THE OFFENCE OF KEEPING A COMMON BAWDY-HOUSE IN CANADIAN CRIMINAL LAW

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I. INTRODUCTION

Black's Law Dictionary defines a "bawdy-house" in the following terms:

> A house of ill fame; a house of prostitution; a brothel. A house or dwelling maintained for the convenience and resort of persons desiring unlawful sexual connection. . . . A disorderly house.[1]

The way in which the criminal law has interpreted, re-defined and extended the offence of keeping such an institution is the subject of this study. An analysis of the history of the offence at common law and the statutory enactments will be examined. The judicial interpretation of the offence will be scrutinized. A number of special legal problems will be discussed and finally, certain policy considerations will be canvassed. In the latter section it will be argued that the offence of keeping a common bawdy-house should be repealed, as it represents an unnecessary restriction on the right to privacy and sexual freedom of expression of individuals and does not create a serious enough degree of social harm to warrant the sanction of the criminal law. This examination is not exhaustive; its scope will be limited to the most important points of law in this area while focusing in particular upon the most recent case law in Canada. A discussion of the offence from the perspective of minors and

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[1] 194 (4th ed. rev. 1968). *I The Oxford English Dictionary* 711 (1970) defines "bawdy" as "1. Of, pertaining to, or befitting a bawd; lewd, obscene, unchaste . . . 3. *Comb* . . . bawdy-house, a brothel . . . 1882 *Ev. Man's Own Lawyer* 390 the keeping of a bawdy-house is a common nuisance." Disorderly is defined as "b. *spec.* in *Law.* Violating public order or morality; constituting a nuisance; *esp.* in *disorderly house* (see quot. 1877); *disorderly person*, one guilty of one of a number of offences against public order as defined by various Acts of Parliament, esp. 5 Geo. IV, c. 83, s. 3 . . . the following houses are disorderly houses . . . common bawdy-houses, common gaming houses, common betting houses, disorderly places of entertainment. 1887 *Times* 30 Sept. 8/3. The charge of keeping . . . a disorderly house." *Id.* vol. III, at 474.

mentally-incompetent persons is outside the purview of this study[2] and, although authorities from other jurisdictions will be discussed, emphasis will be upon the Canadian experience.

II. History of the Offence

A. *England*

At early common law, the offence of keeping a bawdy-house was a common nuisance punishable as a misdemeanour.[3] It would appear that the principal rationale for the existence of such an offence was the protection of public health, public peace and decency:

> The keeping of a *bawdy-house* comes under the cognizance of the temporal law as a common nuisance, not only in respect of its endangering the public peace by drawing together dissolute and debauched persons, and promoting quarrels, but also in respect of its tendency to corrupt the manners of the people, by an open profession of lewdness.[4]

According to Coke's *Institutes*, the keeping of such a house "is against the law of God, on which the common law of England in that case is grounded".[5] Such an act was a common nuisance punishable by the common law, as it was "the cause of many mischiefs, not only to the overthrow of the bodies, and wasting of their livelyhoods, but to the indangering of their soules".[6]

A bawdy-house was but one variety of "disorderly house", the keeping of which also constituted a common nuisance. Stephen defines disorderly houses as "common bawdy houses, common gaming houses, common betting houses, disorderly places of entertainment".[7] A

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[2] Cumming, *Sexual Offences Against Children and Feeble-Minded Persons Problems of Prosecution*, 9 R. de D. Pénal 138 (1981).

[3] H. J. Stephen, Summary of the Criminal Law 105 (1834) *See* R. v. Rogier, 1 B. & C. 272, 107 E.R. 102 (1823); W. Hawkins, I A Treatise of the Pleas of the Crown c. 75 (1716); J. F. Stephen, A Digest of the Criminal Law 186 (8th ed. 1947); Berg v. The Queen, 20 Cr. App. R. 38, at 39 (1927).

[4] *I Tomlins' Law Dictionary* 224 (1836).

[5] Coke, Institutes of the Laws of England Third Part 204 (1798).

[6] *Id.*

[7] A Digest of the Criminal Law, *supra* note 3, at 186. Essentially the same enumeration is found in the definition section of Pt. V of the Criminal Code, R.S.C. 1970, c. C-34, *as amended* (entitled "Disorderly Houses, Gaming Houses and Betting"), which defines "disorderly house" as meaning a "common bawdy-house, a common betting house or a common gaming house" (subs. 179(1)). Blackstone says that "All disorderly *inns* or *alehouses*, *bawdy-houses*, *gaming-houses*, *stage-plays*, unlicensed booths and nuisances, . . . may upon indictment be suppressed and fined" Commentaries on the Laws of England Book IV 167-68 (18th ed. 1829) It was a public nuisance at common law to keep a house, room or other place of such a kind or such a manner, as to cause disorder: W. Russell, II Crimes and Misdemeanors 1887 (7th ed. 1910). *See also* W. Hawkins, *supra* note 3, at 196.

common bawdy-house was defined by him as a "house or room, or set of rooms, in any house kept for the purposes of prostitution. And it is immaterial whether indecent or disorderly conduct is or is not perceptible from the outside."[8] While the keeping of such a place was primarily prosecuted by the common law courts, the charge of keeping a brothel was occasionally brought before the English and Scottish church courts from 1300 to 1800.[9]

A legislative codification of the offence of keeping a common bawdy-house occurred for the first time in The Disorderly Houses Act, 1751,[10] which provides *inter alia* that

> any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, . . . shall be deemed and taken to be the keeper thereof. . . .[11]

In *R. v. Rogier*,[12] a prosecution for keeping a common gaming house, Abbott C.J. cited sections 5 and 8 of the Act and concluded from these provisions that they were "a legislative declaration, that the keeping of a gaming-house is an indictable offence".[13]

Very few reported cases of common bawdy-house or disorderly house prosecutions exist from this period, but the handful that do demonstrate the willingness of the courts, even at this early stage, to give a broad and liberal interpretation to these offences. For example, in *R. v. Higginson*,[14] it was held that a house is disorderly if persons resort there for such illegal practices as "fighting of cocks, boxing, playing at cudgels and misbehaving themselves . . . ".[15] The Court in *R. v.*

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[8] A DIGEST OF CRIMINAL LAW, *supra* note 3, at 187. *See, e.g.*, R. v. Rice, L.R. 1 Cr. Cas. Res., 10 Cox C.C. 155 (1866); J. CHITTY, II A PRACTICAL TREATISE ON THE CRIMINAL LAW 14-17 (1819); W. RUSSELL, *supra* note 7, at 1892; W. HAWKINS, *supra* note 3.

[9] BEFORE THE BAWDY COURT 238-39 (P. Hair ed. 1972).

[10] An Act for the better preventing Thefts and Robberies, and for regulating Places of Public Entertainment, and punishing Persons keeping disorderly Houses, 25 Geo. 2, c. 36.

[11] S. 8. Applied Home Counties (Music and Dancing) Licensing Act, 1926, 16 & 17 Geo. 5, c. 31, subs. 3(13). Although most of The Disorderly Houses Act, 1751 has been replaced by subsequent enactments, ss. 8 and 10 still remain in force today. *See* 8 HALSBURY'S STATUTES OF ENGLAND 32-33 (3d ed. 1969).

[12] *Supra* note 3.

[13] *Id.* at 275, 107 E.R. at 103. The word "gaming-house" was repealed from s. 8 by the Betting and Gaming Act, 1960, 8 & 9 Eliz. 2, c. 60, s. 15 and sch. 6, pt. I.

[14] 2 Burr. 1232, 97 E.R. 806 (1762). *See Berg*, *supra* note 3, at 39.

[15] *See* HARRIS'S CRIMINAL LAW 239 (22nd ed. 1973). In Quinn v. The Queen, [1962] 2 Q.B. 245, at 254, 45 Cr. App. R. 279, at 285 (1961) Ashworth J. cited *Higginson*, *supra* note 14 and *Berg*, *supra* note 3, for the proposition that the prosecution can be successful "as a result of proving that persons resorting to the alleged disorderly house were themselves taking part in illegal practices".

Peirson[16] held, however, that an indictment cannot be maintained against anyone for being a "bawd, and procuring ill-disposed persons to meet and commit fornication". The indictment, according to the Court, ought to have been for keeping a common bawdy-house because "if a person was only a lodger in a house, yet if she made use of her room for the entertaining and accommodating people in the way of a bawdy-house, it would be keeping a bawdy-house, as much as if she had the whole house."

In *R. v. Rice*[17] the accused resided in premises to which men and women resorted for the purpose of prostitution. No indecency or disorderly conduct was visible from the exterior of the house. Counsel for the accused argued that there was no proof that the house was so conducted as to be a common nuisance, but the Court of Criminal Appeals affirmed the conviction and held that it was not necessary that disorderly conduct be visible from the exterior of the house. In *Berg v. The Queen*[18] Avory J. was of the opinion that Stephen's definition of a disorderly house "is not meant to be and is not exhaustive". As for the public character of the premises, he had this to say:

> The argument that unless the house is open to the public at large its disorderliness is not indictable is refuted by *Rogier*, 2 D. & R. 431: 1823, cited by Hawkins J. in *Jenks* v. *Turpin* [13 Q.B.D. 505, 53 L.J.M.C. 161, 15 Cox C.C. 486 (1884)]: those cases referred to gaming houses, but the decisions equally apply to the practices here in question.[19]

To be an offence at common law, a disorderly house must be "so conducted as to violate law and good order". The essence of the offence of keeping such a house is that those accused are "lewd and immoral persons assembled for the purpose of unnatural practices".[20]

In *Quinn v. The Queen*[21] the Court had a further opportunity to interpret the offence at common law. Ashworth J. referred to The Disorderly Houses Act, 1751 and noted that the statute provides no definition of "disorderly house". While the offence of keeping a disorderly house is an offence at common law, "in none of the reported cases to which our attention was called does there appear a comprehensive definition or statement of what the prosecution has to prove in order to establish the charge".[22] After referring to *Rice*[23] he concluded that "while a disorderly house may in some instances amount to a common

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[16] 2 Raym. 1197, 92 E.R. 291 (1706). *See* G. BURBIDGE, A DIGEST OF THE CRIMINAL LAW OF CANADA 174 (1890).

[17] *Supra* note 8. *See* BURBIDGE, *supra* note 16.

[18] *Supra* note 3.

[19] *Id.* at 41-42. It is well established in Canadian law that cases concerning one type of disorderly house are generally applicable to other disorderly house prosecutions.

[20] *Id.* at 42. At common law a "brothel" is "a place resorted to by persons of both sexes for the purpose of prostitution". Singleton v. Ellison, [1895] 1 Q.B. 607, at 608.

[21] *Supra* note 15.

[22] *Id.* at 254, 45 Cr. App. R. at 285.

[23] *Supra* note 8.

nuisance, the latter element is not an essential ingredient in the offence of keeping a disorderly house. . . .''[24]

This is where the law of the offence of keeping a common bawdy-house stood before the adoption of Canada's first Criminal Code and the development of an indigenous Canadian case law.

B. *Canada*

It was established early in Canadian criminal law that at common law every one who keeps a disorderly house commits a common nuisance.[25] Since the adoption of the Canadian Criminal Code in 1892,[26] the statutory provisions relating to the keeping of a common bawdy-house have been amended on a number of occasions, the net effect of which has been progressively to broaden the ambit of the offence.

Section 195 of the 1892 Code defined in simple language a ''common bawdy-house'' only in relation to acts of prostitution: ''A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution.''[27] The substantive offence of keeping a disorderly house was set out in section 198:

> Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined. 2. Any one who appears, acts, or behaves as master or mistress, or as the person having the care, government or management of any disorderly house shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof.

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[24] *Supra* note 15, at 254-55, 45 Cr. App. R. at 286. For a discussion of keeping disorderly houses in modern English law *see* T. HONORÉ, SEX LAW IN ENGLAND 123-25 (1978); J. SMITH & B. HOGAN, CRIMINAL LAW 426-27 (4th ed. 1978). The use of premises for prostitution is now largely regulated by ss. 33, 34 and subs. 35(1) of the Sexual Offences Act, 1956, 4 & 5 Eliz. 2, c. 69. The present law regarding the keeping of brothels is codified in s. 33. In England and Wales, a person who keeps a brothel also commits an offence at common law for which he is punishable with a fine or imprisonment at the court's discretion. A ''brothel'' is ''any place resorted to by persons of both sexes and habitually used for the purposes of illicit sexual intercourse. . . . Premises cannot, however, in law be a brothel unless there are at least two women using them for the purposes of illicit sexual intercourse or acts of lewdness.'' REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 103 (J. Wolfenden Chairman 1957) Cmnd. 247 (The ''Wolfenden Report''). *See also* R. v. Korie, [1966] 1 All E.R. 50 (Crown Ct. 1965); Donovan v. Gavin, [1965] 2 Q.B. 648, [1965] 2 All E.R. 611; Abbott v. Smith, [1965] 3 W.L.R. 362; [1964] 3 All E.R. 762 (Crown Ct. 1964); Gorman v. Standen, [1964] 1 Q.B. 294, [1963] 3 All E.R. 627 (1963); Strath v. Foxon, [1956] 1 Q.B. 67, [1955] 3 All E.R. 398 (1955); Waroquiers v. Marsden, [1950] 1 All E.R. 93 (K.B. 1949).

[25] G. BURBIDGE, *supra* note 16, at 173.

[26] THE CRIMINAL CODE, 1892, S.C. 1892, c. 29, which came into force, 1 Jul. 1893.

[27] This definition was included in Pt. XIV, entitled ''Nuisances'', ss. 191-206.

The definition of common bawdy-house was enlarged by The Criminal Code Amendment Act, 1907[28] which amended the Code's definition as follows:

> 225. A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution *or occupied or resorted to by one or more persons for such purposes*.[29]

This definition was further refined in 1917, when section 225 was repealed and the following substituted therefor:

> 225. A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution *or for the practice of acts of indecency*, or occupied or resorted to by one or more persons for such purposes.[30]

It is perhaps useful to examine the brief discussion that occurred in the House of Commons with respect to this Act, in order to ascertain the legislature's intention in introducing such an amendment.[31] Minister of Justice C.J. Doherty, who introduced Bill 124, explained to the House that the Bill concerned "matters which are considered to be of some urgency and importance".[32] The Minister introduced the Bill by saying it would amend the definition of a common bawdy-house,

> so as to make it include a place where acts of indecency are committed, or a place to which people ordinarily resort for the purpose of indulging in such acts of indecency. Our attention has been called to a certain class of establishment, which is announced under guise of what might be a perfectly legitimate business or treatment, but which, according to police information, is really used for acts of indecency . . . there has unfortunately grown up in different cities under the guise of legitimate places of business — such as massages, etc. — establishments which are resorted to not for purpose of prostitution, but for the purpose of the commission of acts of indecency It has been thought proper that they should be put on the same footing as the bawdy house.[33]

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[28] S.C. 1907, c. 8, s. 2 (*amending* CRIMINAL CODE, R.S.C. 1906, c. 146, s. 225).

[29] (Emphasis added). *See* Patterson v. The Queen, [1968] S.C.R. 157, at 162, 67 D.L.R. (2d) 82, at 86. *See also* text accompanying note 97 *infra*.

[30] An Act to amend the Criminal Code and the Canada Evidence Act, S.C. 1917, c. 14, s. 3 (emphasis added). The marginal note in the Act explains that the definition was "enlarged" to include places where "indecencies" are practised.

