Review of the Law of Indecency and Nudity 1999

A REVIEW OF THE LAW OF INDECENCY AND NUDITY

INTRODUCTION

On July 19, 1991, in Guelph, Ontario, a young woman took off her top and walked, topless, along the streets of the city. Eventually, she arrived at a residence where she sat on the porch for a period of time. She was seen by approximately 250 people. Some, young men, came to leer; others to object. Some removed their children, who were playing on their front lawns. Traffic was disrupted by cars and buses slowing down to look. Eventually, the police arrived, as a result of complaints, and the woman stated that she was hot and was more comfortable without her top on. She was charged with committing an indecent act in a public place, contrary to s.173(1) of the Criminal Code. She was convicted at trial. The conviction was upheld by the Summary Conviction Appeal Court. On further appeal to the Ontario Court of Appeal, the conviction was overturned and an acquittal entered [1]

The Crown in Ontario reviewed the case and decided not to appeal the decision to the Supreme Court of Canada. It was concluded that there was no likelihood that leave would be granted by the Supreme Court. The public reaction was strong and quite vocal. Hundreds of letters and telephone calls from throughout the province of Ontario came pouring in to the Attorney General of Ontario protesting the Ontario Court of Appeal decision and requesting that some steps be taken to prevent public toplessness by women. Throughout the summer of 1997, many Ontario municipal councils considered and debated the issue of toplessness by women occurring in their municipality and what, if any, action was to be taken about it. Many of them wrote to the Attorney General of Ontario asking for the provincial government to take some action. The Attorney General wrote to the federal Minister of Justice, as did many members of the public from Ontario, asking for changes to the criminal law.

The problem was placed on the table for discussion at the 1997 meeting of the Criminal Law Section of the Uniform Law Conference. After a lengthy discussion, it was decided that further work needed to be done before any specific recommendations could be made. The following resolution was passed:

That a working group of the Criminal Section of the Uniform Law Conference be established to examine the indecency and public nudity provisions of the Criminal Code as well as the legal and constitutional issues related to the feasibility of local (i.e. municipal) regulations and to report back at the next Conference.

This paper reviews the state of the law relating to indecency and nudity, and the question whether local regulations may be feasible to deal with problems of dress in public places.

INDECENCY PROVISIONS IN THE CRIMINAL CODE

The current relevant sections of the Criminal Code are sections 173 and 174. They state as follows:

SECTION 173

(1) Every one who wilfully does an indecent act
(a) in a public place in the presence of one or more persons, or
(b) in any place, with intent thereby to insult or offend any person, is guilty of an offence punishable on summary conviction.
(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction.

SECTION 174

(1) Every one who, without lawful excuse,
- (a) is nude in a public place, or
- (b) is nude and exposed to public view while on private property, whether or not the property is his own, is guilty of an offence punishable on summary conviction.

(2) For purposes of this section, a person is nude who is so clad as to offend against public decency or order.

(3) No proceedings shall be commenced under this section without the consent of the Attorney General.

Other offences in the Criminal Code that contain the concept of indecency are:
- Section 163(2)(b) [publicly exhibiting an indecent show]
- Section 167 [indecent theatrical performance]
- Section 168 [mailing indecent matter]
- Section 175(1)(b) [causing disturbance by indecent exhibition]
- Section 197 [definition of common bawdy house includes a place resorted to for the practice of acts of indecency].

The development of the law relating to indecency involves all of the above sections. The criteria used by the courts to determine indecency are applicable to any section where the concept of indecency is involved.

HISTORY OF INDECENCY

1. England

The first offence of indecent exposure has been identified as that of R. v. Sidley in 1663. [2] In this case, the accused appeared nude on a balcony in Covent Garden. The court held that it was a misdemeanour at common law to expose the naked person.[3] By the nineteenth century, the exposure no longer needed to have occurred in a public place:

- it is sufficient if it is made where a number of persons may be offended by it and several see it.[4]

By the mid-twentieth century, it was held that it is "not necessary for the prosecution to prove that the act of indecency in fact disgusted or annoyed those who actually saw it". [5] The test for indecency is whether the act in question would disgust and annoy any ordinary members of the public who might be confronted by it.

In addition to the common law offences, there were statutory offences for bodily exposure: the Vagrancy Act, 1824 section 4, the Town Police Clauses Act, 1847 as well as other local ordinances and bylaws.[6]

Over and above offences directly related to exposure of the body, there is also the common law offence of "outraging public decency". See footnote 7 7 This offence was most recently applied in the case of Gibson and Sylveire. See footnote 8 8 In this case, the accused were involved with displaying a pair of earrings made from freeze-dried human foetuses at an art gallery. The court affirmed the existence of the common law offence of outraging public decency, and went on to distinguish it from the offence of obscenity:

- There are, it seems to us, two broad types of offence involving obscenity. On the one hand are those involving the corruption of public morals, and on the other hand, and distinct from the former, are those which involve an outrage on public decency, whether or not public morals are involved...There is no suggestion here that anyone is likely to be corrupted by the exhibiting of these earrings. It seems to us that the two types of offence are both factually and morally distinct. (pp.344-345)

The distinction between indecency and obscenity has become quite clear and well-established in England. The matter was put in the following way by Parker, L.C.J. in the case of Stanley[9] :

The words "indecent and obscene" convey one idea, namely, offending against the recognized standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale...an indecent article is not necessarily obscene, whereas an obscene article almost certainly must be indecent.

The differentiation recognized between indecency and obscenity by the courts in England is relevant and important because, as will be seen below, Canadian courts have not made a similar differentiation. The result is that in Canada, for the most part, indecency requires the same gravity as obscenity.

2. CANADA

A summary conviction offence prohibiting indecency has been part of the Criminal Code since its inception in 1892. The earliest formulation was as follows:

Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of fifty dollars or to six months' imprisonment, who wilfully,

- (a) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access; or
- (b) does any indecent act in any place intending thereby to insult or offend the person.[10]

The section was revised as part of the overall 1953-54 revision[11] where it took its present shape.

