



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Labaye, 2005 SCC 80

**DATE:** 20051221

**DOCKET:** 30460

**Jean-Paul Labaye**  
Appellant  
v.  
**Her Majesty The Queen**  
Respondent

**OFFICIAL ENGLISH TRANSLATION:** Reasons of Bastarache and LeBel JJ.

**CORAM:** McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

**REASONS FOR JUDGMENT:** McLachlin C.J. (Major, Binnie, Deschamps, Fish, Abella and Charron JJ. concurring)  
(paras. 1 to 72)

**DISSENTING REASONS:** Bastarache and LeBel JJ.  
(paras. 73 to 154)

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r. v. labaye

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*Appellant*

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**Her Majesty The Queen**

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**Indexed as: R. v. Labaye**

**Neutral citation: 2005 SCC 80.**

File No.: 30460.

2005: April 18; 2005: December 21.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for quebec

*Criminal law – Keeping common bawdy-house – Indecency – Harm-based test – Group sex in club – Whether conduct constitutes criminal indecency – Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1) “common bawdy-house”, 210(1).*

The accused was charged with keeping a common bawdy-house for the practice of acts of indecency under s. 210(1) of the *Criminal Code*. The accused operated a club in Montréal the purpose of which was to permit couples and single people to meet each other for group sex. Only members and their guests were admitted to the club. Prospective members were interviewed to ensure that they were aware of the nature of the activities of the club. Members paid an annual membership fee. A doorman manned the main door of the club, to ensure that only members and their guests entered. The club had three floors. The first floor was occupied by a bar, the second a salon, and the third the “apartment” of the accused. Two doors separated the third floor apartment from the rest of the club. One was marked “Privé” and the other was locked with a numeric key pad. Members of the club were supplied with the appropriate code and permitted to gain access to the third floor apartment. This was the only place where group sex took place. Entry to the club and participation in the activities were voluntary.

At trial, the accused was convicted. The trial judge found that the accused’s apartment fell within the meaning of “public place”, as defined in s. 197(1) of the *Criminal Code*. She also found social harm in the fact that sexual exchanges took place in the presence of other members of the club. She concluded that this conduct was indecent under the *Criminal Code* because it was degrading and dehumanizing, was calculated to induce anti-social behaviour in its disregard for moral values, and raised the risk of sexually transmitted diseases. A majority of the Quebec Court of Appeal upheld the accused’s conviction.

*Held* (Bastarache and LeBel JJ. dissenting): The appeal should be allowed and the accused’s conviction set aside.

*Per* McLachlin C.J. and Major, Binnie, Deschamps, Fish, Abella and Charron JJ.: In order to establish indecent criminal conduct, the Crown must prove beyond a reasonable doubt that two requirements have been met. The first is that by its nature the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty, (b) predisposing others to anti-social behaviour, or (c) physically or psychologically harming persons involved in the conduct. The categories of harm capable of satisfying the first branch of the inquiry are not closed. The second requirement is that the harm or risk of harm is of a degree that is incompatible with the proper functioning of society. This two-branch test must be applied objectively and on the basis of evidence. [62]

In this case, the accused must be acquitted. The autonomy and liberty of members of the public was not affected by unwanted confrontation with the sexual conduct in question. On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch. There is also no evidence of anti-social acts or attitudes toward women, or for that matter men. No one was pressured to have sex, paid for sex, or treated as a mere sexual object for the gratification of others. The fact that the club is a commercial establishment does not in itself render the sexual activities taking place there commercial in nature. The membership fee buys access to a club where members can meet and engage in consensual activities with other individuals who have similar sexual interests. Finally, with respect to the third type of harm, the only possible danger to participants on the evidence was the risk of catching a sexually transmitted disease. However, this must be discounted as a factor because it is

conceptually and causally unrelated to indecency. Since the Crown failed to establish the first requirement to prove indecent criminal conduct, it is unnecessary to proceed to the second branch of the test. If one did, there seems to be no evidence that the level of alleged harm rose to the level of incompatibility with the proper functioning of society. [66-71]

*Per* Bastarache and LeBel JJ. (dissenting): The application of the appropriate test leads to the conclusion that the impugned acts were indecent and that the accused's establishment was a common bawdy-house within the meaning of s. 210(1) of the *Criminal Code*. [76]

The new approach to indecency proposed by the majority is neither desirable nor workable. Not only does it constitute an unwarranted break with the most important principles of our past decisions regarding indecency, but it also replaces the community standard of tolerance with a harm-based test. Whether or not serious social harm is sustained has never been the determinative test for indecency. Moreover, when the standard of tolerance is established on the basis of the three categories of harm, it becomes impossible to take into account the multitude of situations that could exceed the threshold for indecency. This new harm-based approach also strips of all relevance the social values that the Canadian community as a whole believes should be protected. The existence of harm is not a prerequisite for exercising the state's power to criminalize certain conduct: the existence of fundamental social and ethical considerations is sufficient. Finally, in the context of an offence under s. 210(1) of the *Criminal Code*, it is not absolutely necessary to consider the harm done to society. [75] [98-104] [115]

To determine whether acts are indecent, it is preferable to continue applying the original test for indecency, which focusses on a contextual analysis of the impugned acts and incorporates the concept of harm as a significant, but not determinative, factor to consider in establishing the applicable level of tolerance. Whether or not harm is sustained is merely one of several indicators or contextual factors that make it possible to gauge the degree of tolerance of the Canadian community. Although a certain degree of subjectivity is inherent in the establishment of the standard of tolerance because of the judge's role as interpreter of the community's minimum standards regarding sex, the analysis remains objective as long as the judge ignores his or her personal convictions and instead tries to determine the nature of the social consensus. [76] [134]

The question that must therefore be asked in the case at bar is as follows: "Do the impugned acts offend the standard of tolerance of the contemporary Canadian community, having regard to their nature and to the place and context in which they occurred?" The following contextual factors may be considered in determining the standard of tolerance: (1) the private or public nature of the place; (2) the type of participants and the composition of the audience; (3) the nature of the warning given regarding the acts; (4) the measures taken to limit access to the place; (5) the commercial nature of the place and the acts; (6) the purpose of the acts; (7) the conduct of the participants; and (8) harm suffered by the participants. Regarding this last factor, attention must be paid to the risk of physical or psychological harm. This approach permits the risk of spreading sexually transmitted diseases to be taken into account. Finally, the consent of the participants or the fact that those present are informed adults is not in itself a determinative factor. A consensual sexual act that is totally acceptable in one situation may be indecent if it is performed in another context. It is the tolerance

of the general public that counts, not the tolerance of the participants or spectators. [81]  
[122] [131-132]