[31] As Grange J. stated in Babineau v. Babineau, 32 O.R. (2d) 545, at 548, 122 D.L.R. (3d) 508, at 511 (H.C. 1981): "In the interpretation of a statute there seems to be little question but that a Court may now delve more deeply into the making of that statute than it could before . . . the Supreme Court of Canada in *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541, considered (or at least received) . . . a speech of the Governor of the Bank of Canada, House of Commons Debates and the Minutes of a Standing Committee of Parliament . . . there appears to be a broadening of reception of political statements . . . ." *See also* MAXWELL ON THE INTERPRETATION OF STATUTES 50 (12th ed. 1969).

[32] H.C. DEB., 12th Parl., 7th sess., at 4292 (9 Aug. 1917) First Reading.

[33] The Bill received Second Reading on 13 Aug. 1917, *id* at 4463-64, and the same day was read a third time and passed, *id*. at 4466.

No further amendments of any significance have been made since that time. In the 1927 revision of the Code the word "publique" was deleted from the phrase "maison de débauche publique" in the French version, and the word "ordinairement" was added in the following manner: "Une maison de débauche est ordinairement une maison. . . . " Nevertheless, this modification appears to be more the result of a slip of the draftsperson's pen, than the product of any conscious and planned legislative alteration.[34]

The 1927 amendment did, however, cause a certain amount of confusion several decades later. In *Gagnon v. Morin*,[35] counsel for the petitioner argued that the word "publique" should have been added after "maison de débauche" in the indictment. The petitioner cited a number of decisions, including *R. v. Jousseau*,[36] where it was held that the word "publique" was essentially to qualify "maison de débauche". Choquette J. was of the view, however, that such decisions could only be justified by the wording of the old French version of section 225 which did include the word "publique" after "maison de débauche". "Evidently, the statutes revision Commission thought that the word 'publique' was not a proper equivalent for 'common' and that the latter should receive the meaning of 'ordinarily kept for the purpose of'."[37] It was therefore sufficient to describe the premises in the terms set forth in the indictment since it was in accordance with the form of the definition at that time.

For the purposes of this paper, the relevant and most important provisions of the current version of the Criminal Code are the following:

> 179(1) In this Part
>
> . . . .
>
> "common bawdy-house" *means* a place that is
>
> (*a*) kept or occupied, or
>
> (*b*) resorted to by one or more persons
>
> for the purpose of prostitution or the practice of acts of indecency;
>
> . . . .
>
> "disorderly house" *means* a common bawdy-house, a common betting house or a common gaming house;
>
> . . . .
>
> "keeper" *includes* a person who
>
> (*a*) is an owner or occupier of a place,
>
> (*b*) assists or acts on behalf of an owner or occupier of a place,
>
> (*c*) appears to be, or to assist or act on behalf of an owner or occupier of a place,
>
> (*d*) has the care or management of a place, or

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[34] CODE CRIMINEL, S.R.C. 1927, c. 36, art. 225. The offence had been transferred by this time from the part dealing with "Nuisance" to the section entitled "Disorderly Houses", ss. 225-37. Both "Nuisance" and "Disorderly Houses" are found in Pt. V, "Offences Against Religion, Morals and Public Convenience".

[35] 116 C.C.C. 104 (Que. S.C. 1955).

[36] 24 C.C.C. 417 (S.P. 1915).

[37] *Supra* note 35, at 110. The word "ordinairement" disappeared. *See* CODE CRIMINEL, S.C. 1953-54, c. 51, subs. 182(1).

(*e*) uses a place permanently or temporarily, with or without the consent of the owner or occupier;

"place" *includes* any place, whether or not

(*a*) it is covered or enclosed,

(*b*) it is used permanently or temporarily, or

(*c*) any person has an exclusive right of user with respect to it;

. . . .

193(1) Every one who keeps a common bawdy-house is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every one who

(*a*) is an inmate of a common bawdy-house,

(*b*) is found, without lawful excuse, in a common bawdy-house, or

(*c*) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.[38]

III. JUDICIAL INTERPRETATION

A. *Constitutional Matters*

Very few constitutional challenges have been mounted during the course of prosecutions under section 193 concerning the validity of the common bawdy-house provisions of the Criminal Code. The few cases which have considered such arguments conclusively demonstrate the constitutional validity of this legislation, both with respect to the Constitution Act, 1867[39] and the Canadian Bill of Rights.[40]

In *R. v. Hislop*[41] the Ontario Court of Appeal recently held that subsection 179(1) and section 193 are not *ultra vires* as being in relation to property and civil rights under head 13 of section 92 of the Constitution Act. The Court furthermore held that the words "practice of acts of indecency" in the definition of common bawdy-house in subsection 179(1) are not vague, uncertain or arbitrary, and do not offend the intention that Canada would have a constitution similar to that of the United Kingdom by virtue of the Preamble of the Constitution Act.[42]

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[38] R.S.C. 1970, c. C-34, *as amended* (emphasis added). These provisions are now grouped under the "Disorderly Houses, Gaming and Betting" heading of Pt. V. A discussion of the state of American law with respect to this offence is outside the scope of this paper. *See generally* Riley v. U.S., 298 A. 2d 228, at 231 (D.C. App. 1972); Trent v. Commonwealth, 25 S.E. 2d 350 (Va. 1943); U.S. v. Hymans, 463 F. 2d 615 (10th Cir. 1972).

[39] *See* Constitution Act, 1982, s. 60 *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[40] R.S.C. 1970 (App. III).

[41] 5 W.C.B. 124 (Ont. C.A. 1980). The Court dismissed an appeal by the accused from a decision dismissing an application for prohibition.

[42] Motion for leave to appeal to the Supreme Court of Canada was dismissed 17 Nov. 1980, *per* Martland, Estey and Chouinard JJ.: [1980] 2 S.C.R. viii, 35 N.R. 18 *See also* Bédard v. Dawson, [1923] S.C.R. 681; P. HOGG, CONSTITUTIONAL LAW OF CANADA 291 (1977); W. TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 39 (2d ed. rev. 1975).

In *Delisle v. The Queen*[43] the British Columbia Court of Appeal was called upon to decide whether the statutory presumption that the place was a common bawdy-house by virtue of paragraph 180(1)(*d*), and upon which the accused's conviction largely rested, was inoperative by reason of paragraphs 2(*e*) and (*f*) of the Canadian Bill of Rights. In this case, the accused was convicted under paragraph 193(2)(*a*) of being an inmate of a common bawdy-house. In order to bring into effect the presumption of paragraph 180(1)(*d*) the Crown adduced evidence that another individual was convicted on a charge of keeping a common bawdy-house at a time and place when it was alleged the appellant was an inmate.

Counsel for the appellant argued that the application of this provision deprived the appellant of a "fair hearing" under paragraph 2(*e*) and the benefit of the presumption of innocence until proven guilty in a "fair hearing" under paragraph 2(*f*) of the Canadian Bill of Rights. However, Bull J.A. refused to accept this proposition:

> The presumption against her that the house in which she was an inmate was a common bawdy-house because of an earlier determination of that fact in other proceedings in no way hampered her right to attack that finding. She could not change the finding in the other proceeding, but it only applied to her in her case if there was "no evidence to the contrary". She had every right to attack the presumption, and every right to show that neither was she an inmate nor was the place a common bawdy-house, or raise a reasonable doubt of either or both. Our criminal law contains many provisions, both statutory and otherwise, which can be attacked and rebutted. I cannot conceive that the provisions in issue in any way inhibit the fairness of the trial and the right to make full answer and defence or the right to be considered innocent until found guilty at a fair hearing any more than, say, did the presumptions in s. 224A(1)(*a*) . . . (now s. 237(1)(*a*)), considered in *R.* v. *Appleby*, [1972] S.C.R. 303 . . . a provision as in s. 180(1)(*d*) *merely places an evidentiary burden on an accused, a burden that can be rebutted* and hence is not contrary to s. 2(*f*) of the Canadian Bill of Rights.[44]

As for paragraph 2(*e*), Mr. Justice Bull referred to *Duke v. The Queen*[45] and cited an excerpt from the opinion of Fauteux C.J.C.[46] Bull J.A. concluded that since the trial judge had acted fairly and in good faith, and since there was no suggestion of bias or lack of judicial temper, paragraph 2(*e*) was not contravened.

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[43] 11 C.R. (3d) 277 (B.C.C.A. 1979). The presumption contained in s. 180 is akin to the presumption in para. 237(1)(*c*) [*repealed and replaced* S.C. 1974-75-76, c. 93, subs. 18(1)] that the accused's blood-level at the time of the breathalyzer test was the same as at the time of the offence where the conditions in that subs. are fulfilled. *See, e.g.*, Lightfoot v. The Queen, 123 D.L.R. (3d) 104 (S.C.C. 1981).

[44] *Delisle*, *supra* note 43, at 280 (emphasis added). *See* R. v. Shelley, [1981] 5 W.W.R. 481, 123 D.L.R. (3d) 748 (S.C.C.); R. v. Hammell, 6 C.C.C. (2d) 173 (Sask. Dist. Ct. 1971).

[45] [1972] S.C.R. 917, 28 D.L.R. (3d) 129.

[46] *Id.* at 923, 28 D.L.R. (3d) at 134.

The protection against self crimination guaranteed by paragraph 2(*d*) of the Canadian Bill of Rights was recently considered in *R. v. Tonnos*.[47] In this case Edmonstone J. held that by virtue of paragraph 2(*d*) a person charged, but not yet tried, of being found in a common gaming house contrary to subsection 185(2), is not a compellable witness at the instance of the Crown at the trial of the person charged with keeping a common gaming house. If such a person were compellable, he would be denied protection against self crimination because of the presumption of paragraph 180(1)(*d*). Further, while section 5 of the Canada Evidence Act[48] would prevent the witness's testimony from being used against him on subsequent proceedings, it could not protect him against the operation of paragraph 180(1)(*d*) at trial.

B. *The Essential Elements of the Offence*

As a reading of subsections 179(1) and 193(1) indicates, the two constituent elements of the *actus reus* of the offence of keeping a common bawdy-house are: (1) the existence of a common bawdy-house, and (2) the "keeping" of that place by the accused for the purpose of prostitution or acts of indecency. According to Carrothers J.A., speaking for the British Columbia Court of Appeal in the recent case of *R. v. Wong*, "[c]learly the *actus reus* of 'keeping' a common bawdy-house lies in the mere providing of accommodation for the prostitution or acts of indecency. . . ."[49] The first step is to analyze the judicial interpretation of the elements of these statutory provisions, the second to discuss the substantive requirements of proof.

1. *Prostitution*

Although the term "common bawdy-house" is defined for the purposes of Part V of the Criminal Code, the constituent elements of that definition are nowhere enumerated. While the Supreme Court of Canada has attempted to cut down the ambit of the offence of soliciting for the purpose of prostitution under section 195.1,[50] lower courts have given a very broad interpretation to the term "prostitution" in subsection 179(1). The general rule is that an isolated act of prostitution does not constitute "prostitution" for the purposes of subsection 179(1).

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[47] 54 C.C.C. (2d) 471 (Ont. Prov. Ct. 1980). *See* Curr v. The Queen, [1972] S.C.R. 889, 26 D.L.R. (3d) 603; *Duke*, *supra* note 45; R. v. Cole, 54 C.C.C. (2d) 324, 115 D.L.R. (3d) 382 (Man. Cty. Ct. 1980), *leave to appeal denied* 57 C.C.C. (2d) 150, 119 D.L.R. (3d) 575 (Man. C.A. 1980).

[48] R.S.C. 1970, c. E-10, *as amended*.

[49] 4 W.C.B. 257 (1980). Cited by Nemetz C.J. in R. v. McLellan, 55 C.C.C. (2d) 543, at 547 (B.C.C.A. 1980). For a discussion of the purpose of s. 179 *see* R. v. Rehe, 6 Que. B.R. 274, at 276 (1897) (Wurtele J.).

[50] Hutt v. The Queen, [1978] 2 S.C.R. 476, 82 D.L.R. (3d) 95 (Spence J.)

Nevertheless, it has been held that where circumstances surrounding the evidence of an isolated act are such that there emerges a certainty that the place is used habitually for the purpose of prostitution, a conviction under subsection 193(1) will be confirmed in the absence of bad reputation of the house.[51] "Prostitution" is not restricted to "normal sexual intercourse" and can include acts performed in massage parlours and manual masturbation.[52]

In *Lantay v. The Queen*[53] the accused was charged with keeping a common bawdy-house. She operated a massage parlour and masturbated men who paid her to do so on her own premises. On appeal against her conviction, Porter C.J., speaking for the Ontario Court of Appeal, looked to the English case of *R. v. De Munck*[54] for the meaning of "prostitution". In that case the charge was procuring or attempting to procure a female to become a "common prostitute". According to Darling J., "common prostitute" in the statute

> is not limited so as to mean only one who permits acts of lewdness with all and sundry, or with such as hire her, when such acts are in the nature of ordinary sexual connection . . . prostitution is proved if it be shown that a woman offers her body commonly for lewdness for payment in return.[55]

Chief Justice Porter then discussed *R. v. Webb*,[56] where the Court of Criminal Appeal further considered the definition of prostitution in a situation similar to the case at bar. In that case the Court held that the phrase "a woman offers her body commonly for lewdness" includes a case where "a woman offers herself as a participant in physical acts of indecency for sexual gratification of men".[57] Porter C.J. simply followed *Webb* and dismissed the accused's appeal.

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[51] R. v. Clay, 88 C.C.C. 36, 1 C.R. 327 (Que. K.B. 1946). The acceptance of an isolated act of prostitution can serve to prove the existence of the "purpose", as long as it is not an isolated fact, but the premises are truly kept or occupied: R. v. Rose, 88 C.C.C. 114, [1947] 3 D.L.R. 618 (Que. B.R. 1946); Dubé v. Le Roi, [1948] R.L. 525, 94 C.C.C. 164 (C.A.); Bouchard v. The King, 101 C.C.C. 413, 12 C.R. 305 (Que. B.R. 1951); Leroy v. Le Roi, [1952] Que. B.R. 82, 14 C.R. 299 (1951). The residence of a woman who uses that place alone for the purposes of prostitution has also been held, in certain circumstances, to constitute a common bawdy-house. *See* R. v. Worthington, 10 C.C.C. (2d) 311, 22 C.R.N.S. 34 (Ont. C.A. 1972); R. v. Cohen, [1939] S.C.R. 212, [1939] 1 D.L.R. 396 (1938) *which overruled* R. v. Mannix, 10 O.L.R. 303, 10 C.C.C. 150 (C.A. 1905) and R. v. Sorvari, 69 C.C.C. 281, [1938] 1 D.L.R. 308 (Ont. C.A. 1937).

[52] For a discussion of massage parlours in the United States *see* R. RICH, THE SOCIOLOGY OF CRIMINAL LAW 101-02 (1979). For a discussion of the applicable American law *see* II WHARTON'S CRIMINAL LAW §275 (14th ed. C. Torcia 1979).

[53] [1966] 1 O.R. 503, [1966] 3 C.C.C. 270 (C.A. 1965).

[54] [1918] 1 K.B. 635, [1918-19] All E.R. Rep. 499 (C.C.A. 1918).

[55] *Id.* at 637-38, [1918-19] All E.R. Rep. at 500, as quoted in *Lantay*, *supra* note 53, at 505, [1966] 3 C.C.C. at 272.

[56] [1964] 1 Q.B. 357, [1963] 3 All E.R. 177 (C.C.A. 1963).

