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Freedom of Expression and the Obscenity Cases (1963–74)

A teacher was telling her class about the history of King Alfred. She reminded them of many things but also of the famous pancake episode.

King Alfred was walking along the road when he came to a house where there lived a young widow and the widow asked the King to mind the pancakes while she went out and King Alfred's mind was given to affairs of state and he forgot to remember about the pancakes and they got burnt.

The teacher asked the class to write an essay on King Alfred and much to her consternation she found that when the essays were written, practically every one dealt with the pancake episode to the exclusion of everything else.

She felt that they would get somewhat of a distorted picture of this King so she said the essays had to be written over again but not a word about the pancakes. Said and done. The very first essay that the teacher got and read went something like this, "King Alfred was an important King who lived during a troubled period in English history. One day he was walking along a lonely country road when he came to a house where there lived a young widow, but the less said about that the better."

[From preamble, "A Creed for Lawyers," speech, New York, 1967]

In the area of the law and its determination of obscenity we enter upon fighting ground, for opinion may differ as to what is actually obscene, or merely in bad taste, or simply rather rambunctious humour. In 1959 Canada's Parliament undertook to define obscenity in an amendment to the *Canadian Criminal Code* (section 159.8), declaring, "Any publication, a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence, shall be deemed to be obscene."

It was to be the "internal necessities" of the work in question, or "the standards of acceptance of the community," that would determine the "undue exploitation of sex." To apply the definition is not simple, as

witnessed by the case concerning D.H. Lawrence's *Lady Chatterley's Lover*, in which the Supreme Court of Canada divided five to four, the majority holding that the book was not obscene under the definition. Here I may be permitted a momentary digression to recall the book review that appeared in the magazine *Field and Stream*, which said:

> Although written many years ago, *Lady Chatterley's Lover* has just been reissued by Grove Press, and this fictional account of the day-to-day life of an English gamekeeper is still of considerable interest to outdoor-minded readers, as it contains many passages on pheasant raising, the apprehending of poachers, ways to control vermin, and other chores and duties of the professional gamekeeper. Unfortunately one is obliged to wade through many pages of extraneous material in order to discover and savour these sidelights on the management of a Midlands shooting estate, and in this reviewer's opinion this book cannot take the place of J.R. Miller's *Practical Gamekeeping*.

In one of a series of appeal court cases in which we dealt with the area of obscenity, the entire court other than myself found the magazines in question to be obscene. This was in 1964, in the case of *Regina v Dominion News & Gifts (1962) Ltd.* The Winnipeg police had charged the Dominion News company under the federal criminal law with being in possession of, and selling obscene literature. The magazines in question were *Dude* and *Escapade*. By present-day standards these magazines would seem very polite, innocuous, innocent. No one now would take a second look at them. They were mild compared to what we see now.

But at that earlier time the trial judge in Winnipeg ruled them obscene. When an appeal was taken to the next level, the county court, on October 12, 1962, Judge A.R. Macdonnel again ruled the magazines obscene and issued a confiscation order. An appeal then came to our court. The full court of five judges sat on the case, and four of them said, "obscene." I, who had been brought up on Aikins Street and Stella Avenue and had a somewhat more rugged outlook in these matters, read the magazines and came to a different conclusion.

The test in this matter was to be community standards, and by the community standards of those days, although I regarded the magazines as risqué, I did not find them to be obscene and thus wrote a dissenting judgment.

The *Criminal Code of Canada*, enacted in 1892, included as an offence the publication of obscene matter that would tend to corrupt morals. The act did not, however, define "obscene matter," and for decades the test applied was a 1868 British case, *Hicklin*,[1] in which Chief Justice Alexander Cockburn declared: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[2] The *Hicklin* case was used as the test to determine obscenity until the 1959 amendment, which the Diefenbaker government "clearly intended to add ... to the existing *Hicklin* text."[3]

JUDGMENT: Regina v Dominion News & Gifts (1962) Ltd[4]

FREEDMAN, J.A. (dissenting): Two appeals, one relating to the magazine "Escapade," the other to the magazine "Dude," came on for hearing together. In both cases the defendant appealed against an order of Macdonnel, C.C.J., wherein that learned judge held the respective magazines to be obscene and ordered them to be forfeited to Her Majesty....

The case for the crown stands or falls on the [argument] ... that a dominant characteristic of these magazines was "the undue exploitation of sex."

