from a judgment of the Ontario Court of Appeal - setting aside the acquittals of the accused and entering convictions on charges of allowing indecent performances.	The performances were considered to be indecent by this court - and so East's appeal was dismissed. However, Mara's appeal was allowed as the court determined that he did not

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		have sufficient mens rea to convict under S.167.
<i>R. v. Marshall</i> , 1962 CarswellNfld 13 (48 M.P.R. 64)	An information was laid by a member of the R.C.M.P. that certain magazines were obscene within s.150 and were kept on the premises of Marshall. The publications were seized and a summons issued to Marshall to show cause why the seized publications should not be forfeited to Her Majesty.	The publications were obscene and should be forfeited for disposal as the Attorney-General might direct.
<i>R. v. Mawson</i> , [1992] O.J. No. 670	Mawson & Cowin charged that they exposed to public view obscene material (video cassette tapes) - and Mawson charged that he sold obscene material (a particular magazine).	Although the material depicts non-violent, non-coercive sex acts - the judge finds that Canadians today are no longer tolerant of other Canadians seeing specific depictions of casual ... unprotected sex... Judge found material obscene and accused guilty.
<i>R. v. McAuslane</i> , [1971] O.J. No. 1769	Appeal by Crown from an order quashing the indictment and order of arrest (details regarding the order are included in the case document).	Appeal quashed.
<i>R. v. McAuslane</i> , [1973] O.J. No. 1336	Ruling as to the mode of selecting a jury at the opening of a trial on an indictment for conspiring to distribute obscene material (considering the scope of permissible questioning of potential jurors when they are challenged for cause).	The judge was of the view that the proposed questioning does not go beyond the rationale of classical questioning which has been recognized by the cases and is not contrary to the spirit of s. 567.
<i>R. v. McGowan</i> , [1995] O.J. No. 5110	A ruling on committal to stand trial after a preliminary hearing. Charged that he did make obscene materials, to wit: two adult video cassette tapes, contrary to S.163(1)(a). Both tapes depict various consensual sexual activities between the accused and two boys who were 14 years old. Question as to how to define 'child.'	Judge said that prior to S.163.1, the Code singled out 14 yrs as the significant juncture - and so he found the tapes to not be obscene - and discharged accused on both counts.

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<i>R. v. McKeigan</i> , 2000 CarswellOnt 1577 (Ontario Court of Justice, 2000)	Sentencing on offences of (a) keeping a common bawdy house; (b) permit premises to be used as a common bawdy house; & (c) permit indecent theatrical performance. Court enters a conditional stay on count 2.	The court determined that charitable donations would be made to 'People with Aids' (\$2000 by Remington's and \$1000 by McKeigan). And McKeigan would receive a conditional discharge and one year of probation for count 1 and 3 - plus 100 hours of community service.
<i>R. v. Mercer</i> , 1988 CarswellNB 106 (88 N.B.R. (2d) 140)	Charged that he did knowingly, without lawful justification or excuse expose to public view an obscene thing, to wit: a videotape with three movies on it (<i>Gentlemen Prefer Ginger</i> , <i>I Like to Watch</i> , and <i>Ball Busters</i>) - contrary to S.159(2)(a).	Judge found the videotape to be obscene and that it was exposed to public view by the defendant.
<i>R. v. Metro Toronto News</i> , 1977 CarswellOnt 1269 (Ontario Provincial Court, 1977)	Accused charged with having obscene material in his possession for the purpose of distribution - <i>Penthouse</i> magazine (December 1975). The Court considered whether the magazine was obscene.	The magazine offends current community standards and is obscene. Accused found guilty.
<i>R. v. Miller</i> , [1990] O.J. No. 2750	Charged with the distribution of obscene material - books. At issue was whether the material was obscene and if so, whether its distribution was protected by S.2(b).	The judge found that the material was obscene and not protected.
<i>R. v. Mood Video Ltd.</i> , [1987] N.J. No. 90	Appeal by the Crown from the dismissal of a charge of possession of obscene motion pictures (video cassette tapes) for the purposes of distribution or circulation contrary to S.159(1)(a). Trial judge found S.159 as vague and uncertain and therefore of no force and effect.	This judge found that the trial judge erred and so overturned the order dismissing charges and ordered a new trial.
<i>R. v. Neil's Ventures Ltd.</i> , [1985] N.B.J. No. 123	Charged that it did circulate obscene publications to wit: motion pictures recorded on video cassette tapes (<i>Honey Throat</i>) contrary to S.159(1)(a).	The judge had strong arguments against the use of the Canadian community standards test. The film is deemed obscene.
<i>R. v. Nicols</i> , [1984] O.J. No. 3475	Charged with circulating obscene material contrary to S.159(1)(a) and with having in	Judge determined that the Crown failed to prove the guilt of the accused beyond a

Case Name/Citation	Summary	Decision
	his possession obscene material for the purpose of circulation. Three videocassettes: <i>Demented</i> , <i>Frankenstein</i> , and <i>Trashi</i> .	reasonable doubt. Verdict of not guilty and accused acquitted.
<i>R. v. NOP Ltd.</i> , [1991] O.J. No. 1474	NOP Ltd, Milberg, Mawson, Calcos, Couillard & Peltier charged that they did knowingly and without lawful justification or excuse possess to sell and sell obscene material contrary to S.159(1)(a) - magazines (numerous) & playing cards (2 packs) - 34 counts.	Judge said that he was bound by the decision in <i>Video World</i> (SCC). He found all material to be obscene and found all accused guilty.
<i>R. v. Odeon Morton Theatres Ltd.</i> , [1974] M.J. No. 6	Appeal by Crown from acquittal. Film at issue was <i>Last Tango in Paris</i> . Issue to be considered was whether the film was obscene under s.159.	Appeal dismissed. The court compared this film with what had become known as 'skin flicks.' Film deemed not obscene.
<i>R. v. Ott (Alta. Q.B.)</i> , [1989] A.J. No. 803	Appeal from the conviction and sentence of Ott, Clarke and Comic Legends Ltd (comic books).	Appeal from conviction and first sentence dismissed - but appeal from second sentence allowed and fine was reduced to \$10.00 each against Comic Legends Ltd and Clarke.
<i>R. v. Penthouse International Ltd.</i> , 1977 CarswellOnt 1268 (Ontario County Court, 1977)	Proceeding pursuant to s.160 (forfeiture) – seizure of a substantial quantity of copies of the September 1977 issue of <i>Penthouse</i> magazine.	Magazine deemed obscene – and the Court ordered that copies of this issue be forfeited.
<i>Regina v. Penthouse International Ltd. et al.</i> , [1979] O.J. No. 4139	Appeal from forfeiture. Conceded by counsel for the appellants that a dominant theme of the magazine was the exploitation of sex – the only question was whether the exploitation was undue.	Appeal dismissed. Noted that the trial judge applied the wrong test but that he would inevitably have come to the same conclusion if he had applied the right test. The exploitation of sex was undue – obscene.
<i>R. v. Pereira-Vasquez</i> , [1985] B.C.J. No. 2698	Charged with two counts of making an obscene videotape and one count of distributing obscene videotapes - and also charged with two counts of committing an act of gross indecency. The accused was the producer, director and principal arranger of the videotapes.	The judge deemed both tapes obscene and convicted the accused on all counts.

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<i>R. v. Pereira-Vasquez</i> (B.C.C.A.), [1988] B.C.J. No. 799	Appeal by the accused from convictions on charges of making or distributing obscene material - and gross indecency. The appellant had various grounds to appeal the obscenity counts.	The court dismissed the various grounds and the appeal. Maintained that the videotapes were obscene. But did acquit the appellant on the count of gross indecency.
<i>R. v. Prairie Schooner News Ltd.</i> , [1970] M.J. No. 32	Convicted on two charges of having obscene written matter in possession for the purpose of publication, distribution or circulation (227 paperback novels, 29 magazines). Accused appeals the convictions and sentences.	Appeals dismissed.
<i>R. v. Price</i> , [2004] B.C.J. No. 814	Charged with making, distributing, and circulating eleven obscene videos. The videos portray bondage and discipline, dominance and submission, sadism and masochistic activities (BDSM).	Judge concluded that there is reasonable doubt that the community would not tolerate other Canadians viewing the 11 videos on the basis that harm would flow from watching them. He found the videos not obscene and Price was acquitted.
<i>R. v. Ramsingh et al.</i> , [1984] M.J. No. 408	The accused are jointly charged with unlawfully possessing and circulating obscene video film cassettes and 8 mm films. Accused argued that S.159 is unconstitutional.	The judge found that it constitutes a reasonable limit and did not declare it of no force and effect. Instead three of the films (<i>Swedish Erotica</i> , <i>Bad Girls</i> and <i>California Gigilo</i>) were deemed obscene. And two films (<i>Deep Throat</i> and <i>Bordello</i>) were not obscene.
<i>R. v. Red Hot Video Ltd.</i> , 1983 CarswellBC 782 (6 C.C.C. (3d) 331)	Charged with three offences of possessing obscene videotapes for the purpose of distribution (S.159(1)(a)). The accused challenged the validity of S.159 on the grounds that its provisions constitute an infringement of S.2(b) and S.7.	This decision rules on that and finds that S.159 is constitutional apart from S.159(6).
<i>R. v. Red Hot Video Ltd.</i> , 1983 CarswellBC 2076 ([1983] B.C.W.L.D. 1626)	Following the previous case in 1983 - the Judge considers and decides on the charges.	He finds all three films (videotapes) to be obscene.
<i>R. v. Red Hot Video Ltd.</i> , [1984] B.C.J. No. 3125	Appeal by the accused from conviction for possession of obscene materials for purposes of distribution. No arguments were advanced by	Judge dismissed the appeal.

