LARRY BRODIE .....APPELLANT; 1961 *Nov. 15

AND

HER MAJESTY THE QUEEN .....RESPONDENT. 1962 Mar. 15

JOSEPH R. DANSKY .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

GEORGE RUBIN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Criminal law—Obscenity—Lady Chatterley's Lover—Whether obscene publication—Whether definition of obscenity in s. 150(8) of the Code exhaustive—Dominant characteristic undue exploitation of sex—Whether test in R. v. Hicklin still applicable—Evidence by experts as to purpose of author and as to literary and artistic merits of book—Whether admissible—Criminal Code, 1953-54 (Can.), c. 51, s. 150(8) (as enacted by 1959, c. 41, s. 11), and s. 150A(4) (as enacted by 1959, c. 41, s. 12).

On an information laid under s. 150A of the *Criminal Code*, copies of a book entitled "Lady Chatterley's Lover" by D. H. Lawrence, were seized on the accused's premises on the allegation that the book was an obscene publication under s. 150(8) of the *Criminal Code*. The trial judge found the book to be obscene and ordered its confiscation. This judgment was unanimously affirmed by the Court of Queen's Bench, Appeal Side. The accused were granted leave to appeal to this Court.

Held (Kerwin C.J. and Taschereau, Locke and Fauteux JJ. dissenting): The book "Lady Chatterley's Lover" was not an obscene publication.

Per Cartwright J.: Assuming, without deciding the point, that the definition of the word "obscene" contained in s. 150(8) of the Code is exhaustive, as was contended by counsel for the accused and conceded by counsel for the Crown, for the reasons given by Judson J., the book in question was not obscene.

Per Abbott, Martland and Judson JJ.: The definition of "obscenity" introduced in 1959 by s. 150(8), enacted for the purposes of proceedings under the Code, precludes the application of any other test. Consequently, the test in *R. v. Hicklin*, L.R. 3 Q.B. 360, and all the jurisprudence thereunder was rendered obsolete by the enactment of

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

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this new and exhaustive definition. Under the definition, there must be a characteristic which is dominant and this dominant characteristic must amount to an exploitation of sex which is undue. The search for such a dominant characteristic involves the reading of the whole book and also involves an inquiry into the purpose of the author. One cannot ascertain a dominant characteristic of a book without an examination of its literary or artistic merit, and this renders admissible the evidence of the author and others on this point. There was real unanimity in the opinions of the witnesses that the book was a true and sincere representation of an aspect of life as it appeared to the author. The phrase "undue exploitation" is aimed at excessive emphasis on the theme of sex for a base purpose. Measured by the internal necessities of the novel, there was no such undue exploitation. There was no more emphasis on the theme of sex than was required in the treatment of such a serious work of fiction. No matter whether "undue exploitation" is to be measured by the internal necessities of the novel itself or by offence against community standards, this novel does not offend.

Per Ritchie J.: The language of s. 150(8) does not constitute an exclusive definition of "obscenity" for the purposes of the *Criminal Code*. That language cannot be construed as meaning that no publication can be obscene for the purpose of the Code unless it has undue exploitation of sex as a dominant characteristic. Section 150(8) has the effect of expanding the meaning of "obscene" to include all publications which have undue exploitation of sex as a dominant characteristic whether or not they can be shown to have a tendency to corrupt and deprave. The word "undue" carried the meaning of "undue having regard to the existing standards of decency in the community". The inquiry as to whether a publication is likely to corrupt a significant segment of the population and as to what is or what is not "undue" so as to offend community standards, involves the reading and consideration of the publication as a whole. It is not only relevant but desirable to consider evidence of the opinions of qualified experts as to the artistic and literary qualities of the publication. Although sex is a dominant characteristic of the book and although there are isolated passages which, when read alone, unduly exploit sex, it does not follow that these passages, read as a part of the whole book, have the effect of making the undue exploitation which they contain a dominant characteristic of the publication so as to bring it within s. 150(8). Furthermore, no significant segment of the population was likely to be depraved or corrupted by reading the book as a whole. In any event, the defence of the public good was available under s. 150A so that any harmful effect which these objectionable passages might have is counterbalanced by the desirability of preserving intact the work of a writer who, on the evidence in this case, was regarded as a great artist by respectable teachers, authors and critics.

Per Kerwin C.J., dissenting: It was unnecessary to deal with the argument that the Crown having cross-examined the witnesses, could not now say that their evidence was inadmissible, because Parliament has prescribed that under s. 150(8) an objective test be applied. The rule in *R. v. Hicklin* is not the one to be followed in applying s. 150(8) of the Code. Under that subsection, a publication is deemed to be obscene if (a) a dominant characteristic of the publication is (b) the undue

exploitation (c) of sex. The claim of the witnesses and of the judgments in the Courts of England and the United States that the dominant characteristic of the book is to show the evils of industrialism in England and the damage it does to the human soul, is not substantiated by a careful reading of the book. The use of "four-letter words" by itself might or might not make a book one in which sex was exploited unduly so as to make that feature a dominant characteristic, but they could not be treated in isolation from the scenes depicted in which they were used. The witnesses called on behalf of the accused have not succeeded in showing that this is a work of art in which there is no undue exploitation of sex and that that is not the dominant characteristic of the book. Although the evidence was competent to show the merits of the book as a work of art, the tribunals would still have to determine whether a dominant characteristic of the book was the undue exploitation of sex. In the present case, the answer must be in the affirmative.

Per Taschereau J., dissenting: The decision of *R. v. Hicklin* is no longer the law of the land. It is unnecessary to determine whether s. 150(8) is exhaustive or not, since if there is to be found in the book *a* dominant characteristic which is the undue exploitation of sex, the book must be banned. Without deciding as to its legality or illegality, too much weight has been attached to the expert evidence adduced. A more objective legal aspect of the question has to be considered. The author relies on sex and adultery to dissolve the clouds of social evils that he believes are hanging over the skies of England. In doing so, he violates s. 150(8) of the Code. "Undue" means "unreasonable", "unjustifiable". The book comes clearly within the ban of the Code as there is an undue exploitation of sex which is "a dominant" characteristic of the work. Even if the book were a work of art, art can co-exist with obscenity and does not exclude it.

Per Locke J., dissenting: The book is an obscene publication within the definition of s. 150(8) of the *Criminal Code*.