An offence prohibiting nudity did not become part of the Criminal Code until 1931:

Every one is guilty of an offence and liable upon summary conviction to three years imprisonment who, while nude,

- (a) is found in any public place whether alone or in company with one or more other persons who are parading or have been assembled with intent to parade or have paraded in such public place while nude, or
- (b) is found in any public place whether alone or in company with one or more other persons, or
- (c) is found without lawful excuse for being nude upon any private property not his own, so as to be exposed to public view, whether alone or in company with or persons, or
- (d) appears upon his own property so as to be exposed to the public view whether alone or in company with other persons.[12]

The section was revised in 1953-54 to include a definition of "nude":

- a person is nude who is so clad as to offend against public decency or order.[13]

THE MEANING OF 'INDECENCY'

As it was pointed out above, the trend in England has been to distinguish between indecency and obscenity. However, the law of indecency in Canada has been, and continues to be, heavily influenced by the law of obscenity. One of the key analytical points of this review is based on the fact that the transformation of the law of obscenity from a "morals-based" offence to a "harm-based" offence has proved to be problematic for indecency. It may be that the future development of the law in this area would benefit from a recognized distinction between the two offences, and given the current judicial state of mind linking the two offences, such a change to the definition of indecency is one that must be made by Parliament.

1. Criteria for determining obscenity

The law of obscenity in Canada has its roots in English law. The 1868 decision of the House of Lords in R. v. Hicklin was the leading case and set out the following test:

- The test for obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those who minds are open to such immoral influences, and into who hands a publication of this sort may fall.[14]

This was the test used in Canada [15] until the Criminal Code was amended in 1959 to include a definition of obscenity as:

- the undue exploitation of sex, or of sex and any one or more of crime, horror, cruelty and violence.[16]

Subsequent to this amendment, Canadian courts shifted their focus from applying the Hicklin test to determining how the "undue exploitation of sex" is to be assessed.

The first Supreme Court of Canada decision on this point is R. v. Brodie[17] where the court adopted the "community standards test" developed in Australia and New Zealand. See footnote 18 18 Judson, J. in his judgment endorses the following:

There does exist in any community at all times - however the standard may vary from time to time - a general instinctive sense of what is decent and what is indecent, of what is clean and what is dirty...There are certain standards of decency which prevail in the community, and [juries] are really called upon to try [cases] because [they] are regarded as representing, and capable of justly applying, those standards. What is obscene is something which offends against those standards. (p.182)

The development of the jurisprudence since Brodie has elaborated and clarified the concept of the community standard. It is:

- a general average of community thinking and feeling;[19]
- a national standard; See footnote 20 20
- one where judges are entitled to judge for themselves, without expert evidence, when this standard has been exceeded. [21]

The phrase now being used, "community standard of tolerance" probably owes its origin to the use of the word 'tolerance' found in McGillivray's, J.A. judgment in R. v. Goldberg and Reitman but it is arguable that the addition of the word 'tolerance' did not add any substantive element or effect a change in the test that had developed as of that point.

An important development in the test for obscenity occurred in the Supreme Court of Canada's decision in Towne Cinema Theatres Ltd. v. The Queen.[22] In this decision, Dickson, C.J.C. stated that the community standard of tolerance is only one way in which the exploitation of sex can be undue for the purposes of determining whether material may be obscene:

- There are other ways in which exploitation of sex might be "undue". Ours is not a perfect society and it is unfortunate but true that the community may tolerate

publications that cause harm to members of society and therefore to society as a whole. Even if, at certain times, there is a coincidence between what is not tolerated and what is harmful to society, there is no necessary connection between these two concepts. Thus, a legal definition of "undue" must also encompass publications harmful to members of society and, therefore, to society as a whole. (page 202)

Therefore, as a result of the decision in Towne Cinema Theatres, material can be obscene if it is harmful, or if it exceeds the Canadian community standard of tolerance, since either of these tests will render the exploitation of sex in the material undue. As far as the former criterion is concerned (viz. harm), material can be considered harmful if it "portrays persons in a degrading manner as objects of violence, cruelty or other forms of dehumanizing treatment" (per Dickson, C.J.C. at p.202); the latter criteria was explained in the following manner:

- [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. (per Dickson, C.J.C. at p.205) [23]

Finally, the Supreme Court of Canada reached its definitive decision in R. v. Butler.[24] The significance of the decision was based on the fact that the Court had to decide whether the obscenity provision of the Criminal Code (s.163) was constitutionally valid in light of the right to freedom of expression guaranteed by section 2(b) of the Canadian Charter of Rights of Freedoms.[25]

In the Court's judgment, delivered by Sopinka, J., there was a formal recognition of the two different criteria established by Dickson, C.J.C. in Towne Cinema Theatres, namely "harm" (manifested by degrading or dehumanizing depictions or treatment of people in the material) and "community standard of tolerance". But the decision begins to fuse the two criteria together. For example, Sopinka, J. cites decisions where it was held that material that is degrading or dehumanizing necessarily fails the community standards test. See footnote 26 26 Sopinka, J. concludes:

- This review of jurisprudence shows that it fails to specify the relationship of the tests one to another. Failure to do so with respect to the community standards test and the degrading and dehumanizing test, for example, raises a serious question as to the basis on which the community acts in determining whether the impugned material will be tolerated. With both these tests being applied to the same material and apparently independently, we do not know whether the community found the material to be intolerable because it was degrading or dehumanizing, because it offended against morals or on some other basis. (page 149)

With respect, this statement may show some misunderstanding of how the two criteria operate. The legal issue is whether the material is obscene. This translates into whether the exploitation of sex is undue. The determination of "undueness" can be based on two separate inquiries:

- 1. Does the material exceed the community standard of tolerance (as that has been explained)? or
- 2. Does the material cause harm (even though the community standard of tolerance may accept the material)?

It may be, as a purely empirical matter of fact, that a positive answer to the first question (i.e. the material exceeds the community's standard of tolerance) is because it causes harm. In other words, at this point in time the community would not tolerate others seeing the material because of its harmful nature. But this is an entirely contingent matter. For example, the material may not cause harm and yet still exceed the community's standard of tolerance because of its effect on public morals. Or, as Dickson, C.J.C. rightly points out in Towne Cinema Theatres, the material may cause harm and yet be tolerated by the community. Even if this is the case, according to Dickson's C.J.C. judgment in Towne Cinema Theatres, the material is nevertheless to be considered obscene.