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	the appellant that the videotapes were not obscene - instead, contended that S.159 conflicted with the fundamental freedoms of expressions.	
<i>R. v. Red Hot Video Ltd.</i> , [1985] B.C.J. No. 2279	Appellant now seeks leave to appeal from the judgment of Melvin (Appeal, 1984).	Appeal dismissed.
<i>R. v. Rhyno</i> , [1989] N.B.J. No. 374	Application for judicial review to quash a search warrant. The applicant argued that the inclusion of the words 'any other thing whatsoever, a dominant characteristic of which is the undue exploitation of sex' was too general.	The judge did not agree and dismissed the application.
<i>R. v. Rodney</i> , [1970] O.J. No. 796	Convicted of making obscene matter for the purpose of distribution (photographs). Accused appeals this conviction.	Appeal dismissed.
<i>R. v. Rollins</i> , [1972] S.J. No. 241	Seizure of a large quantity of paperback novels, magazines, periodicals and other like publications found on the premises of Irvin Rollins.	All publications set out in the summons are forfeited to Her Majesty with the exception of the publication <i>The Mating Game</i> .
<i>R. v. Ronish</i> , [1993] O.J. No. 608	Roman & George Ronish - charged with possession for the purpose of sale, and sale of obscene material in the form of videocassettes.	The judge agreed with the judge in Hawkins and Laliberte - proof of social harm must be established, not assumed. There was no clear proof in this case. Films deemed not obscene - charges dismissed.
<i>R. v. Ronish</i> , 1993 CarswellOnt 133 (26 C.R. (4 th) 75)	Same case as Hawkins (1993) - the five appeals relating to Hawkins, Ronish, Jorgensen (x2) and Smeenck. However, there were some good headnotes regarding the key points.	Appeals dismissed except for Jorgensen-Hamilton.
<i>R. v. Saint John News Co. Ltd.</i> , [1976] N.B.J. No. 74	Appeal from forfeiture (s.160) December 1975 issue of <i>Penthouse</i> magazine.	Appeal dismissed. Concurs with trial judge that the magazine is obscene within the meaning of s.159(8).
<i>R. v. Saint John News Co. Ltd.</i> , [1982] N.B.J. No. 429	Appeal from conviction – being in possession of obscene written matter or pictures for the purposes of distribution (s.159(1)(a)).	Appeal allowed in part - the magazines (<i>Stag</i> , <i>Elite</i> , and <i>Stallion</i>) were considered to be obscene - but the judge did strike down the probation

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	Magazines at issue – <i>Stag</i> (Nov 1982), <i>Elite</i> (Oct 1982), <i>Stallion</i> (Nov 1982). Sentence – fined maximum of \$1000 and a two year probation order with conditions.	order which was included in the sentence.
<i>R. v. Saint John News Company Ltd.</i> , [1984] N.B.J. No. 381	Application to quash indictment - accused argued that S.159 is unconstitutional. Charged with distributing obscene magazines and having in their possession for the purpose of distribution obscene magazines.	Application allowed in part. Judge did not support applicant's argument that S.2(b) was violated - but did state that he couldn't find justification for establishing an offence of absolute liability (S.159(6)). He noted that the problems could be avoided if greater use were to be made of s.160.
<i>R. v. Saint John News Company Ltd.</i> , [1985] N.B.J. No. 253	This is the trial following the application made in the 1984 <i>Saint John News</i> case.	Accused found guilty on both counts. The magazines fail to meet contemporary Canadian standards and are obscene.
<i>R. v. Schell</i> , [1973] O.J. No. 1328	Accused did unlawfully make obscene photographs.	Charge dismissed – photographs were not considered to be obscene.
<i>R. v. Scobey (N.S. Co. Ct.)</i> , [1989] N.S.J. No. 330	Appeal from conviction and sentence on charges that the appellant did knowingly and without lawful justification or excuse sell obscene materials contrary to S.159(2)(a) ... All charges in relation to sexual paraphrenalia and novelties. The appellant appealed on a number of different grounds.	The appeal judge found that the trial judge did indeed err in a number of his decisions - and so allowed the appeal and directed a new trial with a different provincial court judge.
<i>R. v. Scythes</i> , [1993] O.J. No. 537	Glad Day Bookshop and John Scythes charged with possession (& jointly charged with Thomas Ivison) with selling obscene material to wit: a magazine entitled <i>Bad Attitude</i> .	The judge found the magazine (esp. the article <i>Wunna My Fantasies</i>) to be obscene and found all accused guilty.
<i>R. v. SFK Holdings Ltd (c.o.b. Readers Paradise)</i> , [1972] S.J. No. 233	Seizure of a quantity of paperback novels found on the premises of Readers Paradise.	Books deemed obscene and therefore should be forfeited to Her Majesty.
<i>R. v. SFK Holdings Ltd. (c.o.b. Book End)</i> , [1972] S.J. No. 234	Seizure of a large quantity of publications found on the premises of the Book End.	All publications declared to be obscene and therefore should be forfeited to Her Majesty.
<i>R. v. Sham</i> , [1991] O.J. No.	Sentencing hearing - Sham was convicted of selling	A fine was imposed (in many of these cases - the motive is

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3534	obscene material - a film.	gain and there has to be a reduction of this profit motive).
<i>R. v. Smith</i> , [1987] O.J. No. 1967	Charged that he did make obscene pictures, contrary to S.159(1)(a) - eight photographs of a young boy in the nude.	The judge was satisfied that the average Canadian would not tolerate 'kiddie porn' - and so found that the pictures were obscene.
<i>R. v. Smith</i> , [2002] O.J. No. 5018	Smith was convicted of making, possessing for the purpose of distribution, and distribution of obscene material, contrary to S.163(1)(a) - visual images and videos available on two internet sites.	The judge said that the punishment must be in proportion to the gravity of the offence and the degree of responsibility of the offender. He imposed a \$100,000 fine and 3 years of probation (with set conditions).
<i>R. v. Smith</i> , 2002 CarswellOnt 6152 (Ontario Superior Court of Justice, 2002)	Charged with making, possessing for the purpose of distribution, & distributing obscene material, the dominant characteristic of which is the undue exploitation of sex and violence, contrary to S.163(1)(a). Smith uploaded images to internet sites. This is a voir dire to determine the admissibility of the links on the sites and the metatags.	Both were deemed admissible.
<i>R. v. Smith</i> , 76 O.R. (3d) 435	Appeal by the accused from the convictions on obscenity charges and from the sentence imposed. Two types of material formed the basis of the charges - audiovisual and written accessible on a website.	The judge found that the trial judge erred in her instruction to the jury re. explicit sexual activity. Appeal allowed re. audiovisual material and new trial directed. Appeal dismissed re. the written material. It was maintained that the stories were obscene - but judge reduced the fine from \$100,000 to \$2,000.
<i>R. v. Smith</i> , [2007] O.J. No. 3074	Regarding new trial - (for counts related to the audio-visual material) - Application for a Judicial Stay of Proceedings. Smith claims breaches of his rights under S.11(b) and S.7.	Application dismissed.
<i>R. v. Smith</i> , [2007] O.J. No. 3075	Regarding the new trial - Application to exclude evidence. Judge determined that this application based on the search warrants must fail.	Application dismissed.

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<i>R. v. Smith</i> , [2007] O.J. No. 3076	Regarding the new trial - Applicant wishes to re-elect his mode of trial to 'Trial by Judge Alone.' The Crown objects and maintains the new trial should be 'Trial by Jury.' The <i>Criminal Code</i> states that an accused cannot re-elect the mode... without the consent of the Crown.	Judge examines the accused's reasons for re-election and does not find they support the application. Application dismissed.
<i>R. v. Smith</i> , [2008] O.J. No. 740	Application by the Crown to determine the admissibility of certain evidence which the Crown wishes to introduce at trial - the three stories which were deemed obscene at the earlier trial. The Crown wishes to use them to provide context for the audiovisual material, the subject of the present trial.	The judge agreed - application granted.
<i>R. v. Telford Investments Ltd. (c.o.b. Super Love Boutique)</i> , [1982] A.J. No. 468	Appeal from conviction - ground for appeal related to alleged deficiencies in the judge's charge to the jury.	Appeal dismissed. The alleged deficiencies in the charge were not fatal to the conviction.
<i>R. v. Times Square Book Store</i> , [1985] O.J. No. 177	Appeal by Crown from the order made by the Judge in the 1984 case (under Marquis) where the warrant to search the bookstore was quashed (except for insofar as the warrant dealt with a magazine called <i>Mistress Magenta's Phonebook, No. 1</i>).	The judge in this case had different reasons - but also found the warrant to be defective. Appeal dismissed.
<i>R. v. Tompkins</i> , [1981] N.S.J. No. 347	Appeal from conviction - accused charged that he did make use of the mail for the purpose of delivering obscene matter (photographs) (S.164).	Appeal allowed.
<i>R. v. Towne Cinema Theatres (1975) Ltd.</i> , 1981 CarswellAlta 300 ([1982] 1 W.W.R. 512)	The accused corporation was charged under s.163(1) that, being the person in charge of a theatre, presented an obscene entertainment by showing the movie, <i>Caligula</i> .	Accused acquitted.
<i>R. v. Towne Cinema Theatres Ltd.</i> , [1985] 1 S.C.R. 494	Appellant was charged with presenting an obscene motion picture contrary to S.163 - <i>Dracula Sucks</i> . Appellant was convicted at trial and the C of A upheld that decision.	Court decided that the trial judge did err in his judgment and so the appeal was allowed (judgment at trial and on appeal was set aside) and new trial ordered.