Per Fauteux J., dissenting: While s. 150(8) of the Code is effective to expand the meaning of "obscenity" so as to include a publication *a* dominant characteristic of which is exploitation of sex, it does not purport to be an exhaustive definition of obscenity excluding the test found in *R. v. Hicklin* and all the Canadian and English jurisprudence in application of that case. The evidence of experts in literature has always been excluded under the *Hicklin* jurisprudence as irrelevant to the test and there does not appear to be any valid reason why this rule should be varied with respect to the test under s. 158(8) whether, having regard to the existing standards of decency in the community, the exploitation of sex has been carried to a shocking and disgusting point. The book in question can be accurately described as replete with descriptions in minute detail of sexual acts with the use of filthy, offensive and degrading words and terms. Whether admissible or not, expert evidence as to the literary merit of the book is clearly ineffective to change this view. Whether one applies the law as it stood prior to or as expanded by the 1959 amendments, "Lady Chatterley's Lover" is an obscene publication under the *Criminal Code* of Canada.

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APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Fontaine J. Appeals allowed, Kerwin C.J. and Taschereau, Locke and Fauteux JJ. dissenting.

F. B. Scott, Q.C., and *M. Shacter*, for the appellants.

C. Wagner, André Tessier, Q.C., and *Gabriel Houde, Q.C.*, for the respondents.

THE CHIEF JUSTICE (*dissenting*):—By leave of this Court Brodie, Dansky and Rubin appeal from judgments of the Court of Queen's Bench of the Province of Quebec[1] dismissing their appeals from judgments of the Court of Sessions of the Peace for the District of Montreal declaring a certain book "Lady Chatterley's Lover", by D. H. Lawrence, to be obscene and forfeited to Her Majesty in accordance with the provisions of s. 150A of the *Criminal Code* of Canada. The three appeals raise the same question and it is sufficient to deal with the case of Brodie.

Section 150 of the *Criminal Code* including subs. 8 which was enacted July 18, 1959, by 7-8 Eliz. II, c. 41, and s. 150A of the Code enacted at the same time by the same chapter read as follows:

150. (1) Every one commits an offence who

(*a*) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or

(*b*) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(*a*) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

(*b*) publicly exhibits a disgusting object or an indecent show,

(*c*) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of preventing conception or causing abortion or miscarriage, or

(*d*) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

[1] [1961] Que. Q.B. 610, 36 C.R. 200.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(*a*) the commission of crimes, real or fictitious, or

(*b*) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

150A. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be obscene or a crime comic may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is obscene or a crime comic, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene or a crime comic, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsecion (4) or (5) by any person who appeared in the proceedings

(*a*) on any ground of appeal that involves a question of law alone,

(*b*) on any ground of appeal that involves a question of fact alone, or

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(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XVIII and sections 581 to 601 apply *mutatis mutandis*.

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or continued in that province under section 150 with respect to those or other copies of the same publication without the consent of the Attorney General.

(8) In this section,

(a) "court" means a county or district court or, in the Province of Quebec

(i) the court of the sessions of the peace, or

(ii) where an application has been made to a district magistrate for a warrant under subsection (1), that district magistrate,

(b) "crime comic" has the same meaning as it has in section 150, and

(c) "judge" means a judge of a court or, in the Province of Quebec, a district magistrate.

It was under the provisions of s. 150A that an information was laid and a summons issued to Brodie as the occupant of premises within the jurisdiction of the Court of the Sessions of the Peace. A copy of the book seized was put in evidence. Under reserve by the judge of counsel's right so to do, witnesses were called on behalf of Brodie and were cross-examined to some extent. It has been contended on behalf of the appellant that having cross-examined the witnesses the Crown cannot now be heard to say that their evidence was inadmissible. There is a good deal to be said for this argument but it is unnecessary to deal with the point because, in my view, by subs. 8 of s. 150 Parliament has prescribed that an objective test be applied. Before the enactment of subs. 8 the rule laid down by Chief Justice Cockburn in *R. v. Hicklin*[1] had been applied in England and in various Courts in Canada. This was to the effect that the test of obscenity was whether the tendency of the matter charged is "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall". I agree with counsel for the appellant that this is not the rule to be followed in applying the amendment and that the judge of first instance was in error in so doing. It was argued that notwithstanding statements of intention to the contrary

[1] (1868), L.R. 3 Q.B. 360.

the judges in the Court of Queen's Bench applied the *Hicklin* rule. I am unable so to read their reasons, but, in any event, I desire to make it clear that I do not apply it.

So far as relevant to this appeal, under subs. 8 of s. 150 of the Code, a publication is to be deemed obscene if (a) a dominant characteristic of the publication is (b) the undue exploitation (c) of sex. The witnesses called on behalf of the appellant and some, if not all, of the judgments in Courts in England and the United States, put in by his counsel, claim that the dominant characteristic of the book is to show the evils of industrialism in England and the damage it does to the human soul. A careful reading of the book satisfies me that this is not so. This view is based not merely on the comparatively short space allotted to any such thing as compared with that taken up with sex, but on a comprehensive view of the publication. Another matter relied on is the alleged preeminence of "blood knowledge" over "mind knowledge" in the lives of human beings. These terms were invented by Lawrence, it is said, to show that the animal state of man's nature should be in better balance with mind knowledge.

The use of "four-letter words" by itself might or might not make a book one in which sex was exploited unduly so as to make that feature a dominant characteristic, but they cannot be treated in isolation from the scenes depicted in which they are used. The witnesses called on behalf of the appellant have not succeeded in showing that this is a work of art in which there is no undue exploitation of sex and that that is not the dominant characteristic of the book. I pay no attention to the price charged for the book but it is not without significance that on the cover above the title "Lady Chatterley's Lover—D. H. Lawrence" appears: "Complete Unexpurgated Authentic Authorized Edition" and that below the title appears the following: " 'This Signet Edition is the only complete unexpurgated version of LADY CHATTERLEY'S LOVER authorized by the estate of Frieda Lawrence for United States publication' Laurence Pollinger Literary Executor to the estate of the late Mrs. Frieda Lawrence". By themselves these matters might appear insignificant but notwithstanding the protestations of the representative of the publishers they lend weight to the conclusion arrived at.

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By reason of war wounds, the husband of Lady Chatterley was rendered impotent and, in order, as in substance the author puts it, that the wife should not be frustrated, she approached Mellors, her husband's gamekeeper, who was separated from his wife. In fact, she led him to the relationship that is afterwards set out in such great detail. There is not merely a description of one episode only, but of several, and it is sufficient to state that all of them are set forth in great detail that might have been expected in the Greece and Rome of ancient times.