As a result of this confusion of how the criteria operate, Sopinka, J. effectively fuses the two separate criteria and makes the community standard of tolerance dependent on the possible harm caused by the material:

- The 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. (page 150)

The consequences of this fusion created by Butler is that where the material cannot be said to cause harm, by definition it does not exceed the community standard of tolerance. [27]

It may be that the conflation of the two criteria (harm and community standard of tolerance) in Butler was influenced by the fact that the criminal prohibition of the material violated the constitutional right to freedom of expression. If this restriction on expression, punishable as a criminal offence, is to be justified it must be based on a strong societal interest. Thus, only the potential harm caused by the material can be the basis for such a restriction. The community's intolerance of the expression, where it is based on something other than the expression's harmfulness (such as its effect on morality or its profound offensiveness), cannot be a justified basis for restricting this constitutional right.

This reasoning can indeed be found in Sopinka, J.'s judgment. In discussing the Hicklin test, he states that the dominant purpose of the criminal prohibition of obscenity was to:

- advance a particular conception of morality. Any deviation from such morality was considered to be inherently undesirable, independently of any harm to society...I agree with Twaddle J.A. of the Court of Appeal that this particular objective is no longer defensible in view of the Charter. (page 156)[28]

In this vein, Sopinka, J. states that the "overriding objective of s.163 is not moral disapprobation but the avoidance of harm to society" (page 157).

In light of the Charter concerns, it may well have been legitimate to hold that the community standard of tolerance criteria could not longer be a justification for restricting expression. But to transform this criteria into the harm criteria has, it is submitted, created some confusion which has been evident in the context of the criminal provisions dealing with indecency.[29]

2. Criteria for determining indecency

The Supreme Court of Canada has recently had occasion to consider the legal meaning of indecency in two cases. In the first decision, R. v. Tremblay[30], the Court held that the criteria for determining whether an act is indecent is based on the community standard of tolerance test (per Cory, J. at p.115), a test which is "similar to the one used in obscenity cases". The Court then went on to apply the Butler version of the community standard of tolerance test, namely "the degree of harm which could result from public exposure to the impugned material" (page 116), and stated:

- That same consideration of the degree of harm which may flow from the questioned work must also be relevant to the determination of the community standard of tolerance with respect to acts which are said to be indecent. (page 117)

The major difference between the use of the test in obscenity and indecency cases, as reiterated by the Supreme Court in Tremblay, is that the circumstances surrounding the act must be taken into account when applying the test to determine indecency. In this regard, the court quoted with approval from the Quebec Superior Court decision in R. v. Pelletier[31]:

- ...indecency concerns sexual behaviour or its representation which is neither obscene nor immoral but inappropriate according to the Canadian standards of tolerance because of the context in which it takes place. In other words, indecency is not a function of the behaviour itself but rather of the circumstances in which it takes place. (page 89)

As such, the audience, place and context are essential elements in the determination of indecency.

The facts in Tremblay are fairly well-known. The charge related to the keeping of a bawdy house for the purpose of the practice of acts of indecency. At the premises, a client would select a dancer from pictures shown to him. He would then be taken to a private room containing a mattress and a chair.

The dancer chosen would enter, undress and perform an erotic dance on the mattress. There was to be absolutely no touching between the client and the dancer. Small holes in the wall were located in each room so that the owners could ensure that the "no touching" rule was respected. For an additional fee the dancer would use a vibrator. During the dance she would simulate or effect masturbation. The clients were able to remove their clothes and many clients masturbated while observing the dance.

The Supreme Court held that the acts that occurred in the rooms were not indecent. This was based on the following factors:

- according to an expert witness, masturbation is a common activity engaged in by a large majority of the population and is regarded as a healthy and acceptable activity by Canadians;
- the dancing was similar to accepted nude dancing that occurs in many other clubs that are tolerated by both the police and the public;
- there was no physical contact between the client and the dancer;

- the sexual activities were conducted behind closed doors out of the view of the general public (although the premises were a public place within the meaning of the Criminal Code);
- there was no harm caused by the activities; they took place between consenting adults who chose to be in that relatively private location.

Given these factors, the Court held:

- Thus, neither the actions of the dancers nor, in the factual circumstances presented by this case, the acts of masturbation constituted indecent acts. Here, the surrounding circumstances were such that the acts would be tolerated by the community and they were therefore not indecent. This result may seem offensive to some. Yet, it must be remembered that we are not concerned with standards of good taste. Rather, the question is whether the acts will be tolerated by the community. (page 125)

The next major decision of the Supreme Court of Canada dealing with indecency is R. v. Mara and East[32]. The case dealt with the criminal offence of "allowing an indecent performance" (s.167(1)) and concerned the practice of "lap dancing" taking place at a club in Toronto. At the trial, there was testimony given by undercover police officers who had attended the club over a period of several days. There were women who performed exotic dances on stage. But for a fee, the dancer would perform a dance at the customer's table, wearing nothing but a long unbuttoned blouse. In this dance, the dancer would allow contact between the customer and her breasts. For a larger fee, the dancer would perform a "lap dance" whereby she would sit on the customer's lap with her back to him allowing her bare buttocks to come into contact with his groin area. The lap dance also involved the dancer reaching into the customer's pants and, either apparently or actually, masturbating him. The customer was allowed to fondle the dancer's body, and to make contact with parts of her body with his mouth.

At trial, the judge held that this was not indecent, relying in part on the decision in Tremblay. The Ontario Court of Appeal overturned the decision and, based on the accepted facts, convicted the accused. On appeal to the Supreme Court of Canada it was held that the acts were indecent, but the owner and operator could not be convicted because he lacked the necessary knowledge of the acts being performed in the club to sustain a conviction. The conviction against the manager was sustained.

In arriving at its conclusion, the Court confirmed that the appropriate test for indecency is that of the community standard of tolerance as set out in Towne Cinema Theatres, modified by Butler: "harm is the principle underlying the notion of what Canadians would tolerate" (page 551). The key question is whether the social harm engendered by the performance is such that the Canadian community would not tolerate the performance taking place:

- The relevant social harm to be considered pursuant to s.167 is the attitudinal harm on those watching the performance as perceived by the community as a whole. (page 551)

The Court found that, since there was sexual touching between the dancer and the customer, the acts created attitudinal harm because they presented women as sexual objects to be used by men: "it is unacceptably degrading to women to permit such uses of

their bodies in the context of a public performance in a tavern" (page 552). The Court distinguished Tremblay because there was no physical contact in Tremblay and the acts took place in a private room: "the public nature of the activity and the physical contact raise a factual context very different from the previous cases" (page 554).

