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1. *Introduction*

On January 8, 1974, the Nova Scotia Amusements Regulation Board banned the showing of the film *Last Tango in Paris*. Gerard McNeil, the editor of a Dartmouth newspaper, decided to challenge the powers of the Board to make such prohibitions. He first appealed to the Lieutenant-Governor in Council, as required by section 3(4) of the Theatres and Amusements Act[1] but he was not recognized by that body as having the right to appeal. He then requested the Attorney-General to refer the constitutionality of the Act to the Appeal Division of the Supreme Court of Nova Scotia, but to no avail.

Early in 1974 Mr. McNeil applied to the Trial Division of the Nova Scotia Supreme Court for a declaration that the Board was exercising unconstitutional powers to censor or ban films.[2] In the event that preliminary questions were resolved as to the proper parties to the action, Hart J. granted standing to Mr. McNeil and allowed the Court to set a date for hearing upon the constitutional merits. Subsequently, an appeal to the Supreme Court of Canada by the Censor Board contesting the applicant's standing was dismissed on May 20, 1975.[3]

The issue of standing resolved, the Board appealed the decision of Hart J. on the merits.[4] Argument was first heard by the Nova Scotia Court of Appeal in February, 1976.[5] That Court ruled that the sections and Regulations under the Act which dealt with censorship should be declared *ultra vires*. The ruling was appealed

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1. R.S.N.S. 1967, c. 304
2. *Re McNeil et al.* v. *Nova Scotia Board of Censors et al.* (1974), 46 D.L.R. (3d) 259; (1974), 9 N.S.R. (2d) 506
3. *Nova Scotia Board of Censors et al.* v. *McNeil*, [1976] 2 S.C.R. 265; (1975), 55 D.L.R. (3d) 632
4. *Re McNeil* v. *Nova Scotia Board of Censors* (1975), 53 D.L.R. (3d) 259; (1974), 9 N.S.R. (2d) 483
5. *McNeil* v. *Attorney-General of Nova Scotia* (1976), 14 N.S.R. (2d) 227

by the Attorney-General of Nova Scotia to the Supreme Court of Canada[6] which held that, save for Regulation 32 of the Act, the legislation giving power to ban or censor films is *intra vires* the province. It is this latter judgment that will be the object of my comments. The effect of the judgment is that the present practice of film censorship (in the provinces which have relevant legislation) will continue. In what follows, I will argue that the case was wrongly decided by the Supreme Court, and I propose to outline the positive consequences of a 'regulatory' scheme that recognizes this fact.

I will in Part Two consider the arguments for provincial competence, as discussed in the majority judgment and in the dissent. In Part Three, the arguments relating to federal jurisdiction will be reviewed, again, first by the majority and then by the dissenting judges. Finally, in Part Four, a discussion will take place as to the consequences that would have ensued had the Supreme Court not ruled as it did.

II. *Provincial Jurisdiction:*

The Majority

a. *Pith and Substance*

Mr. Justice Ritchie, for the majority (Martland, Pigeon, Beetz and de Grandpré JJ. concurring) first considered the validity of the Nova Scotia Theatres and Amusements Act by characterizing it in pith and substance as "regulation, supervision and control of the film business within the province."[7] He continued: "the impugned legislation constitutes nothing more than the exercise of provincial authority over transactions taking place wholly within the province."[8] The provisions empowering the Censor Board to ban films were seen as "reinforcing the authority vested in a provincially appointed Board to perform the task of regulation."[9] Ritchie J. viewed the censorship powers of the Board as incidental to the regulation of the film business and not, as Chief Justice Bora Laskin remarked in the dissent, prior control of public taste. In Mr. Justice Ritchie's characterization the functions of the Board were likened to those of controlling a specified set of business

6. *Re Nova Scotia Board of Censors et al. and McNeil* (1978), 84 D.L.R. (3d) 1
7. *Id.*
8. *Id.* at 21
9. *Id.*

transactions, viz., amongst film distributors and exhibitors; but Laskin C.J. argued that the censorship aspect of this function imported wider issues involving the public at large and interference with the federal criminal law powers granted under section 91(27) of the *British North America Act*.[10]

Indeed, the view that the Board is involved in decisions affecting only a specified set of film entrepreneurs is strange in light of the Supreme Court's ruling on the matter of *locus standi,* which required resolution before the present case could be heard on the merits.[11] The issue there was whether Mr. McNeil was a person affected by legislation purporting to regulate only the film business within the province; but standing was granted on the basis that the legislation affected the public at large, thus allowing a member of the public to claim *locus standi*. The Supreme Court of Canada unanimously held that:

> . . . there is an arguable case under the terms of the challenged legislation that members of the Nova Scotia public are directly affected in what they may view in a Nova Scotia theatre, albeit there is a more direct effect on the business enterprises which are regulated by the legislation.[12]

Considering the statement that the public was "directly affected" by the particular nature of the legislation at issue (*i.e.,* that the exhibition of films may be regulated by the Board), it is odd that the majority of the Court in the instant case should choose to ignore the wider, public ramifications of the legislation by holding that, in effect, the Theatres and Amusements Act is merely regulatory of certain business transactions. That is not to say at this stage that the wider interpretation *prima facie* threatens the validity of the legislation; but to neglect to incorporate that statement of fact made in the standing case seems inconsistent.

At any rate, Ritchie J. appended two subordinate considerations to the argument that it is the sole object of the legislation to regulate business transactions. Taken together, they are that 'local standards' can be applied to determine 'audience suitability' in the proper discharge of the Board's function. Now, Regulation 32 issued under the Theatres and Amusements Act prohibited any theatre owner from permitting "an indecent or improper performance. . .",[13] and

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10. (1867), 30 & 31 Vict. c.3 (U.K.); R.S.C. 1970, App. II, No. 5
11. *Nova Scotia Board of Censors* v. *McNeil,* [1976] 2 S.C.R. 265
12. *Id.* at 271
13. Compare with s. 159(2) of the *Criminal Code* which provides, in part, that:

this Regulation was declared by Ritchie J. to be null and void as repugnant to section 159 of the *Criminal Code* of Canada, which deals with obscenity.