The evidence for the defence was competent in order to give the opinion of the witnesses as to the merits of the book as a work of art, but in some parts it is made clear that opinions may differ. That would entail a comparison of any evidence that might be adduced in any particular instance and even then the answers on the point would not determine whether a dominant characteristic of the publication was the undue exploitation of sex. That would still have to be determined by the tribunals before which the matter came and in the present case the answers must be in the affirmative.

The appeals should be dismissed.

TASCHEREAU J. (*dissenting*):—I have had the advantage of reading the reasons written by the Chief Justice and I substantially agree with his reasons, and concur in the conclusions that he has reached. I wish to add only a few personal observations.

The original edition of Lady Chatterley's Lover was first published in Italy in 1928. The other editions that were published were expurgated and what was thought to be objectionable was removed from the book. About thirty years later an unexpurgated edition was published, and in November 1959, several copies of this last edition were seized on the strength of a complaint laid under s. 150A of the *Criminal Code* as amended. His Honour Judge Fontaine of the Court of the Sessions of the Peace sitting in Montreal, ordered these books to be forfeited as being obscene, and the Court of Queen's Bench[1] unanimously upheld the decision of the trial judge and dismissed the appeal.

[1] [1961] Que. Q.B. 610, 36 C.R. 200.

The main section of art. 150 of the *Criminal Code* with which we are concerned is s. 150(8) which was enacted in 1959 and which reads as follows:

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Before the enactment of this section the law was far from being clear and left the door open to subtle distinctions, to fine niceties, that too often allowed publishers to continue a wide diffusion of obscene and immoral literature. It is common knowledge that the 1959 amendment was to eliminate the distribution of obscene material and to call a halt to what may be rightly termed legalized assault against morality. The aim of the Act was without doubt to clean up all news stands of this lewd, filthy literature, published surely not to serve the public good but merely for pecuniary gain. I give a cold reception to the suggestion that, if the book is banned, our Courts will be the only ones to hold in such a way. This Court does not make the law but its duty is to apply it as enacted by Parliament. The decisions rendered in England, France and the United States are entirely immaterial for the determination of the case at bar. Our law enacted in 1959 is substantially different, and the decision of *R. v. Hicklin*[1] which was formerly applied in England and Canada is no longer, for the purpose of this case, the law of the land.

The question which is to be solved is the following: Do we find that there is in this publication a *dominant characteristic* which is the *undue exploitation of sex?* If so, the book is *deemed to be obscene.* I find it unnecessary to determine whether s. 150(8) is exhaustive or not. It is sufficient, I think, to say that if we find in the book a dominant characteristic which is the undue exploitation of sex, it must be banned. The law says *a* dominant and not *the* dominant characteristic. Moreover I believe that, without deciding as to its legality or illegality, too much weight has been attached to the expert evidence which has been adduced. The lawful or unlawful circulation of a book cannot be conditioned by the subjective tastes or propensities of witnesses, whatever may be their literary aptitudes. A more objective legal aspect of the question has to be considered.

[1] (1868), L.R. 3 Q.B. 360.

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Taschereau J.

This book is the story of an upper class Englishman who came back paralyzed from the first world war. He operated his coal mines and occasionally wrote novels particularly noteworthy for their mediocrity. His wife, Constance, is dissatisfied and frustrated. After having refused the suggestion of her husband to have a child with one of his friends, which he would recognize as his own, she meets Mellors, the game keeper, who, in Lawrence's mind, is the archetype of the "natural man". He is an offspring of the labour class and is quite intellectually independent. Constance and Mellors then start an intimate relationship, and when she becomes pregnant, she decides to divorce Chatterley and marry the game keeper.

The author then minutely describes with unholy satisfaction more than fifteen adulterous scenes in the hen-house, the brush wood of the nearby fields, or the living quarters of the game keeper. Nothing is left even to the most vivid imagination. All the episodes are brutally described, and the conversation between the two lovers is of a low and vulgar character. Words are used that no decent person would dare speak without, in my view, offending the moral sense of anyone who believes in the ordinary standards of decency, self-respect and dignity.

It is said on behalf of the book that there are three principal characteristics which distinguish this novel:

1. That it is an attack on industrialism and its evils in England;

2. The emphasis on "blood knowledge" rather than "mind knowledge";

3. The redeeming power of love when sex is treated as something beautiful and holy.

It has also been argued that this novel is placed in a setting which emphasizes its literary qualities and it is praised as a significant work of a major English novelist. I must say that I believe that this book has been overglorified. Lawrence may have given many fine contributions to English literature; he may have been stamped as a classic of our modern times, but all the beautiful things that he may have written cannot legalize what the law forbids. He has, of course, a great gift for description, for setting forth in words what is the product of his fertile imagination, but

all the art he unfolds does not change the nature of "Lady Chatterley's Lover". I never thought that the frame could make the picture.

Even if, as argued, this book were a work of art, I think that art can co-exist with obscenity and does not exclude it. A nudity is not an obscenity. The great museums of the world are filled with paintings of the human body, and it would be a nonsense to hold the view that Rembrandt, Leonardo de Vinci, Michel-Ange, Raphaël or Renoir have painted obscenities. There is nothing in those masterpieces which is offensive to modesty or decency, or that expresses or suggests lewd thoughts, as "Lady Chatterley's Lover" does.

It is my view, that if any industrial ills have existed or do exist now in England, and that if there are conflicts between capital and labour, the solution of the problem cannot be found in Lawrence's book. The evidence does not reveal the results obtained by the publication of the book, and there is nothing to indicate that this so-called palliative has even momentarily relieved the ills that Lawrence thought affected the British Isles. In order to improve the social conditions in England, if they have to be improved, I have more faith and hope in sound legislation enacted by Parliament, than in the adulterous scenes described by Lawrence in his book.

Whether the emphasis should be placed on "blood knowledge" or "mind knowledge", in order to purify the social atmosphere of England, or whether sex should be treated as something beautiful and holy in order to become the redeeming power of love, are ideologies that may possibly be the guides of future generations. The diffusion of these patriotic ideas, cherished by Lawrence, are surely not forbidden by law. What in my view is objectionable, is not the aim pursued by the author, although I find it an illusory promise of future happiness, but the means employed for the demonstration of his thesis.