THE ONTARIO COURT OF APPEAL DECISION IN R. v. JACOB

The facts of the case are set out in the Introduction to this paper. A great deal of the decision in the Court of Appeal was taken up with the question of whether an act must have a sexual context in order to be indecent. This is the key question on which the majority and dissent disagreed, although both judgments agreed in the result that the act in question, appearing topless in the streets of the town, was not an indecent act.

The crux of the decision concerns two findings: the trial judge did not apply the correct test and, in any event, there was no evidence of harm.

As far as the first finding is concerned, the trial judge held that the act of going topless in the town exceeded the community's standard of tolerance, because women generally have not appeared publicly in a topless state, nor would the newspapers reporting on the event print a picture of the women in a topless state. This, according to the trial judge, showed what the community standard of tolerance was, namely that public display of toplessness by a woman would not be tolerated. [33]

In commenting on the trial judge's application of the community standard of tolerance test, Osborne, J.A. stated:

- what the trial judge did was measure the appellant's choice of apparel and conduct against what the trial judge concluded Guelph women would deem to be appropriate for themselves. The trial judge seems to me to have applied a test similar to the test rejected by this court in R. v. Giambalvo.
- In my opinion, both the trial judge and the summary conviction appeal court judge erred in law in applying the wrong test to determine whether the appellant's conduct was indecent. They used a test of acceptance based upon the trial judge's assessment of how women chose to act, as opposed to what the contemporary national community would tolerate. (page 16)

However, and what is perhaps more significant, is that, even if the wrong test was applied, Osborne, J.A. went on to find that the community standard of tolerance was not exceeded by the act of toplessness in this case because there was no harm in what was done:

...there is no evidence of harm that is more than grossly speculative. All that the trial judge had before him was some evidence indicating specific individuals' lack of acceptance of the appellant's choice of clothing. There was nothing degrading or dehumanizing in what the appellant did. The scope of her activity was limited and was entirely non-commercial. No one who was offended was forced to continue looking at her. (page 16)[34]

The conclusion reached by the Court of Appeal on how the community standards test should be applied is, of course, based on the decisions of Butler and Tremblay as well as the Ontario Court of Appeal's decision in Mara and East (the Supreme Court's decision not yet having been made, but nevertheless approving the Ontario Court of Appeal's decision). In all of these cases, the issue of the community's standard of tolerance is ultimately a question of the harm caused by the acts, and more particular whether the acts were degrading and dehumanizing. As such, the state of the law is now that both indecency and obscenity are determined by the potential harm that could result from the act in question.

EXPOSURE OF BODY PARTS AND INDECENCY

Even without the recent development in the way that the community standards test is to be determined, the issue of when the exposure of body parts constitutes indecency has never been absolutely clear. It must, of course, be stated at the outset that, by virtue of s.174(1), the Criminal Code renders complete nudity per se to be a summary conviction offence. However, by virtue of ss.(3), the consent of the Attorney General is required to initiate a prosecution. Sometimes cases of complete nudity have been prosecuted under s.173, and the courts have held that this is not an inappropriate exercise of prosecutorial discretion. [35]

Nevertheless, when s.173 is used to prosecute cases of complete nudity, the case law has, with some consistency, held that mere nudity is not per se indecent; there must be something over and above this exposure.[36] Some courts have referred to this additional element as "moral turpitude" [37] but it would seem to be ultimately a function of context: time, place, manner, audience, other surrounding factors.

The question of partial nudity will always be a function of indecency, since s.174(2) defines nudity, for the purposes of ss.(1) to be a question of whether public decency or order has been offended. The Ontario Court of Appeal held in R. v. Giambalvo[38] that the test under ss.(2) is the community standards test.

As such, it would be difficult to state with any clarity or certainty that the act of toplessness itself is, per se, indecent. We know, from the response to the Jacob decision that there are members of the public who are profoundly upset and offended at the idea of women appearing topless in public places. [39] Some object to this on the basis of their religious concerns; others on moral grounds (eg.sexual display, lewd reactions by men); many referred to the problems of children being exposed to this in conjunction with an attempt to educate them into having a set of values expressing modesty and other beliefs inconsistent with a public display of toplessness.

In addition, many of the decisions relating to indecency (eg. Tremblay, Mara and East) concern charges laid for conduct in public places where those who were exposed or

confronted by the behaviour were willing observers. No one would find him/herself having to see the behaviour because, to a large extent, it had to be searched out.

The question of what the community would not tolerate others seeing makes sense in these situations because the restriction is preventing both the actor and the observer from experiencing the behaviour. However, in the Jacob case, appearing topless in public on a city street, involved confronting many unwilling observers with behaviour that they would profoundly have preferred not to have seen. No one had to search out this behaviour and therefore could easily have avoided it if it was considered offensive. On the contrary, children playing on their front lawns were exposed to it. This, it is submitted, creates a different kind of problem from that contemplated by the community standards test. The question of what the community would not tolerate others seeing, does not appear to be the appropriate criteria in this kind of situation.[40]

CONCLUSION

There are two broad conclusions that can be drawn from the above analysis. The first is that indecency is now to be assessed in the same way as obscenity, in terms of the harm caused by the act. But there is a legitimate question whether indecency and obscenity should be treated equivalently for legal purposes. As stated above, indecency relates to conduct or behaviour whereas obscenity relates to material. There are differences between acts and expressions and it may be important for the law to be sensitive to these differences in terms of how it deals with indecency/conduct and obscenity/expression. If there is to be a legally recognized contrast between indecency and obscenity, even one that simply sees them as different gradations along the same scale, there would need to be some legislative reform that establishes different criteria to be used in determining whether something is indecent or obscene.

The second conclusion is that the current test for indecency is not easily applicable to the case where those who are being subjected to the conduct may not tolerate it. If it is recognized that people have a legitimate interest in being relatively free from having to confront profoundly offensive behaviour in circumstances where it is reasonable for them to assume that they will not have to confront such behaviour, then some legal response may be required to deal with this kind of problem.[41] It may, however, not be the kind of legal response for which the criminal law is either appropriate or apposite.

THE FEASIBILITY OF MUNICIPAL REGULATION

As mentioned above, it may be more appropriate for legal means other than the criminal law to deal with the problem of local concerns over having to confront the public display of women's breasts in areas where, given the day-to-day activity, one would not ordinarily expect to be confronted by such behaviour. This requires consideration of the constitutional

(i.e. division of powers) legality of whether a province can delegate to a municipality the power to regulate standards of dress required in various public locations within that municipality.