In the case at bar, the impugned sexual acts were very explicit acts, and the place where the acts were performed was a public establishment. Although advertised as a private club, the accused's club was a place to which the public had ready access "by invitation, express or implied", within the meaning of s. 150 of the *Criminal Code*. All that was necessary was to pay the requested fee after a cursory interview that was quite superficial, or to be the guest of a club member. What is more, the measures taken by the club to control access did not adequately limit the public's access to a place where very explicit sexual acts were performed. The establishment's operations are also indicative of the commercial nature of the activities that took place there. Sexual acts could be performed on the third level of the establishment only after a mandatory commercial transaction between the participants and the owner of the establishment, since everyone had to pay a fee to become a member. The participants essentially purchased sexual services provided by other participants. In the instant case, it is even possible to conclude that a form of social harm has been sustained that results from the failure to meet the minimum standards of public morality. Finally, even though the participants were informed adults whose actions were consensual and voluntary and who presumably shared the philosophy of partner swapping, this characteristic of the participants is not relevant under s. 210 of the *Criminal Code* other than to demonstrate the existence of demeaning or dehumanizing acts. Considered in context, the explicit sexual acts performed in the accused's establishment clearly offended the Canadian community standard of tolerance. The community does not tolerate the performance of acts of this nature in a place of business to which the public has easy access. The acts were therefore indecent. The public and commercial dimensions of the sexual practices

in issue would lead to the conclusion that those practices were indecent even if there were no harm. [137-141] [145-148] [151-153]

## Cases Cited

By McLachlin C.J.

**Applied:** *R. v. Butler*, [1992] 1 S.C.R. 452; **referred to:** *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Mara*, [1997] 2 S.C.R. 630; *R. v. Hicklin* (1868), L.R. 3 Q.B. 360; *Brodie v. The Queen*, [1962] S.C.R. 681; *R. v. Dominion News & Gifts (1982) Ltd.*, [1963] 2 C.C.C. 103, rev'd [1964] S.C.R. 251; *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *R. v. Tremblay*, [1993] 2 S.C.R. 932.

By Bastarache and LeBel JJ. (dissenting)

*Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494; *R. v. Mara*, [1997] 2 S.C.R. 630; *R. v. Tremblay*, [1993] 2 S.C.R. 932; *R. v. Butler*, [1992] 1 S.C.R. 452; *Brodie v. The Queen*, [1962] S.C.R. 681; *R. v. Hicklin* (1868), L.R. 3 Q.B. 360; *Dominion News & Gifts (1962) Ltd. v. The Queen*, [1964] S.C.R. 251; *Provincial News Co. v. The Queen*, [1976] 1 S.C.R. 89; *Dechow v. The Queen*, [1978] 1 S.C.R. 951; *Germain v. The Queen*, [1985] 2 S.C.R. 241; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74; *Roux v. La Reine*, [2001] R.J.Q. 567; *Pelletier v. La Reine* (1985), 27 C.C.C. (3d) 77; *R. v. Angerillo*, [2003] R.J.Q. 1977; *R. v. Jacob* (1996), 31 O.R. (3d) 350.

### **Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms.*

*Criminal Code*, R.S.C. 1970, c. C-34, s. 159(8).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 150, 163(8), 167(1), 197(1), 210(1), 211, 212, 213.

*Criminal Code*, S.C. 1953-54, c. 51, s. 150(8) [ad. 1959, c. 41, s. 11].

### **Authors Cited**

LeBel, Louis. « Un essai de conciliation de valeurs: la régulation judiciaire du discours obscène ou haineux » (2001), 3(2) *Éthique publique* 51.

Mill, John Stuart. *On Liberty and Considerations on Representative Government*. Edited by R. B. McCallum. Oxford: Basil Blackwell, 1946.

APPEAL from a judgment of the Quebec Court of Appeal (Proulx, Rochon and Rayle JJ.A.), [2004] R.J.Q. 2076, 191 C.C.C. (3d) 66, [2004] Q.J. No. 7723 (QL), upholding the accused's conviction on a charge of keeping a common bawdy-house, [1999] R.J.Q. 2801, [1999] Q.J. No. 2524 (QL). Appeal allowed, Bastarache and LeBel JJ. dissenting.

*Robert La Haye and Josée Ferrari*, for the appellant.

*Normand Labelle*, for the respondent.

The judgment of McLachlin C.J. and Major, Binnie, Deschamps, Fish, Abella and Charron JJ. was delivered by

THE CHIEF JUSTICE —

1. Introduction

1           The appellant appeals from a conviction of keeping a “common bawdy-house” for the “practice of acts of indecency” under s. 210(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The issue is whether the acts committed in his establishment were acts of indecency within the meaning of our criminal law.

2           Defining indecency under the *Criminal Code* is a notoriously difficult enterprise. The *Criminal Code* offers no assistance, leaving the task to judges. The test developed by the cases has evolved from one based largely on subjective considerations, to one emphasizing the need for objective criteria, based on harm. This heightened emphasis on objective criteria rests on the principle that crimes should be defined in a way that affords citizens, police and the courts a clear idea of what acts are prohibited. (See *Reference re ss. 193 and 195.1 (1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, *per* Lamer J.) We generally convict and imprison people only where it is established beyond a reasonable doubt that they have violated objectively defined norms. Crimes relating to public indecency are no exception.

3           This appeal requires us to apply the norms developed in recent cases to the operation of clubs established to facilitate group sex, a practice colloquially referred to as “swinging”. This in turn invites further refinement of the objective criteria for indecency under the *Criminal Code*.

4 I conclude that the appellant's conviction should be quashed.

2. Facts

5 The appellant operated a club in Montréal, called l'Orage. The purpose of the club was to permit couples and single people to meet each other for group sex. Only members and their guests were admitted to the club. Prospective members were interviewed to ensure that they were aware of the nature of the activities of the club and to exclude applicants who did not share the same views on group sex. Members paid an annual membership fee.