[57] *Id.* at 366, [1963] 3 All E.R. at 179-80, as quoted in *Lantay*, *supra* note 53, at 506, [1966] 3 C.C.C. at 272-73. As R. v. Stewart, 47 C.R. 75 (Alta. Mag. Ct. 1965) and other cases demonstrate, prosecutions against massage parlours can also be found on the "acts of indecency" element of subs. 179(1).

It is also well established that "prostitution" does not require an element of remuneration. In *R. v. Turkiewich*[58] the alleged bawdy-house in question was a hotel, well-known as a place where men and women could obtain a room at any hour, with or without luggage. The register was haphazardly kept, names often being unintelligible and addresses vague or non-existent. Most registrations were made during the night, with some rooms rented out twice in the same night. There had been a number of charges laid against the guests and the police had warned the accused on a number of occasions. The accused lived on the premises, was in charge of the hotel, acted occasionally as registration clerk, and usually stayed up until midnight. Most importantly, there was no evidence of payment to any of the women. Nevertheless, Schultz J.A. of the Manitoba Court of Appeal held that the element of gain or payment is not necessary to constitute prostitution within the meaning of subsection 179(1). His Lordship cited the definition of "prostitution" in *Webster's New International Dictionary, 1936* and concluded that "it is impossible to read into this definition that to constitute prostitution there must be a monetary payment. Many decided cases hold that the element of gain, of payment is not essential."[59]

2. *Acts of Indecency*

The term "acts of indecency" is not defined in the Criminal Code. The courts have, however, generally interpreted this term in light of the judge-made Canadian community standards test of tolerance used to determine what is and is not "obscene" for the purpose of prosecutions under the Code. The threshold question for this test is not whether the content of a publication or a particular act went beyond what the contemporary Canadian community *thinks is right*, but rather whether it went beyond what the contemporary community is prepared to *tolerate*. Although most of the cases dealing with homosexual acts turn on the "acts of indecency" wing of the definition in subsection 179(1) and give a very broad construction to this term,[60] at least one recent lower court case has attempted to give it a more restricted and, it is submitted, correct interpretation.

In *R. v. Mason*[61] the accused was charged under subsection 193(1) based on allegations of acts of indecency as a result of the use of a house

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[58] 133 C.C.C. 301, 38 C.R. 220 (Man. C.A. 1962).

[59] *Id.* at 305, 38 C.R. at 224. Here he cites *Dube*, *supra* note 51, at 532, 94 C.C.C. at 171. For the Australian approach to this question *see* R. v. Harrison, 8 N.S.W.L.R. 57 (S.C. 1887).

[60] *Infra* text accompanying note 146 *et seq.* An example of the predominant view of homosexuality currently held by the judiciary, that any manifestation of homosexuality is *per se* "indecent" or "obscene", is found in the *obiter dicta* of Pigeon J., giving the judgment of the Supreme Court of Canada, in Guay v. The Queen, [1979] 1 S.C.R. 18, at 21, 89 D.L.R. (3d) 532, at 534-35.

[61] 59 C.C.C. (2d) 461, 6 W.C.B. 112 (Ont. Prov. Ct. 1981).

for acts of group sex. Such acts were between persons of opposite sexes in the privacy of a private dwelling. In his statement to the police, the accused admitted that the only sexual activities which took place on the premises were "touching, caressing, sexual coitus or oral sex".[62] According to Charles J., sections 155 and 157 as well as sections 158 and 169 were relevant to this case. In his opinion an "indecent act" is one "that offends the general standards that decency permits . . . the Courts have declared repeatedly that in order to determine whether an act is indecent it must have regard to the time and the circumstances under which the act is performed."[63] Furthermore, an act is "indecent" in accordance with the contemporary community standards prevailing across this country if

> it is patently offensive or will not be tolerated. I find it difficult to attribute to Parliament any such quixotic and deadening purpose as would render group sex among persons of different sex in privacy of a private dwelling-house, *be it normal or deviate*, an indecent act. . . .[64]

The proper test is a "national standard of decency", and it is the "community standard of tolerance" which must be considered in determining the meaning of the word "indecent" — the same test applied in obscenity cases.[65] Charles J. concluded by holding that the average reasonable person in Canada would, having regard to prevailing community standards, be prepared to tolerate such activity, at least where there is no attempt to proselytize people and the owner of the club is careful in his selection of the persons whom he invites.

R. v. Stewart[66] represents a more traditional interpretation of "acts of indecency". In this case the "place" in question was a massage parlour where masseuses masturbated male customers. Legg J. looked to the offence of indecent act contained in section 169 and stated:

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[62] *Id.* at 466.

[63] *Id.* at 471. *See infra* note 172. Charles J. then reviewed the following cases: R. v. Sidey, 52 C.C.C. (2d) 257 (Ont. C.A. 1980); *Re* Han, 8 C.C.C. (2d) 399, 30 D.L.R. (3d) 57 (B.C. Cty. Ct. 1972); R. v. Stanley, [1965] 1 All E.R. 1035, 49 Cr. App. R. 175 (C.C.A.); R. v. P., [1968] 63 W.W.R. 222, 3 C.C.C. 129 (Man. C.A.).

[64] *Mason*, *supra* note 61, at 475-76 (emphasis added). In R. v. Cloutier, 6 W.C.B. 224 (Ont. Dist. Ct. 1981) Maranger J. held that although french-kissing is not an indecent act *per se*, the accused's actions in kissing the girl and inviting her to have sexual intercourse constituted an indecent assault.

[65] *See, e.g.*, R. v. Penthouse Int'l Ltd., 23 O.R. (2d) 786, 96 D.L.R. (3d) 735 (C.A. 1979); R. v. Sudbury News Serv. Ltd., 18 O.R. (2d) 428, 39 C.C.C. (2d) 1 (C.A. 1978); R. v. Prairie Schooner News Ltd., 75 W.W.R. 585, 1 C.C.C. (2d) 251 (Man. C.A. 1970). Ado Pork makes the following interesting observation with respect to community standards: "It is not often the case . . . that the judge's unproved assumptions as to the prevailing morals of the community may be based on nothing more than his personal moral beliefs? A person who talks of the opinion of the world at large is really referring to the opinion of the few people with whom he has talked." *The Enforcement of Morals*, 4 CRIM. L.Q. 285, at 293 (1962). *See also* R. POUND, LAW AND MORALS 101-02 (1924); LAW AND OPINION 283 (Ginsberg ed. 1959).

[66] *Supra* note 57.

> since s. 158 [now s. 169] makes reference to indecent acts under specific circumstances . . . these are specific charges and an *indecent act* under s. 182(1) [now subs. 193(1)] . . . does not have to be practised under the same conditions and any act which in the opinion of the Court is indecent whether in the presence of one or more persons or whether with intent to insult a person is sufficient under s. 182(1) of the Code.[67]

Even though the term used in subsection 179(1) is "acts of indecency", Legg J. found that "*indecent acts*" had occurred here.

3. *The Nature of the "Place"*

By virtue of subsection 179(1) a "common bawdy-house" may be held to be any "place", as opposed to any "public place", which is the requirement for the offence of soliciting for the purposes of prostitution under section 195.1. What is most striking about the definition of "place" in subsection 179(1) is the excessive breadth of the concept: it does not have to be in a building, nor need it be in a public place nor a place permanent in character. It would thus appear that virtually any "place" can constitute a "place" for the purposes of subsection 179(1).[68]

A recent Alberta case indicates, however, that there may be room left for judicial interpretation in this area. In *R. v. Figliuzzi*[69] the accused appealed against his conviction on a charge of committing an indecent act contrary to paragraph 169(*a*). The act in question occurred entirely in a motor vehicle operated by the accused on a public street. Counsel for the accused argued that the place where the offence was alleged to have been committed was not a public place. The definition of "public place" in subsection 179(1) was considered by the Supreme Court of Canada in *Hutt v. The Queen*[70] under a similar factual situation, and counsel for the accused submitted that because the definition in Part IV is the same as in Part V the Court was bound to follow the Supreme Court's definition.

McFadyen J. held, however, that the interpretation of the definition of "public place" in *Hutt* was limited to the facts of that case, and

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[67] *Id.* at 76 (emphasis added).

[68] In the leading case of Hutt v. The Queen, *supra* note 50, the Supreme Court of Canada held that the undercover police officer's car was not a "public place" within the meaning of subs. 179(1), but rather a "private place" of which the officer had sole control. *Id.* at 481, 82 D.L.R. (3d) at 99. In R. v. McEwen, [1980] 4 W.W.R. 85 (Sask Prov. Ct.) the Court held, however, that a car deliberately stopped on a crosswalk in mid-day is a public place. *Compare* R. v. Wise, 67 C.C.C. (2d) 231 (B.C. Cty Ct. 1982).

[69] 28 A.R. 629, [1981] 4 W.W.R. 595 (Q.B.). In R. v. Dacosta, 3 W.C.B. 261 (Ont. Prov. Ct. 1979) charges under para. 169(*a*) were dismissed where the accused exposed himself while seated in his car. The Court referred to *Hutt* and held that a car is not a public place. For the purposes of Pt. IV of the CRIMINAL CODE "public place" is defined in s. 138 in precisely the same terms as the definition of "public place" contained in Pt. V at subs. 179(1).

[70] *Supra* note 50.

distinguished *Hutt* on the basis that in that case the events occurred entirely in the vehicle and had no effect on anyone outside the vehicle:

> The definition given by Spence J. . . . ha[s] no application to the various offences listed in Part IV of the Criminal Code i.e. indecent acts, nudity where, although the act of the accused is committed within the vehicle, the act is observed by another individual using the public place, the street.[71]

He therefore allowed the accused's appeal and quashed the conviction. The result of this ruling is that where an indecent act is committed in a private vehicle, but observed by an individual using a public street, the court is not precluded from determining that the act occurred in a public place.

It is well established that where a single prostitute resorts to a hotel on several occasions for the purpose of prostitution, the entire hotel does not become a common bawdy-house: the "place" is the room and not the hotel. This is the sensible conclusion arrived at in *R. v. Broccolo* by Wallace J.,[72] who also ruled that in the absence of proof that the accused resided in a particular room, or that on each occasion the same room was used, there is no evidence that a part of the hotel is a common bawdy-house:

> Instead, reason dictates that Parliament intended the place held to be the common bawdy-house ought to be the specific spot or area, or, in the case of prostitution in hotel rooms, the specific room or suite or group of rooms habitually resorted to for the purpose of prostitution.[73]

Although direct or circumstantial evidence is usually adduced by the Crown in attempting to establish the place as a common bawdy-house, is the general "reputation" of the place admissible evidence? As Friedland explains, in one of the rare articles written on the subject of disorderly houses of any kind in Canadian criminal law,[74] it is the *actual character* of the place that is significant and not its *reputation*. When reputation evidence is admitted, it is only allowed in so that the trier of fact may infer the actual character of the place from the evidence of its reputation. It is well established by the leading case of *Theirlynck v. The Queen*[75] that reputation evidence is admissible to prove that a place is a common

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[71] *Supra* note 69, at 632, [1981] 4 W.W.R. at 597.

[72] 30 C.C.C. (2d) 540 (Ont. Prov. Ct. 1976).

[73] *Id.* at 543. This conclusion was based, at least in part, on the rather dubious claim that due to the definition of "place" in the CRIMINAL CODE, "Parliament intended a confined or restricted interpretation of the area or place held to be a common bawdy-house." *Id.* at 543.

[74] *Reputation of Disorderly Houses*, 5 CRIM. L.Q. 328 (1963). In his estimation, the case law in this area is still "uncertain".

[75] [1931] S.C.R. 478, 56 C.C.C. 156, *aff'g* [1931] 1 W.W.R. 352, 55 C.C.C. 126 (Alta. C.A.). In this case the only evidence as to general reputation was that of police officers, as to the conduct of the premises, the traffic to and from the house and the accused's attitude. In this case, where no direct evidence was adduced, the Supreme Court held that the offence is proved if the evidence makes it clear the premises were maintained for that purpose. *See also* Bouchard v. The King, *supra* note 51.

bawdy-house. According to Friedland, the cases prior to *Theirlynck* "were not unanimous in accepting this form of evidence".[76] After this case was decided, the courts consistently accepted this form of circumstantial evidence in common bawdy-house prosecutions.[77] Remarking that the cases do not explain why reputation evidence is admitted in this area, the learned author offers the following possible justification:

> The general reputation in the community would appear to have a high degree of cogency. An analogy between these cases and those that allow reputation evidence to prove a public right would probably not be too far-fetched. But perhaps more important is that it would be difficult to obtain other evidence of the character of the premises without embarrassing members of the community, using an *agent provocateur* or relying on the evidence of prostitutes.[78]

As a matter of policy, this form of evidence is insufficient by itself to form the basis of a conviction and other evidence to establish the character of the premises is required.[79] Even though reputation evidence may be admissible to show the character of the alleged keeper, it is not admitted to prove that the accused is the kind of person who is likely to be the keeper.[80] Such evidence is admitted to establish that the place is occupied by a person whose reputation is consistent with the reputation the place allegedly bears only after it is established that the place has a reputation as a common bawdy-house. Further, evidence of reputation in police circles, if admitted, is improperly admitted evidence:[81]

> As Thayer has pointed out, the presumption of innocence is an important concept in our system of law. . . . It is fundamental to our criminal process that the jury should not draw any inference from the fact that the police think [the accused] guilty. We do not require reputation evidence to know that the police think the accused guilty. The presumption of innocence requires the exclusion of this form of reputation evidence.[82]

It is submitted that what is required is not the reputation of a place in police circles, but the *general community reputation*, which should be sufficiently widespread as to eliminate the possibility of fabrication.[83]

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[76] *Supra* note 74, at 330.

[77] *See*, *e.g.*, R. v. McEwan, 59 C.C.C. 75, [1933] 1 D.L.R. 398 (Alta. C.A. 1932); R. v. Thomas, 69 C.C.C. 246, [1938] 1 D.L.R. 127 (N.S.C.A. 1937); R. v. West, 96 C.C.C. 349, 9 C.R. 355 (Ont. C.A. 1950).

[78] *Supra* note 74.

[79] R. v. West, *supra* note 77, at 354, 9 C.R. at 358-59; R. v. St. Clair, 3 C.C.C. 551 (Ont. C.A. 1900).

[80] R. v. West, *supra* note 77, at 354, 9 C.R. at 359.

[81] *Contra*, R. v. Stone, 81 C.C.C. 237, [1944] 2 D.L.R. 580 (N.S.C.A.).

[82] *Supra* note 74, at 334 (footnote omitted). *See* R. v. West, *supra* note 77, at 354, 9 C.R. at 359.

[83] R. v. Jackson, 27 W.W.R. 31, at 32, 22 C.C.C. 215, at 216 (Alta. S.C. 1914). *See also* R. v. Turkiewich, *supra* note 58, at 307, 38 C.R. at 225. Regarding accomplice evidence *see* R. v. Awram, 6 W.C.B. 420 (B.C.C.A. 1981).