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

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1 *The Queen v Hicklin*, (1868) LR 3 QB 360.

2 *Ibid* at 371.

3 Ian Bushnell, *Captive Court: A Study of the Supreme Court of Canada* (Montreal and Kingston: McGill-Queen's University Press, 1992) at 336.

4 *Regina v Dominion News* (1963) 40 WWR 65, rev'd [1964] SCR 251.

hundreds or thousands, to the prurient, the lascivious, the ignorant, the simple, or even the merely curious. Admitting, therefore, that a large readership is not the test, I must yet add that it is not always an entirely irrelevant factor. For it may have to be taken into account when one seeks to ascertain or identify the standards of the community in these matters. Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered. Obviously, this is no easy task, for we are seeking a quantity that is elusive. Yet the effort must be made if we are to have a fair objective standard in relation to which a publication can be tested as to whether it is obscene or not. The alternative would mean a subjective approach, with the result dependent upon and varying with the personal tastes and predilections of the particular judge who happens to be trying the case.

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

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

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.

Guided by these considerations I turn back to the magazines in question. Both contain photographs of partially nude women. Female bosoms are exposed in both. I am far from persuaded that the mere representation of the female breast, as in the present cases, serves to establish obscenity. I observe that these photographs are of women alone, never accompanied by or placed

in juxtaposition to a male person, except in the case of one group of photographs depicting a male and female in certain ballet dancer poses. Nor should it be thought sex pervades the entire issue of these magazines. I do not say it is essential for conviction that this be the case. A dominant characteristic is enough, provided the exploitation of sex is undue. But I do not find that there.

Viewing both magazines as a whole, I am unable to say that they are obscene. The witness Arnold Edinborough described them as flippant and saucy, and noted that where they dealt with sex they treated it in a normal and not a perverted fashion. I would agree. Risqué the magazines are, but not obscene....

In this case, as the sole dissenter in our court, I did not have to wait long for confirmation of my views. An appeal was taken to the Supreme Court of Canada on the basis of my dissenting judgment. The seven judges who sat on the case were unanimous in their decision, and paid me the high honour of accepting my view on the matter.

> In his terse reasons for judgment in this case, Chief Justice Robert Taschereau, writing for the Supreme Court, said, "We are all of the opinion that the appeals should be allowed. We agree with the reasons given by Freedman J.A .... We wish to adopt those reasons in their entirety and do not find it necessary to add anything to them." Interestingly, Taschereau, one of the most conservative stalwarts on the Supreme Court Bench of the time, had just one year earlier been among four Supreme Court minority judges who had dissented in the case of *Brodie v the Queen*, in which the majority judges, in a vote of five to four, ruled that *Lady Chatterley's Lover* was not obscene.
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> The Supreme Court's ruling on *Brodie*, it has been said, moved the country into a new era regarding freedom of expression. But it was Sam Freedman's judgment in the *Dominion News & Gifts* case that, according to legal scholar Walter Tarnopolsky, would long provide "the best guide" to the meaning of community standards.
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> A year later Sam received a letter from the Honourable Mr. Justice Neil Primrose, under the heading "re: Dominion News and Gifts (1962) Ltd. and Her Majesty The Queen." The letter had one line: "I think you are a great judge!" To which Sam Freedman replied, "Steady! Take it easy! But thank you very much for your enthusiasm, none the

> less. It was kind of you to write so warmly and with such a delightful extravagance."[5]

In agreeing with my view, the Supreme Court of Canada emphasized that community standards in Canada must be contemporary. The effect of this turn of events was that the law on obscenity as enunciated by the Supreme Court of Canada was to be found not so much in the final judgment of the Supreme Court on that case but in the dissenting judgment of our court in Manitoba.[6] It was a pretty and delicate compliment that the Court paid to me.

As an individual, I am not greatly enamoured of censorship, judicial or otherwise; if it were up to me I would rather incur the risk of obscenity than tell people what they can see, what they can read and what they can't read. But Parliament has made a decision. The law as enacted by Parliament has declared that undue exploitation of sex constitutes obscenity, and it is then for the court and the particular case to determine whether there has been undue exploitation of sex. In a number of cases I did find certain materials to be obscene, both books and magazines. In *Regina v Great West News Ltd* (1970), for instance, I was constrained to say that the two magazines in question were obscene. That is the case in which, in writing my own reasons as a member of a unanimous court, I stated at the end, "I may add–parenthetically and not particularly relevantly–that these magazines go over the line even by my own robust standards."[7]

In one of those cases we saw, for example, a magazine in which there was a succession of pictures of nude females. They were posed with their feet spread wide apart, and their pubic hairs had been shaved off. The posture they assumed enabled the reader to see about a third of the way up their vaginas. That was sex for sex's sake–there was no plot–it was simply undue exploitation of sex. In that context, liberal judge though I am, I had no choice but to apply the law on obscenity.