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<i>R. c. Tremblay</i> , 1991 CanLII 3166 (QC C.A)	A number of individuals - charged with keeping a common bawdy house for the purpose of the practice of indecent acts (contrary to S.193(1) (now S.210(1)). Appeal from acquittals.	In this appeal, the judge allowed a motion by the Crown to amend the charge to say 'the practice of prostitution' instead of 'the practice of indecency.' The judge entered a conviction on the basis of the amended charge.
<i>R. v. Tremblay</i> , [1993] 2 S.C.R. 932	Appeal from the decision of the Court of Appeal which materially amended the charge and entered a conviction on the basis of the amended charge.	On the basis that the appeal judge erred in amending the charge and that the acts were not viewed as indecent in light of the current standard of community tolerance - the appeal was allowed (convictions were set aside and the acquittals were restored).
<i>R. v. Tremblett</i> , [1975] N.J. No. 47	Charged with having possession for the purpose of distribution a quantity of magazines (eight in total).	All publications found to be obscene - except for <i>Flip 'n' Flop</i> . Fined \$400 or 20 days in jail.
<i>R. v. Universal News Ltd.</i> , [1972] S.J. No. 235	Seizure of a large quantity of paperback novels, magazines, periodicals and other like material on the premises of Universal News Limited.	All but one of the publications (<i>Cavalier</i>) were deemed obscene and therefore should be forfeited to Her Majesty.
<i>R. v. Vancouver Magazine Service Ltd. (B.C. Co. Ct.)</i> , [1989] B.C.J. No. 343	Appeal by the Crown from an acquittal on three counts of distributing obscene magazines contrary to S.159(1)(a) - now S.163. The Crown alleged that the trial judge erred in both failing to formulate and to apply the proper test of what constitutes an obscene publication.	The appeal judge disagreed and agreed that the publications in question were not obscene. Appeal dismissed.
<i>R. v. Video World Ltd.</i> , [1985] M.J. No. 303	Charged that it did unlawfully have in its possession for the purpose of circulation seven 'obscene' video cassette tapes.	All films found not to be obscene.
<i>R. v. Video World Ltd.</i> , [1985] M.J. No. 143	Appeal by Crown from the acquittal (videocassettes at issue).	Court found that the trial judge erred when he followed the decision in <i>Ramsingh</i> - he should have followed <i>Cinema Int'l</i> and <i>Odeon Morton Theatres</i> . Therefore, the appeal was allowed and convictions entered - all films

Case Name/Citation	Summary	Decision
		were deemed obscene.
<i>R. v. Wagner</i> , [1985] A.J. No. 570	Charged that he did unlawfully have in his possession, for the purposes of distribution or circulation, obscene matter - video cassette tapes - contrary to S.159(1)(a).	All films (except for <i>Greenhorn</i>) were found to be obscene.
<i>R. v. Wagner (Alta. C.A.)</i> , [1986] A.J. No. 113	Appeal from conviction (convicted on two counts of possession of obscene matters in the way of video cassette tapes).	The court rejected the appellant's grounds of appeal and therefore dismissed the appeal. Agreed with the trial judge's determination that all films but one (<i>Greenhorn</i>) were obscene.
<i>R. v. Win-Cans Hollywood Connection</i> , [1987] M.J. No. 658	Charged with unlawfully circulating obscene matter, unlawful possession for the purpose of circulation, and unlawfully making obscene material - video cassette tapes.	Judge found all films to be 'skin flicks' and so pursuant to the case of <i>Video World</i> are deemed obscene. Convictions entered.
<i>R. v. Wise</i> , [1990] O.J. No. 1416	Charged with distributing, selling, possession for those purposes and using the mails for the distribution of obscene materials (contrary to S.163(1)(a), (2)(a) & 168). 24 count indictment regarding magazines, videocassettes, motion pictures & soft cover books (novels).	Accused was convicted on some counts and acquitted on others. Some of the content was deemed obscene - and other content was not obscene.
<i>R. v. Yorke</i> , [1997] N.B.J. No. 24	Charged that he did unlawfully take part as a performer in an indecent performance, to wit, actual or simulated fellatio in a theatre, contrary to S.167(2) - and willfully did an indecent act in a public place, contrary to S.173(1)(a).	The court determined that the act was indecent and violated the community standards of tolerance. He was found guilty as charged.
<i>R. v. Zundel</i> , [1992] 2 S.C.R. 731	Zundel charged with spreading false news (publication of a pamphlet) contrary to s.181 of the <i>Criminal Code</i> . Accused appealed his conviction to this court.	Appeal allowed. The court found that s.181 violated s.2(b) of the <i>Charter</i> and could not be justified under s.1.
<i>Re Application under Section 160 of the Criminal Code of Canada</i> , [1980] N.B.J. No. 106	An application pursuant to S.160 for an order declaring forfeited to Her Majesty certain publications seized from some 14 retail shops on the ground	<i>Penthouse</i> was found not to be obscene whereas <i>High Society</i> was found to be obscene.

Case Name/Citation	Summary	Decision
	that they are obscene - <i>Penthouse</i> and <i>High Society</i> .	
<i>Re Board of School Trustees of School District No. 34 (Abbotsford) and Shewan et al.</i> , [1986] B.C.J. No. 3256	The School Board appeals the decision of a previous court that allowed an appeal by the Shewans (which meant that they were reinstated in their jobs and they were awarded compensation).	The judge in this case determined that they did engage in misconduct and allowed the board's appeal. The Shewan's were teachers and they submitted a nude picture of the wife to a magazine.
<i>Shewan v. Abbotsford School District No. 34 (B.C.C.A.)</i> , [1987] B.C.J. No. 2495	The Shewan's appeal the decision in the 1986 case that found that they engaged in an act of misconduct.	The judges in this case found that the previous court did not err in its decision. They found that the circumstances clearly justified a finding of misconduct and they felt that the one month suspension was appropriate. Appeal dismissed.
<i>Re Winkler and Deputy Minister of National Revenue for Customs and Excise</i> , [1973] O.J. No. 2371	Appeal to a judge of the County Court from a decision of the Deputy Minister of National Revenue for Customs & Excise – the prohibition of the importation of two books <i>Oral Sex & the Law</i> and <i>Decision in Denmark</i> . It was a consequence of the pictorial illustrations that the books were considered to be of an immoral/indecent character – not with respect to the text.	Appeal dismissed. Judge accepts and confirms that the material has been correctly classified as prohibited goods by Customs.
<i>Regina c. Standard News Distributors, Inc.</i> , [1960] J.Q. no 10	Charged with distributing, circulating, and possessing for the purposes of circulating obscene written matter (a magazine entitled <i>Midnight</i>).	Accused company found guilty.
<i>Regina ex rel Murphy v. Adams</i> , [1966] N.S.J. No. 1	Application under s.150(A) regarding certain publications deemed to be obscene.	The Court was satisfied that all magazines were obscene and ordered that they be forfeited to Her Majesty.
<i>Regina v. Beaudoin</i> , [1971] A.J. No. 92	Seizure of posters determined to be obscene.	Both posters deemed to represent an undue exploitation of sex and therefore obscene. Should be forfeited to the Crown.
<i>Regina v. Cameron</i> , [1966] O.J. No. 1047	Appellant appeals her conviction. Charged that she did knowingly, without lawful justification or excuse, expose to public view an obscene	Appeal dismissed.

Case Name/Citation	Summary	Decision
	picture to wit: Lovers 1 by Robert Markle, contrary to the <i>Criminal Code</i> . A further six counts related to exposing pictures to public view.	
<i>Regina v. Campbell</i> , [1974] O.J. No. 2288	Appeal by way of trial de novo ("new trial") which is usually ordered by an appellate court when the original trial failed to make a determination in a manner dictated by law. Appeal against conviction (allowed the presentation of an obscene performance contrary to s.163(1)).	The judge finds the performance to be obscene, confirms conviction of the appellant and confirms sentence (\$350 fine or 15 days in jail).
<i>Regina v. Carty</i> , [1972] A.J. No. 51	Appeal by the Crown from the acquittal of the respondent upon the charge that he did have in his possession for distribution obscene material.	Appeal allowed and conviction entered. All items found to be obscene - except for the condoms.
<i>Regina v. Coles Book Stores Ltd.</i> , [1974] A.J. No. 200	Application under S.160(2) to show cause why the book <i>The Joy of Sex</i> should not be forfeited as being an obscene publication.	The judge finds that the publication is not obscene – and directs that the books be restored to the defendant.
<i>Regina v. Denomme and Braga</i> , [1979] O.J. No. 4577	Both charged that they did unlawfully take part in an indecent performance (indecent dancing at a theatre). Issue was whether the performance in each case was indecent.	Charges dismissed. The judge noted that the community is prepared to tolerate this type of entertainment – and what may be indecent in one locale may not be in another.
<i>Regina v. Dominion News & Gifts Ltd.</i> , [1963] M.J. No. 5	Appeal by accused from conviction. Charged with keeping for sale or distribution copies of an obscene publication pursuant to s.150(8) (magazines).	Appeal dismissed.
<i>Regina v. Duthie Books Limited</i> , [1966] B.C.J. No. 70	Appeal by accused. Publications seized and forfeited to Her Majesty (<i>Last Exit to Brooklyn</i>).	The book clearly falls within s.150(8) of the Code. Therefore, appeal dismissed.
<i>Regina v. E and F</i> , [1981] O.J. No. 3262	They unlawfully participated in sexual immorality by photographing 'T' in sexually suggestive poses and thereby endangered her morals contrary to S. 168(1).	Satisfied that the Crown proved beyond a reasonable doubt all the necessary elements of the actus reus and mens rea and accused found guilty as charged.
<i>Regina v. Fraser, Harris and Fraser Book Bin Ltd. Regina v.</i>	Appeal by accused from conviction. Charged with	Second and third appeals dismissed. First appeal