4. *"Keeps" versus "Keeper"*

Conflicting opinions emanated from the courts in the early 1960s as to whether or not the word "keeps" in subsection 193(1) is synonymous with the definition of "keeper" in subsection 179(1). This may, at first blush, appear to be nothing more than a hairsplitting exercise in semantic accuracy, but it is submitted that the resolution of this problem is of considerable significance — the more so since the definition of "keeper" in subsection 179(1) is an extremely wide one, and the word "includes" as opposed to "means" is employed. By the use of the former it can easily be interpreted to read "includes, but is not limited to" because "[i]n general, the word 'includes', by contrast with the word 'means', carries a broad and non-restrictive interpretation. . . . One notes that where the term 'means' is used, a true equivalence is intended, while where 'includes' is used, an enumeration usually follows."[84] Considering that the term "includes" is employed in some of the definitions in subsection 179(1) while "means" is used in others, it is not possible to infer from this definitional section that the draftsperson indiscriminately employed one or the other term and that all must be given the same force and effect.[85]

The leading case, *R. v. Kerim*,[86] has settled the conflict between the terms "keeps" and "keeper" and has been consistently applied by the courts. In this case a company, of which the accused was president, owned a hotel and was licensed to carry on the business of a public hall. The company leased its hall, *inter alia*, for bingo games, and the accused was on the premises but did not participate in any way in the games. He was convicted on a charge of keeping a common gaming house, but the conviction was quashed by a majority of the Ontario Court of Appeal. Martland J., speaking for the majority of the Supreme Court of Canada, dismissed the appeal. In the course of his reasons for judgment the learned Justice made the following oft-quoted *dicta* which, despite their length, deserve full citation:

> The definition of a *keeper* in s. 168(1)(*h*) is a very broad one and it relates to the keeper of a "place", which is also broadly defined. Every householder and, indeed, every landowner is a keeper within that definition. But this, of course, in itself, constitutes no offence. The offence defined in s. 176(1) is the keeping of a common gaming house. The question is, if the "place" is used in a manner which constitutes it a common gaming house, does everyone who falls within the definition of a keeper of that place automatically keep the common gaming house? In my opinion that conclusion does not follow. The offence is the keeping of the common gaming house, and, in my opinion, in

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[84] *Re* Parc Commemoratif de Montréal, 114 D.L.R. (3d) 600, at 609 (Que. C.A. 1980) (L'Heureux-Dubé J.A. transl.).

[85] *See also* R. v. McMorran, [1948] O.R. 384, at 388-89, [1948] 3 D.L.R. 237, at 239-41 (C.A.).

[86] [1963] S.C.R. 124, [1963] 1 C.C.C. 233. *See* R. v. Lafrenière, [1965] 1 O.R. 313, [1965] 1 C.C.C. 31 (H.C. 1964).

> order to constitute that offence, there must be something more than the keeping of a place whose use, by someone other than the accused, makes it a common gaming house. I do not, for example, see how the owner of a house leased to a tenant, who, without his *knowledge*, operates it as a common gaming house, could possibly be found guilty of the offence. What then is the position of a "keeper" who does not in any way participate in the operation of the games played, but who knows that the place in question is being used for that purpose, and who permits such use? This, it appears to me, is the sort of situation which was contemplated when the offence defined in s. 176(2)(*b*) was created and, in my opinion, *that offence must have been created because it was not contemplated that such a person was, himself, keeping the common gaming house within the meaning of s. 176(1).*[87]

Consequently, the offence defined in subsecton 176(1) (now subsection 185(1)) "involves some act of participation in the wrongful use of the place" which was not established here.

A provocative case comment on *Kerim* by Morris Fish points out that the rather peculiar result of the decision is that by a majority of three to two, the Supreme Court found that the hall had been used as a gaming house but acquitted the accused of keeping it.[88] Until this case was decided it had generally been assumed that the definition of "keeper" in subsection 179(1) was applicable to subsection 193(1),[89] and since in *Kerim* the accused acted on behalf of the owner, Fish argues it would appear that he *prima facie* fell within the definition of "keeper" in paragraph (*b*) of subsection 179(1). Mr. Justice Martland held, however, that this did not make him one who *keeps* a common gaming house within the meaning of subsection 185(1). Although the result in *Kerim* is perhaps surprising, showing that in certain circumstances a "keeper" does not "keep", Fish suggests that "it would be more paradoxical still if the courts had held otherwise".[90] He suggests that one reason for such a result may be the following:

> To prove the offence of keeping a gaming house . . . if the courts interpreted "keeps" as broadly as the Code defines "keeper", the Crown would merely need to establish that the accused *owned* a "place". Yet to secure a conviction under the less serious summary conviction offence created by s. 176(2), this would not suffice. The Crown would have to prove, in addition, that the accused owner had *knowingly permitted the place to be let or used expressly for the prohibited purposes of gaming or betting*.
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> In other words, under s. 176, and under the related bawdy house section as well, the greater the degree of culpability, the lesser the offence. Surely an interpretation which produces this ironic result does violence to the spirit of the Criminal Code and to the intention of the legislature. The interpretation

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[87] *Kerim*, *supra* note 86, at 130-31, [1963] 1 C.C.C. at 239-40 (emphasis added). This passage has been cited consistently in judgments dealing with prosecutions under subs. 193(1). It should be noted that in the definition of "keeper" in subs. 179(1) each of the clauses presupposes the existence of real or apparent *control* over the premises.

[88] *The "Keeper" Who Does Not "Keep"*, 10 CRIM. L.Q. 412 (1968).

[89] *See, e.g.*, R. v. Rubenstein, [1960] O.R. 133, at 139, 126 C.C.C. 312, at 320 (C.A. 1959).

[90] *Supra* note 88, at 414-15.

> laid down in *Kerim*, however startling semantically, at least is acceptable philosophically.[91]

According to Fish, the Supreme Court left open the following "intriguing question": since the Code does not create an offence for "keepers", if the definition of "keeper" does not apply to "keeps" in sections 185 and 193, why was it included in the Code? One possible answer, he suggests, may be found in subsection 179(1), which provides that a place is a "common gaming house" (under subparagraph (*b*)(ii)) if it is kept or used for the purpose of playing games, and it is one "in which all or any portion of the bets or proceeds from a game is paid . . . to the *keeper* of the place".[92] Although from the viewpoint of strict statutory interpretation this may be a theoretically pleasing rationalization, one would argue that the better way to explain *Kerim* is simply to view it as an attempt by the Supreme Court to restrict the ambit of the various offences relating to the keeping of disorderly houses.[93]

Fish concludes his analysis of this decision by stating that the definition of "keeper" in subsection 179(1) is more applicable in relation to subparagraph (*b*)(ii) of the common gaming house definition than in relation to section 185:

> It makes more sense to hold that a place is a gaming house if proceeds from the game are paid to a person who "appears to be . . . an owner or occupier of the place" [in paragraph (*c*) of the "keeper" definition] or "assists or acts on behalf of the owner or occupier of a place" [in paragraph (*b*)] than to convict such a person on an offence more serious than he would commit if he *owned* the place and *knowingly permitted* its use for gaming house purposes [*i.e.* subsection 185(2)].[94]

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[91] *Id.* at 415 (emphasis in original). As to the significance of the word "knowingly" (as used in para. 185(2)(*b*)) *see* R. v. Larocque (No. 1), 25 W.W.R. 431, 120 C.C.C. 246 (B.C.C.A. 1958); R. v. Brooks, 100 C.C.C. 164 (Ont. Cty. Ct. 1951); R. v. Rozonowski, 45 C.C.C. 193, [1926] 1 D.L.R. 732 (B.C.S.C.); R. v. Beaver, 9 O.R. 418, 9 C.C.C. 415 (C.A. 1905). For an example of the apparent reluctance of some courts to apply the definition of "keeper" rigorously in cases where an accused under subs. 185(1) is embraced by its words but not by its spirit *see* Cormier v. The Queen, [1962] Que. B.R. 669.

[92] *Supra* note 88, at 415 (emphasis added). *See also* R. v. Westendorp, 26 C.R. (3d) 374, 390-92 (Alta. C.A. 1982).

[93] *See, e.g., Hutt, supra* note 50.

[94] *Supra* note 88, at 416 (emphasis in original). He further submits that "only a rigorous application of *Kerim* can prevent anomalous and unintended convictions under the disorderly house sections of the Criminal Code", a conclusion with which this author would heartily concur. The English courts have held that to keep a disorderly house there must be proof of taking some part in the management of the premises. *See* Jenks v. Turpin, 13 Q.B.D. 505, 15 Cox C.C. 486 (1884). *See also* R. v. Hislop (unreported, Ont. Prov. Ct., 12 Jun. 1981). In Rockert v. The Queen, [1978] S.C.R. 704, 38 C.C.C. (2d) 438, the Supreme Court of Canada considered *Kerim* and held that "a place is 'kept' by a person who allows others to use it for a prohibited purpose." *Id.* at 709, 38 C.C.C. (2d) at 444.

A recent interpretation of *Kerim* occurred in the case of *R. v. McLellan*[95] where the accused prostitute was seen on four occasions over a two-week period entering a hotel frequented by prostitutes and their customers. Nemetz C.J. held that the offence of subsection 193(1) requires the provision of *accommodation* by the accused. Here there was no evidence that she was given any particular room or had rented a particular room for an extended period or even that she had paid the rent on the room. While she could have been convicted as an *inmate* of a common bawdy-house contrary to paragraph 193(2)(*a*), the lack of accommodation meant that the Crown had failed to show she kept a common bawdy-house. Chief Justice Nemetz cited *Kerim* with approval and concluded:

> If every person who uses a place keeps that place, there is no need of s. 193(2)(*a*) and (*b*). Every inmate would be guilty under s. 193(1). Similarly, every owner and occupier would be guilty under s. 193(1) and (2)(*c*) would serve no purpose. That result suggests that the interpretation that led to it is not sound.[96]

C. *Substantive Requirements of Proof*

A number of substantive requirements of proof are peculiar to disorderly house prosecutions. One of the most significant is that, in general, an isolated act of prostitution is insufficient, rather evidence of continual and habitual use of the place for prostitution or acts of indecency is required. This is laid down by the leading case of *Patterson v. The Queen*.[97] In that case the accused and several *agents provocateurs* went to a particular house on one occasion upon which the accused was prepared to engage in acts of prostitution. Mr. Justice Spence,[98] speaking for the Court, cited with approval Schroeder J.A. who dissented in the Ontario Court of Appeal,[99] to the effect that "the words 'kept or occupied' and the words 'resorted to' . . . connote a *frequent or habitual use* of the premises for the purposes of prostitution."

Spence J. then went on to summarize the evidence from which the Court found that the prohibited nature of the premises was established, as follows:

> *first*, there has been *actual evidence* of a continued and habitual use of the premises for prostitution as in *The King v. Cohen*, . . . and *R. v. Miket*, . . . *secondly*, there has been evidence of the reputation in the neighbourhood of the premises as a common bawdy-house, or,

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[95] *Supra* note 49. *See also* Perron v. The Queen, 18 C.R. 270 (Que. Q.B. 1954); R. v. Worthington, *supra* note 51.

[96] *McLellan*, *supra* note 49, at 546. For a discussion of the interpretation of penal statutes *see* MAXWELL ON THE INTERPRETATION OF STATUTES, *supra* note 31, at 238-51.

[97] *Supra* note 29.

[98] *Id.* at 160, 67 D.L.R. (2d) at 84.

[99] [1967] 1 O.R. 429, [1967] 3 C.C.C. 39 (C.A.).

> *thirdly*, there has been evidence of such circumstances as to make the inference that the premises were resorted to habitually as a place of prostitution, a proper inference for the court to draw from such evidence.[100]

In this case, the private residence used was not a common bawdy-house as the requisite degree of frequency had not been established. Consequently "[s]ince this place was not a common bawdy-house it is irrelevant who the keeper was."[101] Spence J. concluded[102] by applying the following *dicta* of Hanrahan J. in *R. v. Martin*:

> It is true convictions have been registered and sustained on appeal on evidence of a single act of prostitution, but always in such cases the surrounding circumstances established the premises had been habitually used for such a purpose and in most cases had acquired such a reputation in the community.[103]

A relatively recent example of how the *Patterson* test has imposed a significant restriction upon the scope of subsection 193(1) is *R. v. Evans*.[104] In this case, a stag party was held on one evening, and there was no evidence of similar prior use of the premises. Although numerous acts of intercourse occurred during that one encounter, Brooke J.A. held that it could not be said that the premises were a common bawdy-house, given the ruling in *Patterson*. For him the evidence failed to establish "the element of frequency of resort to or habitual use which is necessary for the finding that the premises were a common bawdy-house".[105]

Although the issue is still moot, it would appear that while the court can base an inference that the place is being kept or occupied for the

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[100] *Supra* note 29, at 161, 67 D.L.R. (2d) at 85 (emphasis added, footnotes omitted). An example of the third point is R. v. Davidson, 11 Alta. L.R. 9, 35 D.L.R. 82 (C.A. 1917) which held that although the accused was only a night clerk in a hotel he came within the definition of "keeper". *See also* R. v. Clay, *supra* note 51. *Compare* R. v. Rose, [1946] Que. B.R. 163.

[101] R. v. King, [1965] 1 O.R. 389, [1965] 2 C.C.C. 324 (C.A. 1964). In this case a traveller who registered in a motel and was assigned a room, went into the room and had sexual intercourse with the accused for money. Roach J.A., speaking for the Ontario Court of Appeal, held that the room was not rented or kept or occupied for the purpose of prostitution or the practice of acts of indecency. He furthermore held that while subs. 179(1) "extends the definition of 'keeper', it in no way affects the definition of common bawdy-house". *Id.* at 390, 2 C.C.C. at 325.

[102] *Supra* note 29, at 162-63, 67 D.L.R. (2d) at 86.

[103] 89 C.C.C. 385, at 386-87 (Ont. Mag. Ct. 1947). *But see* R. v. Clay, *supra* note 51. In R. v. Ikeda, 42 C.C.C. (2d) 195, 3 C.R. (3d) 382 (Ont. C.A. 1978) Mackinnon J.A. cited *Patterson*, which had been applied by the Ontario Court of Appeal in many cases, and held that "in light of what the Crown has very fairly described as an 'insubstantial amount' of evidence, we feel it would be unsafe to sustain a conviction based on an inference from the limited evidence given that the premises were resorted to 'habitually' as a place where indecent acts were performed." *Id.* at 197, 3 C.R. (3d) at 384.

[104] 11 C.C.C. (2d) 130, 22 C.R.N.S. 32 (Ont. C.A. 1973).

[105] *Id.* at 132, 22 C.R.N.S. at 33. The learned justices also held that the accused were not keepers within the meaning of the subs. 179(1) definition because the evidence was not sufficient to establish that they were. *See also* R. v. Broccolo, *supra* note 72, at 543.

purpose of prostitution on all the evidence, the better view is that there must be proof that acts of prostitution or indecency actually took place on the premises. In the recent case of *Sheehan v. The Queen*,[106] the accused had her telephone number listed in a publication distributed in the rooms of large hotels in Montreal advertising, *inter alia*, escort services to help enjoy the city. She made telephone calls and arrangements in her apartment, stating her fees of forty dollars for two hours of female company and that financial arrangements for extra services could be made. Counsel for the accused argued that subsection 193(1) was not made out because no act of sexual intercourse took place in her apartment. Turgeon J.A. concluded from these facts that although the accused was hoping to recruit clients for the purpose of prostitution, if acts of prostitution occurred, they were not committed in the accused's apartment and no agreement was made at her apartment for the acts to be committed elsewhere. The Court therefore followed *Patterson* and *R. v. Eguiagaray*[107] and held that the Crown failed to prove a habitual or frequent use of the accused's apartment for the purpose of prostitution.

A similar approach is found in *R. v. Barrie*[108] where a police officer listened at the door of a motel room and testified he heard "sounds of sexual intercourse". This evidence was held by Dunlap J. to be insufficient to establish that sexual acts had been performed. Furthermore, the acts of prostitution were alleged to have occurred in the room of a large motel, but there was no evidence that the room was under the accused's control.