The power to legislate in relation to criminal law is exclusively within the jurisdiction of the federal Parliament (s.91(27) of the Constitutional Act, 1867). Provincial Legislatures have power to legislate over the areas of:

- property and civil rights" (s.92(13)), or
- matters of a "merely local and private nature in the Province" (s.92(16)).

In relation to this division of powers, there are three important points that need to be made:

1. Since the decision by Rand, J. in Margarine Reference[42] this power has been understood to relate to "a body of prohibitions" enacted in relation to a public purpose; 'public purpose' includes: public peace, order, security, health, and morality. The list is not exhaustive nor is it the case that legislation in relation to any one of these public purposes necessarily makes the legislation in question criminal law.[43]

2. The category of morality is not coextensive with the field of criminal law. In Nova Scotia Board of Censors v. McNeil[44] , the Supreme Court of Canada was asked to determine the validity of provincial legislation that prevented the film, Last Tango In Paris, from being shown. In deciding that the legislation was valid provincial law, rather than criminal law, Ritchie, J. made the following comment:

- I share the opinion expressed in this passage that morality and criminality are far from coextensive and it follows in my view that legislation which authorizes the establishment and enforcement of a local standard of morality in the exhibition of films is not necessarily an invasion of the federal criminal field. (page 692)[45]

3. The "pith and substance" of legislation must come within either a federal or provincial head of power. [46]But the fact that, in pith and substance, some piece of legislation comes under one jurisdiction's head of legislative power does not mean that, under another aspect of it, it cannot fall under some head of power belonging to the other jurisdiction. [47]Thus, both the federal Parliament and a provincial legislature (or municipality) could deal with a certain subject matter, eg. public nudity, and both sets of laws could be valid. Where there is a direct conflict between the two sets of laws, the federal laws would be paramount. [48]However, in the absence of direct conflict, both sets of laws can coexist.

The question then is whether municipal regulation designating standards of dress (specifically nudity or partial nudity) can be construed, in pith and substance, as coming under one of the heads of legislative power belonging to the provincial legislature?

It is submitted that a provision controlling the appearance of nudity or partial nudity on municipal streets, parks or other public spaces could be framed as being a matter of property and civil rights (s.92(13)) or as a matter of a merely local and private nature in the

Province (s.92(16)). The purpose of the provision would be to regulate the use of municipal areas in order to address one or more of the following concerns:

- * nuisance
- * street congestion and disorder
- * the exposure of children to behaviour contrary to the values their parents are trying to instill
- * ensuring the ability of persons within the locality their right to enjoy their property.

All of these objectives have been found by the courts to be a proper basis for a province or municipality to pass legislation or by-laws even though the subject-matter may also be construed as moral in nature or overlaps with some provision of the Criminal Code.

Clothing worn by employees in massage parlours

For example, the courts have upheld provincial legislation that dictates the type or amount of clothing worn by employees in massage parlours. In Cal Investments Ltd. v. Winnipeg, [49]the Manitoba Court of Appeal considered a municipal by-law requiring a person working in a massage parlour to "wear a non-transparent outer garment from neck to knee". The law was challenged on the basis that it went further than mere regulation of massage parlours and in its effect constituted a prohibition of such parlours and intruded upon the federal legislative power over criminal law. The court relied on the analysis used in MacNeil (supra) and held that "in pith and substance the by-law in question was designed to regulate massage parlour trade". To the extent that it dealt with morality, the court held that it was not legislation with respect to criminal law and therefore was not invalid [50]

Similarly, in Re Moffat and City of Edmonton, [51] the constitutionality of a by-law which set a standard of dress for persons engaged in providing a body rub was challenged. The court relied upon the decisions in Cal Investments and MacNeil and held that if, city council may deem this to be a regulation or restriction reasonably necessary to prevent what might be normally a body-rub becoming something deleterious to health or morals, I am unable to see how this by itself goes so far as to invade the criminal field. (page 109)

Clothing and relationship with audience

The courts have also upheld provincial or municipal regulations that stipulate the type and amount of clothing worn by entertainers and the relationship that they can have with the audience. In Rio Hotel (supra) a challenge was issued against provincial legislation that authorized conditions being imposed on a liquor licence specifying the degree of nudity acceptable as well as rules for staging events presupposing the removal of clothing. It was argued that the Criminal Code included provisions dealing with nudity and that the licensing requirements imposed by the Liquor Licensing Board were an infringement of the federal criminal law power. Writing for a majority of the Supreme Court of Canada, Dickson, C.J. held that the legislation was a proper exercise of provincial legislative power because it was related to property and civil rights as well as matters of a purely local nature.

The purpose of the legislation was to "regulate the forms of entertainment used by the owners of licensed premises as marketing tools to boost sales of alcohol". Dickson, C,J, noted that while the provisions overlapped somewhat with the Criminal Code provisions, there was no direct conflict between the licensing conditions and the Criminal Code provisions dealing with nudity. Also, no penal consequences resulted from a breach of the licensing conditions whereas the Criminal Code provisions were punitive in nature. The provincial and federal provisions were not inconsistent and could operate concurrently.[52]

Distribution of adult videos

The courts have upheld provincial legislation regulating the distribution of adult videos. In It's Adult Video Plus Ltd. v. British Columbia (Director of Film Classification), [53] the British Columbia Supreme Court upheld a provincial law requiring all adult films to be submitted for classification before distribution, and to allow only approved films to be distributed. The court held that the purpose of the law was the regulation of the dissemination of pornographic films, in order to:

- suppress conditions giving rise to the commissions of crimes;
- establish production and quality controls for the industry within the province;
- protect residents, especially children, from "surreptitious distribution of prohibited materials".

Display of erotic publications except under certain conditions

The courts have upheld provincial legislation regulating the display of erotic publications even going so far as prohibiting them except under certain conditions. In Information Retailers Association of Metropolitan Toronto v. Metropolitan Toronto, See [54] a challenge was made against provincial legislation that authorized municipalities to license and regulate premises where books or magazines were sold which appeal to "erotic or sexual appetites or inclinations". The by-law in question required that adult books be displayed 1.5 metres above the floor, and that only the name of the publication should be visible.