The learned judge nowhere considered precisely the criteria used by the Board in determining the decency or propriety of such shows; for him the Board is merely applying 'local standards' of taste to films compulsorily submitted for their approval.[14] In this respect, 'moral considerations', as Ritchie J. preferred to call them, are acceptable in the execution of the requirements of the Act, as no more significant, one presumes, than the 'moral standard' which permits the province to take legislative action against companies that pollute the environment. In both instances, actions require regulation for the public good, the reasoning goes, and it is obvious that to deny such intervention on the basis that it involves 'moral standards' would be to strip the province of virtually all its legislative power.

If, however, the true basis upon which the Censor Board makes its determinations of suitability is examined, it must be concluded that no consideration other than obscenity itself sets the standard. Laskin C.J. in the dissent confirms that this is indeed the true picture. He states that:

> Cooper J.A. was of the opinion that it was clear from the material before the Court that the film was placed in the rejected classification because it was considered by the Board to offend against acceptable standards of morality. The only material before the Court consisted of various affidavits and of letters exchanged between counsel for the parties. There were affirmations in some of the affidavits of belief that the film was banned because [it was] offensive to public morality and because it was *obscene*. However, the Chairman of the [Censor] Board, although swearing an affidavit, did not disclose in it any reason for the ban and the Attorney General refused in an answering letter to assign any reason for the ban when asked directly . . . MacKiegan C.J.N.S. said flatly that "censorship of this type is obviously directed at *obscenity* and other immoral exhibitions". (My emphasis)[15]

In other words, it was a finding of the Supreme Court of Nova

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(2) Everyone commits an offence who knowingly, without lawful justification or excuse, . . . (b) publicly exhibits . . . an indecent show . . . .

14. Nova Scotia Theatres and Amusements Act, R.S.N.S. 1967, c. 304, s. 15(1). (Later we will turn to a closer examination of the criteria used by both the Board and the Court in determining obscenity.)

15. (1978), 84 D.L.R. (3d) 1 at 8

Scotia that more than mere 'moral considerations' were at work, and that obscenity, which is properly the concern of the federal authorities under relevant sections of the *Criminal Code,* was one of the main criteria underlying the Board's decision to ban *Last Tango in Paris* from theatres in Nova Scotia.

But, even if this inference is not founded upon fact, due to the reluctance of the authorities to explicitly state what the criteria are, it should be remembered that Regulation 32, which Ritchie J. later struck down, is a pretty accurate indication of what the Board was being asked to do, *i.e.,* censor films on the basis of what in their view is indecent. The effect of the learned judge's declaration was to recognize that the legislature was overstepping its constitutional authority in issuing Regulation 32, because it was in clear conflict with provisions of the *Criminal Code* that deal with obscene or indecent performances. And it is not a question of whether or not the Board would have come to the same *conclusion* that a court of law would have on a charge of obscenity: the fact that the Board is doing something properly reserved to a prosecution under the standards and procedures required by the *Criminal Code* is sufficient to establish a conflict. Was it not, then, inconsistent to leave intact the Board's *power* to apply those very considerations in its daily operation? It would seem more consistent, on the facts, either to have left the Regulation intact as a statement of the criteria that the Board is to rely upon in their decisions or declare all the sections dealing with censorship (not regulation) *ultra vires* the provincial legislature.

b. *'Local and Private Matters'*

What about the argument that, as tastes and standards vary across Canada, "the determination of what is and is not acceptable for public exhibition on moral grounds may be viewed as a matter of a local and private nature in the province within the meaning of section 92(16) of the *B.N.A. Act?"* [16] Does the head invoked by Mr. Justice Ritchie suffice constitutionally to allow the preference for local standards of taste to dictate the scope of provincial censorship powers? In answering in the affirmative, the learned judge cited the *Local Option* case in which Lord Watson stated that if a subject is not specifically enumerated in section 91 or 92 of the *B.N.A. Act*

16. *Id.* at 28

then if it is 'local and private' in nature it is reserved to the provinces' jurisdiction.[17]

To make such a determination it is not enough to say that 'local standards' suffice alone to bring the whole practice of the Censor Board under the jurisdiction of the province: the 'pith and substance' of the legislation as well as the practices of the Board must first be viewed. Actually, 'local standards' of acceptability applied by the Board is not the type of 'local and private matter' contemplated by section 92(16). It is an administrative or policy standard which, as found by the Supreme Court of Nova Scotia, has as its true object the determination of what is indecent or obscene. Put another way, the alleged power to be sensitive to local tastes cannot be allowed to obscure what the Board is actually doing, and it is a mistake to say that the 'local matters' head of section 92 admits 'local standards' of *administrative* functioning. If that were the case any provincial legislation could be validated on the basis that the 'standards' considered before administrative action is taken are different from those that apply anywhere else, making it thus a 'local and private matter'. The true meaning of section 92(16) is as Lord Watson characterized it in *Local Option, supra,* cited by Ritchie J. himself: it is a residual head analogous to "peace, order and good government". It is properly invoked when a matter in dispute cannot be said to fit into any of the other heads of sections 91 and 92 of the *B.N.A. Act.* It was placed there to catch eventualities that the framers of the *B.N.A. Act* could not have foreseen, and that would not fit within the four corners of any of the other heads of jurisdiction.[18] To invoke it as it has been in the instant case can only be done *after* the other possibilities of characterization have been exhausted, and to rely solely upon the Board's 'local' objects in effect skips over this exercise. Its use by the learned judge is even stranger in light of the fact that he has

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17. *A.-G. Ont.* v. *A.-G. for the Dominion,* [1896] A.C. 348 at 359. "(Section 92(16)) assigns to the provincial legislature all matters in a provincial sense local or private *which have been omitted from the preceding enumeration.*" (My emphasis)
18. Prof. Hogg in his *Constitutional Law of Canada* (Toronto: Carswell, 1977) says of this head that "in practice it has turned out to be quite unimportant because its work has been done for it by section 92(13): Property and Civil Rights in the Province" (p. 242). This intepretation means that the terms "local and private" in their raw form are not particularly edifying when coming to a determination of whether a matter is federally or provincially valid; what must happen is that the matter must find an affinity with one of the other heads of section 92 before it can be so determined. See Hogg, chapter 7

already characterized the legislation as "in relation to property": that has the effect of rendering his statements on this aspect *obiter*.