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5 Letters (13 August 1964, 8 September 1964), Winnipeg, Provincial Archives of Manitoba (box 68, file no 7).

6 Peter H Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 303 also makes the point that this dissenting opinion in the Manitoba Court of Appeal "became in effect the law of Canada."

7 *Regina v Great West News Ltd* (1970) 72 WWR 354 at 355, 10 CRNS 42.

There is also no question under the law that in some areas, such as child pornography, the materials should be suppressed. Then too there is the question of violence—how to reconcile that acts of sex, basic to human life, are considered to be obscene, but movies and television can show almost any form of violence. We have far too much violence in movies, I believe, and I find it revolting—Brownie and I have walked out of films for that reason. But violence by itself does not come under the obscenity law. The law's definition of obscenity includes violence, but it is "sex and violence" together, not violence in itself but violence associated with sex. A change in this regard is something that deserves consideration.

In the following judgment, Sam spelled out more specifically what he saw as some of the complexities of the obscenity issues.

JUDGMENT: Regina v Prairie Schooner News Ltd[8]

FREEDMAN, J.A. (in dissent respecting the sentence): This is an obscenity case. It concerns an abundance of printed material, roughly divisible into two classes. One consists of 227 paperback books; the other of 29 magazines, largely pictorial in nature....

That the publications are marked by an exploitation of sex is unquestionable. Indeed, that fact is not denied. But obscenity requires something more. There must be "undue" exploitation of sex. The inclusion of Parliament of the adjective "undue" in its definition of obscenity under ... the Criminal Code, 1953-54 ... represented an acknowledgement that there could be an exploitation of sex that would be permissible and lawful, and in no way obscene .... Our task on this appeal is to determine whether the exploitation of sex in the publications before us was permissible and lawful or whether it was, as the trial Judge found, obscene. That determination is to be made according to contemporary community standards in Canada....

I find somewhat less difficulty with the magazines than with the books. The magazines are closely akin to those that were before this Court in *Reg. v. Great West News* (1970) ... and there held to be obscene....

It is not for the court to determine whether publications of this kind hurt anyone or do any demonstrable harm. Parliament has already made that determination. It has spoken on the matter by defining obscenity in terms of

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8 *R v Prairie Schooner News Ltd*, [1970] MJ No 32 (MB CA), 75 WWR 585.

undue exploitation of sex and proscribing the possession, sale, distribution, etc., of all publications falling within that definition. All that remains is for the court to decide whether, according to contemporary Canadian standards, the present publications are within the definition or without it. In my view what is offered in these magazines goes beyond what the Canadian community is prepared to tolerate even in the relatively liberal atmosphere of 1970....

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

But books can be obscene, and the learned trial Judge found that those in the present case were. Our task is to determine whether his finding was correct.

I am bound to say that these books are marked by a high degree of crudity and vulgarity. *Mental Revenge* is typical of them all, and I select it as both representative and illustrative. It concerns one Jack Doyle, an ex-Marine not long back from the war in Vietnam. The chambermaid has come into his hotel room for the purpose of making it up. But, in the matter that is characteristic of this type of literature, she is quickly diverted from that purpose....

> Sam Freedman then made a point of reading a page from the book that described in detail the amazing activities and proclivities of Jack and the chambermaid. He proceeded:

Pausing only to note that Jack Doyle's age is not given, I point out that the whole book is filled with incidents similar to that quoted. There are variations, it is true. Thus one episode sets forth in full detail a lesbian sexual experience, while another shows Jack Doyle taking on three females in sequence as well as simultaneously. This last accomplishment is perhaps better left in this way, without further descriptive elaboration.