He relies on sex and adultery to dissolve the clouds of social evils that he believes are hanging over the skies of England. In doing so, he violates, I think, s. 150(8) of the *Criminal Code,* and I am convinced that we must necessarily find in the book "an undue exploitation of sex", which is *"a dominant"* characteristic of the work. "Undue" in the ordinary English language means of course "unreasonable",

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"unjustifiable". It conveys the idea that what is said goes beyond what is appropriate or necessary to prove the proposition that one endeavours to demonstrate to the public. I know of no one capable of finding words or imagining scenes that could be added to this publication to make it more obscene. Over three-quarters of the book, or 250 pages deal with filthy, obscene descriptions that are offensive to decency, and entirely unnecessary for what we have been told is the purpose of the book. Nobody would seriously think that this novel could be shown on television or that any respectable publisher would make available to the public in a newspaper or a magazine the complete story of "Lady Chatterley's Lover", without shocking the feelings of normal citizens. I am not aware that obscenity is, under the law, the exclusive prerogative of novelists, whatever may be their outstanding talent.

I have no hesitation in reaching the conclusion that the book comes clearly within the ban of the Act, and that the three appeals should be dismissed.

LOCKE J. (*dissenting*):—In my opinion this book is an obscene publication, as that term is defined in subs. (8) of s. 150 of the *Criminal Code*.

I would, therefore, dismiss these appeals.

CARTWRIGHT J.:—The course of the proceedings in the courts below is set out in the reasons of other members of the Court.

In opening the appeals in this Court counsel for the appellants submitted that subs. (8) of s. 150 of the *Criminal Code* now contains an exhaustive definition of the word "obscene" for all purposes of the *Criminal Code* and that a publication cannot be held to be obscene unless it falls within the terms of that subsection. Counsel for the Crown in answer to a question from the bench stated that he agreed with this submission and consequently counsel for the appellants was not required to deal further with it in reply.

The orders of forfeiture made by the learned Judge of first instance are analogous to convictions of a criminal offence and I do not think that this Court should inquire whether those orders might be supported on a view of the law which counsel for the Crown expressly disclaimed. We should, I think, dispose of the appeals on the basis upon which they were presented to us by all counsel and treat the definition

of the word "obscene" contained in s. 150(8) as exhaustive. I wish, however, to reserve my opinion as to the true construction of that subsection in case it should be called in question in the future.

On the assumption that the definition is exhaustive, for the reasons given by my brother Judson I agree with his conclusion that the book in question is not obscene.

I would dispose of the appeals as proposed by my brother Judson.

FAUTEUX J. (*dissenting*):—This appeal calls for the determination of two questions. The first, one of law, being what constitutes an obscene publication under the *Criminal Code* of Canada and the other, one of fact, whether the publication here impeached is obscene under the Code.

Until at least the 1959 amendments, hereafter considered, the *Criminal Code* did not give any definition of "obscenity" and for nearly a hundred years, from 1868 to 1959, the Canadian Courts, following the Courts in England, have been guided by the rule laid down in *R. v. Hicklin*[1]. On this century-old case, the test of obscenity is "whether the tendency of the matter charged with obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." *R. v. Stroll*[2]; *R. v. National News*[3]; and *R. v. American News*[4] are, prior to 1959, the more recent applications of this test by the Canadian Courts.

In 1959, the provisions of the *Criminal Code,* appearing under the sub-heading "Offences Tending to Corrupt Morals", were amended by 7-8 Elizabeth II, c. 41, by the addition of subs. (8) to s. 150 and the further addition of a new section, namely, 150A, providing the latter, as is the case under the English law, a preventive measure forestalling the dissemination of obscene publications. While the proceedings leading to this appeal are taken under the

[1] (1868), L.R. 3 Q.B. 360 at 371.
[2] (1951), 100 C.C.C. 171.
[3] [1953] O.R. 533, 16 C.R. 369, 106 C.C.C. 26.
[4] [1957] O.R. 145, 25 C.R. 374, 118 C.C.C. 152.

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preventive provisions, the substantive law as to obscenity appears in s. 150 which, as amended and applicable to this case, reads as follows:

150. (1) Every one commits an offence who

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or

(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

(b) publicly exhibits a disgusting object or an indecent show,

(c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of preventing conception or causing abortion or miscarriage, or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious, or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

The primary question to be determined as to the law is whether, as contended for on behalf of appellants and conceded by Crown counsel in answer to a question from the Bench, the provisions of subs. (8) purport to be a definition and an exhaustive definition of obscene publication. If this be the case, henceforth the *Hicklin* test and all the Canadian and English jurisprudence thereunder are rendered obsolete and subs. (8) becomes the only remaining provision where the constituent elements of obscene publication may possibly be found and determined. With deference, I may immediately say that I do not think this Court should rest the decision of a question of law on an admission of counsel. This is specially so in a case where, as here, the particular question assumes in this Court, as it did in the Courts below, a primary influence in the disposition of the case and where the same question has already been judicially considered and negatively answered by a provincial Court of Appeal. In *R. v. Munster*[1], the five members of the Supreme Court of Nova Scotia *in banco* were unanimously of the opinion that subs. (8) does not purport to be a definition of "obscenity" and that matters not included in its provisions may yet become obscene under the *Hicklin* test.

The purport of the various amendments successively made in recent years to the law related to obscenity manifests the well publicized and commonly known intention of Parliament to strike more effectively at the corruption of public morals by obscene publications. Evincing such an intent are particularly the provisions of subs. (8) of the 1959 amendments enacting that:

> (8) For the purposes of this Act, any publication *a dominant characteristic* of which is the *undue exploitation of sex,* or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, *shall be deemed* to be obscene.

The true significance of the terms here italicized must of necessity be ascertained.

Generally, the predominant characteristic of a publication is accepted as the determining feature of its nature. It is also, in certain jurisdictions, only the predominant characteristic of a publication which is relevant to the determination of the specific question whether or not a publication is obscene. If that was a possible view of the law in this

[1] (1960), 45 M.P.R. 157, 34 C.R. 47, 129 C.C.C. 277.

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country prior to the enactment of subs. (8), no longer can this view obtain under the *Criminal Code* of Canada. The expression "*a* dominant characteristic" does not have a meaning equating to that of the expression "*the* dominant characteristic". Henceforth, sufficient it will be that one of the prominent features of a publication be that described in subs. (8) to make it an obscene publication under the Code.

The ascertainment of the true meaning of the terms "undue exploitation of sex", in the context of the subsection and in the broader context of the whole section, is not free from difficulties. Standing alone, the word "undue" and the word "exploitation" are thus defined in The Shorter Oxford English Dictionary, the first:

> Not appropriate or suitable; improper; unseasonable. Unjustifiable, illegal. Going beyond what is appropriate, warranted or natural; excessive.

and the second:

> The action of turning to account; the action of utilizing for selfish purposes.