Before leaving this subject, however, the merits, if any, of the 'local standards' argument should be examined not for their constitutional substance but in order to see if a practical purpose would be served by allowing provincial authorities to regulate what we may or may not see.

The issue of which jurisdiction is the proper one to regulate various forms of publishing and broadcasting is briefly discussed by Professor Hogg in his book on the Constitution.[19] He states that

> . . . the regulation of speech which is not typically criminal in form (for example because it makes use of an administrative agency) and which is specifically limited to issues of primarily local significance, (for example, the depiction of commercial advertising, violence and sex) should follow the constitutional boundaries of the media. This means that the federal Parliament may impose regulation on radio and most forms of television, and the provincial legislatures may impose content regulation on films, live theatre, literature and records.[20] (Footnotes omitted)

What Professor Hogg seems to be saying is, *inter alia,* that he upholds the present practices of the provincial censor boards on the basis that they are the best solution to the administrative problem of controlling locally what the public consume. He implicitly recognizes the desirability of local standards being preserved and respected, and yet I believe that the mistake he makes is in lumping all forms of 'content regulation' into one category, that is, he says, if it is part of an administrative scheme it is unconditionally acceptable. Some forms of 'content regulation' *are* constitutionally valid for the provinces, viz., liquor advertising[21] and advertising directed towards children.[22] And some are validly federal; for example, the power of the Canadian Radio-Television and Telecommunications Commission to regulate Canadian versus foreign content. But the issue of their moral objectionability

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19. Hogg, *id.*
20. *Id.* at 428. "The depiction of . . . violence and sex" is covered by section 159(8) of the *Criminal Code:*

> . . . 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.

21. *Regina* v. *Telegram Publishing Co. Ltd.* (1960), 25 D.L.R. (2d) 471 (Ont. H.C.)
22. *Attorney-General of Quebec* v. *Kellogg's Co. of Canada* (1978), 83 D.L.R. (3d) 314 (S.C.C.)

transcends local administrative considerations, and must be viewed in relation to the powers of each jurisdiction according to the constitution. So the 'local matters' argument does not help us to decide whether the type of regulation is one that can be done by one jurisdiction or the other. In the above examples it has been held that the content regulation must fall within some valid federal or provincial purpose.

In sum, the 'constitutional boundaries of the media' cannot be allowed to determine the powers of each jurisdiction; the constitutional boundaries of each jurisdiction must determine the powers exercised in relation to the media. What must be examined in all cases are the aspects purporting to bring the activity within each jurisdiction; it must not be assumed that methods of transmission or places of consumption dictate *a priori* all matters affecting that activity.

The Dissent

The Chief Justice, in his dissent,[23] expressed other grounds for disputing the province's competence to empower a censor board to ban films. The argument consists of three aspects: a. Penalty/Prohibition b. Provincial Powers and c. Paramountcy.

a. *Penalty/Prohibition*

Laskin C.J. began by dismissing the contention that since there is no penalty attached when the Censor bans a film, it cannot be thought of as in relation to criminal law. Ritchie J. in his argument that the Board is clothed with powers to ban films points out that this measure is preventive. He stated that:

> [The Theatres and Amusements Act] is directed to regulating a trade or business where [the *Criminal Code*] is concerned with the definition and punishment of crime; . . . one is preventative while the other is penal.[24]

In the dissent, this view is seen as improperly empowering the Board to "do by prior restraint what it cannot do by defining an offence and prescribing *post facto* punishment."[25] I find the reasoning of the Chief Justice a little difficult to follow: he cannot be understood as taking away *in toto* the provincial power to

23. Concurred in by Judson, Spence and Dickson. JJ.
24. (1978), 84 D.L.R. (3d) 1 at 16
25. *Id.* at 28

prescribe penalties *post facto* for prohibited acts, as section 92(15) of the *B.N.A. Act* gives the provinces the ability to prescribe "punishment by fine, penalty or imprisonment", *in relation to provincial matters*. Although Laskin C.J. did not expressly mention it, it is the *crime* that is not open to legislation for prevention under section 92(15) and that is because the prohibited act falls within the federal criminal jurisdiction. The mere declaration that the province is creating a prohibited act (*i.e.*, showing a banned film) is not enough. It must be shown that the prohibited act is criminal in nature. And this he proceeded to do,[26] first by describing the provincial powers that are properly exercised, and then by turning to a consideration of the federal criminal law.

b. *Provincial Powers*

What, then, are some of the indicia of provincial competence? The first proviso that Laskin C.J. stipulated for such legislation to be valid is that "the legislative objects must in themselves be anchored in the provincial catalogue of powers,"[27] and he found no such anchorage in the Board's power to censor films. The words of the Chief Justice himself should suffice to explain:

> What is asserted . . . by way of tying the challenged provisions to valid provincial regulatory control, is that the province is competent to licence the use of premises, and may . . . determine what shall be exhibited. This would . . . justify control by the province of any conduct and activity in licensed premises, even if not related to the property aspect of licensing, and is patently indefensible.[28]

Censorship, he concluded, takes place without relation to any premises. *Bédard* v. *Dawson,*[29] the case where 'disorderly houses'