The Ontario Court of Appeal found the legislation to be within the provincial head of legislative power under s.92(13) since it authorized the regulation of a permitted business and did not go so far as to prohibit the business. The principal intent of the legislation was "to restrict physical and visual access by children to certain publications, particularly what are known as "adult" or "skin" magazines". On the issue of morality, the court stated:

it is well established that the presence of a moral element in the purpose does not of itself render the by-law invalid as an improper exercise of federal criminal law jurisdiction...The pith and substance of the impugned by-law was the regulation of a permitted business...Morality is not an independent constitutional value and may be regulated either by Parliament or a Legislature depending on the characterization of the legislation as a whole. A by-law aimed at regulating a trade or business in order to protect children has, in my view, as its "true object, purpose, nature and character" matters within provincial legislative authority and is not to be declared invalid simply because its purpose may extend

to moral considerations. (pages 462-463)

The court found no conflict between the provisions of the by-law and the obscenity provisions of the Criminal Code because the two laws served totally different purposes.

Nuisance control and crime prevention

The courts have upheld provincial legislation controlling the operation of disorderly houses. In Bedard v. Dawson, See footnote 55 55 legislation passed by the province of Quebec was challenged. The legislation gave a right to private citizens to apply to the court for an injunction to close down a premises because it was being used as a disorderly house. The Supreme Court of Canada held that the legislation was valid because the province had the legislative power to restrain nuisances. Idington, J. stated:

- [The province has] the power called in question herein so far as the relevant facts require. Indeed, the duty to protect neighbouring property owners in such cases as are involved in this question before us renders the question hardly arguable. There are many instances of other nuisances which can be better rectified by local legislation within the power of the legislatures over property and civil rights then by designating them crimes and leaving them to be dealt with by Parliament as such. (emphasis added, page 684)

Anglin, J. added:

- I am of the opinion that this statute in no wise impinges on the domain of the criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it - a pure matter of civil right. In my opinion in enacting the statute now under consideration a legislature exercises the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process. (page 685)[56]

Street control

The courts have also upheld municipal regulations controlling the use of the streets. In A.G. (Can.) and Dupond v. Montreal, [57]the Supreme Court of Canada upheld the validity of a municipal by-law which prohibited the holding of "any assembly, parade or gathering in the public domain of the City of Montreal for a time-period of thirty days". Beetz, J. in the majority decision, stated that the by-law dealt with matters of a local character and was regulatory in nature. The preventative nature of the by-law, and the fact that it was a temporary measure were an important part of the finding. However, the court held that the province had the legislative power to suppress conditions likely to favour the commission of crime.

Of course, not every provincial or municipal enactment has been accepted as valid by the courts. In a trilogy of decisions, the Ontario Court of Appeal held municipal by-laws to be invalid where the by- laws attempted to control the standard of dress of persons providing service or entertainment in adult establishments (bars, clubs, body rub parlours). [58]However, in Rio Hotel, Estey, J. in a separate concurring judgment, after discussing these cases, stated that: "In my respectful view, the dispositions in Koumoudouros, Nordee and Sherwood were in error." (page 677) Indeed, more recently, in

the case of Re Ontario Adult Entertainment Bar Association and Municipality of Metropolitan Toronto, [59]the Ontario Court of Appeal followed Estey, J. in Rio Hotel and held that these three cases were now overruled.

In Re Ontario Adult Entertainment, the court was asked to consider the validity of a municipal by-law that prohibited close-contact dancing ("lap dancing") in adult entertainment establishments. The court held the by-law to come properly within provincial legislative power by addressing health, safety and crime prevention concerns. Although an ancillary effect of the by-law touched on matters of morality, the court held, following Rio Hotel:

- provinces have the right under the division of powers under the Constitution Act, 1867, to enact regulations in the nature of police or municipal regulation of a merely local character to preserve in the municipality, peace and public decency, and to repress drunkenness and disorderly and riotous conduct. (page 167)

Finally, the Supreme Court of Canada's decision in R. v. Westendorp [60]must be mentioned. In that case, a by-law enacted by the city of Calgary was being challenged. The by-law created an extensive regulatory scheme relating to the use of city streets. However, one section dealt with prostitution and it prohibited being on a street for the purposes of prostitution. The court declared this section of the provision to be invalid in that it was a colourable attempt by the city to prohibit prostitution, which was clearly within the domain of criminal law. The court found the section to be unconnected with the rest of the by-law, and noted that the nuisance associated with street prostitution was singled out in being prohibited whereas other equal street nuisances were not even mentioned. Therefore, it was evident that the city was attempting to prohibit and punish street prostitution under the guise of its power to control local nuisances, prevent crime, maintain public order and use of the streets.

CONCLUSION

It should be fairly clear from the above cases that a municipality can indeed create a by-law that would regulate the standard of dress controlling nudity or partial nudity from occurring in various public locations within its streets and parks. But not every by-law passed by a municipality controlling nudity will be valid. For example:

- a municipality cannot pass a by-law dealing with the subject-matter of the public appearance of nudity that is in direct conflict with any of the related provisions of the Criminal Code;[61]
- a municipality cannot pass a by-law the aim of which is to punish people from appearing nude in public.

What this means is that a municipality would need to create a fairly well-focused by-law that was clearly aimed at preventing nuisances, maintaining public order and keeping children from being exposed to nudity or partial nudity. This kind of by-law would probably not contain a blanket prohibition on nudity or partial nudity, nor should it establish an offence for appearing nude or partially nude. If the by-law regulated standards of dress in certain public areas (eg. public swimming pools, parks, beaches), especially areas where

children would reasonably be expected to be present it is more akin to matters of property and civil rights or of a purely local nature than to criminal law. Moreover, if the regulation gave a power to prevent the person from continuing to be present at these locations in such a state, rather than creating a punishable offence, then the by-law would appear "in pith and substance" to be linked to proper local objectives. It is submitted that such a by-law is not aimed at punishing indecency (especially where the local standard of indecency is different from that contained in the Criminal Code) but at controlling behaviour within the locale that a majority of the members of that community wish to establish for themselves.

This kind of by-law, for example, might allow a municipal official present at a swimming pool to request someone not properly dressed to take such steps as would comply with the dress standard (eg. to ask a topless woman bather to put her top on). If the person refused, that person could then be asked to leave the swimming pool. At this point, a refusal to leave may result in the person infringing the provincial trespass legislation. But the by-law itself would not be aimed at punishing the person; rather its aim is directed at controlling how the person would be dressed at that location as a function of legitimate local concerns and objectives.