Read together, the first qualifying the second, these words indicate that Parliament recognizes that, within some limits, exploitation of sex in a publication is by no means illegal and never was indeed so considered. Common in literature, moving pictures and other forms of entertainment, and even in commercial publications, exploitation of sex, within or beyond these limits, would entirely be banned by subs. (8) were it not for the presence of the word "undue" in the provision. The word "undue" is thus effective and given full scope if the prevention of such a result is truly the intended purpose and purport of the word. That this may well be its true significance is suggested by its otherwise unbounded vagueness and consequential ineffectiveness to indicate *per se* with any degree of the certainty required in criminal matters, the limits beyond which exploitation of sex in a publication is prohibited. On this view, "undue" is synonymous to "illegal", one of the dictionary meanings ascribed thereto, and one then must and only has to refer to the other provisions of s. 150, which exhaustively states the substantive law of obscenity, to ascertain the limits beyond which exploitation of sex in a publication becomes illegal. Thus construed, the subsection still has scope to bar the defence based on the contention that only *the* predominant characteristic of a publication is to be considered

and has also scope to import in the concept of obscenity new subjects, namely, "crime, horror, cruelty and violence". On this construction, exploitation of sex is illegal or undue if it has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall, unless it is shown (i) that the public good is served by the publication and (ii) that the exploitation of sex does not extend beyond what serves the public good.

Another view of the matter, with which I am in agreement, is that the enactment of subs. (8) is effective to expand the meaning of "obscenity" so as to include a publication a dominant characteristic of which is exploitation of sex, if, having regard to the existing standards of decency in the community, such an exploitation is shocking and disgusting, though not necessarily shown to have the tendency to corrupt or deprave.

I am unable, however, to accept the submission made on behalf of appellants that subs. (8) purports to be an exhaustive definition of an obscene publication. The merit of this contention is conditioned by the true significance, in the context, of the words "shall be deemed to be obscene". The expression "shall be deemed to be" does not necessarily purport to define. The word "deemed" is not inflexible. In *R. v. Norfolk County Council*[1], Cave J. said at page 380:

> Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless . . . . it is to be deemed to be that thing.

Our *Criminal Code* offers many illustrations of a like significance being given by Parliament to the word "deemed" or the expression "shall be deemed". One example will suffice. A person who, with intent to commit an indictable offence, obtains entrance in a building by threat or artifice or by collusion with a person within, does not, in any sense, break and enter. Yet, by force of a legal fiction introduced in s. 294(*b*)(i), a person entering a building by either one of the means therein mentioned, "shall be deemed to have broken and entered" for the purposes of s. 292. It has never been nor can it be suggested that these provisions of s. 294 purport to define breaking and entering in the true

[1] (1891), 60 L.J.Q.B. 379.

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sense or in a manner excluding the ordinary meaning attending breaking and entering under s. 292; they simply provide that entrance in either one of the circumstances above shall be considered to be breaking and entering. Likewise, Parliament in enacting the provisions of subs. (8), for the purposes of criminal law, resorted to a legal fiction by the force of which (i) the nature of a publication is no longer to be determined exclusively by its predominant characteristic, and (ii) subjects hitherto foreign to the colloquial or legal meaning of obscenity, namely, "crime, horror, cruelty and violence", are henceforth, when associated with sex, made subjects relevant to the legal concept of obscenity as related to publication. Clearly, with respect to these new matters, the expression "shall be deemed" has a like significance to the one attending the same expression in s. 294 Cr. C. Qualifying as it does the whole and only phrase of the subsection, under no rule of construction can this expression be held to have one significance with respect to some of and another with respect to the other matters dealt with in the provision. I find it impossible to hold that Parliament intended, by this enactment, to put beyond the reach of the law a publication having, because of exploitation of sex, the tendency described under the *Hicklin* test. In my respectful opinion, the subsection does not, either in expressed terms or by clear implication, evince any intention of Parliament to alter the century-old law of obscenity—with which Parliament is presumed to have been acquainted at the time of the enactment—otherwise than by specifically adding thereto that when the particular circumstances described in this amendment are present in a publication, such publication "shall be deemed to be obscene".

For all these reasons, I would say that, while subs. (8) is effective to expand the law of obscenity, it does not purport to be a definition of obscenity excluding the definition of the *Hicklin* test and all the Canadian and English jurisprudence in application of that case.

In the consideration of the book here impeached, one is naturally conscious that criminal law is not meant to operate in the abstract field of speculation but in the field

of concrete factual realities. One is also particularly reminded that, as stated by Lord Goddard C.J. in *Reiter, Carter, Gaywood Press Limited et al.*[1]:

> When it is being considered whether books have a tendency to deprave and corrupt, naturally every body's mind turns to the depraving and corrupting of young people into whose hands they may fall.

Allured by the conspicuous indication on the cover of this book that the particular edition thereof is unexpurgated, juveniles buying pocket-books thus advertised—it is not unreasonable to think—have a dim interest in the literary merits, motives or purposes of the writer. Whether the reading of this book will have upon them or other classes of juveniles the tendency to deprave or corrupt them cannot be determined by the minute process of analysis which experts in the art of literature may adopt to lift out of the book the motives, purposes and literary qualities of its author. An ultimate consideration of substance is the impact which the reading of this book may exert upon their mind and whether depravation and corruption, against which Parliament intends to protect them, may ensue therefrom. This edition of the book contains no less than fifteen pornographic and adulterous episodes which decency has always forbidden ministerial or judicial officers to recite textually in the written opinion they gave as to its character. This edition is accurately described in the following excerpt from the interdiction pronounced in respect thereto by the United States Postmaster-General:

> The book is replete with descriptions in minute detail of sexual acts engaged in or discussed by the book's principal characters. These descriptions utilize filthy, offensive and degrading words and terms. Any literary merit the book may have is far outweighed by the pornographic and smutty passages and words, so that the book, taken as a whole, is an obscene and filthy work.

Whether admissible or not, expert evidence, so much relied on by appellants, as to the literary merit of Lawrence's works, is clearly ineffective to change this view of the book. The unexpurgated edition speaks for itself. While, generally, evidence of experts in literature is relevant to the literary merit of a publication, it has been excluded under the *Hicklin* jurisprudence as irrelevant to the question whether a publication has a tendency to deprave or corrupt. There does not appear to be any valid reason why this rule should

[1] (1954), 38 Cr. App. R. 62.