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26. To support this proposition, *i.e.*, that the provinces cannot legislate in federal matters even by prior prohibition, 'escaping' the penalty problem, Laskin C.J. cites *A.-G. Ont.* v. *Koynok et al.*, [1941] 1 D.L.R. 548 (Ont. S.C.) where legislation purporting to give the A.-G. power to seek injunction or prohibition to distrain publishing of obscene material was declared *ultra vires*. The legislation differed slightly from the impugned Nova Scotia Theatres and Amusements Act in the instant case: nowhere here does the Board have the statutory power to seek injunction. Thus, Laskin C.J. equates a banning with an injunction, as both have the effect of preventing public access to material. The issue as to whether both make their determination on the basis of obscenity is in dispute, depending on how the Board's "standards" are characterized. See note 38, *infra*

27. McNeil, *supra*, note 6 at 16

28. *Id.*

29. [1923] S.C.R. 681

could be closed by provincial authority (only if persons habituating them had been convicted of a criminal offence), heavily relied upon by the appellant, was distinguished as it was "in relation to property": specifically, the occupation and enjoyment of premises. But that legislation was held valid, as distinguishable from the legislation invalidated in *Switzman* v. *Elbling*.[30] In the latter case, all that was said of *Bédard* v. *Dawson* by Kerwin C.J. was that "the *Bédard* case was concerned with control and enjoyment of property."

Switzman, supra, which was concerned with the prohibition of Communist propaganda, was held to be in relation to the criminal law: the provincial claim that it was framed in relation to property was rejected. For the purposes of the property argument, then, it would not be unreasonable to expect that neither the dissemination of 'propaganda' nor the exhibition of 'indecent' films can be controlled through curbs on the use of the premises in which they might happen to occur. (Do not forget that films in Nova Scotia to which the public is to be admitted, *regardless* of the premises they are shown in, must be submitted for approval to the censors before they are exhibited in specific theatres in the province. In my view, this tends to weaken the contention that that form of regulation is in relation to any specific premises, or the regulation of business activity, and strengthens the position that censorship happens in respect of films *qua* their moral objectionability: see section 3(2) (a) of the Theatres and Amusements Act.) *Bédard* v. *Dawson, supra,* which seems to have been the only authority upon which the appellants could rely, concerned measures specifically aimed at the control of the *use* to which premises are put. In film exhibition the *use* of the premises is to view a film. If there are any ulterior purposes to which those premises are being put that the legislators want to control, they must state openly their intention in separate legislation, even if it be along the lines of prohibiting a certain class of persons from gathering at one place. This was held valid in *Bédard,* and I see no reason why it could not be equally enforceable in respect to a theatre. But an Act of such general application as the Theatres and Amusements Act (which has universal application to all places where films are shown, and which has the total public as its target) must surely fall outside the more strict ambit of *Bédard.*

A line of authority follows in Chief Justice Laskin's reasons

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30. [1957] S.C.R. 285; 7 D.L.R. (2d) 337

which focus upon provincial legislation that has been held valid as being in relation to property. For example, control of liquor advertising has been held to be in relation to the sale of liquor in the province,[31] and likewise control of disorderliness in licensed premises.[32] Both involved enactments falling under the scheme of control of liquor, a settled provincial concern. Similarly, *post facto* curbs upon gambling are distinguished as being directed against the licensee; presumably escaping the *Criminal Code* provisions against gamblers.[33] Laskin C. J. took judicial notice of a strong dissent in that case by Adamson J.A. who stated that as a result of that law a hotel-owner could be held liable to conviction for gambling in any room of the hotel.[34] Finally, *Henry Birks and Sons (Montreal) Ltd.* v. *Montreal*[35] was followed. In that case, provincial controls of observance of religious holidays were struck down as having a tenuous connection with property.[36] The instant case seems to militate against the history of judicial interpretation of the prescribed federal and provincial powers, that is, that a recogizable anchor in property rights must exist. Laskin C.J. gave us this summarization of the case law having to do with activities that can be sanctioned by the provinces: where there is the possibility of overlap into federal areas there must be a strong, clear anchor in one of the provincially enumerated powers. The Chief Justice took issue with Mr. Justice Ritchie's opinion that the legislation in dispute was simply in relation to property. He recognized the possibility of such an overlap, and, indeed, he determined that the extent of overlap was fatal to the legislation. Thus, the second proviso that Laskin C.J. had to address was the paramountcy issue.

c. *Paramountcy*

The Chief Justice was inclined to hold that the operating federal field of the criminal law serves to render inoperative the censorship provisions of the Theatres and Amusements Act. To do so, the extent to which the legislation resembles the criminal law must be examined. To provide the full context of this issue, we must turn to the arguments contained in both the majority and the dissent in relation to this head.

31. *Regina* v. *Telegram Publishing Co.* (1960), 25 D.L.R. (2d) 471 (Ont. H.C.)
32. *Regina* v. *Skagstead and Skagstead,* [1964] 2 C.C.C. 295 (Man. C.A.)
33. *Miller* v. *The Queen,* [1954] 1 D.L.R. 148 (Man. C.A.)
34. *Id.* at 156
35. [1955] S.C.R. 799
36. *Id.* at 24

III. *Federal Jurisdiction:*

The Majority

After dealing with the property aspects of the Theatres and Amusements Act, Ritchie J. turned to a discussion of the purported criminal dimensions of it. He took notice of the reasons for rejection of the legislation by Mr. Justice Cooper of the Supreme Court of Nova Scotia which were, he said, that the Board's criteria for rejecting films were based upon considerations of public morals, which is properly the jurisdiction of the federal Parliament under section 91(27) of the *B.N.A. Act*. In addition, the reasons of Mr. Justice McKiegan of the court below were recognized. As we have seen, his comments were more direct: for him, censorship of this type "is obviously directed at obscenity . . . an invalid invasion of the federal criminal field."[37] Finally Mr. Justice Ritchie acknowledged the 'fundamental freedoms' grounds elicited by Judges MacDonald and Cooper, but he put off discussion of that matter until later.