Depending on the municipality and its local concerns (especially the community's views on standards of dress in public areas), by-laws could be created that would allow certain areas to be used where dress standards might be relaxed, "zones of tolerance", and this could be made clear to members of the public so that no one who did not wish to confront this activity, or have their children exposed to it, would need to enter these zones. [62]

It should be clear that the criminal standard for indecency allows Canadians to prevent other Canadians from seeing or doing what they would like to in public. This is a strong control over the actions of others and, as stated above, it may be that, in order to comply with the Charter, such penal restrictions on actions that persons willingly want to experience may only be justified on the basis of the harm it causes.

However, local by-laws regulating standards of dress in certain public areas are designed not to prevent Canadians from seeing something because other Canadians will not tolerate them seeing it, but because the members of that community have decided that they themselves do not want to have to be exposed to this behaviour, or do not want their children being exposed to it.

It goes without saying that the criminal law is a blunt instrument for dealing with problems of this nature. As the courts have recognized, this kind of problem is better dealt with by local regulation. It is submitted that if a municipality, in good faith, attempted to regulate standards of dress in public areas this would be considered by the courts as a proper exercise of legislative power belonging to the province.

Footnote: 1 R. v. Jacob (1997) 112 C.C.C. (3d) 1. There was a dissenting judgment that did not disagree on the disposition but only on the legal criteria for a finding of indecency. The majority did not restrict indecency to sexual conduct, whereas the dissenting judge did.

Footnote: 2 (1663) 1 Sid. 168; 82 E.R. 1036

Footnote: 3 See generally: Archbold, Criminal Pleading, Evidence and Practice Volume 2 (London: Sweet and Maxwell, 1994) at 31-64, and Smith and Hogan, Criminal Law 7th Ed. 1992 (London: Butterworths) at pp.474-476.

Footnote: 4 R. v. Thallam (1863) 9 Cox C.C. 388.

Footnote: 5 R. v. Mayling [1963] 2 W.L.R. 709.

Footnote: 6 See Archbold, supra at 31-65, and Smith and Hogan, Criminal Law, supra.

Footnote: 7 See Knuller v. D.P.P. [1973] A.C. 435; 56 Cr.App.R. 633 (H.L.)

Footnote: 8 (1990) 91 Cr.App.R. 341 (Eng.C.A.)

Footnote: 9 (1965) 49 Cr.App.R. 175 (Eng.C.A.) at pp.180-181.

Footnote: 10 Criminal Code, S.C. 1892, c.29, s.177.

Footnote: 11 Criminal Code, S.C. 1953-54, c.51, s.158. The addition of s.171(2) came as a result of Bill C-15. S.C. 1987, c.24, s.7.

Footnote: 12 S.C. 1931 c.28, s.2, Criminal Code s.205A. Subsection 2 required the consent of the Attorney General of the province before a prosecution could be commenced.

Footnote: 13 S.C. 1953-54, c.51, s.159.

Footnote: 14 L.R. 3 Q.B. 360 per Cockburn C.J. at 371.

Footnote: 15 See R. v. American News Co. (1957) 118 C.C.C. 152 (Ont.C.A.); R. v. National News Co. (1953) 106 C.C.C. 26 (Ont.C.A.); R. v. Stroll (1951) 100 C.C.C. 121 (Mont.Ct.Sess.Peace).

Footnote: 16 S.C. 1959, c.41, s.11.

Footnote: 17 (1962) 132 C.C.C. 161.

Footnote: 18 See R. v. Close [1948] V.L.R. 445.

Footnote: 19 Dominion News and Gifts v. The Queen [1969] 2 C.C.C. 103 (S.C.C.) affirming [1967] 3 C.C.C. 1 (Man.C.A.).

Footnote: 20 R. v. MacMillan Company of Canada (1976) 31 C.C.C. (2d) 286 at 322 (Ont.C.A.); R. v. Kiverago (1973) 11 C.C.C. (2d) 463 at 464 (Ont.C.A.);R. v. Goldberg and Reitman (1971) 4 C.C.C. (2d) 187 at 191 (Ont.C.A.).

Footnote: 21 R. v. Great West News Ltd. [1970] 4 C.C.C. 307 per Dickson, J.A. at 315.

Footnote: 22 (1985) 18 C.C.C. (3d) 193.

Footnote: 23 The majority of the Court also held that the intended audience was a relevant factor for consideration in determining the standard of tolerance.

Footnote: 24 (1992) 70 C.C.C. (3d) 129.

Footnote: 25 The Court held that, although s.163 violates the right to freedom of expression, the section is nevertheless justified on the basis of section one as a reasonable limit prescribed by law in a free and democratic society.

Footnote: 26 See pages 146-147. The use of the word 'necessarily' is crucial because, in Towne Cinema Theatres, although Dickson, C.J.C. acknowledged that it was empirically possible that a degrading or dehumanizing depiction may, as a matter of fact, exceed the standard of tolerance of a community, the two criteria were conceptually distinct. By using the word necessarily', Sopinka, J. and the cases he cites, are identifying the two criteria as conceptually equivalent.

Footnote: 27 This may be an acceptable result when dealing with obscenity (which, it should be pointed out, is mostly a form of expression and not conduct). However, because indecency is, as the English courts have recognized, much lower on the scale of recognized standards of acceptable behaviour, it is submitted that the current approach in Canada is problematic because the court, in determining indecency, is now looking for harm and not directly attempting to gauge community tolerance. As such, the test of community tolerance for an act considered to be indecent has been artificially raised.

Footnote: 28 It is perhaps worth noting that the Hicklin test - the tendency of the material to deprave and corrupt- is arguably not just a matter of enforcing morality but was believed to be necessary to prevent the harmful effects the material would actually have on the individual in relation to his/her values and the consequent behaviour. Sopinka, J. himself states that "harm in this context means that it predisposes persons to act in an antisocial manner...Antisocial conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning." (pages 150-151) Indeed, even Sopinka, J. agrees that the notions of moral corruption and harm to society are not distinct: "It is moral corruption of a certain kind which leads to the detrimental effect on society." (page 157)

Sopinka, J. believes that Parliament has the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values of society which are integral to a free and democratic society (page 156). Why would moral corruption not fit into this "fundamental conception"?