Now, crudity is not necessarily obscenity. The Canadian public has more than once accepted books whose pages contain descriptions of sexual experiences set forth, if not crudely, at least with much detail and candour. *Lady Chatterley's Lover* and [Philip] Roth's *Portnoy's Complaint* are but two examples. What distinguishes books of that class from the books we have before us in this case? There are of course many differences, but if I were to isolate the single one which, in the context of obscenity law, sets the two classes apart I would describe it thus: In the one case, sex grows out of the storyline, it plays a role in the plot's development, and it is material to the author's legitimate social purpose; in the other, sex is there for its own sake, the "plot" being either non-existent or at most a transparently thin framework on which to hang the inevitable succession of sexual experiences....

The books in the present case conform to the standard formula of hard core pornography. In my view they go beyond the Canadian community tolerance level and are obscene under our law....

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How does one determine "community standards"? What about the vast silent majority who say nothing on these issues?

In the last analysis it is the judge's impression of what community standards are in relation to the particular issue that faces him. It is not an easy thing. The effort is to arrive at an objective assessment of community feeling on the matter. I would be less than candid if I did not admit that to a considerable extent a subjective approach colours the decision. One judge says, "I see community standards as requiring me to say that this is obscene." His colleague sitting next to him on the bench says, "I see community standards as pointing in a different direction and that requires me to say that this is not obscene." What's the answer? Community standards can't be finally determined but are expressed through the determination of a particular judge who says what he thinks they should be.

There have been attempts at random samplings of the population's opinion relating to these standards—a sort of Gallup poll idea. We have had one encounter with that in Manitoba, and will probably have more. There does seem [in 1977] to be a movement to tighten up on what people can read and see and listen to. The pendulum seems to be swinging back towards a more restrictive approach. The people who like the open society—I read anything, I see anything, I listen to anything—are not the

ones who are marching to Parliament Hill and asking for a retention or even a liberalization of the law. It is usually the people who are against the law who will speak up. There has been a good deal of agitation against obscenity, against pornography, and people in the House of Commons are responsive to popular pressures. I would predict that in the next two to four years you are going to have a stronger obscenity law—that is, a less liberal law.

Something else: I do not normally use the four-letter words myself. I am a lover of writers like Charles Dickens and Walter Scott and the Victorians—you never see a dirty word in their books, and they make their points effectively. But that doesn't mean that my own personal standards prevent me from taking a liberal point of view on what should be available to the general public.

In dealing with this issue of obscenity, in keeping with the written law, one has to decide whether there is an *undue* exploitation of sex. Some degree of exploitation of sex is recognized to be proper, in some cases. It is the undue exploitation of sex which attracts the condemnation of the law. In the later *Last Tango in Paris* case, the point I made was that sex was not introduced for the sake of sex but was a matter growing out of the innate necessities of the film. I distinguished that from the case of the pornographic films, which are on the whole absent of plot but consist of a series of sexual and erotic incidences, one following the other, all gathered around a thin framework which substitutes for plot.

Once, when we were in New York City, Brownie and I saw a movie called *The Resurrection of Eve*. It was the most explicit thing you could get. It had sexual intercourse, fellatio, cunnilingus, tangos—that is, not two people but four or six or eight—who is doing what to whom? At the end of the two hours you come out of the place not turned on but absolutely turned off. It was disgusting, but does that mean that if I were the arbiter of our laws I would close the show down? No, because no one *has* to go to see that film. I paid five dollars for a ticket, my reason being that the *Last Tango in Paris* case was coming up in the following weeks, and in the spirit of scientific research I wanted to see what was being shown in other places—and maybe I was just being human, I won't deny that.

JUDGMENT: Regina v Odeon Morton Theatres Ltd & United Artists Corp (1974, CA)[9]

FREEDMAN, C.J.M. (Hall and Matas J.J.A. concurring): The subject of this appeal is the film "Last Tango in Paris." The issue to be determined is whether that film is obscene under the terms of s.159 of the Criminal Code. The case came on for trial before Provincial Court Judge Enns. That learned Judge, after a hearing that extended over several days and included the testimony of 10 expert witnesses, concluded that the film should not be adjudged obscene. This is an appeal by the Crown against his decision.

... Because the Court is not unanimous on this issue and because the matter may possibly yet be carried to the Supreme Court of Canada, it may be justifiable for me to state my views on the merits of the Crown's appeal, even if in the circumstances such views are in the nature of obiter dicta....