a. *'Crime'*

The first argument used in rejection of the Nova Scotia Supreme Court's position was that no 'punishment' was created; it was merely a regulatory scheme. Ritchie J. went no further with the argument than this; so it amounts to a flat statement implying that if no *post facto* punishment exists on a literal reading of the Act, then the province is free to legislate on any matter. With respect, this cannot be the law. As we have seen, the Chief Justice descends with some vehemence upon this argument and, to summarize his opinion here, the presence or lack of a 'punishment' is not crucial to a determination of the subject matter and hence the constitutionality of the impugned legislation; it is not valid to attempt by prior restraint what one cannot do by subsequent punishment.[38]

b. *Morality/Criminality*

Mr. Justice Ritchie seemed to be content to validate the legislation

37. *McNeil* v. *A.-G. N.S.* (1976), 14 N.S.R. (2d) 227 at 228

38. In fact, however, the legislature *did* prescribe punishment for breach of the Act, or its Regulations: such consequences may include arrest without warrant (s.9), suspension of exhibitor's or distributor's licenses (s.2(3)), fines of from twenty to two hundred dollars (s.8) and, if violation of the Act results in bodily injury, the 'person violating' the Act may be imprisoned for up to one year (s.10).

negatively, *i.e.*, by finding fault with the judgment below. There is no objection to this form of reasoning, except that it depends upon an accurate reading of what the court below held, rather than an exclusive examination of the merits of the case before the Supreme Court. In so doing, Ritchie J. made a fundamental mistake in his characterization of the Supreme Court of Nova Scotia's basis for rejecting the Act as 'equating morality with criminality'. The short answer is that the court below made a finding that the Board was determining what was obscene.[39]

Ritchie J. used this characterization to attack the court below by quoting Lord Atkin in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* to the effect that "morality and criminality are far from co-extensive."[40] It is an odd choice of a quotation, for in its own context it was used to validate the federal power to create new crimes, even if they have no 'moral' objectionability. If we accept this view, *i.e.*, that criminality is not dependent upon morality, all it means is that the federal Parliament can define crimes as it sees fit. Mr. Justice Ritchie used the quotation here to say that if it is an act prohibited on *moral* grounds, it need not be criminal; not necessarily 'an invasion of the federal criminal field'. Thus, the two arguments regarding which authority is competent to act are set off: one saying that 'morality' does not necessarily bring the issue within the federal realm; the other, as we have seen, saying that a tenuous connection with property does not suffice to reserve it to the provinces. It is clear that what is needed to resolve the impasse is a more perceptive understanding of what this legislation is purporting to do.

Nevertheless, Ritchie J. proceeded to consider the 'morality' question as *prima facie* not fatal to provincial jurisdiction. In so doing, he mis-characterized what the Supreme Court of Nova Scotia found as a fact, viz., that the Board was engaged in a determination of what is obscene. The learned judge here never came forth and found to the contrary in so many words; he merely characterized it as a 'local standard of morality' coming into play. With the 'local standard' element I have no argument (at least, for the present), but as we have seen that does not suffice *ipso facto* to take the entire matter out of federal competence. Ritchie J. did not explicitly state as much, and so one can only infer that he thought that the Board

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39. See quote, *supra*, p. 739
40. [1931] A.C. 310 at 324 (P.C.)

was not finding or applying standards of obscenity.[41]

In any case, the issue may not hinge upon the similarity, or lack thereof, between the Board's criteria and those invoked with the guidance of section 159(8) of the *Criminal Code*. What I think the court below established was that the Board was usurping a function expressly reserved to the federal criminal law, namely, prosecuting exhibitions that allegedly are obscene, whatever that word entails. The argument that Ritchie J. used to defend the Board's powers, in my respectful opinion, overlooked this fact. The 'moral' elements appealed to, although in theory perhaps not meeting the more objective terms of section 159(8) of the *Code*, are still remarkably similar in that they have the same purpose: the elimination of that which offends the moral (not aesthetic) sensibilities of the 'average' moviegoer. If anything, the ill-defined standards of the Board should be struck down as allowing a far more arbitrary interpretation of what those sensibilities are, than do the provisions of the *Criminal Code* section, which must have as a dominant characteristic "the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence."

If, however, we grant the objection that the standards used by the Board are different from those set out in the *Code*, enabling them to operate concurrently, it must be established that the standards and objectives are indeed so different as to provide a significant distinction. In *Regina* v. *Odeon Morton Theatres, Ltd. and United Artists*[42] the Manitoba Court of Appeal held that the film *Last Tango in Paris* (the same film that was banned by the Nova Scotia Censor, which brought about this appeal) had to be judged by "contemporary community standards."[43]

In that case, Freedman C.J.M of the Manitoba Court of Appeal held that the 'community standards' test had many factors, including testimony of experts, the fact that the film was restricted to persons eighteen years of age and over, and the fact that the film was being shown in four provinces without cuts. (This case was heard prior to the banning by the Nova Scotia Censors.) The learned

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41. The Board was certainly reticent on the issue of how it made its determinations and, no evidence to the contrary, I cannot see how the Supreme Court of Nova Scotia made an error in holding as it did. In any case Mr. Justice Ritchie never formally contradicts this factual determination.

42. (1974), 16 C.C.C. (2d) 185; 45 D.L.R. (3d) 224 (Man. C.A.)

43. *Id.* at 196. [The film was found to be not obscene].

judge said, after reviewing the evidence: "I am loath to believe that Manitobans are less tolerant, less sophisticated or more in need of protective shelter than other Canadians."[44]

Taken as a whole, in my estimation, this judgment illustrates the similarity in objectives of the censors and the obscenity provisions of the *Criminal Code*. The court took judicial notice of the status of the film before the various Boards in the country, and concluded that, although not binding in any way upon the Court, the notion of "community standards' may well be one shared by the two jurisdictions. The Court dismissed any idea that Manitobans were in need of special 'protection', over and above that afforded by existing local authorities. Of course, should those authorities be found to be exercizing censorship powers unconstitutionally the process of Criminal prosecution would have to step into the breach where necessary. Recent jurisprudence on motion picture obscenity demonstrates that the courts are up to the task.