Footnote: 29 It is worth noting that indecency, for the most part, concerns conduct or behaviour whereas obscenity relates to some form of expressive material (written, film, art). Although conduct can be expressive, the interests at stake in regulating conduct rather than pure expression are quite different and therefore the basis for a justification of restricting conduct (even if it is expressive) may be different from what is capable of justifying a restriction on expressive material that does not take the form of conduct.

Footnote: 30 (1994) 84 C.C.C. (3d) 97.

Footnote: 31 (1985) 27 C.C.C. (3d) 77.

Footnote: 32 (1997) 115 C.C.C. (3d) 539.

Footnote: 33 (1997) 112 C.C.C. (3d) 1 (Ont.C.A.) per Osborne, J.A. at 15.

Footnote: 34 In dissent, Weiler, J.A. agreed that the trial judge had incorrectly applied the community standards test and that he erred in not considering whether there was any harm: see page 27.

Footnote: 35 R. v. Verette (1978) 40 C.C.C. (2d) 273 S.C.C.; R. v. Bennet (1975) 29 C.C.C. (2d) 403 (B.C.S.C.).

Footnote: 36 See R. v. Pickard (1984) Ont.D.Crim.Conv. 6095-07 (Ont.Prov.Ct.); R. v. Hecker (1980) 58 C.C.C. (2d) 66 (Yuk.T.Ct.); R. v. Balazsy (1980) 54 C.C.C. (2d) 346 (Ont.Prov.Ct.); R. v. Springer (1975) 31 C.R.N.S. 48 (Sask.Dis.Ct.); R. v. Niman (1974) 31 C.R.N.S. 48 (Ont.Prov.Ct.); R. v. Beaupre (1971) 7 C.C.C. (2d) 320 (B.C.S.C.)

Footnote: 37 See Beaupre, supra, and Niman, supra.

Footnote: 38 (1982) 70 C.C.C. (2d) 324.

Footnote: 39 It is worth noting that the members of the public upset and concerned about toplessness may differ in percentage from community to community. This is a factor that supports the idea being proposed in this paper which is that the problem of toplessness is better handled through local regulation rather than by national law.

Footnote: 40 It is worth noting at this point that the English approach, as set out in Mayling (supra), for indecency is whether the act in question would disgust and annoy any ordinary members of the public who might be confronted by it.

Footnote: 41 It is submitted that the response of the Court of Appeal in Jacob, that anyone who was offended could simply look away, fails to understand the full import of what is actually occurring in this kind of situation.

Footnote: 42 [1949] S.C.R. 1 at 50, approved by the Privy Council at [1951] A.C. 179.

Footnote: 43 See for example the decision in Labatt Breweries v. A.G.Can [1980] 1 S.C.R. 914 where the majority of the Supreme Court of Canada concluded that a provision of the federal Food and Drug Act (that prohibited the labelling or advertising of beer as light beer unless the beer complied with a standard prescribed by Parliament, and breaching the prohibition was a hybrid offence subject to a fine or 3 year term of imprisonment) was not legislation in relation to criminal law even though it was in relation to health.

Footnote: 44 [1978] 2 S.C.R. 662.

Footnote: 45 In the later case of Rio Hotel v. Liquor Licence Board [1987] 2 S.C.R. 59; 44 D.L.R. (4th) 663, Estey, J. in a minority concurring opinion, referring to this aspect of the decision, stated that the decision did not need to be decided on this basis and that it could perhaps be considered obiter.

Footnote: 46 See Lord'sDay Alliance of Canada v. A.G.B.C. [1959] S.C.R. 497 per Kerwin, C.J.C. at 503; Churchill Falls (labrador) Cor. v. A.G. Nfld. [1984] .

Footnote: 47 This is known as the "aspect doctrine". See Hodge v. The Queen (1883) 9 App.Cas. (P.C.) 117 at 130; and Multiple Access Ltd. v. McCutcheon [1982] 2 S.C.R. 161.

Footnote: 48 See Rio Hotel, supra at pages 666-667.

Footnote: 49 (1978) 84 D.L.R. (3d) 699 (Man.C.A.).

Footnote: 50 ibid, at pages 704-705.

Footnote: 51 (1979) 99 D.L.R. (3d) 101 (Alta.Q.B.).

Footnote: 52 See also Re Sharlmark Hotels Ltd. v. Metropolitan Toronto (1981) 32 O.R. (2d) 129.

Footnote: 53 (1991) 81 D.L.R. (4th) 436 (B.C.S.C.).

Footnote: 54 (1985) 52 O.R. (2d) 449 (Ont.C.A.).

Footnote: 55 [1923] S.C.R. 681 (S.C.C.).

Footnote: 56 More recently, the jurisdiction of a provincial Attorney General to restrain conduct constituting a public nuisance was upheld by the Ontario Court of Justice (General Division) in Ontario Attorney General v. Dieleman (1994) 20 O.R. (3d) 229; 117 D.L.R. (4th) 449. The case involved picketing on public streets and sidewalks near abortion clinics, hospitals, doctors' offices and doctors' residences. Adams, J. found that the Attorney General had standing to seek an injunction restraining this activity because of the interest in restraining public nuisances which materially affect the reasonable comfort and convenience of life of those local citizens who have to deal with it.

Footnote: 57 [1978] 2 S.C.R. 770 (S.C.C.).

Footnote: 58 See Koumoudouros v. Metropolitan Toronto (1985) 52 O.R. (2d) 442 (Ont.C.A.); Sherwood Park Restaurant Inc. v, Markham (1984) 48 O.R. (2d) 449 (Ont.C.A.); Nordee Investments Ltd. v. Burlington (1984) 48 O.R. (2d) 123 (Ont.C.A.).

Footnote: 59 (1997) 35 O.R. (3d) 161 (Ont.C.A.); leave to appeal to the Supreme Court of Canada refused.

Footnote: 60 [1983] 1 S.C.R. 43; 2 C.C.C. (3d) 330.

Footnote: 61 The fact that the by-law would prohibit some behaviour that is allowed by the Criminal Code does not constitute a direct conflict. Although it is hard to assess this in the abstract, generally speaking the question of whether it is possible to comply with both provisions, or whether one provision requires some act that is prohibited by the other, are the key elements of a direct conflict.

Footnote: 62 An obvious example would be specific beaches or beach sites where topless or even nude bathing would be permitted. A clear sign at the perimeter of the beach would note that persons beyond this point may not be wearing any clothes. Anyone offended at this does not have to attend at this beach.

March 1999