Case Name/Citation	Summary	Decision
<i>Fraser, Poirier and Fraser Book Bin Ltd. Regina v. Fraser and Fraser Book Bin Ltd.</i> , [1965] B.C.J. No. 74	various charges for having in possession obscene matter for the purpose of publication, distribution or circulation.	allowed (set aside the two convictions thereunder).
<i>Regina v. Georgia Straight Publishing Ltd. And Mcleod</i> , [1969] B.C.J. No. 332	Charged with three counts (publishing obscene written matter and pictures).	All counts dismissed.
<i>Regina v. McLeod and Georgia Straight Publishing Ltd.</i> , [1970] B.C.J. No. 581	Appeal by Crown against the acquittal of the respondents.	Appeal dismissed in its entirety (counts 1-3 dismissed and respondents acquitted).
<i>Regina v. Goldberg and Reitman</i> , [1971] O.J. No. 1634	Appeal by accused from their convictions. Charged that they did have in their possession for the purpose of publication, distribution or circulation an obscene film (<i>Columbus for Sex</i>).	Appeal dismissed.
<i>Regina v. Hawkshaw</i> , [1981] O.J. No. 3116	Application to quash committal for trial (charge that he unlawfully did make an obscene publication (photograph)).	Application allowed and order to quash.
<i>Regina v. Hawkshaw*</i> , [1982] O.J. No. 3544	Appeal from Crown from order quashing committal for trial - asks that the order for trial be restored.	Appeal allowed.
<i>Regina v. Householders T.V. and Appliances Ltd. et al.</i> , [1984] O.J. No. 3474	Accused jointly charged that they did have in their possession an obscene video cassette (<i>I Spit on Your Grave</i>) for the purpose of circulation, contrary to S.159(1)(a).	Judge found that for a charge under S.159(1)(a) to be successful it must relate to more than just distribution of copies to individuals. Accused acquitted.
<i>Regina v. Kleppe</i> , [1977] O.J. No. 2562	Charged that he was a master of ceremonies at an immoral, indecent or obscene performance. Amateur strip-tease contest and professional strip-tease.	Charges dismissed, not obscene. If a performance does not offend the audience that chooses to watch it, it is not obscene.
<i>Regina v. Lambert</i> , [1965] B.C.J. No. 104	Appeal by accused from conviction. Charged that he unlawfully did make use of the mails for the purpose of transmitting obscene material (letters).	Appeal dismissed and the conviction affirmed with costs against the appellant.

Case Name/Citation	Summary	Decision
<i>Regina v. Mason</i> , [1981] O.J. No. 3263	Charged that he unlawfully did keep a common bawdy house - a swingers club.	The Crown did not prove the charge against the accused beyond a reasonable doubt and accordingly was found not guilty and acquitted.
<i>Regina v. McFall et al.</i> , [1975] B.C.J. No. 1007	Appeal from conviction – exposing to public view an obscene motion picture (cubicles to view motion pictures, coin operated).	Appeal allowed, conviction set aside and new trial directed. Key issue that the court rested on was the fact that evidence was improperly rejected and the jury may have reached a different conclusion had the evidence been admitted.
<i>Regina v. Metro News Ltd.</i> , [1986] O.J. No. 826	Appellant appeals from its conviction that it did possess for the purpose of distribution and did distribute obscene publications (contrary to S.159(1)(a) - December 1984 issue of <i>Penthouse</i> magazine.	Appeal was based on a number of grounds which the judge rejected - apart from a finding that S.159(6) is constitutionally invalid. Overall, the appeal was dismissed.
<i>Regina v. Munster</i> , [1960] N.S.J. No. 2	Appeal by the Attorney General against the acquittal of the respondent. Charged that he did unlawfully make obscene pictures and have obscene pictures in his possession for the purpose of circulation.	Appeal allowed and new trial ordered.
<i>Regina v. Murphy</i> , [1972] O.J. No. 2095	Accused appeared as a performer in an indecent performance. During the trial, the court was shown a videotape of a performance of the <i>Silver Flash</i> .	The court decided that Murphy did not perform in such a way as to exceed current Canadian standards of tolerance. Her performance was limited to an audience of adults who paid to enter to see it. Performance deemed not obscene.
<i>Regina v. O'Reilly and four others</i> , [1970] O.J. No. 1553	Appeal by accused from conviction and sentence. Charged that they did allow to be presented an obscene performance.	Appeal allowed and the conviction set aside and the fine remitted to the appellants.
<i>Regina v. Pink Triangle Press et al.</i> , [1979] O.J. No. 4557	Charged that they unlawfully did make use of the mails for the purpose of transmitting indecent, immoral or scurrilous matter - the December 1977 - January 1978 issue of <i>The Body Politic</i> (especially the article entitled <i>Men Loving Boys Loving Men</i>). A publication that serves the gay	Accused found not guilty of this charge. The judge commented that the Crown failed to satisfy him beyond a reasonable doubt that the magazine taken as a whole was indecent, immoral or scurrilous and noted his concern for the right of free discussion and dissemination

Case Name/Citation	Summary	Decision
	community.	of ideas.
<i>Regina v. Pipeline News</i> , [1971] A.J. No. 48	Proceeding under s.150(A) of the Code. Seizure of books and magazines. Publications deemed to be obscene.	All publications deemed to be hardcore pornography and therefore, according to the court, obscene. The publications are ordered forfeited.
<i>Re Regina and Provincial News Co. Ltd.</i> , [1973] A.J. No. 111	Ruling on motion to dismiss. In regards to the February 1973 issue of <i>Penthouse</i> Magazine.	Found the publication to be obscene and that it should be forfeited to the Crown. In his ruling, the judge said that once a work has been found to have a dominant characteristic of the exploitation of sex, if any of this exploitation is offensive then the exploitation is undue and the work is obscene.
<i>Regina v. Provincial News Co., Penthouse International Ltd. and Guccione</i> , [1974] A.J. No. 146	Appeal from Judge Kerans order in the 1973 case where he found the issue of <i>Penthouse</i> to be obscene and directed it to be forfeited. Against publication not person (S.160)	Appeal allowed. Judge rules that the evidence in this case, taken as a whole, does not satisfy him beyond a reasonable doubt that, tested by contemporary Canadian standards of tolerance, there is present in the February 1973 issue of <i>Penthouse</i> an undue exploitation of sex.
<i>R. v. Provincial News Co.</i> , [1976] 1 S.C.R. 89	The Crown moved to quash the appeal by the accused and the latter applied for leave to appeal in the event that the motion to quash succeeded. Related to the seizure and forfeiture of certain magazines.	The motion to quash should be granted and the application for leave to appeal should be dismissed.
<i>Regina v. Salida</i> , [1968] O.J. No. 1292	Charged that he did unlawfully have in his possession for the purpose of publication, distribution or circulation a quantity of obscene written matter and pictures.	Accused found guilty with reference to each item seized (seventeen titles in total).
<i>Regina v. Sidey</i> , [1979] O.J. No. 4572	Appeal from a finding of guilt on a charge violating s.170(1)(a) – without lawful excuse, she was found nude in a public place.	Appeal allowed – findings of guilt set aside, disposition quashed, a verdict of not guilty substituted. The judge found that there is no evidence to support the trial judge's decision that Sidey was so clad as to offend public decency or order. Note:

Case Name/Citation	Summary	Decision
		conviction was restored following an appeal to the Ontario Court of Appeal. The Court commented that there was no need for such evidence.
<i>Small et al. v. The Queen</i> , [1972] B.C.J. No. 660	Appeal by accused from conviction. Charged that they did unlawfully present an obscene performance and did appear as a performer in an obscene performance in a theatre.	Appeals from conviction dismissed for all appellants, except for Henry Yeagher.
<i>Regina v. Small et al.</i> , [1973] B.C.J. No. 783	Appeal from conviction.	Appeal allowed, conviction quashed and a new trial ordered.
<i>Regina v. Sudbury News Service Ltd.</i> , [1977] O.J. No. 2376	Appeal from conviction – distributed obscene publications (magazines – e.g. <i>Penthouse</i> and <i>Oui</i>) contrary to s.159(1)(a).	Appeal allowed, not obscene, and conviction set aside. The distributor had nothing to do with the way the material was sold or displayed. The Court concluded that printed material which is not obscene by Canadian community standards does not become so merely by the fact that the vendor of the material displays the material for sale in a rack in a shop open to the general public (incl. children).
<i>Regina v. Sudbury News Service Limited</i> , [1978] O.J. No. 2713	The Crown is seeking leave to appeal and if leave is granted, appeals the order which set aside the conviction.	Appeal allowed – sets aside the order and conviction and remits matter back to the Provincial court judge for determination in accordance with the proper test as set out in this decision. The trial judge did not apply the proper test in determining the community standards.
<i>Regina v. Sutherland, Amitay, Bowie</i> , v. [1974] O.J. No. 2283	Trial. Items, such as vibrators, splints, creams, jellies, seized from a store known as 'Lovecraft'.	Instructions to the Jury which resulted in a directed verdict of not guilty on all counts.
<i>Regina v. The MacMillan Company of Canada Ltd.</i> , [1976] O.J. No. 2268	Charged that they had in its possession for the purpose of distribution obscene books – primarily <i>Show Me</i> - a picture book of sex for children and parents. Sole issue was whether the book is obscene	The book was deemed not obscene and the accused was acquitted. The Court commented that there have been noticeable shifts – national exposure to sex with a candour and realism in