A handful of other cases have, however, come to a contrary conclusion. For example, in *R. v. Sorko*[109] the British Columbia Court of Appeal held that it is not necessary that there be proof that acts of prostitution actually took place on the premises. Referring to *Patterson*, Mr. Justice MacLean held that the court may base an inference that the place is being kept or occupied for the purpose of prostitution on all the other evidence. In his opinion the evidence was certainly sufficient to justify the inference that the hotel was kept or occupied for such purpose.[110]

One case, which arguably represents the most extreme example of this line of cases, sustained a conviction under subsection 193(1) where there was *no* direct evidence whatsoever that acts of prostitution or indecency occurred on the premises. In *Lavoie v. La Reine*[111] the male accused maintained a modelling and hostess agency in an office. A telephone call was placed to the female accused who met an undercover

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[106] 4 C.R. (3d) 307 (Que. C.A. 1978), *rev'g* [1978] R.L. 597 (S.C.).

[107] [1971] Que. C.A. 653, 15 C.R.N.S. 58. *See Patterson*, *supra* note 99, at 436-37, [1967] 3 C.C.C. at 47-48 (Schroeder J.A.).

[108] 25 C.C.C. (2d) 216 (Ont. Cty. Ct. 1975).

[109] [1969] 4 C.C.C. 241 (B.C.C.A.).

[110] *Id.* at 244. He then stated that it was completely immaterial that no act of prostitution took place on the premises, citing *Theirlynck*, *supra* note 75, as authority.

[111] [1975] Que. C.A. 26.

police officer at the office. The officer paid money to the male accused, then the female accused took the officer to a hotel. The appellant relied on *Eguiagaray*[112] where the accused, after receiving a phone call at her residence, met outside and committed acts of prostitution elsewhere. The same Court confirmed the acquittal since her apartment could not be considered to be a common bawdy-house. According to Mayrand J.A. the facts were different here because the clients of Agence Futuriste Enrg. and prostitutes entered the premises and "c'est là que le marché initial de prostitution était conclu. . . . "[113] He then referred to the fact that the Quebec Court of Appeal had already decided in *Dubé v. Le Roi*[114] that proof of illicit relations is not necessary. It is submitted that Mayrand J.A. confused the evidentiary issue raised in *Dubé* with the substantive requirements of the definition of a common bawdy-house.

Dubé is the culmination of a line of cases, beginning with *R. v. Roberts*[115] and *Theirlynck*,[116] which held that direct proof of particular acts of sexual intercourse occurring on the premises is not required. Circumstantial or "inferential" evidence of such acts is sufficient.[117] In such cases it is still necessary to establish by inference that acts of prostitution or indecency occurred on the premises. The outcome of *Lavoie* is that the premises in question were held to be kept for the purpose of prostitution:

> Le contrat de prostitution y était conclu en termes succincts mais non équivoques et il importe peu que les relations sexuelles ne s'y soient pas réalisées . . . le "local occupé . . . à des fins de prostitution" comprend celui où le scénario de la prostitution est composé, même si le dernier acte se joue sur une autre scène.[118]

One risk encountered when relying on purely circumstantial evidence or "inferential" evidence is that it may exclude the possibility of the defence of innocent purposes being considered. For instance, in *Lazure v. The Queen*[119] the police testified that over a two-day period officers observed four unidentified men enter and leave the accused's premises staying for approximately twenty-five minutes. One constable made a telephone appointment to have sexual relations with the accused for five dollars and after he went to her premises and paid the money the accused was arrested. At that time, two men who lived in the same

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[112] *Supra* note 107.

[113] *Supra* note 111, at 27-28.

[114] *Supra* note 51.

[115] 17 Alta. L.R. 95, 62 D.L.R. 395 (C.A. 1921).

[116] *Supra* note 75.

[117] *See also McEwan*, *supra* note 77; *Thomas*, *supra* note 77; *Turkiewich*, *supra* note 58; *Patterson*, *supra* note 29; *Sorko*, *supra* note 109.

[118] *Supra* note 111, at 28. The Court places much less emphasis on the necessity for control. *See also* R. v. Chatelle, [1972] R.L. 50 (Le tribunal de Montréal).

[119] [1966] Que. B.R. 986, 49 C.R. 301. *See* R. v. Sands, 25 Man. R. 690, 28 D.L.R. 375 (C.A.). *See also* Durand v. The King, [1951] Que. B.R. 391, 101 C.C.C. 368; R. v. Blais, [1947] Que. B.R. 311, 1 C.R. 190.

building, and the accused's son, were found in the kitchen. Evidence was adduced that lodgers in the building frequently made use of her kitchen and she kept the apartment as a home for herself and her son, and as a place in which she worked as a seamstress. The reasons for the visits of the unidentified men were unexplained. Choquette J.A. held that there was no evidence that she kept a common bawdy-house within the meaning of the Code, and that the visits in question could have been made for innocent purposes.

While *mens rea* is required in the offence of subsection 193(1), the courts have rarely addressed this issue in a direct fashion. Rather they seem content to infer knowledge of the existence of acts of prostitution or indecency on the premises to the accused by summarily discarding the standard defence of lack of knowledge of such activities.[120] However, in *R. v. Catalano*[121] this issue was not ignored. There the appellant was convicted on a charge which alleged that he "unlawfully [was the keeper] of a common bawdy-house . . . contrary to the Criminal Code". Jessup J.A., speaking for the Ontario Court of Appeal, held that "it is not an offence known to the law to be simply a keeper without the ingredient of *mens rea* referred to in the *Kerim* case."[122] This same reasoning is found in *R. v. Baskind*[123] where Montgomery J.A. of the Quebec Court of Appeal held that the co-accused resorted to the house in question for the purpose of prostitution or acts of indecency, but "[o]ne or two incidents of this type are not . . . sufficient for the appellant to be convicted of keeping a common bawdy house unless there be proof of guilty knowledge on her part . . . *Rioux v. The Queen*, [1968] Que. Q.B. 867."[124]

Finally, it would appear that photographs and sexual aids seized by the police at the "place" are regularly admitted by the courts as relevant circumstantial evidence on the issue of whether or not acts of indecency occurred on the premises. In at least one case, however, the court refused to admit such "relevant" evidence. In *R. v. Mason*[125] many "obscene" photographs, sexual aids and sheets containing the names of members of the club were seized by the police, but Charles J. ruled that "having regard to the nature of the charge I considered the obscene photographs and the sexual aids which were tendered in evidence by the Crown as being totally irrelevant for the purpose of my judgment."[126]

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[120] *See* in particular the line of cases beginning with *Walsh*, *infra* note 146. Where the accused owner has no "guilty knowledge" of the acts in question, he cannot be convicted of keeping a common bawdy-house: R. v. Baskind, 23 C.C.C. (2d) 368 (Que. C.A. 1975); *Durand*, *supra* note 119; Hopper v. Clark, 40 N.B.R. 568 (C.A. 1911).

[121] 37 C.C.C. (2d) 255 (Ont. C.A. 1977).

[122] *Id.* at 256.

[123] *Supra* note 120.

[124] *Id.* at 370.

[125] *Supra* note 61. As to the admissibility of letters against a person charged with keeping a bawdy-house, *see* R. v. Thompson, [1918] A.C. 221, 13 Cr. App. R. 61 (H.L. 1917). As to the admissibility of evidence of a film, *see Quinn*, *supra* note 15, at 256-57, 45 Cr. App. R. at 288.

[126] *Supra* note 61, at 463.

D. *The Special Case of Paragraph 193(2)(c)*

Paragraph 193(2)(*c*)[127] is primarily directed at the owner or landlord of a common bawdy-house who has some degree of control and management of the premises, and who *knowingly* allows the place to be used for the purposes of a common bawdy-house. In *R. v. Turkiewich*[128] the Manitoba Court of Appeal held that even though there was no evidence that the women were charging money for their services, or that couples resorting to the place were unmarried, the accused was rightly convicted because he knowingly allowed the premises to be used as a common bawdy-house contrary to paragraph 193(2)(*c*).

In the more recent case of *R. v. Wong*,[129] the evidence demonstrated that the accused was the principal shareholder in a company that leased to a tenant an apartment which was used by the tenant as a common bawdy-house. It was also established that the accused undoubtedly knew of such use. On appeal, Prowse J.A. held that the words "or otherwise having charge or control" in paragraph 193(2)(*c*) qualify the earlier words in the section and make it clear that the provision is not directed at an owner or landlord *per se*, but rather at such persons "having charge or control of the premises".[130]

Mr. Justice Prowse went on to hold that in this case the accused may have had the power to "acquire" the control or charge of the premises by termination of the lease, but once leased the *tenant* had the charge or control of the premises. The paragraph is therefore directed at an owner or landlord

> who has the right to intervene forthwith and prevent the continued use of the premises as a common bawdy-house and whose failure to do so can be considered as the granting of permission to make sure such use of the premises as and from the time he gained such knowledge. The section is directed at persons in *actual charge or control and not at persons who have the right to acquire charge or control*.[131]

After having made this clarification, thereby narrowing the applicability of the provision, he concluded that neither the accused nor his company had "charge or control" of the apartment at the material time. The Crown's appeal from the acquittal was dismissed.

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[127] R.S.C. 1970, c. C-34, *as amended*.

[128] *Supra* note 58. The result of this decision is that an owner, landlord, *etc.* may also be convicted of the more serious indictable offence under subs. 193(1) if he comes within the definition of "keeper". *See also* R. v. Puterbaugh, [1964] 1 C.C.C. 370 (Sask. Mag. Ct. 1963); Bouchard v. The King, *supra* note 51.

[129] 2 Alta. L.R. (2d) 90, 33 C.C.C. (2d) 6 (C.A. 1977).

[130] *Id.* at 94, 33 C.C.C. (2d) at 9.

[131] *Id.* at 95, 33 C.C.C. (2d) at 10 (emphasis added). *See* Siviour v. Napolitano, [1931] 1 K.B. 636. This reasoning is consistent with the tenet of statutory interpretation that penal statutes are to be restrictively interpreted, a principle which should be more consistently applied by the courts in interpreting subs. 179(1) and s. 193. *See* R. v. Philips Electronics Ltd. — Philips Électronique Ltée., 66 C.C.C. (2d) 384, 126 D.L.R. (3d) 767 (S.C.C. 1981).

Since the wording of paragraph 193(2)(*c*) indicates in a lesser way the element of participation in the wrongful use of the place — as compared to subsection 193(1) — the offence set out in paragraph 193(2)(*c*) has been held to be an included offence to the offence of keeping a common bawdy-house.[132] This is to be contrasted with the offence of being found in a common bawdy-house, paragraph 193(2)(*b*), which is not a lesser offence included in a charge under subsection 193(1).[133]

IV. Special Legal Problems

A. *The Undoctrinaire Relationship Between Subsection 193(1) and Section 169*

The courts have consistently interchanged the concepts and principles associated with section 169 and subsection 179(1). This judicial interpretation creates a problem as the definitional section of a common bawdy-house, subsection 179(1), uses "acts of indecency", whereas section 169 speaks of "indecent acts". It is submitted that in strict law this is an incorrect approach. If the legislature intended that the offence of committing an "indecent act" would have the same meaning in subsection 179(1), why were the same terms not used? Different wording would imply different meaning, all the more so in light of the strict constructionist approach adopted by the Supreme Court in *Kerim*.[134]

Unfortunately, the courts have largely ignored the problems raised by this interchange of definitions between section 169 and subsection 179(1). One of the few cases to even suggest that such problems do exist is *R. v. Laliberté*.[135] Gagnon J.A. of the Quebec Court of Appeal, considering section 169, held that the "public nature of the indecent act is an element which augments the indecent character of the act but which

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[132] R. v. Lafrenière, *supra* note 86. The following distinction between paras. 193(2)(*c*) and 185(2)(*b*) was drawn by Wells J. In para. 193(2)(*c*) "the words 'or otherwise having charge or control of any place' directly modify the unnamed members of the class designated by the word 'otherwise' and also . . . modify the words 'owner, landlord, lessor, tenant, occupier, agent' as well." Hence they import into para. 193(2)(*c*) an element which is lacking in para. 185(2)(*b*), *i.e.* charge or control of the place in the classes named or included. *Id.* at 319, [1965] 1 C.C.C. at 38.

[133] R. v. Labelle, [1957] Que. B.R. 81.

[134] *Supra* note 86. According to the Law Reform Commission of Canada the suppression of "disorderly conduct" (including "indecent acts") can be justified "on the grounds of the need to safeguard public decency". Law Reform Commission of Canada, Sexual Offences, Working Paper 22 38 (1978). Furthermore, s. 169 "is important because it is applied primarily to the phenomenon of exhibitionism and is one of the most common sexual offences". Since s. 169 is "from social and clinical perspectives, the appropriate criminal law section to deal with the activity" the Commission has recommended that it be retained. *Id.* at 39.

[135] 12 C.C.C. (2d) 109 (Que. C.A. 1973).

does not define it. Finally, that element does not come into the definition of a common bawdy-house.''[136] The issue of the application of the principles of section 169 to subsection 179(1) will only be resolved when the Supreme Court finally provides an interpretation of the meaning of ''acts of indecency'' in subsection 179(1). The flurry of prosecutions against the ''keepers'' of gay bars and steambaths, based on the ''acts of indecency'' wing of subsection 179(1), may eventually provide the Court with such an opportunity. In the meantime, it appears that appellate and trial courts will continue to throw around these terms in an alarmingly undoctrinaire fashion. The Supreme Court should disregard the wealth of case law built up around section 169, based on the community standards of tolerance test which has characterized far too many acts and publications as ''obscene'' or ''indecent'',[137] and begin to develop a new and unique approach to construing ''acts of indecency'', combined with a more serious attempt to enumerate which particular acts are in law ''acts of indecency'' in a given set of circumstances.

B. *The Non-Existent Relationship Between Subsection 193(1) and Section 195.1*

Despite the fact that the term ''prostitution'' is found both in section 195.1 (soliciting for the purpose of prostitution) and section 195 (procuring), the courts have not found it necessary to draw on the interpretation of this term under these two related provisions when construing subsection 179(1). One possible explanation for this is the fact that the bulk of the prosecutions under section 195.1 turns on the meaning of the act of ''soliciting'' as opposed to the nature of the ''prostitution'' itself, as is best illustrated by *Hutt v. The Queen*.[138] In fact, so far no reported case has referred to sections 195 or 195.1 in interpreting the word ''prostitution'' under subsection 179(1).

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[136] *Id.* at 111.

[137] This approach may, in fact, be inferred from the reasoning in R. v. Figliuzzi, *supra* note 69. A variety of interesting cases under s. 169 have recently come before the courts. *See* in particular R. v. Niman, 31 C.R.N.S. 51 (Ont. Prov. Ct. 1974); R. v. Springer, 24 C.C.C. (2d) 56 (Sask. Dist. Ct. 1975); R. v. Bennett, 29 C.C.C. (2d) 403 (B.C.S.C. 1975); R. v. Miceli, 36 C.C.C. (2d) 321 (Ont. Prov. Ct. 1977); R. v. Dalen, 44 C.C.C. (2d) 228 (Sask. Dist. Ct. 1978). With incredible frankness Jessup J.A. stated recently in Pitchford v. The Queen, 66 C.C.C. (2d) 568, at 575, 25 C.R. (3d) 149, at 157 (Ont. C.A. 1982) that ''the law with respect to what is indecent is far from settled.''