The reasons of Freedman C.J.M. are a good example. First there was the suggestion that the status of a given film before other Boards can be used to determine whether that film is obscene. It is a novel approach, because from it one infers that the Court sees its function as 'protecting' the public from unwanted depictions of unpalatable things. This objective is reminiscent of the purpose for which the Censor Boards themselves were created, but further, it underlines the possibility of some kind of accord between the two levels if, as I will suggest later in this article, the provincial boards are stripped (or, relinquish) their powers to ban or cut films (retaining the power of classification). That approach is based on the reason given by the Chief Justice of the Manitoba Court of Appeal, which was that since the film was classified 'restricted', a vulnerable sector of the population, viz., those under eighteen, would be effectively protected from seeing the film. Hence, there is less of a compunction to totally remove the film from the public through a finding of obscenity. The effect may be a tightening of the circumstances under which a finding of this sort will be made; thus, if the local Board has classified a film accordingly, and the Court is less likely to make a finding, all things being equal, the exhibitor is being 'protected' from prosecution, which heretofore has been one of his chief complaints about the system. But more on this later.

The final objection I have is that, as mentioned earlier, Mr. Justice Ritchie 'severed' Regulation 32, which stated explicitly that

44. *Id.* 16 C.C.C. (2d) at 196; 45 D.L.R. (3d) at 236

the Board may "define what constitutes an indecent or improper performance" as being repugnant to section 159(2) of the *Criminal Code*. My objection is that there is no difference between what the Regulation said the Board should do and what the Board actually does, *i.e.*, determine what is obscene. It does not even have to be 'obscene', for neither the Regulation nor this section of the *Code* use the word "obscenity". The distinction is, in my estimation, barely evident, and should not continue to be allowed to form the basis of the Board's powers.

c. *Prevention of Crime*

Mr. Justice Ritchie went on to state that even if the impugned legislation is concerned with 'criminal morality', "it would still have to be noted that it is preventive rather than penal."[45] In this context, Ritchie J. was speaking in terms of prevention of crime and was attempting to bring it under *Bédard* v. *Dawson, supra*. With respect, I cannot see the validity of this line of reasoning. Nowhere did the learned judge state what kind of crime. Did he mean disorderly conduct? Sexual offences? What evidence did the Court rely upon to support the proposition that movies incite or otherwise advocate the commission of crimes? The legislation upheld in *Bédard* was created to prevent convicted criminals from gathering in private premises and conspiring to commit further crimes. Those circumstances surely do not bear comparison to the typical ones surrounding private citizens who attend a cinema; public premises that are licensed by the provincial authorities. If the province can determine what the public may see on this contentious basis, it will next be able to do so unchallenged in live theatre, concerts and possibly even broadcasting. The possibilities for abuse take on frightening proportions.

d. *Double Aspect*

Next the learned judge insisted that the Act and the *Code* provisions can co-exist. He stated that the Board can affix standards of morality notwithstanding that the *Criminal Code* penalizes obscene or indecent performances.[46] To this end, he cited *O'Grady* v. *Sparling*,[47] in which provincial driving offences were upheld even

45. McNeil, *supra*, note 6 at 23
46. *Criminal Code*, s. 163(1)
47. [1960] S.C.R. 804

though the federal Parliament had enacted legislation covering driving offences.[48] Ritchie J. made no direct factual comparisons here, but it must be inferred that the sole ground for his reliance upon this authority was that there is not "a complete identity of subject matter"[49] between the conflicting provisions, which, as we have already seen, is open to some doubt. Instead, the learned judge went on to consider the case of *Smith* v. *The Queen*[50] where section 63 of the *Securities Act*[51] was held not to be repugnant to *Criminal Code* provisions. It was held to be *intra vires* the province, as, in the words of the then Chief Justice Kerwin of the Supreme Court of Canada, "[i]t is merely incidental to the main purpose and aim of the enactment" . . . (in the words of Lord Atkin for the Judicial Committee in *Lymburn* v. *Mayland* [1932] A.C. 318 at 324) "that *persons who carry on the business* of dealing in securities shall be honest and of good repute . . . ."[52] It will be noted that the legislation had business ethics of dealers as its object: no one would likely argue with similar legislation in relation to theatre managers or distributors, but to extend that principle to permit censorship is to me somewhat difficult to follow.

Finally, pursuing the argument that 'moral' considerations can be the object of valid provincial legislation, Mr. Justice Ritchie relied upon *Quong Wing* v. *The King*,[53] a rarely cited case that would be an embarrassment today were it to come before the Supreme Court, and almost certainly would be decided differently. In that case, the provincial legislation prohibited the employment of white women by Chinamen on pain of a $100 penalty. It was held valid as in relation to a place of business "in the interests of the morals of women and girls of Saskatchewan."[54] In effect, the civil rights of Chinamen were held to be secondary to the protection of the morals of the women of the province.[55] Apparently, the importation of a 'morality' aspect was deemed, sixty-five years ago, to supersede

48. *Criminal Code*, s. 233
49. Per Judson J., *O'Grady* v. *Sparling*, [1960] S.C.R. 804 at 807. Laskin C.J. deals with this problem — see *infra*
50. [1960] S.C.R. 776
51. R.S.O. 1950, c. 351, s. 63. The section dealt with furnishing false information in a prospectus.
52. *Smith* v. *The Queen*, *supra*, note 50 at 780 (my emphasis)
53. (1914), 49 S.C.R. 440; 18 D.L.R. 121; 23 C.C.C. 113
54. Per Sir Charles Fitzpatrick C.J. S.C.R. at 444; D.L.R. at 124; C.C.C. at 116
55. *Id.* The substantial reason that the Court relied upon to uphold the legislation was that it had the 'morals of women in the province' as its true object, not discrimination against Chinamen.

understanding between races. In another sense, however, this case is bad authority for the reason that the Censor is not 'protecting the morals' of persons by banning films. It is withholding from public view that which is indecent or offensive; that which does not correspond to 'community standards' of morality.[56]