Case Name/Citation	Summary	Decision
	&/or whether the company's possession of the book for the purpose of distribution served the public good.	recent years. The judge noted that the Canadian community would tolerate parents who wished to use the book with their children.
<i>Regina v. Times Square Cinema Ltd.</i> , [1971] O.J. No. 1697	Appeal by the accused from conviction. Charged that it did knowingly without lawful justification or excuse expose to public view an obscene thing, to wit: a videotape entitled <i>Vixen</i> contrary to the <i>Criminal Code</i> .	Appeal allowed and new trial directed.
<i>Scorpio Rising Software Inc. v. Saskatchewan (Attorney General)</i> , [1986] S.J. No. 295	Application by the video store owner to quash a search warrant which had been issued to search his premises, to direct the return of all seized material (videotapes), and for an order awarding compensation under the <i>Charter</i> .	Application allowed in part - search warrant quashed and material returned - but no damages awarded.
<i>Sex Party v. Canada Post Corp.</i> , [2008] F.C.J. No. 45	Application for judicial review pursuant to S.18.1 of the <i>Federal Courts Act</i> . The Sex Party seeks to have judicially reviewed a decision by Canada Post corporation, refusing to distribute a leaflet of the Sex Party using the Unaddressed Admail Service on the grounds that the leaflet was sexually explicit.	Application allowed and decision quashed - not on S.2(b) grounds - but b/c it was not made in conformity with the regulation enacted by the corporation. Order suspended to allow time to amend/change reg.
<i>Video Movies Ltd. v. R.</i> , [1984] N.B.J. No. 354	The applicant seeks an order quashing a search warrant - argued that the warrant should have been issued under S.160.	Judge dismisses the application - 'publication' as used in S.160 does not include video cassettes.

**APPENDIX C: LIST OF CHILD PORNOGRAPHY AND
OTHER EXCLUDED CASES**

Paintings, Drawings and Photographic Slides of Paintings [by Eli Langer] (Re), [1995]
O.J. No. 1045

R. c. Blondin, 2000 CanLII 11365 (QC C.A.)

R. c. Colalillo, [2005] Q.J. No. 19771

R. c. Colalillo, [2006] Q.J. No. 24498

R. c. L.(M.), 2006 CarswellQue 9347 (JE 2007-178)

R. c. Landreville, 2005 CanLII 60182 (QC C.Q.)

R. c. Martin, 2005 CanLII 35273 (QC C.Q.)

R. c. S.G., 2006 QCCQ 13560 (CanLII)

R. c. Sharpe, [2001] 1 R.C.S. 45

R. c. Sharpe, [2001] A.C.S. no 3

R. c. Tremblay, 2009 QCCQ 13358 (CanLII)

R. v. A.B., [2006] O.J. No. 2543

R. v. A.R., [2007] O.J. No. 4205

R. v. Alcorn, 2008 CarswellOnt 6490 (2008 ONCJ 547)

R. v. Allingham, [2005] M.J. No. 275

R. v. Anderson, [2005] A.J. No. 535

R. v. Anderson, 2006 CarswellAlta 2489 ([2006] A.J. no. 244)

R. v. Aube, 2008 CarswellNB 331 (2008 NBCP 33)

R. v. Austin, 2006 CarswellBC 3353 (2006 BCPC 596)

R. v. Ayers, [2005] O.J. No. 1547

R. v. Aylesworth, [2008] O.J. No. 726

R. v. Ayoob, 2005 CarswellOnt 6623 (68 W.C.B. (2d) 426)

R. v. B.(A.), 2006 CarswellOnt 5505 (Ontario Superior Court of Justice, 2006)

R. v. B.(D.E.W.), 2003 CarswellAlta 1702 (2003 ABPC 190)

R. v. B.(J.D.), 1999 CarswellBC 1203 (British Columbia Supreme Court, 1999)

R. v. B.(J.J.), 2004 CarswellBC 142 (2004 BCPC 7)

R. v. B.(R.A.), 2006 CarswellBC 1954 (2006 BCPC 367)
R. v. B.(T.L.), 2006 CarswellAlta 905 (2006 ABQB 533)
R. v. B.(T.L.), 2007 CarswellAlta 194 (2007 ABCA 61)
R. v. B.W., [2002] O.J. No. 5727
R. v. Bares, 2008 CarswellOnt 1265 (Ontario Superior Court of Justice, 2008)
R. v. Batshaw, [2004] M.J. No. 249
R. v. Batshaw, 2003 CarswellMan 486 (179 Man.R. (2d) 149)
R. v. Bauer, [1999] O.J. No. 5294
R. v. Baxter, [2009] O.J. No. 334
R. v. Beattie, [2005] O.J. No. 1302
R. v. Beattie, 2003 CarswellOnt 6544 (Ontario Superior Court of Justice, 2003)
R. v. Bennett, 2006 CarswellOnt 27 (2006 ONCJ 3)
R. v. Bergeron, 2009 ONCJ 104 (CanLII)
R. v. Better, 2002 CarswellOnt 6272 (Ontario Superior Court of Justice, 2002)
R. v. Bishop, [2007] O.J. No. 3806
R. v. Black, 2007 CarswellSask 144 (2007 SKPC 28)
R. v. Black, 2007 CarswellSask 234 (2007 SKPC 46)
R. v. Blencowe, [1997] O.J. No. 3619
R. v. Bono, [2008] O.J. No. 4516
R. v. Bono, 2008 CarswellOnt 5887 (Ontario Superior Court of Justice, 2008)
R. v. Brady, 2006 CarswellOnt 9632 (Ontario Court of Justice, 2006)
R. v. Braudy, [2009] O.J. No. 347
R. v. Bryant, 2007 CarswellAlta 1942 (Alberta Provincial Court, 2007)
R. v. Bryant, 2008 Carswell Alta 680 (2008 ABCA 203)
R. v. Burrows, [1995] O.J. No. 1820
R. v. C.(D.), 2009 CarswellNB 550 (2009 NBCA 59)

R. v. C.(L.A.), 2005 CarswellAlta 1122 (2005 ABPC 217)
R. v. C.(W.), 2004 CarswellOnt 8012 ([2004] O.J. No. 5985)
R. v. C.D.H., 1999 CanLII 12222 (BC S.C.)
R. v. C.D.J., [2005] B.C.J. No. 2924
R. v. C.F., [2007] O.J. No. 3534
R. v. C.W.F., [2006] B.C.J. No. 3217
R. v. Cafferata, [2009] Y.J. No. 141
R. v. Carratt, [2005] A.J. No. 743
R. v. Carswell, [2009] O.J. No. 2624
R. v. Chalk, [2007] O.J. No. 4627
R. v. Chalk, 2004 CarswellOnt 9800 (Ontario Superior Court of Justice, 2004)
R. v. Chalk, 2004 CarswellOnt 9801 (Ontario Superior Court of Justice, 2004)
R. v. Chalmers, [1999] O.J. No. 5241
R. v. Cheyne, 2004 CarswellOnt 8871 (Ontario Court of Justice, 2004)
R. v. Cheyne, 2004 CarswellOnt 8872 (Ontario Court of Justice, 2004)
R. v. Cheyne, 2006 CarswellOnt 1427 (206 C.C.C. (3d) 543)
R. v. Chiasson, 2008 CarswellNat 887 (2008 CM 4002) – Court martial
R. v. Chin, 2005 CarswellAlta 2692 (Alberta Provincial Court, 2005)
R. v. Ching, 2006 CarswellBC 3748 (2006 BCPC 661)
R. v. Clemens, 2006 CarswellOnt 7887 (Ontario Superior Court of Justice, 2006)
R. v. Cohen, [2001] O.J. No. 1606
R. v. Cole, [2009] O.J. No. 1755
R. v. Connell, 2006 CarswellAlta 2468 (Alberta Provincial Court, 2006)
R. v. Connor, [2009] O.J. No. 3828
R. v. Coutu, 2007 CarswellOnt 8648 (Ontario Superior Court of Justice, 2007)
R. v. Craig, [2005] O.J. No. 662

R. v. Currie, 2003 CarswellMan 591 (188 Man.R. (2d) 7)

R. v. Cuttell, [2009] O.J. No. 4053

R. v. D.(B.), 2008 CarswellOnt 325 (2008 ONCJ 21)

R. v. D.C. and M.G., 2009 NBCA 59 (CanLII)

R. v. D.F., [2003] O.J. No. 6103

R. v. D.N.G., [2007] B.C.J. No. 3012

R. v. Dabrowski, [2007] O.J. No. 3414

R. v. Daniels, [2004] N.J. No. 406

R. v. Daniels, [2004] N.J. No. 84

R. v. Daniels, 1997 CarswellNfld 320 (156 Nfld. & P.E.I.R. 324)

R. v. Daniels, 1997 CarswellNfld 321 (Newfoundland Supreme Court (Trial Division), 1997)

R. v. Daniels, 1999 CarswellNfld 216 (137 C.C.C. (3d) 527)

R. v. Daniels, 2004 CarswellNfld 363 (2004 NLCA 73)

R. v. Debidin, 2007 CarswellOnt 5725 (75 W.C.B. (2d) 716)

R. v. Decker, 2008 CarswellNS 466 (2008 NSPC 43)

R. v. Dienaar, 2007 CarswellOnt 4819 (Ontario Superior Court of Justice, 2007)

R. v. Dittrich, [2008] O.J. No. 1617

R. v. Dixon, [2005] C.M.A.J. No. 2

R. v. Dolovich, [2009] M.J. No. 161

R. v. Dragani, 2007 CarswellBC 3284 (2007 BCPC 452)

R. v. Dunphy, 2003 CarswellNB 351 (2003 NBQB 272)

R. v. Duval, 2007 CarswellOnt 635 (Ontario Court of Justice, 2007)

R. v. Elder, 2002 CarswellMan 425 (2002 MBCA 133)

R. v. Evans, 1999 CarswellOnt 1502 ([1999] O.J. No. 1831) – Blair T.

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1 S.C.R. 877

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S.C.J. No. 44

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Wynberg v. Ontario, [2005] O.J. No. 1228

X, Re, 2003 CanLII 8784 (QC C.Q.)