6 At the time of the events giving rise to the charge against the appellant, the club l'Orage had three floors. The first floor was occupied by a bar, the second a salon, and the third the "apartment" of the appellant. A doorman manned the main door of the club, to ensure that only members and their guests entered. Two doors separated access to the third floor apartment from the rest of the club. One was marked "Privé" and the other locked with a numeric key pad.

7 Members of the club were supplied with the appropriate code and permitted to access the third floor apartment. This was the only place where group sex took place. A number of mattresses were scattered about the floor of the apartment. There people engaged in acts of cunnilingus, masturbation, fellatio and penetration. On several occasions observed by the police, a single woman engaged in sex with several men, while other men watched and masturbated.

8 Entry to the club and participation in the activities were voluntary. No one was forced to do anything or watch anything. No one was paid for sex. While men considerably outnumbered women on the occasions when the police visited, there is no suggestion that any of the women were there involuntarily or that they did not willingly engage in the acts of group sex.

### 3. Judicial History

9 According to Baribeau J., the test of indecency required assessing the public or private context of the activities at issue ([1999] R.J.Q. 2801). She found that the appellant's apartment fell within the meaning of "public place", defined in s. 197(1) of the *Criminal Code* as including "any place to which the public have access as of right or by invitation, express or implied". The trial judge attached no significance to the fact that the public here was composed of members of the club and their guests. Based on the public nature of the locale, the trial judge concluded that the sexual practices on these facts fell below the Canadian community standard of tolerance.

10 The trial judge, relying on *R. v. Mara*, [1997] 2 S.C.R. 630, found social harm in the fact that sexual exchanges took place in the presence of other members of the club. In her view, this conduct was indecent under the *Criminal Code* because it was degrading and dehumanizing, was calculated to induce anti-social behaviour in its disregard for moral values, and raised the risk of sexually transmitted diseases.

11 A majority of the Quebec Court of Appeal upheld the appellant's conviction (2004), 191 C.C.C. (3d) 66. Rochon J.A. held that the activities at issue were prejudicial to society because of the health risks involved and the propagation of a degrading and

dehumanizing view of sexuality. Rayle J.A. agreed, inferring a more substantial risk of harm than in *Mara* from the higher number of sexual partners involved. In the view of the majority, the voluntary character of their participation did not diminish the resulting degradation, loss of integrity and self-respect.

12 Proulx J.A, dissenting, found that the trial judge's conviction was based on several errors. Even if the establishment was a public place, as defined in the *Criminal Code*, members of the club did not perform the sexual acts in open public view, but in a context of relative privacy. Entrants were screened and informed. All the participants retained their full autonomy. The sexual exchanges they participated in reflected their personal choice and view of sexuality. Since there was no meaningful distinction between participants and observers, the presence of observers was not relevant for assessing the publicly indecent character of the activities. Moreover, there was no social harm comparable to that identified in *Mara*, where the payment of women for sexual services led to an inference of exploitation.

#### 4. Analysis

##### 4.1 *The Legal Test for Criminal Indecency*

###### 4.1.1 The History of Criminal Indecency

13 Section 210(1) of the *Criminal Code* makes it an offence, punishable by two years in prison, to keep a common bawdy-house. A bawdy-house is defined in s. 197(1) of the *Code* as a place kept, occupied, or resorted to "by one or more persons for the

purpose of prostitution or the practice of acts of indecency”. The only question in this case is whether what went on at l’Orage constituted “acts of indecency”.

14 Indecency has two meanings, one moral and one legal. Our concern is not with the moral aspect of indecency, but with the legal. The moral and legal aspects of the concept are, of course, related. Historically, the legal concepts of indecency and obscenity, as applied to conduct and publications, respectively, have been inspired and informed by the moral views of the community. But over time, courts increasingly came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices. This led to a legal norm of objectively ascertainable harm instead of subjective disapproval.

15 Canadian law on indecent acts, from its origins in the English common law, has been firmly anchored in societal rather than purely private moral concerns. For example, in the early case of *R. v. Hicklin* (1868), L.R. 3 Q.B. 360, Cockburn C.J. stated that the test for obscenity was whether the material would tend to deprave and corrupt other members of society.

16 However, depravity and corruption vary with the eye of the beholder, and the *Hicklin* test proved difficult to apply in an objective fashion. Convictions often depended more on the idiosyncracies and the subjective moral views of the judge or jurors than objective criteria of what might deprave or corrupt. Nevertheless, the *Hicklin* test remained in place for almost a century.

17 In 1959, the Canadian Parliament introduced a new “undue exploitation of sex” test for obscene materials: s. 150(8) of the *Criminal Code*, S.C. 1953-54, c. 51. (added by S.C. 1959, c. 41, s. 11) (now s. 163(8)). In considering this test, the Supreme Court emphasized the failings of the previous test and the need for new criteria “which have some certainty of meaning and are capable of objective application and which do not so much depend as before upon the idiosyncrasies and sensitivities of the tribunal of fact, whether judge or jury”: *Brodie v. The Queen*, [1962] S.C.R. 681, at p. 702, *per* Judson J.

18 Borrowing on decisions from Australia and New Zealand emphasizing the foundation of criminal legislation on obscenity and indecency in societal norms, the Court adopted a test based on the community standard of tolerance. On its face, the test was objective, requiring the trier of fact to determine what the community would tolerate. Yet once again, in practice it proved difficult to apply in an objective fashion. How does one determine what the “community” would tolerate were it aware of the conduct or material? In a diverse, pluralistic society whose members hold divergent views, who is the “community”? And how can one objectively determine what the community, if one could define it, would tolerate, in the absence of evidence that community knew of and considered the conduct at issue? In practice, once again, the test tended to function as a proxy for the personal views of expert witnesses, judges and jurors. In the end, the question often came down to what they, as individual members of the community, would tolerate. Judges and jurors were unlikely, human nature being what it is, to see themselves and their beliefs as intolerant. It was far more likely that they would see themselves as reasonable, representative members of the community. The chances of a judge or juror saying, “I view this conduct as indecent but I set that view aside because it is intolerant”, were remote indeed. The result was that despite its

surfacial objectivity, the community standard of tolerance test remained highly subjective in application.