Federal Jurisdiction:

The Dissent

In his reasons, the Chief Justice considered the extent to which the federal criminal law overrides the powers of the Board in banning films. His first authority was *Regina* v. *Board of Cinema Censors, ex parte Montreal Newsdealers Supply Co.*[57], in which Batshaw J. of the Quebec Superior Court declared the *Quebec Publications and Public Morals Act*[58] (in which a Board of Censors was given the power to determine whether any illustration in any periodical was 'immoral') to be *ultra vires*. This case distinguished, *inter alia*, *O'Grady* v. *Sparling*, and *Mann* v. *The Queen*, as not dealing with public morals, the latter being an aspect of the federal criminal law power. The Chief Justice went on to reiterate that "the determination of what is indecent or obscene in conduct or in publication . . . whether in films, in art or in a live performance is, as such, within the exclusive power of the Parliament . . . in relation to the criminal law."[59]

A line of cases followed in the dissent which substantiates the breadth of the criminal powers, starting with *A.-G. of Ont.* v. *Hamilton Street Railway*[60] as authority for the proposition that the criminal law power has been held to be as much a brake on provincial legislation as a source of federal legislation.[61] More directly pertinent is *Switzman* v. *Elbling, supra*, which states that suppression of propagandist literature cannot be framed in terms of property, or other provincial heads. As Fauteux J. said in the course of his reasons:

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56. By contrast, it could be said that *classifying* films *(i.e.,* as Restricted, Adult, or General) accomplishes a 'protective' purpose. That is, it protects those films with 'adult' content from youth. Can it be seriously maintained in this day and age that the public require the same kind of protection, based upon the premise that what an adult views determines his behaviour towards others?
57. (1967), 69 D.L.R. (2d) 512 (Que. Sup. Ct.)
58. R.S.Q. 1964, c. 50
59. *McNeil, supra,* note 6 at 14
60. [1903] A.C. 524 (P.C.)
61. *McNeil, supra,* note 6 at 14

> In such cases, the rights being encroached upon are not those of an individual entitling him to a monetary compensation. The rights . . . are those of society itself involving punishment.[62]

Finally, the fact that films themselves have been subject to prosecution under the *Criminal Code* is noted. As we saw earlier, it is difficult to separate the motives behind provincial assessment of a film's suitability from those of a court in a criminal proceeding: both purport to use 'local' or 'community' standards. As well, there has been some jurisprudence of late to suggest that the court may be guided by what the provincial Boards are doing, presumably on the premise that the same criteria are operating. In view of these similarities, Laskin C.J. comes to the conclusion that the doctrine of paramountcy must take effect, *i.e.*, that the censorship power of the Nova Scotia Theatres and Amusements Act is inoperative, being an infringement upon section 159 of the *Criminal Code*.

IV. *A Proposed Alternatvie*

The pros and cons of state intervention in the moral conduct of the public have been expressed by numerous authors and critics, from John Stuart Mill to H.L.A. Hart.[63] The debate has ranged far and wide, and will not be discussed here. Suffice it to say that it pitted the individual's fundamental right to freedom of thought and expression against the fear that without the control of ideas harmful to peace, dignity and civility, the state would lose its cohesiveness. What we are dealing with here, however, is the reality that, as an expression of the general will of the public, some form of sanction must obtain against those who would subvert or debase morality, or profit by such acts. What I think does bear examination are the mechanisms through which this will is expressed.

The *McNeil* case has shown that, constitutionally, there can be entertained some objection to the provinces' maintaining themselves as the arbiters of social moral behaviour. The existence of a range of federal provisions setting out and punishing anti-social activity seems to close this area off from the provinces. The object at this point, given the uncertainty of the entire exercise of adjudicating these matters (save for the fact that the Supreme Court has guaranteed, for all practical purposes, the jurisdiction of the

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62. *Switzman* v. *Elbling*, [1957] S.C.R. 285 at 320 (translation)
63. For a succinct summary of these and other views, see J. Weiler, *Controlling Obscenity by Criminal Sanction* (1971), 9 Osgoode Hall L.J. 415

provinces over this matter), should be to specify once and for all who we want to make these determinations. Only then can we effect the improvements in the system that we desire, notwithstanding the decision in *McNeil*.

This will not, as I have said, lead us into a debate upon the merits of censorship versus fundamental freedoms.[64] Those arguments are beyond the scope of this article. But, involved in the sensitive question of how these standards are to be arrived at and enforced are considerations of how the interests of Canadian society are to be best served.

At present, the *Criminal Code* directs itself to obscenity through section 159 and related sections. Various tests as to what constitutes obscenity have been developed and revised through the years. Joseph Weiler, in his article,[65] summarizes them, and perhaps that article should be referred to for further detail as to their development. Of course, the standards orginally were subjective, as in *R.* v. *Hicklin*[66] where a publication was considered obscene if "(it is) to deprave and corrupt those whose minds are open to such immoral purposes."[67] One objection to this test is, as Weiler points out, that it requires a subjective, speculative evaluation by the judge as to the corrupting and depraving tendencies of the material upon a group of unknown readers. The possibilities for inconsistency were obvious, so Parliament in 1959 enacted section 159(8) of the criminal Code to try and provide a more objective standard *in addition* to the *Hicklin* test. The section forbids in part "the undue exploitation of sex, or of sex and any one or more of the following subjects, nmely, crime, horror, cruelty and violence." This standard has had judicial interpretation,[68] but the problem has been,

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64. The issue of 'fundamental freedoms' was dealt with very summarily by Ritchie J. for the majority, who dismissed the argument that the Board *could* "affect some of the rights" by saying that "it was not the purpose of the Act" and to hold otherwise would "involve speculation as to the intention of the legislature" *(McNeil, supra,* note 6 at 29). With respect, I do not think that the learned judge appreciated the issues involved. On the other hand, Chief Justice Laskin, in the dissent, spoke not a word regarding this dimension, as he was content to hold invalidate the legislation on the narrower grounds given. But one can infer that he premised his remarks on the assumption that the powers exercised by the Board could be used to infringe such rights as exist.