Perhaps a proper starting point here might be a brief statement concerning the film and its plot. The work is the product of the distinguished Italian film director, Bernardo Bertolucci, who at the young age of 32 had already achieved a position of eminence in the world of the cinema. "Last Tango in Paris" was both written and directed by him. Its feature roles are played by Marlon Brando, the well-known American actor, and Maria Schneider, a young star from France.

Early in the film its central character, Paul (played by Brando) is shown to us in an unfurnished Paris apartment which he is thinking of renting. The female star Jeanne (Maria Schneider) is there for a similar purpose. They are strangers to each other. Paul, a man of about 45 years of age, appears to be distressed, tormented, embittered. Flashbacks will later reveal to us the source of his anguish. In the apartment little communication between the man and the girl takes place. But an encounter between them is plainly developing, although what form it will take the viewer does not know. Suddenly Paul closes the apartment door, walks over to the girl, takes her in his arms and carries her to the wall. There, in a vertical position, without removing their clothes, they engage in an act (simulated) of sexual intercourse....

Paul's story emerges in stages. He is reeling from the blow of his wife's suicide. Their marriage had been a failure, the wife had openly taken a lover, and Paul has been driven to a state in which he feels his very masculinity questioned and challenged. Lost and anchorless he seeks through Jeanne some form of reestablishment of himself. The contact between them is, in the

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9 *R v Odeon Morton Theatres Ltd*, [1974] MJ No 6 (MB CA), 45 DLR (3d) 224.

words of the well-known theatre director, John Hirsch, "on the most basic kind of a level, a kind of wordless level, which is the sexual act ..."

What begins as a quest for the assertion of male mastery moves on to love.

Jeanne for her part does not entirely recoil from male mastery. Often indeed she appears to welcome it. She herself is engaged to a young film maker who is constantly exploiting her freshness and vitality for use in his films. To him she is an object—a camera object—upon whom he is constantly focusing his camera, whether she is willing or not. Their plans to marry seem to be abandoned when the young man is brought to a realization that Jeanne looks upon marriage from immature eyes and is likely to make a game of it.

A particularly revealing flashback tells us much of the relationship that existed between Paul and his wife. It takes us to a funeral parlour and shows Paul standing over his wife's open coffin or bier. A long soliloquy follows. In the course of it he moves from expressions of tender love to angry bitterness. This was the woman who had commanded his deepest affection and who had then betrayed him. Her suicide following upon her open infidelity has left him shattered. His chance meeting with Jeanne in the isolation of the empty apartment has opened an avenue by which he may find personal restoration....

There are several depictions, in varying forms, of sexual encounters between Paul and Jeanne. They included sexual intercourse, masturbation, and sodomy. These are simulated but they are not lacking in vividness. The evidence shows that in a film that runs for two hours and nine minutes the scenes involving sex or nudity—seven in number—in their aggregate total 18 minutes and 59 seconds. This includes the seven scenes in their entirety, commencing with the introduction or unfolding of a particular scene and terminating with the movement of the camera to another subject. Of that period of 18 minutes and 59 seconds the actual time in which sex and nudity are revealed aggregates eight minutes. And of that eight minutes the actual sex scenes alone take up four minutes and 56 seconds.

These times are not referred to for the purpose of negating the view that sex is a dominant characteristic of the film. It is indeed such a characteristic. The times are relevant, however, to the central issue whether there has been an undue exploitation of sex in the film. Brevity of itself does not exclude a possibility of undue exploitation. In every case we would need to know all the facts, particularly the relationship played by the sexual episodes to the remainder of the allegedly offending publication. Conceivably a film may have sexual scenes, brief in time but lurid in character, that are so little related to or warranted by plot, that one is impelled to a conclusion that they represent sex merely for its own sake. It is otherwise if the sexual scenes play an essential

role in the development of a legitimately presented plot. Even then, if the sexual scenes so dominate the film as to dwarf the plot itself, a finding of undue exploitation may be possible. It is in that context that the times of the sexual episodes in "Last Tango" become relevant. In my view the sexual scenes in the present film advance the plot rather than dwarf it. As such their role in the film is justifiable.

In determining whether a publication is obscene or not one must consider it in its entirety. To isolate particular portions of it and to found a conclusion on those portions alone would be unfair. No less important, it would be contrary to the law as declared by our highest Court. The Supreme Court of Canada settled that matter in *R. v. Brodie* (1962) ... the case which dealt with D.H. Lawrence's *Lady Chatterley's Lover*.