19 Freedman J.A., dissenting in the Manitoba Court of Appeal, while noting the difficult challenge of applying the new community standard of tolerance test in an objective fashion, concluded that it was the only alternative to pure subjectivity. In a passage adopted by the Supreme Court of Canada, Freedman J.A. wrote:

Th[ose] standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered. Obviously this is no easy task, for we are seeking a quantity that is elusive. Yet the effort must be made if we are to have a fair objective standard in relation to which a publication can be tested as to whether it is obscene or not. The alternative would mean a subjective approach, with the result dependent upon and varying with the personal tastes and predilections of the particular Judge who happens to be trying the case. [p. 116]

(*R. v. Dominion News & Gifts (1962) Ltd*, [1963] 2 C.C.C. 103, rev'd [1964] S.C.R. 251)

20 In 1985, the Supreme Court pursued the search for objectivity by introducing a two-part definition of community standards of tolerance in *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494. The first way to establish obscenity (undue exploitation of sex) was to show that the material violated the norm of tolerance of what Canadians would permit others, whose views they did not share, to do or see (p. 508). The second was to show that the material would have a harmful effect on others in society (p. 505). Although this notion of harm had been implicit in Cockburn C.J.'s definition of obscenity in *Hicklin*, *Towne Cinema* marked the first clear articulation of the relationship between obscenity and harm in Canadian jurisprudence, and represented the beginning of a shift from a community standards test to a harm-based test.

21           The shift to a harm-based rationale was completed by this Court's decisions in *R. v. Butler*, [1992] 1 S.C.R. 452, and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69. In *Butler*, the two-part test for obscenity of *Towne Cinema* was resolved into a single test, in which the community standard of tolerance was determined by reference to the risk of harm entailed by the conduct:

The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. [Emphasis added; p. 485, *per Sopinka J.*]

22           The Court in *Little Sisters* confirmed that harm is an essential ingredient of obscenity. As Binnie J. pointed out, “the phrase ‘degrading and dehumanizing’ in *Butler* is qualified immediately by the words ‘if the risk of harm is substantial’ . . . This makes it clear that not all sexually explicit erotica depicting adults engaged in conduct which is considered to be degrading or dehumanizing is obscene. The material must also create a substantial risk of harm which exceeds the community’s tolerance”(emphasis added, at para. 60).

23           In *Mara*, the Court affirmed that in cases of indecency, like obscenity, the community standard of tolerance test amounts to a test of harm incompatible with society's proper functioning.

24           Grounding criminal indecency in harm represents an important advance in this difficult area of the law. Harm or significant risk of harm is easier to prove than a community standard. Moreover, the requirement of a risk of harm incompatible with the proper functioning of society brings this area of the law into step with the vast majority of criminal offences, which are based on the need to protect society from harm.

25           However, it is not always clear precisely how the harm test for indecency applies in particular circumstances. New cases have raised questions as to the nature and degree of harm sufficient to establish indecency. Further definition is required in order to resolve cases like this, and to permit individuals to conduct themselves within the law and the police and courts to enforce the criminal sanction in an objective, fair way.

#### 4.1.2       Toward a Theory of Harm

26           Developing a workable theory of harm is not a task for a single case. In the tradition of the common law, its full articulation will come only as judges consider diverse situations and render decisions on them. Moreover, the difficulty of the task should not be underestimated. We must proceed incrementally, step by cautious step.

27           The facts of this case require the further exploration of what types of harm, viewed objectively, suffice to found a conviction for keeping a bawdy-house for the purposes of act of indecency. This exploration must be based on the purposes that the offence serves. More precisely, what harms are sought to be curtailed by targeting indecent conduct?

28           The first step is to generically describe the type of harm targeted by the concept of indecent conduct under the *Criminal Code*. In *Butler* at p. 485 and *Little Sisters* at para. 59, this was described as “conduct which society formally recognizes as incompatible with its proper functioning”.

29           Two general requirements emerge from this description of the harm required for criminal indecency. First, the words “formally recognize” suggest that the harm must be grounded in norms which our society has recognized in its Constitution or similar fundamental laws. This means that the inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its laws and institutions, has recognized as essential to its proper functioning. Second, the harm must be serious in degree. It must not only detract from proper societal functioning, but must be *incompatible* with it.

30           It follows that the analysis to be performed in a particular case involves two steps. The first step is concerned with the *nature* of the harm. It asks whether the Crown has established a harm or significant risk of harm to others that is grounded in norms which our society has formally recognized in its Constitution or similar fundamental laws. The second step is concerned with the *degree* of the harm. It asks whether the harm in its degree is incompatible with the proper functioning of society. Both elements must be proved beyond a reasonable doubt before acts can be considered indecent under the *Criminal Code*.

31           I now turn to a more detailed consideration of each of the two requirements for establishing indecent acts for the purposes of s. 210 of the *Criminal Code*.

4.1.3 The Nature of the Harm: Harm to Individuals or Society Contrary to Society's Norms

32 To ground criminal responsibility, the harm must be one which society *formally recognizes* as incompatible with its proper functioning: *Butler*, at p. 485.

33 The requirement of formal societal recognition makes the test objective. The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential. Views about the harm that the sexual conduct at issue may produce, however widely held, do not suffice to ground a conviction. This is not to say that social values no longer have a role to play. On the contrary, to ground a finding that acts are indecent, the harm must be shown to be related to a fundamental value reflected in our society's Constitution or similar fundamental laws, like bills of rights, which constitutes society's formal recognition that harm of the sort envisaged may be incompatible with its proper functioning. Unlike the community standard of tolerance test, the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values.

34 The complexity of the guarantee of freedom of religion in this context requires further comment. The claim that particular sexual conduct violates particular religious rules or values does not alone suffice to establish this element of the test. The question is what values Canadian society has formally recognized. Canadian society through its Constitution and similar fundamental laws does not formally recognize particular religious views, but rather *the freedom to hold particular religious views*. This

freedom does not endorse any particular religious view, but the right to hold a variety of diverse views.