APPENDIX D: OBSCENITY PROVISIONS

Offences Tending To Corrupt Morals

Corrupting morals

163. (1) Every one commits an offence who

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

Idem

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(b) publicly exhibits a disgusting object or an indecent show;

(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

Defence of public good

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

Question of law and question of fact

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

Motives irrelevant

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) [Repealed, 1993, c. 46, s. 1]

Definition of "crime comic"

(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

Obscene publication

(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.

R.S., 1985, c. C-46, s. 163; 1993, c. 46, s. 1.

Definition of "child pornography"

163.1 (1) In this section, "child pornography" means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Making child pornography

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of ninety days.

Distribution, etc. of child pornography

(3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of ninety days.

Possession of child pornography

- (4) Every person who possesses any child pornography is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of forty-five days; or
 - (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

Accessing child pornography

- (4.1) Every person who accesses any child pornography is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of forty-five days; or
 - (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

Interpretation

- (4.2) For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself.

Aggravating factor

- (4.3) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the offence with intent to make a profit.

Defence

- (5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

Defence

- (6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence
- (a) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and
 - (b) does not pose an undue risk of harm to persons under the age of eighteen years.

Question of law

- (7) For greater certainty, for the purposes of this section, it is a question of law whether any written material, visual representation or audio recording advocates or counsels sexual

activity with a person under the age of eighteen years that would be an offence under this Act.

1993, c. 46, s. 2; 2002, c. 13, s. 5; 2005, c. 32, s. 7.

Warrant of seizure

164. (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that

(a) any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, within the meaning of section 163,

(b) any representation, written material or recording, copies of which are kept in premises within the jurisdiction of the court, is child pornography within the meaning of section 163.1, or

(c) any recording, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is a voyeuristic recording,
may issue a warrant authorizing seizure of the copies.

Summons to occupier

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

Owner and maker may appear

(3) The owner and the maker of the matter seized under subsection (1), and alleged to be obscene, a crime comic, child pornography or a voyeuristic recording, may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

Order of forfeiture

(4) If the court is satisfied, on a balance of probabilities, that the publication, representation, written material or recording referred to in subsection (1) is obscene, a crime comic, child pornography or a voyeuristic recording, it may make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

Disposal of matter

(5) If the court is not satisfied that the publication, representation, written material or recording referred to in subsection (1) is obscene, a crime comic, child pornography or a voyeuristic recording, it shall order that the matter be restored to the person from whom it was seized without delay after the time for final appeal has expired.

Appeal

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

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

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

(c) on any ground of appeal that involves a question of mixed law and fact, as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI and sections 673 to 696 apply with such modifications as the circumstances require.

Consent

(7) If an order is made under this section by a judge in a province with respect to one or more copies of a publication, a representation, written material or a recording, no proceedings shall be instituted or continued in that province under section 162, 163 or 163.1 with respect to those or other copies of the same publication, representation, written material or recording without the consent of the Attorney General.

Definitions

(8) In this section,

“court”
« tribunal »

“court” means

(a) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,

(a.1) in the Province of Ontario, the Superior Court of Justice,

(b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen’s Bench,

(c) in the Provinces of Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court,

(c.1) [Repealed, 1992, c. 51, s. 34]

(d) in the Provinces of Nova Scotia and British Columbia, in Yukon and in the Northwest Territories, the Supreme Court, and

(e) in Nunavut, the Nunavut Court of Justice;

“crime comic”
« histoire illustrée de crime »

“crime comic” has the same meaning as in section 163;

“judge”
« juge »

“judge” means a judge of a court.

“voyeuristic recording”
« enregistrement voyeuriste »

“voyeuristic recording” means a visual recording within the meaning of subsection 162(2) that is made as described in subsection 162(1).

R.S., 1985, c. C-46, s. 164; R.S., 1985, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 3, c. 17, s. 9; 1992, c. 1, s. 58, c. 51, s. 34; 1993, c. 46, s. 3; 1997, c. 18, s. 5; 1998, c. 30, s. 14; 1999, c. 3, s. 27; 2002, c. 7, s. 139, c. 13, s. 6; 2005, c. 32, s. 8.

Warrant of seizure

164.1 (1) If a judge is satisfied by information on oath that there are reasonable grounds to believe that there is material — namely child pornography within the meaning of section 163.1, a voyeuristic recording within the meaning of subsection 164(8) or data within the meaning of subsection 342.1(2) that makes child pornography or a voyeuristic recording available — that is stored on and made available through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to

- (a) give an electronic copy of the material to the court;
- (b) ensure that the material is no longer stored on and made available through the computer system; and
- (c) provide the information necessary to identify and locate the person who posted the material.

Notice to person who posted the material

(2) Within a reasonable time after receiving the information referred to in paragraph (1)(c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court, and show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the custodian of the computer system to post the text of the notice at the location where the material was previously stored and made available, until the time set for the appearance.

Person who posted the material may appear

(3) The person who posted the material may appear and be represented in the proceedings in order to oppose the making of an order under subsection (5).

Non-appearance

(4) If the person who posted the material does not appear for the proceedings, the court may proceed *ex parte* to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared.

Order

(5) If the court is satisfied, on a balance of probabilities, that the material is child pornography within the meaning of section 163.1, a voyeuristic recording within the meaning of subsection 164(8) or data within the meaning of subsection 342.1(2) that makes child pornography or the voyeuristic recording available, it may order the custodian of the computer system to delete the material.

Destruction of copy

(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.

Return of material

(7) If the court is not satisfied that the material is child pornography within the meaning of section 163.1, a voyeuristic recording within the meaning of subsection 164(8) or data within the meaning of subsection 342.1(2) that makes child pornography or the voyeuristic recording available, the court shall order that the electronic copy be returned to the custodian and terminate the order under paragraph (1)(b).

Other provisions to apply

(8) Subsections 164(6) to (8) apply, with any modifications that the circumstances require, to this section.

When order takes effect

(9) No order made under subsections (5) to (7) takes effect until the time for final appeal has expired.

2002, c. 13, s. 7; 2005, c. 32, s. 9.

Forfeiture of things used for child pornography

164.2 (1) On application of the Attorney General, a court that convicts a person of an offence under section 163.1 or 172.1, in addition to any other punishment that it may impose, may order that any thing — other than real property — be forfeited to Her Majesty and disposed of as the Attorney General directs if it is satisfied, on a balance of probabilities, that the thing (a) was used in the commission of the offence; and (b) is the property of

(i) the convicted person or another person who was a party to the offence, or

(ii) a person who acquired the thing from a person referred to in subparagraph (i) under circumstances that give rise to a reasonable inference that it was transferred for the purpose of avoiding forfeiture.

Third party rights

(2) Before making an order under subsection (1), the court shall cause notice to be given to, and may hear, any person whom it considers to have an interest in the thing, and may declare the nature and extent of the person's interest in it.

Right of appeal — third party

(3) A person who was heard in response to a notice given under subsection (2) may appeal to the court of appeal against an order made under subsection (1).

Right of appeal — Attorney General

(4) The Attorney General may appeal to the court of appeal against the refusal of a court to make an order under subsection (1).

Application of Part XXI

(5) Part XXI applies, with any modifications that the circumstances require, with respect to the procedure for an appeal under subsections (3) and (4).

2002, c. 13, s. 7; 2008, c. 18, s. 4.

Relief from forfeiture

164.3 (1) Within thirty days after an order under subsection 164.2(1) is made, a person who claims an interest in the thing forfeited may apply in writing to a judge for an order under subsection (4).

Hearing of application

(2) The judge shall fix a day — not less than thirty days after the application is made — for its hearing.

Notice to Attorney General

(3) At least fifteen days before the hearing, the applicant shall cause notice of the application and of the hearing day to be served on the Attorney General.

Order

(4) The judge may make an order declaring that the applicant's interest in the thing is not affected by the forfeiture and declaring the nature and extent of the interest if the judge is satisfied that the applicant

(a) was not a party to the offence; and

(b) did not acquire the thing from a person who was a party to the offence under circumstances that give rise to a reasonable inference that it was transferred for the purpose of avoiding forfeiture.