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vary with respect to the question whether, having regard to the existing standards of decency in the community, the exploitation of sex, which is here a dominant characteristic of the publication, has been carried to a shocking and disgusting point. Whatever be the outstanding position held by Lawrence as a writer, this book offers no evidence that an expert in literature necessarily qualifies, for that reason, as a *custos mores*.

Whether one applies the law as it stood prior to or as expanded by the 1959 amendments, I am in respectful agreement with the unanimous conclusion reached in the two Courts below that this unexpurgated edition of Lady Chatterley's Lover is an obscene publication under the *Criminal Code* of Canada.

I would dismiss the appeal.

The judgment of Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—The proceedings against this book, Lady Chatterley's Lover, by D. H. Lawrence, were taken under s. 150A of the *Criminal Code* enacted in 1959. A Judge, on an information laid by a police officer, issued a warrant of seizure for copies of the book on certain premises and then issued a summons to the occupiers requiring them to appear before the Court and show cause why the matter seized should not be forfeited to Her Majesty. The owners of the premises appeared at the trial to show cause in the Court of Sessions of the Peace for the District of Montreal. This Court, on June 10, 1960, declared that the publication was obscene and made an order directing the forfeiture of the seized copies in accordance with s. 150A, subs. (4), of the Code. This judgment was unanimously affirmed on appeal to the Court of Queen's Bench[1] on April 7, 1961. On May 29, 1961, this Court granted leave to appeal and declared that the leave was granted at large.

In 1959 a new definition of "obscenity' was introduced into the *Criminal Code* of Canada by the enactment of subs. (8) of s. 150. This reads:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty, and violence, shall be deemed to be obscene.

[1] [1961] Que. Q.B. 610, 36 C.R. 200.

This section is before this Court for the first time. It is enacted for the purposes of the Act not merely for the purposes of the section in which it appears, which is s. 150. It applies to proceedings for the seizure of a book under s. 150A and, in my opinion, in which I am in agreement with Casey J. in the Court of Queen's Bench, it precludes the application of any other test and specifically the one that had been applied in *R. v. Hicklin*[1], and followed in *R. v. American News*[2]; *R. v. National News*[3]; and *R. v. Stroll*[4]. The *Hicklin* test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." All the jurisprudence under the *Hicklin* definition is rendered obsolete by the enactment of the new and exclusive definition of obscenity contained in subs. (8) of s. 150. Under this definition it must be found that all four elements of obscenity are present before there can be a condemnation of the book. There must be a characteristic which is dominant and this dominant characteristic must amount to an exploitation of sex which is undue. If any of these elements is missing, the charge fails.

The matter is, of course, one of great importance. A writer who faces a charge of obscenity is entitled to know by what standard his work is to be judged and what defence, if any, he is called upon to make. Under the *Criminal Code*, as amended in 1959, there is no double standard, that is to say (1) the statutory definition intended to strike down the obvious, and (2), the *Hicklin* test still in the background, although unstated in the Code, for those works that are not within the statutory definition. If there is to be a double standard, it must be expressly set out in the Code and I would disapprove of *R. v. Munster*[5], where, in sending the case back for a new trial, the Supreme Court of Nova Scotia *in banco* held that there was error when the magistrate directed himself exclusively according to s. 158(8) on the ground that the subsection does not purport to be a definition of what is obscene and because matter not included with its provisions may be obscene under the *Hicklin* test.

[1] (1868), L.R. 3 Q.B. 360 at 371.
[2] [1957] O.R. 145, 25 C.R. 374, 118 C.C.C. 152.
[3] [1953] O.R. 533, 16 C.R. 369, 106 C.C.C. 26.
[4] (1951), 100 C.C.C. 171.
[5] (1960), 45 M.P.R. 157, 34 C.R. 47, 129 C.C.C. 277.

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If a result such as this is to be brought about the legislation must define the two standards of obscenity and tell the Court that the charge is proved if the work offends either standard. I note that this is the way that the New Zealand legislation is framed, *Re Lolita*[1], and also the Australian legislation, although not so clearly, as considered in *Wavish v. Associated Newspapers Ltd.*[2]; *MacKay v. Gordon & Gotch (Australasia) Ltd.*[3]; and *Kyte-Powell v. Heinemann Ltd.*[4]. Otherwise, why define obscenity for the purposes of the Act, if it is still permissible for the Court to take a definition of the crime formulated 100 years ago and one that has proved to be vague, difficult and unsatisfactory to apply?

In contrast, I think that the new statutory definition does give the Court an opportunity to apply tests which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury. We are now concerned with a Canadian statute which is exclusive of all others.

The inquiry then must begin with a search for a dominant characteristic of the book. The book may have other dominant characteristics. It is only necessary to prove that the undue exploitation of sex is a dominant characteristic. Such an inquiry necessarily involves a reading of the whole book with the passages and words to which objection is taken read in the context of the whole book. Of that now there can be no doubt. No reader can find a dominant characteristic on a consideration of isolated passages and isolated words. Under this definition the book now must be taken as a whole. It is not the particular passages and words in a certain context that are before the Court for judgment but the book as a complete work. The question is whether the book as a whole is obscene not whether certain passages and certain words, part of a larger work, are obscene.

A search for a dominant characteristic of the book also involves an inquiry into the purpose of the author. What was he trying to do, actually doing, and intending to do? Had he a serious literary purpose or was his purpose one

[1] [1961] N.Z.L.R. 542.
[2] [1959] V.R. 57.
[3] [1959] V.R. 420.
[4] [1960] V.R. 425.

of base exploitation? There is no doubt that English jurisprudence has rejected under the *Hicklin* test any evidence that the author or others may wish to give of a book's literary or artistic merit as distinct from scientific value. One cannot ascertain a dominant characteristic of a book without an examination of its literary or artistic merit and this, in my opinion, renders admissible the evidence of the author and others on this point. Evidence concerning literary and artistic merit has been excluded in England on the ground of irrelevancy and a supposed rule excluding evidence of opinion on the very fact which is before the Court for decision. Wigmore's opinion is that there never was any basis for such a general rule (3rd ed., s. 1921).

The test of the admissibility of this kind of opinion evidence under the present definition in the Code must be whether it is relevant to the determination of a dominant characteristic in the book. I can well understand that some judges and juries might think that such evidence would not help them to a decision and that others might be of the opposite opinion. I would join the second group. I can read and understand but at the same time I recognize that my training and experience have been, not in literature, but in law and I readily acknowledge that the evidence of the witnesses who gave evidence in this case is of real assistance to me in reaching a conclusion.