35           The requirement of formal endorsement ensures that people will not be convicted and imprisoned for transgressing the rules and beliefs of particular individuals or groups. To incur the ultimate criminal sanction, they must have violated values which Canadian society as a whole has formally endorsed.

36           Three types of harm have thus far emerged from the jurisprudence as being capable of supporting a finding of indecency: (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct. Each of these types of harm is grounded in values recognized by our Constitution and similar fundamental laws. The list is not closed; other types of harm may be shown in the future to meet the standards for criminality established by *Butler*. But thus far, these are the types of harm recognized by the cases.

37           Reference to the fundamental values of our Constitution and similar fundamental laws also eliminates types of conduct that do *not* constitute a harm in the required sense. Bad taste does not suffice: *Towne Cinema*, p. 507. Moral views, even if strongly held, do not suffice. Similarly, the fact that most members of the community might disapprove of the conduct does not suffice: *Butler*, p 492. In each case, more is required to establish the necessary harm for criminal indecency.

38           A particular type of conduct may involve several types of harm; life does not fall into neatly tagged juridical boxes. But since each type of harm rests on its own set of

values, it is useful to consider each independently. Being clear about the type of harm raised by the facts of a particular case, helps to determine what factors are relevant to assessing whether it rises to the degree prescribed in *Butler*. It ensures that the analysis is truly contextual, and is not skewed by factors that may not be relevant to the particular harms alleged in the case.

39           Against this background, I turn to a closer look at the three types of harm that may ground a finding of criminal indecency. If harm in any of these senses is established beyond a reasonable doubt, the inquiry then proceeds to the second step of the *Butler* test, to assess whether the nature and quality of the harm rises to the required degree.

#### 4.1.3.1       *The Harm of Loss of Autonomy and Liberty Through Public Confrontation*

40           The first is the harm of public confrontation with unacceptable and inappropriate conduct. One reason for criminalizing indecent acts and displays is to protect the public from being confronted with acts and material that reduce their quality of life. Indecent acts are banned because they subject the public to unwanted confrontation with inappropriate conduct. This harm is conceptually akin to nuisance. Nevertheless, to call this the “eyesore” basis of criminalization of indecent acts is to trivialize the harm. The harm is not the aesthetic harm of a less attractive community, but the loss of autonomy and liberty that public indecency may impose on individuals in society, as they seek to avoid confrontation with acts they find offensive and unacceptable. The value or interest protected is the autonomy and liberty of members of the public, to live within a zone that is free from conduct that deeply offends them.

41            Much harm in this category does not rise to the levels of harm required by *Butler* and *Little Sisters*. Tolerance requires that only serious and deeply offensive moral assaults can be kept from public view on pain of criminal sanction. We live in an age when sexual images, some subtle and some not so subtle, are widely dispersed throughout our public space. However, this does not negate the fact that even in our emancipated society, there may be some kinds of sexual conduct the public display of which seriously impairs the livability of the environment and significantly constrains autonomy. Sexual relations are an intensely personal, religious and age-sensitive matter. People's autonomy and enjoyment of life can be deeply affected by being unavoidably confronted with debased public sexual displays. Even when avoidance is possible, the result may be diminished freedom to go where they wish or take their children where they want. Sexual conduct and material that presents a risk of seriously curtailing people's autonomy and liberty may justifiably be restricted. The loss of autonomy and liberty to ordinary people by in-your-face indecency is a potential harm to which the law is entitled to respond. If the risk of harm is significant enough, it may rise to the degree of the test for criminal indecency in *Butler* – conduct which society formally recognizes as incompatible with its proper functioning.

42            Since the harm in this class of case is based on the public being confronted with unpalatable acts or material, it is essential that there be a risk that members of the public either will be unwillingly exposed to the conduct or material, or that they will be forced to significantly change their usual conduct to avoid being so exposed.

43            This makes relevant the manner, place and audience of the acts alleged to be indecent. In this respect, indecency differs from obscenity, where an element of public

exposure is presumed: *Butler*, at p. 485. As stated in *R v. Tremblay*, [1993] 2 S.C.R. 932, at p. 960, “the place in which the acts take place and the composition of the audience” may affect whether acts are indecent.

44           While these factors inform the factual and contextual determination of indecency, they are merely subsidiary and instrumental to the ultimate finding of harm. Whether certain acts are indecent cannot simply depend on whether they are performed in a “public place”, as defined in the *Criminal Code*. *Tremblay* cautioned against an overly simplistic reliance on this factor, as “common sense indicates that there are great differences between locations which can come within the definition of public places” (p. 970). More importantly, exclusive reliance on the public nature of the place is at odds with the harm-based rationale for criminal indecency. Indecency targets harm or significant risk of harm to members of the public, which has to be established on the evidence and cannot be presumed or automatically inferred from the nature of the location where the acts take place.

#### 4.1.3.2     *The Harm of Predisposing Others to Anti-social Acts or Attitudes*

45           The second source of harm is based on the danger that the conduct or material may predispose others to commit anti-social acts. As far back as *Hicklin*, Cockburn C.J. spoke of using the criminal law to prevent material from depraving and corrupting susceptible people, into whose hands it may fall. The threshold for criminal indecency is higher under *Butler* than that envisioned by Cockburn C.J. almost a century and a half ago, but the logic is the same: in some cases, the criminal law may limit conduct and expression in order to prevent people who may see it from becoming predisposed to acting in an anti-social manner: *Butler*, at p. 484. Indeed, a particular

harm envisaged in *Butler* was the “predispos[ition of] persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse” (p. 485).

46           This source of harm is not confined to explicit invitations or exhortations to commit anti-social acts. As discussed in *Butler*, the inquiry embraces attitudinal harm. Conduct or material that perpetuates negative and demeaning images of humanity is likely to undermine respect for members of the targeted groups and hence to predispose others to act in an anti-social manner towards them. Such conduct may violate formally recognized societal norms, like the equality and dignity of all human beings, which is protected by the *Canadian Charter of Rights and Freedoms* and similar fundamental laws such as the provincial human rights codes.

47           Because this source of harm involves members of the public being exposed to the conduct or material, here too it is relevant to inquire whether the conduct is private or public. This type of harm can arise only if members of the public may be exposed to the conduct or material in question.