Appeal to court of appeal

(5) A person referred to in subsection (4) or the Attorney General may appeal to the court of appeal against an order made under that subsection. Part XXI applies, with any modifications that the circumstances require, with respect to the procedure for an appeal under this subsection.

Powers of Attorney General

(6) On application by a person who obtained an order under subsection (4), made after the expiration of the time allowed for an appeal against the order and, if an appeal is taken, after it has been finally disposed of, the Attorney General shall direct that

(a) the thing be returned to the person; or

(b) an amount equal to the value of the extent of the person's interest, as declared in the order, be paid to the person.

2002, c. 13, s. 7.

Tied sale

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

R.S., c. C-34, s. 161.

166. [Repealed, 1994, c. 44, s. 9]

Immoral theatrical performance

167. (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

Person taking part

(2) Every one commits an offence who takes part or appears as an actor, a performer or an assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

R.S., c. C-34, s. 163.

Mailing obscene matter

168. (1) Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous.

Exceptions

(2) Subsection (1) does not apply to a person who

(a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;

(b) prints or publishes a notice or report under the direction of a court; or

(c) prints or publishes any matter

(i) in a volume or part of a genuine series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or

(ii) in a publication of a technical character that is intended, in good faith, for circulation among members of the legal or medical profession.

R.S., 1985, c. C-46, s. 168; 1999, c. 5, s. 2.

Punishment

169. Every one who commits an offence under section 163, 165, 167 or 168 is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 169; 1999, c. 5, s. 3.

Retrieved from: <http://laws.justice.gc.ca/eng/C-46/page-4.html#anchorbo-ga:l V-gb:s 163>

APPENDIX E: MEMORANDUM D 9-1-1



Ottawa, February 14, 2008

MEMORANDUM D9-1-1

In Brief

CANADA BORDER SERVICES AGENCY'S POLICY ON THE CLASSIFICATION OF OBSCENE MATERIAL

1. This memorandum has been revised to reflect both legislative and administrative amendments, including revisions to the obscenity indicators made in keeping with changes to the law and the ever-evolving community standard of tolerance.
2. This revision replaces Memorandum D9-1-1, *Canada Customs and Revenue Agency's Policy on the Classification of Obscene Material*, dated September 9, 2003.



Printed in Canada



Ottawa, February 14, 2008

MEMORANDUM D9-1-1

CANADA BORDER SERVICES AGENCY'S POLICY ON THE CLASSIFICATION OF OBSCENE MATERIAL

This memorandum outlines and explains the interpretation of tariff item 9899.00.00, paragraph (a), of the Schedule to the *Customs Tariff*.

Legislation

The *Customs Tariff* provides that the importation into Canada of any goods enumerated, described or referred to in tariff item 9899.00.00 is prohibited.

Tariff item 9899.00.00 reads, in part:

Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that

(a) are deemed to be obscene under subsection 163(8) of the *Criminal Code*; . . .

Subsection 163(8) of the *Criminal Code* reads:

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.

GUIDELINES AND GENERAL INFORMATION

The Uniqueness of Obscenity Decisions in the Canada Border Services Agency's (CBSA) Mandate

1. In the course of administering the many laws of Parliament that regulate, control or prohibit the importation of goods into Canada, CBSA officials deal with a wide range of goods.
2. One category of goods (tariff item 9899.00.00) differs from all others however, and involves material that is suspected of constituting obscenity under subsection 163(8) of the *Criminal Code*. The *Customs Tariff* prohibits the importation of such material into Canada, including written, visual and audio materials.
3. Unlike many other goods with which CBSA officials routinely deal, such expressive materials have been found by the courts to be protected by the freedom of expression guarantee set out in subsection 2(b) of the *Canadian Charter of Rights and Freedoms*.

The Courts and the CBSA's Role in Prohibiting Obscenity

4. The courts have found that, by seeking to prohibit certain types of expressive material, the *Customs Tariff* infringes upon the constitutional right to freedom of expression. However, the courts also found that the infringement of subsection 2(b) of the Charter is justifiable under section 1, because the overriding objective of the legislation is the avoidance of harm to society and that is a sufficiently substantial concern to warrant a restriction on freedom of expression. As a result, the courts affirmed the CBSA's mandate to prevent obscene material from being imported into Canada.

5. Although the courts upheld the CBSA's mandate to prohibit the importation into Canada of obscene material, they found that the legislative provisions that allow CBSA officials to detain and/or prohibit obscene material **do not allow CBSA officials to unreasonably detain and prohibit material that is not obscene**. The courts have ruled that decisions by CBSA officials to unreasonably detain or prohibit material that is not obscene unjustifiably infringe upon importers' rights under the Charter.

6. Therefore, the handling of potentially obscene material and the decision-making process for classifying material as obscene under tariff item 9899.00.00 have different repercussions for the CBSA and for importers than do comparable decisions made in relation to other goods that do not involve Charter issues.

Universality of Application

7. In a decision rendered by the Supreme Court of Canada in December 2000 (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*), the Court affirmed that the legislation applies equally to heterosexual and homosexual material, and is indifferent to whether harm arises in the context of heterosexuality or homosexuality. The Court also affirmed that the legislation applies to both depictions and descriptions and includes written material such as books.

Service Standard

8. In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, the Supreme Court of Canada directed that decisions concerning the classification of goods detained as suspected obscenity must be made in a timely manner. In response to the guidance given by the Court, the CBSA provides a 30-day service standard at both the determination and re-determination levels. This means that,

in general, goods suspected of being obscene must be classified within 30 days of the date of detention, and that the importer must be promptly notified of the decision. Where an importer makes a request for a re-determination of the classification pursuant to Section 60 of the *Customs Act*, the decision must also be made within 30 days of the receipt of the importer's request. If a determination or re-determination is not rendered within the 30-day period, those specific goods should be allowed importation. It should be noted that the size and complexity of the shipment might have an impact on meeting the service standard.

Burden of Proof

9. The courts have ruled that subsection 152(3) of the *Customs Act* is not to be construed and applied so as to place the onus on an importer to establish that goods are not obscene within the meaning of subsection 163(8) of the *Criminal Code*. The burden of proving obscenity rests on the Crown, in this case the CBSA, who is alleging it.

10. When dealing with magazines, or other such compilations, where the undue exploitation of sex is a dominant characteristic, but not necessarily the dominant characteristic, the courts have said that the Crown does not need to prove that an entire issue is obscene. The entire publication will be obscene if it contains obscene passages or pictures that cannot be redeemed by other non-obscene content contained therein (*R. v. Penthouse International Limited et al.* and *R. v. Metro News Limited*).

Determining Whether Goods are Obscene

11. Goods are deemed to be obscene under the *Criminal Code* if the materials exhibit, as a dominant characteristic, the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence.

12. The courts have found that some of the material that the CBSA deals with is quite complex and difficult to evaluate. Since attempts to provide exhaustive instances of obscenity have failed, the only practical alternative for the courts was to strive towards a more abstract definition of obscenity that is contextually sensitive. In order for material to qualify as "obscene," the exploitation of sex must not only be a dominant characteristic, but such exploitation must be "undue." In determining whether the exploitation of sex will be considered to be "undue," the courts have provided specific tests: the community standard of tolerance test and the internal necessities test or artistic merit defence (*Butler v. Her Majesty the Queen* and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*).

13. These tests help to determine whether sexually explicit material, when viewed in the context of the entire work, would be tolerated by the community as a whole. For the purposes of the CBSA, the community to be considered is the whole of Canada.

14. CBSA officials are required to apply these tests in order to determine whether or not goods may be classified as obscenity under tariff item 9899.00.00.

The Community Standard of Tolerance Test

15. The community standard of tolerance test is the first test that officials need to apply in determining whether the exploitation of sex is "undue."

16. The exploitation of sex will almost always be "undue" when the sexually explicit sections of the material fail the "community standard of tolerance test."

17. This 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. **This is not a test of whether given material may be morally offensive to some people, but rather whether public opinion would perceive the material to be harmful to society.**

18. According to the courts, material will generally fail the community standard of tolerance test if it portrays sex with violence, or if it portrays sex that is degrading or dehumanising **and** the risk of harm is substantial.

19. The material referred to in paragraph 18 would generally fail the community standard of tolerance test, not because it offends against morals, but because there is an appreciable risk of harm to society in the portrayal of such behaviour.

20. Harm in this context means that the material predisposes persons to act in an anti-social manner; in other words, in a manner which society recognizes as incompatible with its proper functioning.

21. The stronger the inference of harm, the lesser the likelihood of tolerance.

22. Explicit sex that is not violent is generally tolerated in Canadian society and will not qualify as the "undue exploitation of sex," unless it employs children in its production.

23. Explicit sex that is either degrading or dehumanising but which does not have a substantial risk of harm does not qualify as the "undue exploitation of sex."

Note: Each item must be judged on its own merit and in its entirety.

The Internal Necessities Test, Also Known as the Artistic Merit Defence

24. The last step in the analysis of whether the exploitation of sex is "undue" is the internal necessities test, or the artistic merit defence.

25. Material that, by itself, offends the community standard of tolerance will not be considered "undue" if the portrayal of sex is required for the serious treatment of a theme.

26. The need to apply the internal necessities test arises only if a work contains sexually explicit material that might, in another context, constitute the “undue exploitation of sex.”

27. The portrayal of sex must be viewed in context to determine whether the exploitation of sex is the main object of the work or whether the portrayal of sex is essential to a wider artistic, literary or other similar purpose.