The evidence in this case is all one way. The Crown rested its case on the mere production of the book. Oral evidence was given by Mr. Hugh MacLennan and Mr. Morley Callaghan on the literary and artistic merit of the book and the position of Lawrence in the world of English literature. A third witness who gave oral evidence was Mr. Harry T. Moore, a teacher and critic. Many reviews were also filed written by outstanding literary critics in the United States. There is real unanimity in their opinions that the book is a true and sincere representation of an aspect of life as it appeared to the author. No objection was taken to the admissibility of this evidence. The Crown asked for two or three adjournments for the purpose of refuting it but produced no such evidence. It was then that objection was taken to its admissibility. Even if objection had been taken at the time of its tender, I would hold that it was admissible for the purposes that I have stated.

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Lawrence had certain opinions about the organization of modern industrial society and its effect upon the relations between man and woman. He chose to express these opinions in a work of imagination, written about an adulterous relationship between the wife of an impotent man of property and that man's servant. Whether his choice of medium was a good choice for the preaching of his ideas and whether the ideas themselves were foolish and wrong-headed are matters upon which there may be a difference of opinion. But a theme of adultery, and what to some readers—and there must be many of these—appears to be a stilted assertion that there exists an important connection between the organization of an industrial society and the sexual relations between man and woman, do not, in themselves, give the book a dominant characteristic condemned by the section of the Code.

This novel is a complex piece of writing. It is, in part, but only in part, the story of the development of the relationship between the man and the woman and an outspoken description of their sexual relations. This could be described as a dominant characteristic of the book although such a description could be criticized as an over-simplification. The objectionable characteristic is, of course, to be found in the explicit description and the four letter words. With these qualities, the question is, as I have already stated, whether the book as a whole has a dominant characteristic of undue exploitation of sex.

The phrase "undue exploitation" suggests, at first sight, an element of tautology but I do not think that this is a sound view. There is a difference between a statute which condemns a book a dominant characteristic of which is the exploitation of sex and one which condemns the undue exploitation of the theme. The use of the word "undue" recognizes that some exploitation of the theme is of common occurrence. What I think is aimed at is excessive emphasis on the theme for a base purpose. But I do not think that there is undue exploitation if there is no more emphasis on the theme than is required in the serious treatment of the theme of a novel with honesty and uprightness. That the work under attack is a serious work of fiction is to me beyond question. It has none of the characteristics that are often described in judgments dealing with obscenity—dirt for dirt's sake, the leer of the sensualist, depravity in the

mind of an author with an obsession for dirt, pornography, an appeal to a prurient interest, etc. The section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit and the quality of the work, as the witnesses point out and common sense indicates, must have real relevance in determining not only a dominant characteristic but also whether there is undue exploitation. I agree with the submission of counsel for the appellant that measured by the internal necessities of the novel itself, there is no undue exploitation.

Counsel for the appellant also submits that if "undueness" is to be measured by the usages of contemporary novelists and writers, then this book cannot be condemned. Mr. Callaghan and Mr. MacLennan both gave evidence on this point, which is really directed to standards of acceptance prevailing in the community. No matter what form of words may be used, I doubt whether any tribunal, whether judge or jury, can get very far in an obscenity case without being influenced, either consciously or unconsciously, by considerations such as these. The only judicial examination of "undue exploitation" or "undue emphasis" that I have found is in Australia and New Zealand. As I have already stated the New Zealand legislation begins by telling the court what matters are to be taken into consideration in determining whether a publication is indecent. Then four standards are set out, some of which undoubtedly suggest the *Hicklin* test. Finally, the next section says: "Subject to the provisions of the last preceding section any document or matter which unduly emphasizes matters of sex, horror, crime, cruelty or violence shall be deemed to be indecent within the meaning of this Act."

The first consideration of "undue emphasis" appears in the judgment of Fullagar J. in *R. v. Close*[1]. To me it is very impressive. He said at p. 465:

> 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, and when the distinction has to be drawn, I do not know that today there is any better tribunal than a jury to draw it. . . . I am very far from attempting to lay down a model direction, but a judge might perhaps, in the case of a

[1] [1948] V.L.R. 445.

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novel, say something like this: "It would not be true to say that any publication dealing with sexual relations is obscene. The relations of the sexes are, of course, legitimate matters for discussion everywhere. . . . There are certain standards of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing, and capable of justly applying, those standards. What is obscene is something which offends against those standards."

Offence against the standards of the community as a test of "undueness" as outlined by Fullagar J. seems to have been accepted in subsequent cases in Australia and New Zealand although it has not been considered by the High Court of Australia. The principle has not escaped criticism as judicial legislation (24 Mod. L.R. 768). I am not satisfied that the criticism is altogether valid. Surely the choice of courses is clear-cut. Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion—and even that must be subject to some influence from contemporary standards—or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think that the second is the better choice.

But no matter whether the question of "undue exploitation" is to be measured by the internal necessities of the novel itself or by offence against community standards, my opinion is firm that this novel does not offend. I would allow the appeals and dismiss the charge and direct that the seized copies of the book be returned to their owners.

RITCHIE J.:—The course of these proceedings in the Courts below is set out in the reasons of other members of the Court and the relevant sections of the *Criminal Code* are reproduced in full in the reasons of the Chief Justice so that it would be superfluous for me to reiterate them.

While I agree that this appeal should be disposed of in the manner proposed by my brother Judson, I do not share his opinion that the language of s. 150(8) constitutes an exclusive definition of "obscenity" for the purposes of the *Criminal Code* and in spite of the fact that Crown counsel argued the appeal on this basis I find it necessary to express the contrary view.

In finding this publication to be obscene, the learned trial judge did not consider himself to be confined to the test of obscenity provided by s. 150(8) and felt free to consider also the standard set by Cockburn C.J. in *R. v. Hicklin*[1], when he said:

> . . . the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall

While affirming the decision at trial, Mr. Justice Casey in the Court of Queen's Bench[2] stated himself to be convinced of the soundness of the appellants' argument to the effect that the provisions of s. 150(8) exclude all other tests of obscenity formerly used, and, as has been indicated, it was on this basis that the present appeal was argued by counsel for both parties before this Court.