#### 4.1.3.3     *Harm to Participating Individuals*

48           A third source of harm is the risk of physical or psychological harm to individuals involved in the conduct at issue. Sexual activity is a positive source of human expression, fulfilment and pleasure. But some kinds of sexual activity may harm those involved. Women may be forced into prostitution or other aspects of the sex trade.

They may be the objects of physical and psychological assault. Sometimes they may be seriously hurt or even killed. Similar harms may be perpetrated on children and men. Sexual conduct that risks this sort of harm may violate society's declared norms in a way that is incompatible with the proper functioning of society, and hence meet the *Butler* test for indecent conduct under the *Criminal Code*.

49           The consent of the participant will generally be significant in considering whether this type of harm is established. However, consent may be more apparent than real. Courts must always be on the lookout for the reality of victimization. Where other aspects of debased treatment are clear, harm to participating individuals may be established despite apparent consent.

50           Unlike the previous types of harm by confrontation and by inculcation, the third type of harm is only minimally dependent on whether the conduct is private or public, since its focus is not on harm to society or members of society, but on individuals involved in the acts. Harm of this type is not dependent on public viewing, and may occur in a private room of an establishment, so long as the minimal element of publicity is satisfied to bring it within the scope of the indecency provisions, by showing it to be a place kept for the purpose of practising such acts, for instance. In the final analysis, the critical issue is not how members of the public might be affected, but how the participant is affected.

51           A form of harm to participants which invokes special considerations is the danger of sexually transmitted disease. Clearly this is an important harm that may flow from sexual conduct. It has been considered as a factor in determining whether conduct is criminally indecent (*Tremblay*), and as a factor exacerbating an already existing harm

(*Mara*). However, it is difficult to assign the risk of sexually transmitted disease an *independent* role in the test for indecency. The risk of disease, while it may be connected to other legal consequences, is not logically related to the question of whether conduct is indecent, either conceptually or causally. Indecency connotes sexual mores rather than health concerns, and sex that is not indecent can transmit disease while indecent sex might not.

4.1.4 The Degree of the Harm: Harm Incompatible with the Proper Functioning of Canadian Society

52 At this stage, the task is to examine the degree of the harm to determine whether it is incompatible with the proper functioning of society. The threshold is high. It proclaims that as members of a diverse society, we must be prepared to tolerate conduct of which we disapprove, short of conduct that can be objectively shown beyond a reasonable doubt to interfere with the proper functioning of society.

53 The objective test for criminal indecency that this Court has long insisted must be our goal, requires careful and express analysis of whether the alleged harm is on the evidence in the particular case truly incompatible with the proper functioning of Canadian society. This involves value judgements. What is the “proper” functioning of society? At what point do we say an activity is “incompatible” with it?

54 Value judgements in this domain of the law, like many others, cannot be avoided. But this does not mean that the decision-making process is subjective and arbitrary. First, judges should approach the task of making value judgments with an awareness of the danger of deciding the case on the basis of unarticulated and unacknowledged values or prejudices. Second, they should make value judgments on

the basis of evidence and a full appreciation of the relevant factual and legal context, to ensure that it is informed not by the judge's subjective views, but by relevant, objectively tested criteria. Third, they should carefully weigh and articulate the factors that produce the value judgements. By practices such as these, objectivity can be attained.

55           It is important to evaluate the nature of the conduct in light of contemporary Canadian standards. As Freedman J.A. wrote 42 years ago:

Times change, and ideas change with them. Compared to the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television, and sometimes even in parlour conversation, various aspects of sex are made the subject of comment, with a candour that in an earlier day would have been regarded as indecent and intolerable. We cannot and should not ignore these present-day attitudes when we face the question whether *Dude and Escapade* are obscene according to our criminal law. (*Dominion News & Gifts*, at pp. 116-17)

Only if the impact of the acts in degree of harm poses a real risk of damaging the autonomy and liberty of members of the public, judged by contemporary standards, can indecency be established.

56           Incompatibility with the proper functioning of society is more than a test of tolerance. The question is not what individuals or the community think about the conduct, but whether permitting it engages a harm that threatens the basic functioning of our society. This ensures in part that the harm be related to a formally recognized value, at step one. But beyond this it must be clear beyond a reasonable doubt that the conduct, not only by its nature but also in degree, rises to the level of threatening the proper functioning of our society.

57           Whether it does so must be determined by reference to the values engaged by the particular kind of harm at stake. If the harm is based on the threat to autonomy and liberty arising from unwanted confrontation by a particular kind of sexual conduct, for example, the Crown must establish a real risk that the way people live will be significantly and adversely affected by the conduct. The number of people unwillingly exposed to the conduct and the circumstances in which they are exposed to it are critical under this head of harm. If the only people involved in or observing the conduct were willing participants, indecency on the basis of this harm will not be made out.

58           If the harm is based on predisposing others to anti-social behaviour, a real risk that the conduct will have this effect must be proved. Vague generalizations that the sexual conduct at issue will lead to attitudinal changes and hence anti-social behaviour will not suffice. The causal link between images of sexuality and anti-social behaviour cannot be assumed. Attitudes in themselves are not crimes, however deviant they may be or disgusting they may appear. What is required is proof of links, first between the sexual conduct at issue and the formation of negative attitudes, and second between those attitudes and real risk of anti-social behaviour.

59           Similarly, if the harm is based on physical or psychological injury to participants, it must again be shown that the harm has occurred or that there is a real risk that this will occur. Witnesses may testify as to actual harm. Expert witnesses may give evidence on the risks of potential harm. In considering psychological harm, care must be taken to avoid substituting disgust for the conduct involved, for proof of harm to the participants. In the case of vulnerable participants, it may be easier to infer psychological harm than in cases where participants operate on an equal and autonomous basis.