28. In other words, the internal necessities test, or the artistic merit defence, assesses whether the exploitation of sex has a justifiable role in advancing the plot or theme and, in considering the work as a whole, has a legitimate role in the work itself.

29. Any doubt in this regard must be resolved in favour of the freedom of expression, which, in practical terms, means that doubt as to whether or not goods constitute obscenity requires the release of those goods.

Obscenity Indicators

30. The CBSA has set out classification indicators, to help CBSA officials in the identification of obscene materials. These indicators are intended to reflect the evolving national community standard of tolerance for obscene materials. They have been drafted following consultations with various government and non-government bodies across Canada who are involved in the evaluation of adult sex books, magazines and films. These indicators are set out in detail in Appendix B to this memorandum. It should be noted that the indicators are subject to change, as the CBSA strives to ensure that they continually reflect the current community standard of tolerance, as it relates to obscenity.

31. The obscenity indicators apply equally to personal and commercial shipments, as the material is evaluated on its own merit and not its intended distribution.

32. If suspect goods are found to contain material falling under the obscenity indicators, they then must be further examined to determine if the portrayal of sex is essential to a wider artistic, literary or other similar purpose.

33. Goods may only be deemed to be obscene for the purposes of tariff item 9899.00.00 if a dominant theme of the material is the undue exploitation of sex (as described in detail above), **and** where the portrayal of sex is **not** essential to a wider artistic, literary or other similar purpose.

34. Goods not classified as obscenity under tariff item 9899.00.00 include the following:

- (a) goods which counsel, procure or incite persons to commit criminal offenses, unless they are determined to be obscene;
- (b) goods which communicate in a rational and unsensational manner information about a sexual activity that is not unlawful;
- (c) sex aids and toys; and
- (d) advertisements that simply promote the sale of goods which may themselves be prohibited. However, advertisements containing explicit descriptions or depictions of acts considered obscene will be prohibited.

Note: For the purposes of tariff item 9899.00.00, goods that are made (manufactured, printed, purchased, etc.) in Canada and subsequently exported are considered to constitute an importation on their return to Canada.

APPENDIX A

ADVANCE REVIEWS AND IMPORTERS' RIGHTS

ADVANCE REVIEWS

1. Individuals or commercial importers who encounter difficulty in determining whether goods are in compliance with these obscenity guidelines may submit a sample of the goods, prior to importation, to the Prohibited Importations Unit (PIU), at Headquarters, for review. An official from the Unit will then provide an opinion regarding the admissibility of the goods into Canada. This service is designed to promote voluntary compliance with the legislation in cases where the classification of specific materials is not immediately clear. Importers can arrange for an advance review by contacting the PIU in Ottawa, at 613-954-7049. It should be noted that any sample goods submitted to the PIU for the purposes of an advance review will **not** be returned.

IMPORTERS' RIGHTS

When Suspected Goods are Detained – Notification

2. An importer, whose goods are suspected of being obscene according to the legislation, will be provided with a written notice of detention containing the following information: a brief description of the goods detained as suspected obscenity; the port of entry where the goods are detained; the date of detention; and a contact name and telephone number. This information will be provided in the top portion of the Form K27, *Notice of Detention/Determination*.
3. Once a full review of the goods has been conducted, generally within 30 days of the date of detention, the importer will be notified of the determination in writing (i.e. whether the goods are prohibited or released).
4. If the goods are found to be admissible, the importer will receive a written notice of determination containing a brief description of the goods and the date of determination. This information will be provided by way of Part B of the Form K27. The goods will then be released to the importer, subject to the payment of any applicable duties and/or taxes.
5. If the goods are prohibited as obscenity, the importer will receive a written notice of determination containing the following information: a brief description of the goods; the date of determination; the reasons for prohibition; and a list of options available to the importer, including instructions for appeal. This information will be provided by way of Part B of the Form K27.
6. If a shipment contains more than one prohibited title, the Form K27A, *Continuation Sheet*, will be used by CBSA officials to indicate to the importer the specific reasons for which each title was prohibited. A completed Form K27A will then accompany the completed Form K27.

When Goods Are Prohibited – Importers' Rights

7. When goods are deemed to be obscene, and are therefore prohibited, the importer may exercise any one of the following options, as set out on the reverse of the Form K27, *Notice of Detention/Determination*:
 - a) the decision may be appealed by writing to the Customs Disputes Section of the Prohibited Importations Unit, at the address provided on the Form K27, within 90 days of the date of the determination, referring to the title of the material, the applicable Form K27 control number, and any other applicable information;
 - b) the goods may be exported, under customs control and at the importer's expense and arrangement; or
 - c) the goods may be abandoned to the Crown, pursuant to section 36 of the *Customs Act*, in which case the material will be destroyed, pursuant to section 142.
8. If the importer fails to appeal or to provide instructions either to export or to abandon the goods within 90 days of the date of decision, the goods will be considered forfeit and will be destroyed.

APPENDIX B

OBSCENITY INDICATORS

1. When dealing with material where a dominant theme is the portrayal of sex, the indicators set out below apply.

Note: For the purposes of determining obscenity under tariff item 9899.00.00, the term “sex” includes depictions and/or descriptions (including illustrations and animation) of any oral, anal or vaginal penetration, masturbation and/or the full or partial exposure of genitalia, pubic regions, anal regions and/or female breasts, for the purposes of sexual arousal.

2. Goods containing one or more of the following indicators may be found to be obscene and prohibited entry into Canada, if it is established that the portrayal of sex is not essential to a wider artistic, literary or other similar purpose.

Depictions and/or descriptions of:

- (a) Sex with degradation or dehumanisation, if the risk of harm is substantial, e.g.
 - (i) actual or implied urination, defecation or vomit onto or into another person, and/or the ingestion of someone else’s urine, feces or vomit, with a sexual purpose, excluding consensual urine onto another person;
 - (ii) ridicule and/or humiliation
- (b) Sex with pain
- (c) Sexual assault
- (d) Sex with violence
- (e) The taking of a human life for the purpose of sexual arousal
- (f) Incest
- (g) Bestiality
- (h) Necrophilia

Note: Depictions and descriptions of sexual activities involving children and/or juveniles (persons under the age of 18) will generally constitute child pornography.

Interpretation

The following represents the CBSA’s interpretation of several terms contained within its obscenity indicators. These definitions are intended solely for the purposes of classifying material as obscenity under tariff item 9899.00.00. **Please note that these terms apply only in situations where sexual context has been established.**

“Bestiality” is defined as a sexual act between a human being and a live animal, including implied or real acts.

“Humiliation” is defined as the practice of lowering an individual’s self-respect or dignity for the purpose of sexual arousal.

“Incest” is defined as a sexual act between parent/child, siblings or grandparent/grandchild, whether related by blood, adoption or fostering.

“Necrophilia” is defined as a sexual act between a live person and a dead person or a dead animal.

“Pain” is defined as clear discomfort expressed through visual, verbal or descriptive cues. Pain may be inferred where a reasonable person would conclude that the activity would result in pain. This may include, but is not limited to, situations involving striking, gagging, choking, cutting, burning, branding or similar activities resulting in areas of the body becoming red or bruised, welts being raised or the skin being broken. For the purposes of this indicator, the portrayal of pain must be for sexual arousal.

“Ridicule” is defined as the practice of mocking, making fun of or belittling an individual for the purpose of sexual arousal.

“Sexual assault” is defined as an activity where an individual is forced or induced to participate in a sexual act without their consent. This includes situations where sexual activity is induced:

- through the threat of bodily harm or death, which may include the use of a weapon (real or imitation)
- through the abuse of a position of power, trust or authority

This also includes situations where a person is clearly unable to consent to their participation in a sexual act.

“Taking of a human life for the purpose of sexual arousal” is defined as the portrayal of the killing of a human being with the intent to sexually arouse. This would not include instances where the portrayal of death occurs by accident, negligence, due to health reasons or for any other reason outside of sexual arousal, even if the death is portrayed in a sexual context.

“Violence” is defined as physical acts of aggression, which appear to cause, or are likely to cause, bodily harm. These may include, but are not limited to, situations involving beating, kicking, extreme limb twisting or asphyxiation. For the purpose of this indicator, the portrayal of violence must be for sexual arousal.

Note: While these indicators and definitions seek to capture the vast majority of obscene material that may fall under the provisions of tariff item 9899.00.00, they are not exhaustive and they are subject to change as the CBSA strives to continually reflect the evolving community standard of tolerance.

APPENDIX C**FORMS**

Paper copies of the forms K27, *Notice of Detention/Determination*, and K27A, *Continuation Sheet*, are no longer available. The current versions of these two forms are now available to all CBSA officials electronically, exclusively through the CBSA's intranet under "Forms and Templates."

REFERENCES

<p>ISSUING OFFICE –</p> <p>Prohibited Importations Unit Border and Compliance Programs Directorate Admissibility Branch</p>	<p>HEADQUARTERS FILE –</p> <p>5905-7-1</p>
<p>LEGISLATIVE REFERENCES –</p> <p><i>Canadian Charter of Rights and Freedoms</i>, section 1 and subsection 2(b) <i>Criminal Code</i>, subsection 163(8) <i>Customs Act</i>, sections 36, 58, 60 and 142 and subsection 152(3) <i>Customs Tariff</i>, tariff item 9899.00.00 of the Schedule</p>	<p>OTHER REFERENCES –</p> <p>N/A</p>
<p>SUPERSEDED MEMORANDA “D” –</p> <p>D9-1-1, September 9, 2003</p>	

Services provided by the Canada Border Services Agency are available in both official languages.