Section 150(8) provides that:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

With the greatest respect for those who hold a different view, I am unable to construe the language of this section as meaning that no publication can be obscene for the purpose of the *Criminal Code* unless it has undue exploitation of sex as a dominant characteristic. On the contrary, I share the opinion expressed by Ilsley C.J. in *R. v. Munster*[3], when he said of this section at p. 159: "It does not purport to be a definition of 'obscene'. Matter not included in its provisions may be obscene."

The words "shall be deemed" have a variable meaning depending upon the context in which they occur, but although they are employed in more than thirty separate instances in the *Criminal Code* and are used in many other statutes, I have been unable to find any case holding that when it is provided that a given set of circumstances "shall be deemed" for the purposes of the Act in question to fall into a certain category, Parliament is to be taken to have intended to exclude from that category all circumstances which would otherwise have been included in it.

[1] (1868), L.R. 3 Q.B. 360.
[2] [1961] Que. Q.B. 610, 36 C.R. 200.
[3] (1960), 45 M.P.R. 157, 34 C.R. 47, 129 C.C.C. 277.

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In the *Criminal Code* the expression "shall be deemed" is frequently used to extend the meaning of a word or phrase so that it is to be treated for the purposes of the Act or a section of the Act as connoting matters which would not otherwise necessarily be considered as coming within its ordinary and accepted meaning (e.g., ss. 3(2), 5A(4), 38(2), 41(2), 42(3), 269(5), 294(b) and 371(1) and as to the extension of territorial jurisdiction, s. 419). In my view, it is in this sense that the expression is used in s. 150(8).

Sections 150 and 150A are found in Part IV of the *Criminal Code* which bears the heading *"SEXUAL OFFENCES, PUBLIC MORALS AND DISORDERLY CONDUCT"* and the sub-heading directly preceding s. 150 reads *"OFFENCES TENDING TO CORRUPT MORALS"*. These headings afford some indication of the fact that this legislation was initially enacted for the purpose of protecting society against the corruption of public morals by the publication of obscene material, and before the enactment of s. 150(8) the *Hicklin* test was widely accepted as the only yardstick by which obscenity was to be measured. But corruption of morals is only one harmful aspect of the publication of obscene material, and the *Hicklin* test leaves out of account publications which are obscene in the sense of being offensive and shocking to the community standards of decency unless they can also be said to have a tendency to deprave and corrupt. Under that test Stable J. in my opinion correctly instructed the jury in *R. v. Martin Secker Warburg, Limited*[1], when he said:

> The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. The charge is that the tendency of the book is to corrupt and deprave.

In my opinion the enactment of s. 150(8) had the effect of expanding the meaning of "obscene" for the purposes of the *Criminal Code* to include all publications which have undue exploitation of sex as a dominant characteristic whether or not they can be shown to have a tendency to corrupt and deprave and thus of protecting the public against the shocking and disgusting in addition to the depraving and corrupting aspects of obscenity. In my view it is in this sense that the word "undue" is employed in s. 150(8) and it carries the meaning of "undue having regard to the existing standards of decency in the community."

[1] [1954] 2 All E.R. 683 at 686.

I do not think that this Court is bound by, nor would I follow, those authorities which have tended to construe the *Hicklin* definition as meaning that literature available to the community is to be limited by the standard of what is considered to be suitable reading material for adolescents, but I do think that in discharging his duty under s. 150A if a judge is satisfied that the publication before him is likely to have a lowering effect on the moral fibre of adolescent boys and girls or of any other significant segment of the community he would be justified in declaring such a publication to be "obscene" even if it did not contain all the ingredients specified in s. 150(8). On the other hand, if the judge is satisfied that the publication contains all those ingredients, that is an end of the matter as far as he is concerned and he must make an order "declaring it to be forfeited to Her Majesty in the Right of the Province in which the proceedings take place." (s. 150A(4)).

Under s. 150A the burden of deciding whether the publication is likely to corrupt a significant segment of the population and the burden of determining what is or what is not "undue" so as to offend community standards is placed upon the judge before whom the publication is brought, and while it is true that his decision in either case must be a subjective one and will of necessity be coloured in some degree by his own predispositions on such questions, this is not a unique position for a judge under our system of law, and under the *Criminal Code* it is he and he alone who must be "satisfied that the publication is obscene . . . ." if it is to be forfeited. It should be remembered, however, that these sections of the *Criminal Code* are enacted for the protection of the public and obscenity is not to be determined by the fact that a publication may offend the prude or excite the frustrated; it must be offensive to community standards or be likely to deprave or corrupt a recognizable segment of the public.

I agree with Mr. Justice Judson that this inquiry necessarily involves the reading and consideration of the publication as a whole and that it is not only relevant but desirable to consider evidence of the opinions of qualified experts as to the artistic and literary qualities of the publication.

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BRODIE, DANSKY AND RUBIN v. THE QUEEN

Ritchie J.

Having read the publication which is now before us as a whole and having considered the evidence of the experts called for the defence and the extensive, critical and other material having to do with the book which has been filed, I have little doubt that D. H. Lawrence deliberately selected sex as a dominant characteristic of "Lady Chatterley's Lover" and that one of the chief messages which he sought to convey was that there is nothing shameful or dirty about the natural functions of the body and that the ultimate physical fulfilment of love between the sexes is a thing of tenderness and beauty having no aspects of obscenity or pornography. It may be said with justice that the author has, in several isolated passages, employed language and depicted scenes which, standing alone, unduly exploit sex, but the opinion is widely held by men of high literary qualifications that this book as a whole constitutes an outstanding contribution to 20th-century English literature and the passages to which I refer must be regarded as an integral part of the wider theme. Although sex is a dominant characteristic of the book and although there are isolated passages which, when read alone, unduly exploit sex, it does not appear to me to follow that these passages, read as a part of the whole book, have the effect of making the undue exploitation which they contain a dominant characteristic of the publication so as to bring it within the provisions of s. 150(8) of the *Criminal Code*. Nor do I think that any significant segment of the population is likely to be depraved or corrupted by reading the book as a whole.

I agree with counsel for the appellant that the defence of the public good is available under s. 150A and while we are not required to pass judgment on the literary or artistic qualities of the book or its author, it nevertheless seems to me that any harmful effect which these objectionable passages might have upon those who seek them out for separate reading is counterbalanced by the desirability of preserving intact the work of a writer who, according to the only evidence before us, is regarded as a great artist by teachers, authors and critics whose opinion is entitled to respect.

I would allow these appeals.

Appeals allowed, KERWIN C.J. *and* TASCHEREAU, LOCKE *and* FAUTEUX JJ. *dissenting.*

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