In that connection 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.

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

The basic characteristic of "skin-flicks" is that they are either wholly destitute of plot or, if they do have anything resembling a storyline, it is one that is transparently thin, a palpably meagre framework on which to hang one erotic episode after another. In describing such films Father Pungente, chairman of the Manitoba Film Classification Board, stated that they invariably show, among other depictions of sex, a scene of lesbianism as well as the inevitable wild orgy. Anyone familiar with "skin-flicks"—either through stag movies or through certain types of commercial theatres—will be aware of something else too, namely that the sexual scenes often go beyond mere

simulation. I share the view of the many qualified observers who testified for the defence that sex in "Last Tango" rests on an altogether different footing and that its role there is justified by the internal necessities of the film....

I have referred to the opinions of the experts, on both sides of the fence, with full knowledge that in the last analysis it is the Court and not they who must decide the issue of obscenity. But their evidence is clearly relevant and admissible, its weight being a matter for the determination of the Court. That determination is not to be made merely by a counting of heads, on one side or the other. What kind of head it is and what comes out of it are the important things. It remains only to add that in the present case, where manifestly the views of the experts were honestly given and no issue of credibility on that score arises, an appellate Court is in virtually as good a position to assess the expert testimony as the Court of first instance. And on that point I have already indicated where my preferences lie.

"Last Tango in Paris" is a film which has evoked both high praise and strong criticism. But the issue is not whether it is a good film or a bad film, but rather whether it is obscene under the Criminal Code. That issue must be determined according to contemporary community standards in Canada. Relevant to that determination are many factors. One is the testimony of the experts, to be judicially assessed and weighed. Another is the circumstance that the film is adult fare only, as it has been given the classification "Restricted Adult" thereby becoming unavailable to persons under 18 years of age. A third is the fact that the film is being shown in New Brunswick, Quebec, Ontario, and British Columbia, in all of which Provinces it was given clearance by censor boards who made no deletions in it. (The film is of course being shown in many other countries in the world as well.) The record does not disclose a single Province that has banned "Last Tango". I am loath to believe that Manitobans are less tolerant, less sophisticated, or more in need of protective shelter than other Canadians.

Having regard to all these factors I am of the view that the film in question is not obscene....

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In the *Last Tango* case mine was the majority judgment, with two of our other judges dissenting.[10] In the end the Attorney General of

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[10] Mr. Justice Freedman's majority decision was supported by Mr. Justice Gordon Hall and Mr. Justice R.J. Matas. Mr. Justice A.M. Monnin dissented, supported by Mr. Justice R.D. Guy. Mr. Justice Monnin found the film to be "a piece of debauchery."

Manitoba decided not to appeal to the Supreme Court of Canada. That made our judgment the last word on that particular subject.

> Some three decades after the *Dominion News* judgment, the Freedman statement on community standards was still being cited by textbooks, legal dictionaries, and, most importantly perhaps, by high court judges.[11] In the 1990s the landmark decision became the Supreme Court's decision in *R v Butler*,[12] which built on *Towne Cinema*.[13] The decision in *Butler* held that section 163 of the *Criminal Code* (formerly s. 159) infringed s. 2 of the Canadian Charter of Rights and Freedoms, but could still be justified under s. 1 of the Charter. In their judgment the judges quoted at length Freedman's eloquent passage on community standards in *Regina v Dominion News & Gifts (1962) Ltd.* as well as detailing his discussion of what constitutes "undue" exploitation of sex in *R v Odeon Morton Theatres Ltd.* (1974).

His dissenting judgment concluded, "On the basis of the transcript of the trial as it appears, the exhibits as I have read or seen, the film is unduly exploitive of sex ... By virtue of this undue exploitation, coupled with a degree of violence in language and in acts which can be seen or heard through the 129 minutes of it, the film is deemed to be obscene ... It goes beyond the Canadian community tolerance level and is obscene in fact and in law." *The Winnipeg Tribune* (30 January 1974) 1, 5.

11 See for e.g. Daphne A Dukelow & Betsy Nuse, *The Dictionary of Canadian Law*, 2d ed (Toronto: Carswell, 1995) at 215.

12 [1992] 2 WWR 577, 1 SCR 452.

13 *Towne Cinema Theatres Ltd v R* [1985] 4 WWR 1, 1 SCR 494.

Fig. 6