[138] *Supra* note 50. As for s. 195.1, *see* in particular R. v. Patterson, 9 C.C.C. (2d) 364, 19 C.R.N.S. 289 (Ont. Cty. Ct. 1972); R. v. Obey, 11 C.C.C. (2d) 28, 21 C.R.N.S. 121 (B.C.S.C. 1973); R. v. Gallant, 17 C.C.C. (2d) 555 (B.C. Cty. Ct. 1974); R. v. Dudak, 41 C.C.C. (2d) 31, 3 C.R. (3d) 68 (B.C.C.A. 1978); R. v. DiPaola; R. v. Palatics, 43 C.C.C. (2d) 199, 4 C.R. (3d) 121 (Ont. C.A. 1978); R. v. Goobie, 11 C.C.C. (2d) 538 (Ont. H.C. 1973); R. v. Galjot, 51 C.C.C. 254 (B.C. Cty. Ct. 1980); R. v. Whitter, 4 W.C.B. 486 (B.C.C.A. 1980).

C. *Has Section 158 Affected the Elements of Subsection 193(1)?*

A further problem in interpretation is whether or not the introduction of section 158 (then section 149A) in 1969[139] has had any effect on the interpretation of subsection 179(1) and section 193. The general prevailing attitude of the judiciary is that it has had no effect whatsoever. Nevertheless, defence counsel in a number of bawdy-house prosecutions have attempted to argue that subsection 179(1) and section 193 must be construed in light of section 158. Some defence counsel have gone so far as to declare that the latter provides a defence to a charge under subsection 193(1).

In *R. v. Laliberté*[140] Gagnon J.A. was firmly of the opinion that in enacting section 158 Parliament did not create a new definition of the term "indecent act":

> An indecent act is an act that offends the general standards that decency permits. I do not find it difficult to decide that the physical act performed for gain by the appellants on the persons of their customers who are complete strangers, for their sexual satisfaction, constitutes an indecent act [under subsection 179(1)]. I do not believe it is necessary to go as far as the Court of Appeal for Ontario which, in *R. v. Lantay* . . . held that such acts constituted prostitution.[141]

Mr. Justice Gagnon conceded that the term "acts of indecency" is not defined in the Code, "although indecency is in issue not only in s. 179(1) but also gross indecency in s. 157 and indecent act in s. 169". But, as for section 158,

> [i]t is not accurate to say that *indecent act* received a new definition by the introduction . . . of new s. 158 . . . [which] makes clear without the slightest ambiguity that it does not affect the acts contemplated by ss. 155 and 157. The fact that Parliament has not applied it to the definition of common bawdy-house in s. 179(1) weakens rather than supports the appellants' submissions.[142]

A number of cases involving gay bars and steambaths have also dealt with the relationship of section 158 to subsection 179(1) and section 193. The Quebec Court of Appeal in *Walsh v. The Queen* summarily dismissed the submission on this issue in the following terms:

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[139] Criminal Law Amendment Act, 1968-69, S.C. 1968-69, c. 38, s. 7.

[140] *Supra* note 135.

[141] *Id.* at 112.

[142] *Id.* at 111 (emphasis added). His reference to "indecent act" should actually read "acts of indecency" since it refers to subs. 179(1). The alleged common bawdy-house in this case was a massage parlour, and Gagnon J.A. concluded that the closed-circuit television enabled persons in the basement to view what was going on in the massage studios: "I have difficulty in believing that this installation served only administrative purposes; I rather see it as the use of an electronic technique of satisfying the instincts of voyeurs which only adds to the illegal character of the premises and adds to the gravity of the offence." *Id.* at 112.

> I do not regard it as material that in the present case the acts of indecency, or some of them, may have been committed under circumstances such that persons performing them could not, because of the provisions of section 158 . . . have been prosecuted under sections 155 or 157.[143]

Similarly, in *R. v. Vandal* it was held that section 158 had no application to that case and, in all events,

> l'article 158 n'abroge pas, pas plus qu'il ne suspend, l'article 193 . . . sur lequel est basée l'accusation qui fait l'objet du présent litige et la Charte des droits et libertés de la personne ne stipule nulle part, et pour cause, que la maison de débauche . . . a cessé d'être un crime.[144]

There is one case which holds that subsection 179(1) can be construed in light of section 158. The decision in *R. v. Franco*[145] will be discussed in the next section. This decision is on appeal and cannot be considered the final word on this disputed subject.

D. *Do Homosexual Steambaths and Bars Constitute Common Bawdy-Houses?*

A recent line of interesting cases has dealt with the issue of whether or not homosexual steambaths and bars can constitute common bawdy-houses where there is no question of acts of prostitution having occurred on the premises. With only one exception, they all indicate that the courts are not construing the provisions of the Code in broad and liberal terms, but are expanding the very ambit of the offence in an alarming fashion. These cases deserve to be analyzed in some detail.

The first major decision with respect to homosexual steambaths is *Walsh v. The Queen*,[146] an unreported decision of the Quebec Court of Appeal. The accused was the manager of the Sauna Aquarius, which was described as a sauna and health club, operating on a strictly commercial basis and open to the public generally. In a one-week period prior to the laying of a charge under subsection 193(1) members of the Montreal Urban Community Police Force visited the club and posed as "ordinary guests". The accused's defence was that the club was operated for legitimate purposes and that if sexual activities did take place on the premises he was unaware of them.

The police officers called by the Crown testified that the facilities were "inadequate, little used and in a poor state of repair",[147] which was partially corroborated by the accused himself. Occasionally two men would retire to a room, and the door would be left ajar, "so that a witness

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[143] *Infra* note 146, at 4.

[144] *Infra* note 163, at 5. In that case the accused had reproduced ss. 138, 155, 157 and 158 on signs displayed on the premises.

[145] *Infra* note 172.

[146] (Unreported, No. 10-000140-762, Que. C.A., 10 Mar. 1977), digested at 1 W.C.B. 202. Most of these judgments are unfortunately unreported.

[147] *Id.* at 3.

had been able to see two men indulging in sexual activities". In addition to refreshments, homosexual magazines and lubricants were sold at the counter near the entrance. The label on one such lubricant, explaining that the product would enable its users "to participate in the SEXUAL FREEDOM OF THE SWINGING SEVENTIES", left "little imagination as to the purpose for which this lubricant was intended",[148] according to Montgomery J.A.

Counsel for the appellant urged *Kerim*[149] in support of the argument that although the accused might have been a "keeper" within the meaning of subsection 179(1), that did not necessarily mean that he was "one who keeps a common bawdy-house" within subsection 193(1). Mr. Justice Montgomery rejected the accused's claim of lack of knowledge and held that "the performance of *indecent acts* by clients was so frequent and so open that it is unbelievable that Appellant did not know the purposes for which the house was being used."[150] Montgomery J.A. summarily dismissed the standard defence of lack of knowledge and imputed *mens rea* to the accused, a practice that has been consistently followed by the courts in this area ever since:

> What the Crown did was to make evidence of a number of facts from which the trial judge concluded that the premises were being operated, not as a *bona fide* sauna and health club, but as a rendezvous where homosexuals could find partners for the performance of *indecent acts* and facilities for such activities, and that this was done systematically and openly that Appellant, as manager, could not have failed to have knowledge of the nature of these activities. . . . I find that the proof was ample to sustain the conviction.[151]

Nowhere in this judgment does the learned Justice explain *which* of the various acts performed on the premises were "acts of indecency", or whether they all were. This lacuna is another common thread winding through these gay steambath and bar cases.

R. v. Walsh[152] is another case of a prosecution for keeping a homosexual steambath as a common bawdy-house involving the same accused. Testimony given during the trial revealed that the following acts took place on the premises: "caresses . . . d'attouchements . . . d'actes de masturbation, buccale ou autres . . . de sodomie . . . et d'autres du même genre".[153] Furthermore, employees had sexual relations with

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[148] *Id.* at 3-4. For a discussion of the prevailing judicial attitude regarding homosexuality *see* Richstone & Russell, *Shutting the Gate: Gay Civil Rights in the Supreme Court of Canada*, 27 McGILL L.J. 92 (1981).

[149] *Supra* note 86.

[150] *Supra* note 146, at 6 (emphasis added). As for the claim that there were contradictions in the Crown's evidence, Montgomery J.A. attributes this, at least partially, to the fact that the police "were obliged to make their investigation while clad only in a towel, which must have added to the difficulty in taking notes". *Id.* at 7.

[151] *Id.* at 8 (emphasis added).

[152] (Unreported, No. 16-10839, Que. Mun. Ct., 18 Dec. 1979) (on appeal to Que. C.A.).

[153] *Id.* at 4.

some of the customers during their working hours. Tellier J. concluded, on the basis of all of the evidence, that the character of the Sauna Neptune as a common bawdy-house was very clearly established:

> [c]e studio soi-disant de conditionnement physique était en fait d'abord et avant tout et même exclusivement un endroit où des hommes se rencontraient sans qu'aucun système sérieux de surveillance n'ait été institué . . . et ce *dans le but précis, recherché et non dissimulé d'avoir des relations sexuelles* avec d'autres personnes . . . du sexe masculin. Le Sauna Neptune était donc un endroit reconnu où . . . on pouvait facilement trouver des partenaires pour se livrer à des actes d'indécence . . . la preuve est accablante sur le fait que des actes d'indécence aient été commis *en quantité innombrable*.[154]

Counsel for the accused cited *Kerim*[155] and *Catalano*[156] as support for his submission that the accused did not "keep" the premises as a common bawdy-house. According to Judge Tellier the issue turned on the degree of participation by the accused in the business itself. According to the evidence the accused was, *inter alia*, the director of the company and its vice-president. The learned Judge concluded that the accused had kept a common bawdy-house contrary to subsection 193(1) without any discussion of whether or not the accused had actual or imputed knowledge that "acts of indecency" occurred on his premises.

A recent decision of the Ontario Provincial Court dealt with a homosexual steambath that was specially designed for sadomasochistic sexual activity. In *R. v. Hislop*[157] five men were jointly charged with keeping The Barracks as a common bawdy-house. The premises included a number of one-way mirrors and peepholes in "cubicle type dressing rooms". The undercover police officers testified both as to the objects which were for sale and the various acts they observed.

Judge Rice interpreted "acts of indecency" in subsection 179(1) by citing *Popert v. The Queen*,[158] where Zuber J.A. stated that the appropriate test for obscenity is the "community standard of tolerance", and the same test should be applied in determining whether material is immoral or indecent. Judge Rice interpreted "acts of indecency" as meaning acts which are not within the community standard of tolerance. His Honour made the important distinction that an act may be within community standards of tolerance under one set of circumstances while the same act is not within such standards under a different set of circumstances. Consequently, in determining what is within the community standards of tolerance, "the Court must consider not only the

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[154] *Id.* (emphasis added). The italicized phrases were the same as used by Pigeon J. in *Vandal*, *infra* note 163.

[155] *Supra* note 86.

[156] *Supra* note 121.

[157] *Supra* note 94.

[158] 58 C.C.C. (2d) 505, at 510, 19 C.R. (3d) 393, at 399 (Ont. C.A. 1981), *aff'g* 51 C.C.C. (2d) 485 (Ont. Cty. Ct. 1980), *rev'g* 45 C.C.C. (2d) 385 (Ont. Prov. Ct. 1979). *Sub nom. R. v. Pink Triangle Press*. This was a prosecution under s. 164.

core act, but also all of the circumstances surrounding the act."[159] In this case the acts of buggery, fellatio and masturbation done in the circumstances described in the evidence were not within the community standards of tolerance within the meaning of subsection 179(1). The premises were habitually resorted to for such acts of indecency and The Barracks was therefore a common bawdy-house.

In determining whether or not all or some of the accused "kept" the premises as a common bawdy-house, the Court carefully analyzed the peculiar facts of each of the accused, coming to radically different conclusions. In the case of Gaudet, who was an attendant, night manager and cashier, the Crown relied on the definition contained in paragraphs (*c*) through (*e*) of the "keeper" definition in subsection 179(1). Judge Rice found that the accused had a degree of control, care and management of the premises, and was therefore found guilty of the offence as charged:

> The acts of indecency were so flagrant and open that anyone performing the job of attendant would have knowledge of such acts and his care and control and management of the place would extend to cover the acts of indecency. That is, he would have some control over the persons entering and leaving the premises and he would also have some control over permitting the acts of indecency to occur on the premises.[160]

The Crown relied on the same parts of subsection 179(1) with respect to the charge against Fabo, who also was an attendant, and for the same reason given in analyzing Gaudet's case, the Court found him guilty of the offence.[161]

George Hislop was the President of The Barracks Ltd., Ricky Stenhouse was the Secretary-Treasurer and Jerry Levy was the General Manager. Judge Rice could not, however, determine whether Hislop was the actual owner of the place, and confronted a further obstacle: "it is inconceivable that they did not have knowledge of the acts of indecency

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[159] *Hislop*, *supra* note 94, at 16.

[160] *Id.* at 23. Once again we see the Court imputing *mens rea* to the accused coupled with a refusal to consider seriously the defence of lack of knowledge. Judge Rice cited Martland J. in *Kerim*, *supra* note 86, at 130, [1963] 1 C.C.C. at 239, with respect to who is a "keeper", and concluded that although in *Kerim* the requirement of "keeping" was with reference to a different offence, "it applies equally to the offence of keeping a common bawdy house". *Hislop*, *supra* note 94, at 22. As for "minor employees" *see Cormier*, *supra* note 91; R. v. Coates, 47 C.C.C. 344 (Sask. C.A. 1927). In R. v. Jung York, [1951] O.W.N. 266, 99 C.C.C. 313 (C.A.) it was held that a person will be deemed to be a keeper as long as he "assist[s] 'in the care, government, or management' of that which served to make the premises a disorderly house". *Id* at 267, 99 C.C.C. at 315. The Quebec Court of Appeal has recently held that a temporary employee of a sauna can be a "keeper" of a common bawdy-house: Gonthier v. La Reine, (not yet reported, No. 500-10-000394-799, Que. C.A., 6 Jan. 1982). In this case the accused was a temporary employee working as a cashier. He was held to be a keeper because he had control over who was to be admitted, he rented rooms and lockers and assisted the owners of the establishment.

[161] *Hislop*, *supra* note 94, at 24. The defence argued that acts of indecency had to involve women, but the Court held that subs. 179(1) is not restricted to women.

. . . I realize that a corporation acts through its officers, however, I cannot find for certain which officers performed what duties for The Barracks Limited.''[162] The Court therefore acquitted the three corporate officers since it was unable to determine what act of participation, if any, they performed with respect to the acts of indecency. The rather anomalous result of this case was that while two attendants, mere employees, of the premises were found guilty, the corporate accuseds were acquitted.

Another recent gay steambath prosecution is *R. v. Vandal*, where the accused was the president of the Sauna David Inc., described by Judge Pigeon as an ''endroit de prédeliction pour les homosexuels''.[163] From the review of the police testimony, Pigeon J. concluded that ''[l]a multiplicité, la fréquence et la répétition de ces actes indiquent bien qu'il s'agit d'une maison de débauche au sens du Code criminel.''[164] As for the element of *mens rea*, he was of the opinion that the accused had often visited the premises and the activities of his clientele could not have gone unnoticed. The accused, in a written statement given to the police, admitted to having seen ''des actes indécents'' in the showers, the sauna and the rooms. He also claimed that the majority of his clientele visited the sauna ''[p]our faire des rencontres dans le but d'avoir des relations sexuelles entre eux''. On the basis of the evidence as a whole Judge Pigeon concluded, in words strikingly similar to those of Tellier J. in *R. v. Walsh*, that ''ce soi-disant bain sauna était en fait un endroit où des hommes se rencontraient dans un but précis, recherché et non dissimulé, d'avoir des relations sexuelles avec d'autres personnes de sexe masculin.''[165]

A recent Alberta case also dealt with a homosexual steambath. In *R. v. Pisces Health Spa*[166] the accused three men and the corporation entered guilty pleas to charges of keeping a common bawdy-house. In an oral judgment, Rolf J. found that although a health club for homosexuals was not illegal (which was never an issue in the trial), the place had become a ''meeting place'' and was open twenty-four hours a day ''apparently and for no other reason but to provide sexual gratification in the homosexual sense''.[167] He then concluded his very brief judgment

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[162] *Id.* at 26.