60           These are matters that can and should be established by evidence, as a general rule. When the test was the community standard of tolerance, it could be argued that judges or jurors were in a position to gauge what the community would tolerate from their own experience in the community. But a test of harm or significant risk of harm incompatible with the proper functioning of society demands more. The judge and jurors are generally unlikely to be able to gauge the risk and impact of the harm, without assistance from expert witnesses. To be sure, there may be obvious cases where no one could argue that the conduct proved in evidence is compatible with the proper functioning of society, obviating the need for an expert witness. To kill in the course of sexual conduct, to take an obvious example, would on its face be repugnant to our law and the proper functioning of our society. But in most cases, expert evidence will be required to establish that the nature and degree of the harm makes it incompatible with the proper functioning of society. In every case, a conviction must be based on evidence establishing beyond a reasonable doubt actual harm or a significant risk of actual harm. The focus on evidence helps to render the inquiry more objective. It does not, however, transform the entire inquiry into a pure question of fact. A finding of indecency requires the application of a legal standard to the facts and context surrounding the impugned conduct. It is this legal standard that the harm-based test seeks to articulate.

61           Where actual harm is not established and the Crown is relying on risk, the test of incompatibility with the proper functioning of society requires the Crown to establish a significant risk. Risk is a relative concept. The more extreme the nature of the harm, the lower the degree of risk that may be required to permit use of the ultimate sanction of criminal law. Sometimes, a small risk can be said to be incompatible with the proper functioning of society. For example, the risk of a terrorist attack, although

small, might be so devastating in potential impact that using the criminal law to counter the risk might be appropriate. However, in most cases, the nature of the harm engendered by sexual conduct will require at least a probability that the risk will develop to justify convicting and imprisoning those engaged in or facilitating the conduct.

#### 4.1.5 Summary of the Test

62 Indecent criminal conduct will be established where the Crown proves beyond a reasonable doubt the following two requirements:

1. That, by its *nature*, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by, for example:
  - (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty; or
  - (b) predisposing others to anti-social behaviour; or
  - (c) physically or psychologically harming persons involved in the conduct, and
2. That the harm or risk of harm is of a *degree* that is incompatible with the proper functioning of society.

As the above makes clear, the categories of harm capable of satisfying the first branch of the inquiry are not closed, nor is any one of the listed categories in itself an integral part of the definition of harm. For example, predisposition to anti-social behaviour, while central to this Court's analysis in *Butler*, is but one illustration of the type of harm that undermines or threatens to undermine one of society's formally recognized values.

63           This test, applied objectively and on the basis of evidence in successive cases as they arise, is directed to articulating legal standards that enhance the ability of persons engaged in or facilitating sexual activities to ascertain the boundary between non-criminal conduct and criminal conduct. In this way, the basic requirements of the criminal law of fair notice to potential offenders and clear enforcement standards to police will, it is hoped, be satisfied.

#### 4.2 *Application of the Test*

64           The first question is whether the conduct at issue harmed, or presented a significant risk of harm to individuals or society.

65           The sexual acts at issue were conducted on the third floor of a private club, behind doors marked "Privé" and accessed only by persons in possession of the proper numerical code. The evidence establishes that a number of steps were taken to ensure that members of the public who might find the conduct inappropriate did not see the activities. Pre-membership interviews were conducted to advise of the nature of the activities and screen out persons not sharing the same interests. Only members and guests were admitted to the premises. A doorman controlled access to the principal door.

66           On these facts, none of the kinds of harm discussed above was established. The autonomy and liberty of members of the public was not affected by unwanted confrontation with the sexual conduct in question. On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch.

67           Nor was there evidence of the second type of harm, the harm of predisposing people to anti-social acts or attitudes. Unlike the material at issue in *Butler*, which perpetuated abusive and humiliating stereotypes of women as objects of sexual gratification, there is no evidence of anti-social attitudes toward women, or for that matter men. No one was pressured to have sex, paid for sex, or treated as a mere sexual object for the gratification of others. The fact that l'Orage is a commercial establishment does not in itself render the sexual activities taking place there commercial in nature. Members do not pay a fee and check consent at the door; the membership fee buys access to a club where members can meet and engage in consensual activities with other individuals who have similar sexual interests. The case proceeded on the uncontested premise that all participation was on a voluntary and equal basis.

68           Finally, there is no evidence of the third type of harm – physical or psychological harm to persons participating. The only possible danger to participants on the evidence was the risk of catching a sexually transmitted disease. However, this must be discounted as a factor because, as discussed above, it is conceptually and causally unrelated to indecency.

69           As stated above, the categories of harm are not closed; in a future case other different harms may be alleged as a basis for criminal indecency. However, no other

harms are raised by the evidence in this case. All that is raised, in the final analysis, is the assessment that the conduct amounted to “an orgy” and that Canadian society does not tolerate orgies. (Rochon J.A., at para. 133) This reasoning erroneously harks back to the community standard of tolerance test, which has been replaced, as discussed, by the harm-based test developed in *Butler*.

70 I conclude that the evidence provides no basis for concluding that the sexual conduct at issue harmed individuals or society. *Butler* is clear that criminal indecency or obscenity must rest on actual harm or a significant risk of harm to individuals or society. The Crown failed to establish this essential element of the offence. The Crown’s case must therefore fail. The majority of the Court of Appeal erred, with respect, in applying an essentially subjective community standard of tolerance test and failing to apply the harm-based test of *Butler*.

71 It is unnecessary to proceed to the second branch of the test. However, if one did, there appears to be no evidence that the degree of alleged harm rose to the level of incompatibility with the proper functioning of society. Consensual conduct behind code-locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society.

72 I would allow the appeal and set aside the conviction.

English version of the reasons delivered by

BASTARACHE AND LEBEL JJ. —

1. Introduction

73           The fundamental issue in this case is what constitutes indecency and in what circumstances the conditions required to establish indecency will lead to the conclusion that a common bawdy-house is being kept within the meaning of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”). In our dissenting reasons, we will therefore examine the criteria to be applied in defining indecency, specifically in the context of an offence under s. 210(1) *Cr. C.*, which prohibits the keeping of a common bawdy-house. The next step will be to determine whether the sexual acts at issue in this case are indecent and whether the appellant is consequently guilty of keeping a common bawdy-house in the circumstances of the case.