65. *Supra,* note 63

66. (1868), 3 Q.B.D. 360

67. *Id.* at 371. See Weiler, *supra,* note 63 at 418

68. See, for example, the *dicta* of Mr. Justice Judson in *R.* v. *Brodie,* [1962] S.C.R. 681

and is, the application of the 'standard' to particular fact situations; that is, determining when something falls within the 'standard'. One important test of interest here is the so-called 'community standards' test introduced by Mr. Justice Judson in *R.* v. *Brodie* in 1962.[69] It had its origin in an Australian case, *R.* v. *Close*[70] where it was propounded that there exists in *every community* a sense of decency; and that a jury is competent to discover and apply these standards.[71]

It is submitted that this standard, although vague, is nevertheless closely analogous to that invoked by the provincial Censor Boards. The test seems to admit *local* community standards, that is, the judge is permitted to consider the immediate social context out of which a charge has arisen. Also admissible, as we have seen, is evidence of the film's acceptability in other regions of the country[72] as well as expert testimony as to the merits of the film in question.[73] Now, it is obvious that the sum total of these tests, if they are admitted, and the evidence which is considered, will not conclusively determine the acceptability of a given film, for in many cases (especially in the case of a film such as *Last Tango in Paris,* which has been subjected to the highest praise and the deepest criticism) reasonable men will differ on this point. But, that is not to say that, *a fortiori,* the factors taken into consideration by the Court are not as 'sensitive' to local needs as those of a provincial tribunal.[74] Indeed, it is my submission that the Court has the potential for a far more enlightened assessment of the merits than that which summarily occurs in a screening room attended by three or four politically answerable appointees.

It should be apparent by now that I am advocating the voluntary removal of censorship powers (*i.e.,* banning or cutting films) from the provincial authorities, but leaving intact their powers of classification, as the latter serves to exclude a class of persons from

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69. *Id.*
70. [1948] V.L.R. 445 (Vict. S.C.)
71. *Cf.* Weiler, *supra,* note 63 at 420 (my emphasis)
72. See, for example, the tests applied by Freedman C.J.M. of the Manitoba Court of Appeal in *Regina* v. *Odeon Morton Theatres* (1974), 16 C.C.C. (2d) 185
73. *Id.*
74. Especially as, in the case of one provincial tribunal (the Ontario Censor Board), cuts are made that result in the *exact* same version of a film being shown in Stratford as on Yonge Street, Toronto. Can it truly be said that the Censor Board is equipped to respond to 'community standards' when even in a given province they can arguably vary so widely?

attending films with an 'adult' context, presumably because, being at an impressionable age, youth should be protected from experiences that are beyond their years. (In support of this practice being *intra vires* the provinces, and not just another form of interference in the federal criminal process, I would cite the powers of the provinces to legislate in relation to minors in other areas such as consumption of alcoholic beverages.) It would seem, then, on its face, that classification would fall within this category of legislation in relation to minors.

Would the effect of these changes be to strip the provinces of any and all power to supervise who can see a film? If we carry the example of classification a bit farther, it will be seen that the Censors (now the 'Film Classification Board') can compel the advertiser to include various warnings as to the nature of the content of the film, thus allowing persons who would be upset or offended (*i.e.*, by coarse language or scenes of violence or sex) to make an enlightened choice. I believe that it is preferable to allow persons to make a choice *not* to patronize a certain film, rather than have a Censor make that choice for *all* the persons in the province.

What if the new scenario resulted in many prosecutions under the *Criminal Code* in one region of the country? Would that have the effect of 'legislating' what the rest of the country could see? Given that the 'local' or 'community' standards approach is open to the courts, it may be successfully argued that a less liberal community could secure convictions where they would not occur in another region. This is admittedly a bizarre situation, for it militates against the principle of certainty in the criminal law, *i.e.*, that a given act is or is not prohibited, regardless of the geographical locale (leaving aside considerations of *mens rea* for the present).

My answer is that two things could occur. First, because we are dealing with a criminal test that is inevitably as malleable as the age in which we live, it is doubtful that a majority of convictions would hold forth even in a few years. If anything, this fact tends to argue in favour of the 'community standards' test: it is the standards of the community that are the most relevant in determinations of this nature. As a result, a conviction in one jurisdiction may arguably be open to distinction in another on the basis that the 'community local standards' test must inevitably vary from place to place. This is certainly an improvement over the existing system, where the same version is seen by everyone in the province.[75] That cannot be seen

75. And even in other parts of Canada. Most films are imported and shown first in

as highly flexible or responsive to community standards.

The other thing that could, and likely would, occur is that if a conviction were registered against a given film, the distributor would feel compelled to make cuts voluntarily, so as not to risk prosecution under the same fact situation as the conviction that has already taken place. And this 'dynamic' give-and-take between the owner of the film and the public (which would undoubtedly become active in the debate concerning which films to charge, via the offices of the attorneys general of the provinces and the courts) is a positive factor; previously, the distributor took his grievances over what alterations are made to the censors themselves, and this has become a closed-door practice, sometimes resulting in pressures being brought to bear. As in any system of supply and demand, the distributor and exhibitor would soon learn what is acceptable and what is not.

In sum, I have argued that there is still some doubt about the constitutionality of the present system of provincial film censorship. Notwithstanding that the issue will likely never come before the Supreme Court again in this form, it is still open to the federal and provincial authorities to voluntarily revise that system. In light of the fact that the courts have demonstrated a willingness to respond to the requirements of the community in which a dispute arises, coupled with the fact that the present system seems to inhibit, and not promote, the expression of those requirements I feel that such a change would go far to encourage freedom and flexibility of choice for the people of Canada.

Ontario. If cut, the film copies go out to the various provinces *still cut*. Thus persons in Alberta or New Brunswick are seeing material deemed acceptable in Ontario, and they are not realizing any advantage by having a 'local' Board. This practice is surprisingly common.