[163] (Unreported, No. 10-542, Que. Mun. Ct., 8 Jul. 1981), at 3 (on appeal to Que. C.A.).

[164] *Id.* The learned Judge cited Mr. Justice Pratte in *Dubé*, *supra* note 51, at 532, 94 C.C.C. at 171, without further comment: ''Mais ce que la loi a entendu réprimer, suivant moi, c'est la tenue d'établissements destinés à favoriser des relations immorales entre hommes et femmes.''

[165] *Vandal*, *supra* note 163, at 4-5. *See Walsh*, *supra* note 152.

[166] (Unreported, Alta. Prov. Ct., 4 Jun. 1981). Here various persons were called to the stand to give evidence under s. 181. The Crown prosecutor claimed in his submissions as to sentence that hearings under s. 183 can be held and persons can be interviewed while on the premises. This, he argued, was accomplished not while on the premises, but persons found on the premises can be interviewed in a ''formal'' way. Appeal Bk., at 107.

[167] *Id.* at 134.

with the following: "Now, I'm not prepared to make any kind of ruling or . . . an appraisal . . . of the morality involved. But once it degenerated into this morass, if that's the term, of activity, it became . . . a common bawdy house, in a most extraordinary sense."[168] All of the accused were convicted as charged and received significant fines.[169]

In only one case has the court confronted the issue of whether or not a gay bar can constitute a common bawdy-house within the meaning of subsection 179(1). The accused in *R. v. Salvaggio*[170] was the owner of a men's gay bar called Truxx. In his judgment Langlois J. reviewed at great length the police evidence gathered during extensive undercover investigations. Officers testified that some men in the bar were hugging, kissing and sometimes feeling each other's bodies and genitals. In the washroom they repeatedly observed men masturbating at urinals, and occasionally performing acts of anal intercourse in full view. On the basis of this evidence the Court concluded:

> La preuve de la poursuite a révélé dans les témoignages entendu que le 1426 de la rue Stanley . . . constitue un lieu de rendez-vous pour les homosexuels, pour commettre des actes indécents [qui] avaient lieu devant tout le monde et le gérant qui circulaient à chaque étage ne pouvait pas ne pas les voir. . . . La preuve a révélé également que ces actions indécentes se produisaient en quantité innombrable.[171]

A recent decision at first instance has departed from a long and well-entrenched line of cases and convictions as it decided that an individual did not "keep" a common bawdy-house in his own home. In *R. v. Franco*[172] the Crown argued that the accused's home became public by virtue of his newspaper advertising for sex partners. Charles J., in an oral judgment, rejected this submission adding that if such were the case, anyone who invited a person to his home would convert it to a public place. Franco engaged in sadomasochistic activities and had outfitted a room in his home with leather articles and other paraphernalia. A police officer entered his home pretending to be a gay man who had answered a

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[168] *Id.*

[169] An appeal from their sentences to the Alberta Court of Appeal was allowed (Unreported, No. 14658, 9 Sep. 1981). Speaking for the Court, Lieberman J.A. said that the spa was openly declared to be a homosexual spa as it provided facilities for "consenting adult homosexuals to meet and to engage in the activities that appealed to them". Appeal Bk., at 2. The Court concluded by holding that the sentences were excessive and disproportionate to sentences imposed in other similar cases, and lowered the fines accordingly.

[170] (Unreported, No. 17-1189, Que. Mun. Ct., 2 Apr 1980, *aff'd* unreported, Que. C.A., 9 Mar. 1982). *See also* Keenan v. Stalker, [1979] C A 446, 5 R DE D PÉNAL 84 (1980).

[171] *Salvaggio*, *supra* note 170, at 25. As with every other judgment in this line of cases, Langlois J. gives no consideration to the meaning of "acts of indecency"

[172] (Unreported, Ont. Prov. Ct., 24 Sep. 1981) (on appeal) A summary of this judgment is found in Hannon, *Bedroom, not bawdy-house*, THE BODY POLITIC, Nov. 1981, at 9. A transcript of the oral judgment was not available to the author at the time of this writing.

classified advertisement Franco had published in the gay liberation magazine *The Body Politic*. Judge Charles seems to have focused his judgment on the issue of the individual's right to privacy, and appears to have made it a major part of his reasoning, a rare occurrence in judgments of Canadian criminal courts. His Honour stated, for example, that section 183 of the Criminal Code "makes breathtaking inroads into a person's privacy". He was, moreover, critical of police officers acting as *agents provocateurs* to entice individuals into committing illegal acts. Although such behaviour is sometimes justified, he felt that a case such as this did not warrant the use of such power.

In an interesting display of innovative statutory interpretation, he broke with the line of cases holding that section 158 has no effect whatsoever upon section 193. Judge Charles held that although the acts committed by the accused were indecent and even *grossly* indecent, as the Canadian community would not tolerate them, section 158 does *not* limit the types of gross indecency which would be permitted. During the trial defence counsel argued that since Franco engaged in consensual acts in privacy with adults over the age of twenty-one such acts were not grossly indecent and therefore could not be construed as "acts of indecency" within the meaning of subsection 179(1).[173] Though this view required some statutory juggling, this author suggests that the result of the decision is correct and reflects a rare willingness of the court to assess the particular sexual acts in question from a non-biased viewpoint.

V. Selected Policy Considerations

A. *Law Reform*

Aside from the series of amendments which fleshed out the offence early in this century, very little progress has been made in the area of law reform with respect to the offence of keeping a common bawdy-house. Few groups or organizations have analyzed this area of the criminal law or made recommendations for legislative amendments. This is all the more regrettable in light of the fact that a series of bills have been introduced into the House of Commons during the past few years which have sought substantially to reform the sexual offences contained in the Criminal Code.

In its major working paper in this area, the Law Reform Commission decided not to advance any recommendations concerning section 193 though it made significant recommendations with respect to almost all of the other offences.[174] The Commission was quite willing to

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[173] The Crown has appealed from this acquittal, *inter alia*, on the grounds that the Judge misinterpreted the definition of "public place" and that s. 158 does not apply to s. 193.

[174] Sexual Offences, *supra* note 134.

recommend, *inter alia*, that sections 157 and 158 be repealed, but in dealing with the offences under Part V of the Code it concluded:

> there are [*sic*] very little empirical data on the incidence of these offences, all of which relate in some way to prostitution. . . . This lack of data . . makes it difficult to formulate policy implications on which reform could be based. No recommendations on bawdy-houses, procuring and soliciting are being proposed at this time. A study relating to this area of the law should precede such recommendations.[175]

This same decision to abstain from making recommendations with respect to section 193 is echoed in the most recent legislative reform of sexual offences contained in Bill C-127,[176] which was introduced into the House of Commons originally as Bill C-53 on 12 January 1981 for First Reading by the Minister of Justice. Bill C-127, like its predecessors, makes no amendments whatsoever to the provisions of the Code respecting common bawdy-houses. Nevertheless, a number of organizations did prepare submissions for presentation to the Standing Committee on Justice and Legal Affairs which do advance serious proposals for change. Two of these organizations are the Canadian Association of Lesbians and Gay Men and the Association pour les droits de la communauté gaie du Québec. In its brief on Bill C-53, the Canadian Association of Lesbians and Gay Men expressed its concern over the prosecution of gay bars and steambaths under section 193, and recommended:

> the provisions in the Code which relate to common bawdy-houses be abolished on the ground that the activity which the law seeks to control should correctly be governed by the laws relating to nuisance. Neither prostitution nor homosexual conduct are *per se* illegal; the provisions in the Code refer to the use of buildings, which is not a topic of concern for the criminal law. In making this recommendation we refer to the recommendation of the Law Reform Commission that as a means of social control the criminal law should only be used as a last resort.[177]

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[175] *Id.* at 41-2. *See also* LAW REFORM COMMISSION OF CANADA, REPORT ON SEXUAL OFFENCES, at 33 (1978). As of the date of this writing, the proposed study on Pt. V had yet to be undertaken by the Commission.

[176] Passed by the House of Commons, 4 Aug. 1982, 32nd Parl., 1st sess., 1980-82. Neither omnibus sexual offences bills contained amendments to s. 193, but Bill C-53 did contain amendments which would have removed the criminal sanction from buggery, bestiality and sexual acts between more than two consenting adults. These amendments were later withdrawn by Justice Minister Jean Chrétien before the Standing Committee on Justice and Legal Affairs. *See* Bill C-53, 32nd Parl., 1st sess., 1980-81; *infra* note 198.

[177] CANADIAN ASSOCIATION OF LESBIANS AND GAY MEN, DRAFT BRIEF ON BILL C-53, at 17 (1981). *See also* ASSOCIATION POUR LES DROITS DE LA COMMUNAUTÉ GAIE DU QUÉBEC, LE BILL C-53 ET LA COMMUNAUTÉ GAIE ET LESBIENNE DU QUÉBEC, at 14 (1982); *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 25 May 1982, No. 87. In addition the Right to Privacy Committee of Toronto presented a brief to the Standing Committee which recommended the repeal of s. 193, and also appeared before the Committee. *See Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 29 Apr. 1982, No. 79. The National Action Committee on the Status of Women made a similar proposal. *See id.*, 1 Jun. 1982, 91:10.

These would appear to be the only organizations seeking reform of this section despite the fact that a number of other organizations have proposed reform of other sections of the Code dealing with prostitution.[178]

B. *Should the Criminal Law Intervene in Matters of Consensual Sexual Activity and Private Morality?*

While the existence of the offence of keeping a common bawdy-house was rationalized in the early English common law on the basis of it constituting a common nuisance, it is generally accepted today that its purpose is to suppress sexual immorality. In the words of Gagnon J.A. in *Laliberté*:

> Parliament, for perfectly understandable reasons, did not want to impose a strict morality on citizens but it did, in certain cases, want to make itself guardian of some morality. It made a crime of the exploitation of a common bawdy-house and the function of the Judge is to apply and interpret the law when necessary.[179]

Although, strictly speaking, the keeping of a common bawdy-house and prostitution are not synonymous, it may be useful to examine the most noteworthy report on the law and prostitution which created an awesome ripple-effect in the overlapping fields of law and morality.

The recommendations of the *Report of the Committee on Homosexual Offences and Prostitution*[180] were enacted in the Street Offences Act, 1959,[181] and led to the famous Hart-Devlin debate.[182] The principles of the Committee's Report are strikingly similar to those advanced by the

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[178] *See, e.g.*, NATIONAL ASSOCIATION OF WOMEN AND THE LAW, A NEW IMAGE FOR SEXUAL OFFENCES IN THE CRIMINAL CODE: A BRIEF IN RESPONSE TO BILL C-53, at 35 (1981). The Association recommends in its Brief that s. 195.1 and subs. 195(2) be repealed, essentially on the grounds that it is not the domain of the criminal law to legislate private morality, and that these provisions represent an unnecessary restriction on the freedom of individuals. It is interesting to note that in *Mason*, *supra* note 61, at 477, the Court referred to Bill C-53, saying that "if passed, [it] would certainly exonerate this accused. However, that is no defence. . . . This in no way influences me but I thought it a strange coincidence whilst I was trying this case that this Bill was before Parliament [which] would have liberalized the laws pertaining to sexual morality. . . ."

[179] *Supra* note 135, at 112.

[180] *Supra* note 24. *See* LEE & ROBERTSON, *infra* note 198, 20 *et seq.*

[181] U.K. 1959, c. 57. *See* G. GEIS, NOT THE LAW'S BUSINESS 187-89 (1972).

[182] H. HART, LAW, LIBERTY AND MORALITY (1963); LORD DEVLIN, THE ENFORCEMENT OF MORALS (1965); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, at 1336-46 (1977); *Hoerster, Strafwürdigkeit und moral in der Angelsächsischen Rechtsphilosophie*, 82 ZEITSCHRIFT FÜR DIE GESANTE STRAFECHTSWISJENSCHAFT 538 (1970).

great liberal theorist J.S. Mill in his essay *On Liberty*.[183] This preferable modern approach to sexual morality[184] is contained in the following oft-quoted passage from the Report:

> It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined. It follows that we do not believe it to be a function of the law to attempt to cover all the fields of sexual behaviour. Certain forms of sexual behaviour are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition; and such actions may be reprobated on these grounds. But the criminal law does not cover all such actions at the present time. . . .[185]

In dealing specifically with the issue of prostitution, the Committee stated:

> We recognize that we are here, again, on the difficult borderline between law and morals, and that this is debatable ground. But, for the general reasons which we have outlined in Chapter II above, we are agreed that private immorality should not be the concern of the criminal law except in the special circumstances therein mentioned.[186]

The Report recommended that the law be amended so as to make it clear that the term "brothel" includes premises used for homosexual acts and "heterosexual lewdness".[187] The classical liberal approach of the Committee is most clearly articulated in its conclusion on the subject of prostitution:

> As long as society tolerates the prostitute, it must permit her to carry on her business somewhere. That she ought not to be allowed to carry it on in public will be apparent from what we have said in an earlier chapter; and the law, for a variety of reasons, rightly frowns on the brothel. The only remaining possibility is individual premises. We have therefore reached the conclusion that it would not be right to amend the law in such a way as to make guilty of a criminal offence a person who lets premises to a prostitute who uses them, even with his knowledge, for the purposes of her own habitual prostitution.[188]

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[183] For criticism of Mill, *see* J.F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (2d ed. 1874). *See also* Samek, *The Enforcement of Morals: A Basic Re-examination in its Historical Setting*, 49 CAN. B. REV. 188; MacPherson, *Politics Post-Liberal-Democracy?*, in IDEOLOGY IN SOCIAL SCIENCE 17, 19 (R. Blackburn ed. 1972); Samek, *Untrenching Fundamental Rights*, 27 McGILL L.J. 755 (1982); LEE & ROBERTSON, *infra* note 198, 35 *et seq*.

[184] According to Ado Pork, while "ethics" refers to the system of theoretical norms which guide human conduct, "morals" refers to the "attitudes and practices that prevail in a given society or class of society": *supra* note 65, at 286. *See also* Edwards, *Criminal Law and its Enforcement in a Permissive Society*, 12 CRIM. L.Q. 417 (1970).

[185] *Supra* note 24, at 10.

[186] *Id.* at 79.

[187] *Id.* at 115.

[188] *Id.* at 104-05. The Committee's recommendations on prostitution were accepted by the U.K. Parliament. *See also* C. BERG, FEAR, PUNISHMENT AND THE WOLFENDEN REPORT (1959).

A similar approach is advanced in an article by the Canadian writer, Mewett.[189] In discussing the proper purpose and function of the criminal law he states:

> It should concern itself only with acts which are demonstrably socially harmful, and then only if the harmful side effects of declaring an act to be a crime are less than the harmful effects of the act. The purpose of the criminal law thus becomes "the reduction of criminal activities to a level where society can absorb the harmful effects of crimes without danger to its stability. To put it another way, the function of the criminal law is to ensure that as little harm as possible comes to society from acts which are socially harmful."[190]

It is his opinion that the offences contained in Part V of the Code are aimed at preventing the corruption of others:

> It is, however, quite clear that the juridical bases of these offences have never been fully explored. Sanctions against bawdy-houses and procuring do, one supposes, reduce the incidence of illicit sexual intercourses by reducing the facilities for such activities and therefore reduce the opportunity for the moral corruption of other people.[191]

Due to the essentially public nature of such institutions, he postulates that the prohibition exists for the protection of the public from what is excessively offensive or indecent rather than for the suppression of moral corruption. He admits that there is little indication that Part V is primarily designed to prevent the moral corruption of the public in general, but makes the dubious and unsubstantiated assertion that section 193 "does prevent the debauching of otherwise relatively innocent females".[192]

After discussing the Wolfenden Report and the celebrated House of Lords decision in *Shaw v. D.P.P.*[193] he concludes his analysis with the following:

> Those immoral acts which should, *per se*, be crimes are not crimes because they are immoral but because demonstrable social harm results from the isolated act, as in the case of murder, theft, rape and so on. If an isolated act itself is not harmful to society, then there is no justification for making the *act* criminal. Thus adultery and fornication are not crimes, nor drinking, nor

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[189] *Morality and the Criminal Law*, 14 U. TORONTO L.J. 213 (1962).

[190] *Id.* at 213.

[191] *Id.* at 219. One view, however, is that subs. 193(1) is directed at public nuisances and the suppression of establishments which foster criminal activity: *see, e.g.*, R. v. Martin, 89 C.C.C. 385, at 387 (Ont. Mag. Ct. 1947); *Dubé*, *supra* note 51, at 537-38, 94 C.C.C. at 175; R. v. Roberts, [1921] 3 W.W.R. 419, at 420, 36 C.C.C. 381, at 382 (Alta. S.C.).

[192] *Morality and the Criminal Law*, *supra* note 189, at 220. While maintaining that the law is too restrictive in its definition of a common bawdy-house, Rodgers advances the rather novel idea that "[i]t seems reasonable to suggest that the definition of a bawdy-house should be such as to exclude the living quarters of one or two prostitutes, if such quarters do not also support a 'keeper' or other persons securing part of the process." SEX AND LAW IN CANADA 42 (1962).

[193] [1962] A.C. 220, [1961] 2 All E.R. 446 (H.L. 1961).

> prostitution, nor gambling, nor the actual taking of a proscribed drug. Furthermore, one prostitute is no more immoral than a hundred. . . .[194]

As Hart points out, the developments in England flowing from the Wolfenden Report had parallels in the United States.[195] For example, in 1955 the American Law Institute published with its Model Penal Code a recommendation that all consensual relations between adults in private should be excluded from the scope of the criminal law. It based this recommendation on the grounds, *inter alia*, that "no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners", and "there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others."[196] The most recent version of the Model Penal Code does, however, include provisions which would prohibit the manifestations of prostitution under certain circumstances. The goal of these provisions dealing with "public indecency", which includes "prostitution and related offences",

> is to protect against the open flouting of community standards regarding sexual or related matters. The . . . Code does not attempt to enforce private morality. Thus, none of the provisions contained in this Article purport to regulate sexual behaviour generally. Instead, each is limited to the affront to public sensibilities occasioned by public or commercial sexual misconduct.[197]

C. *Section 193 is a "Victimless Crime" and an Unnecessary Restriction on the Freedom of Individuals*

The proper test for determining what manifestations of sexual expression should be sanctioned by the criminal law, is whether or not they pose a serious degree of actual social harm, as opposed to a mere threat to the prevailing morality. Mewett and the Wolfenden Report have accepted this test. If it is widely accepted, the continued existence of

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[194] *Supra* note 189, at 225. *See also* Poole, *The Law and Sexual Deviation*, 2 WESTERN L. REV. 66 (1963); A. SION, PROSTITUTION AND THE LAW (1977). Pork is equally skeptical about the use of the criminal law in this domain. In his view law is only one of the many social controls, and perhaps not always the most effective one. Furthermore, "[t]he present trend in criminal law is towards the curative-rehabilitative technique. The focus is on the individual rather than his wrong. The emphasis is also on the social harm created by the conduct rather than its moral significance. This was evident from the Wolfenden Report. It is suggested that this is the proper aim of the criminal law." *Supra* note 65, at 294.

[195] *Supra* note 182, at 15.

[196] AMERICAN LAW INSTITUTE, MODEL PENAL CODE 277-78 (Tent. Draft No. 4, 1955).

[197] MODEL PENAL CODE AND COMMENTARIES: PART II 447 (1980). The main goal of s. 251.2 is the suppression of commercialized sex. *See also* Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17, at 19 (1968).

section 193 must be seriously questioned. It has yet to be demonstrated, empirically or otherwise, that the keeping of a common bawdy-house creates serious social harm. On the contrary, a good argument can be made that the offence of keeping a common bawdy-house is a "victimless crime" which has no place in our Criminal Code inasmuch as neither the clients nor the keepers, nor indeed society itself, is seriously harmed by such conduct. Furthermore, this section arguably represents an unneccessary infringement on the freedom of expression and, more specifically, on the freedom of *sexual* expression which, although not cloaked with the same protection as the "traditional" freedoms, should be guaranteed by our courts and legislatures.[198] As the Law Reform Commission of Canada has stated:

> While protection of society from crime is one goal, the criminal law should also maximize personal liberty and minimize state intervention. Because criminal sanctions diminish freedom, they should be invoked only with great restraint because of the impact of both misuse and overuse on the individual and the state. As a means of social control, the criminal law, then should only be used as a last resort.[199]

The right to privacy in non-coercive and consensual sexual matters has been successfully argued in only one prosecution under section 193,[200] and Canadian civil courts are still hesitant about applying this

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[198] There are some indications that legislators are impliedly recognizing such a freedom of sexual expression via legislative amendments. Three of the most noteworthy examples are: (1) the 1968 amendment introduced to "legalize" homosexual activity between consenting adults over 21 years of age in private, *i.e.* S.C. 1968-69, c. 38, s. 7 introducing s. 158 of the CRIMINAL CODE, (2) the inclusion of the term "sexual orientation" in the list of prohibited categories of discrimination in the Quebec Charter of Human Rights and Freedoms, L.R.Q. 1977, c. C-12, *i.e.* L.Q. 1977, c. 6, s. 1, and (3) the proposed amendment to the CRIMINAL CODE, R.S.C. 1970, c. C-34, contained in Bill C-53 (now Bill C-127) which, by virtue of cl. 7, would have changed the age of consent for homosexual acts to 18 years of age, and would have allowed, in effect, "group sex" because of the word "persons" (as opposed to "two persons" in present para. 158(1)(*b*) in the proposed para. 169.1(2)(*b*)). *See also supra* notes 196 & 176. *See* para. 2(*b*) and s. 26 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11. *See also* E. SCHUR & H. BEDAU, VICTIMLESS CRIMES (1974); E. SCHUR & H. BEDAU, CRIMES WITHOUT VICTIMS (1965); D. LEE & T. ROBERTSON, "MORAL ORDER" AND THE CRIMINAL LAW: REFORM EFFORTS IN THE UNITED STATES AND WEST GERMANY 25 (1973).

[199] *Supra* note 134.

[200] *Franco*, *supra* note 172. *See* ASPECTS OF PRIVACY LAW: ESSAYS IN HONOUR OF JOHN M. SHARP (D. Gibson ed. 1980); Bowker, Book Review, 59 CAN. B. REV. 598 (1981); Richards, *supra* note 182.

right to privacy in tort law.[201] It can be argued that section 193 represents an attack on this fundamental right. If it is true that the State no longer has any place in the bedrooms of the nation, then the bedrooms of premises which might be found to be common bawdy-houses under the positive law also should not be interferred with by the harsh hand of the criminal law.[202] As the Canadian Advisory Council on the Status of Women explained: "laws prohibiting exploitation, force, and harm should be sufficiently all-encompassing to make it unnecessary to identify as crimes activities such as prostitution."[203] These could include the enactment of municipal by-laws and provincial legislation respecting the regulation and inspection of bawdy-houses, or a number of existing offences under the Criminal Code, for example, common nuisance (section 176) and procuring (section 195).[204]

Finally, although Canadian courts have been timourous about accepting the defence of entrapment,[205] the fact that in so many of the

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[201] *See* V. FLEMING, THE LAW OF TORTS 590-96 (5th ed. 1977), Krouse v Chrysler Canada Ltd., 1 O.R. (2d) 225, 40 D.L.R. (3d) 15 (C.A 1973); Athans v Canadian Adventure Camps, 17 O.R. (2d) 425, 80 D.L.R. (3d) 583 (H.C. 1977); Racine v. C.J.R.C. Radio Capitale Ltée., 17 O.R. (2d) 370, 80 D.L.R. (3d) 441 (Cty Ct. 1977); Privacy Act, R.S.B.C. 1979, c. 336, ss. 1-3; Davis v. McArthur, 72 W.W.R. 69, 10 D.L.R. (3d) 250 (B.C.S.C. 1969); Malone v. Metropolitan Police Comm'r, [1979] 1 Ch. 344, [1979] 2 All E.R. 620; Nader v. General Motors Corp., 307 N.Y.S. 2d 647 (Ct. App. 1970); Beaumont v. Brown, 237 N.W. 2d 501 (Mich. Ct. App. 1975); C. WRIGHT & A. LINDEN, CANADIAN TORT LAW 2-36-37 (7th ed. 1980); Vaver, *What's Mine is not Yours: Commercial Appropriation of Personality Under the Privacy Acts of British Columbia, Manitoba and Saskatchewan*, 15 U.B.C.L. REV. 241 (1981), Rosenbleet & Briente, *The Prostitution of the Criminal Law* 11 AM CRIM. L.Q. 373, 411-21 (1973). *See also* s. 5 of the Quebec Charter of Human Rights and Freedoms, *supra* note 198; Glenn, *Le droit au respect de la vie privee*, 39 R. DU B. 879 (1979); Pollack, *The confidentiality of employment records in Quebec*, 42 R. DU B 125 (1982), Bowker, *supra* note 200. *See generally* Richards, *supra* note 182.

[202] The logical extension of the recommendation that s. 195.1, one of the most visible manifestations of prostitution, be repealed is that its more private counterpart, *viz.* s. 193, also be repealed: *supra* note 178.

[203] M. RIOUX & J. MCFADYEN, BACKGROUND NOTES ON THE PROPOSED AMENDMENTS TO THE CRIMINAL CODE, THE CANADA EVIDENCE ACT AND THE PAROLE ACT (BILL C-51) 19 (1978). Bill C-51 was the predecessor of Bill C-53.

[204] The European systems of regulation have involved the registration of prostitutes, periodic medical examinations, confinement of prostitution to designated areas and surveillance by special police squads. *See* FLEXNER, PROSTITUTION IN EUROPE 121-64 (1914).

[205] *See supra* note 172. *See also* Kirzner v. The Queen, [1978] 2 S.C.R. 487, 38 C.C.C. (2d) 131 (1977); R. v. Sabloff, [1979] Que. C.S. 821, 13 C.R. (3d) 326; R. v. Amato, 51 C.C.C. (2d) 401 (B.C.C.A. 1979); R. v. Ridge, 51 C.C.C. (2d) 261 (B.C.C.A. 1979); R. v. Baxter, 16 C.R. (3d) 397 (Que. S.C. 1980), Amato v. The Queen, (unreported, S.C.C., 9 Aug. 1982); Paterson, *Towards a Defence of Entrapment*, 17 OSGOODE HALL L.J. 261 (1979). Despite the fact that entrapment has rarely been argued as a defence in bawdy-house cases, the argument can certainly be made that the conduct of the *agents provocateurs* amounted to "calculated inveigling and persistent importuning", as formulated by Laskin J.A. (as he then was) in R. v Omerod, [1969] 2 O.R. 230, at 238, [1969] 4 C.C.C. 3, at 11 (C.A.). This approach to the matter of entrapment was adopted by the B.C. Court of Appeal in R. v Chernecki, [1971] 5 W.W.R. 469, 4 C.C.C. (2d) 556.

above-mentioned cases *agents provocateurs* were employed in order to carry out the arrests should be cause for concern. It lends further support to the argument that one is dealing with another victimless crime. That this practice is such a widespread phenomenon may even, arguably, bring the administration of justice into disrepute.[206]

VI. CONCLUSION

It is not the purpose of this paper to propose specific alternatives to section 193, and only the more significant issues in the area of law reform relating to bawdy-houses have been sketched. It is important to stress that the ultimate issue is the phenomenon of prostitution, which has created a plethora of troublesome problems and few simple solutions. In this sense, the following comments from the *Report of the Royal Commission on the Status of Women* are illuminating:

> In the words of the Wolfenden Report, prostitution "has persisted in many civilizations through many centuries and the failure of attempts to stamp it out by repressive legislation shows it cannot be eradicated through the agency of criminal law". The Prevost Commission indicated that the public did not favour the punishment of prostitutes even though it considered prostitution morally wrong . . . prostitution is *fundamentally a social, not a criminal, problem*.[207]

Since the legislature has, for the time being, no apparent plans for reform in this area of our criminal law, society will have to live with its contradictions and inherent unfairness. What is beyond any doubt, however, is that there is no end to the seemingly continual list of creative and innovative bawdy-houses that the courts are willing to find. If a parking lot frequented by four prostitutes is a common bawdy-house,[208] and a 5,000 square-foot circus tent in which group sex took place is also a bawdy-house,[209] then what place or establishment is beyond the scope of section 193? It is submitted that if the federal government is truly

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[206] *See supra* note 172. *See also* the judgments of Estey and Lamer JJ. in Rothman v. The Queen, [1981] 1 S.C.R. 640, 121 D.L.R. (3d) 578; and subs. 24(2) of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[207] 37-71 (1970) (emphasis added).

[208] As was recently held by the Ontario Court of Appeal: R. v. Pierce, 66 C.C.C. (2d) 388, 7 W.C.B. 375 (1982). The Court went on, however, to acquit the accused on the ground that the women could not be keepers because they had no right or controlling interest in the lot.

[209] R. v. Hughes, (10 Jun. 1982) (Mitchell J.) reported in Orr, *Decision due June 10 in bawdy-tent trial*, THE BODY POLITIC, Jun. 1982, at 15, and Patterson, *Tent sex ruled bawdy, judge convicts duo*, THE BODY POLITIC, Jul./Aug. 1982, at 11. This case concerns the Heritage Hide-a-Way Campground located near Hamilton, Ontario. *See also Court told pair operated camp for group sex*, The Gazette (Montreal), 13 Jan. 1982, at 76, col. 1; *Sex witness thankful children didn't see*, The Gazette (Montreal), 16 Jan. 1982, at 36, cols. 1 & 2.

concerned about withdrawing the shackles from private, consensual sexual activity — Bill C-127 does this in part — then it should be consistent and remove this, one of the most damaging and notorious "out-dated offences".[210]

[210] The term is taken from MINISTER OF JUSTICE, INFORMATION PAPER: SEXUAL OFFENCES AGAINST THE PERSON AND THE PROTECTION OF YOUNG PERSONS 41 (1980), a document which discusses Bill C-53 in considerable detail. *See also* GOVERNMENT OF CANADA, THE CRIMINAL LAW IN CANADA SOCIETY Preface (1982) for the recently released "policy of the Government of Canada with respect to the purpose and principles of the criminal law".