74           Our colleagues have opted to modify the concept of indecency found in the case law to make it more objective by basing it solely on harm and disregarding the other criteria that have been recognized by the courts. According to the majority, the fundamental test for determining what the contemporary Canadian community will tolerate can be reduced to whether or not the conduct causes social harm that is serious enough to be incompatible with the proper functioning of society by, for example, predisposing individuals to act in an anti-social manner. Only by demonstrating such harm can it be established that the acts in question are not tolerated by the community. The acts must constitute wrongs that are formally recognized as such by the community and must be sufficiently serious in degree. This ensures that the test is objective. In the case at bar, our colleagues are of the view that no serious social harm was demonstrated, given the absence of degradation, commercial transactions or sexual exploitation. They instead stress the consensual nature of the acts and state that there was no evidence that the participants were used as objects of gratification. As there were, according to this

harm-based test, no acts that could be defined as indecent, the appellant's establishment was not, in their view, a common bawdy-house.

75           The majority is in this way departing from the case law of this Court and proposing a new approach to indecency that is, in our view, neither desirable nor workable. It constitutes an unwarranted break with the most important principles of our past decisions regarding indecency. Our colleagues' approach replaces the community standard of tolerance with a test that treats harm as the basis of indecency rather than as a criterion for determining the community's level of tolerance. Whether or not serious social harm is sustained has never been the determinative test for indecency, and it cannot take the place of a contextual analysis of the Canadian community standard of tolerance without completely transforming the concept of indecency and rendering it meaningless.

76           In contrast to our colleagues, we propose to continue applying the original test for indecency, which focusses on a contextual analysis of the impugned acts and incorporates the concept of harm as a significant, but not determinative, factor to consider in establishing the applicable level of tolerance. Whether or not harm is sustained is merely one of several indicators or contextual factors that make it possible to gauge the degree of tolerance of the Canadian community. In our view, all the contextual factors must be considered in every case. The application of this test to the facts of the case at bar leads to the conclusion that the impugned acts were indecent and that the appellant's establishment was a common bawdy-house within the meaning of s. 210(1) *Cr. C.*

## 2. Facts

77 In our opinion, the description of the facts set out in the majority opinion is incomplete. We believe it is important to clarify the following facts.

78 First, it must be acknowledged that the L'Orage club is located in a commercial building. Other facts also serve to establish the commercial nature of the place. As the trial judge noted: (i) advertisements encouraging the public to become members appeared regularly in the *Journal de Montréal*, *Voir* magazine, the newsletter of a Toronto swingers' club, and an erotic publication; (ii) interviews were granted to magazines and television hosts to attract new members; and (iii) an information booth was rented at the *Salon de l'amour et de la séduction* trade fair in Montreal in February 1998, where between 2,000 and 3,000 brochures were distributed to the general public. The commercial nature of the place and the activities that took place there is beyond doubt. This factor is of major significance in the contextual analysis respecting the standard of tolerance.

79 Second, we would note that, as the trial judge concluded, the appellant's apartment on the third floor of the building in which he operated his business was not genuinely intended to be lived in. It was essentially a large loft-style room with few intimate or private spaces. It should also be noted that the layout of the premises created at best an illusion of privacy or intimacy. On this point, the trial judge pointed out that there was no kitchen equipped with basic plumbing, cupboards or electrical outlets. There was no space that could serve as a bedroom, apart from eight mattresses strewn about on the floor. According to a city of Montreal building inspector, the premises could not be characterized as a residential apartment based on the standards of the

National Building Code. Moreover, there was a constant movement of people from one level of the establishment to another. The only step taken to limit access to any part of the establishment was the installation of two doors leading to the third level. One of the doors was marked “*Privé*” (private). The other was equipped with a numeric lock whose access code was known to all club members. All these facts confirm that the place where the impugned acts took place was indeed public.

80           Finally, it should be noted that any adult person interested in group sexual activities could become a member of the swingers’ club unless, according to the evidence, he or she seemed to be [TRANSLATION] “disrespectful” or did not share the philosophy of the club and its members. Few applicants were refused membership. At the time of the search, over 800 people had access to L’Orage, including its third level, where the sexual acts in issue took place. Interviews with prospective members consisted primarily in answering the questions of those wishing to enter the club. It was a mere formality that could not reasonably be intended to limit the public’s access to the club. Moreover, every member had the right to bring guests, who did not have to be interviewed.

### 3. Analysis

#### 3.1 *General Description of the Test*

81           In our opinion, there is a single question that must be asked to find that acts are indecent and to determine whether a place constitutes a common bawdy-house: “Do the impugned acts offend the standard of tolerance of the contemporary Canadian community, having regard to the place and context in which they occurred?”

82 Dickson C.J. stated the guiding principles for establishing the standard of tolerance in *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494, at p. 508:

. . . (i) in determining what is undue exploitation within s. 159(8), one of the tests to be applied is whether the accepted standards of tolerance in the contemporary Canadian community have been exceeded; (ii) the standards must be contemporary as times change and ideas change with them, one manifestation being the relative freedom with which the whole question of sex is discussed; (iii) it is the standards of the community as a whole which must be considered and not the standards of a small segment of that community such as the university community where a film was shown; (iv) the decision whether the publication is tolerable according to Canadian community standards rests with the court; (v) the task is to determine in an objective way what is tolerable in accordance with the contemporary standards of the Canadian community, and not merely to project one's own personal ideas of what is tolerable.

The cases all emphasize that it is a standard of *tolerance*, not taste, that is relevant. What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it. [Emphasis in original.]

83 It is now well established in the case law that the standard of tolerance is established by means of a contextual analysis that requires an assessment of the specific circumstances of each case: *Towne Cinema*, at p. 508; *R. v. Mara*, [1997] 2 S.C.R. 630, at para. 32. In *R. v. Tremblay*, [1993] 2 S.C.R. 932, Cory J., writing for the majority, summed up the approach to be adopted as follows, at p. 960:

In any consideration of the indecency of an act, the circumstances which surround the performance of the act must be taken into account. Acts do not take place in a vacuum. The community standard of tolerance is that of the whole community. However just what the community will tolerate will vary with the place in which the acts take place and the composition of the audience.

84           The purpose of assessing indecency in relation to tolerance and not on the basis of personal taste is to prevent it from becoming a tool for establishing or bolstering the morality of a particular group or minority of people in relation to sexual mores. Also, the analysis must not be based solely on the personal and subjective opinions of judges: see *Towne Cinema*, at pp. 508 and 516; *Tremblay*, at p. 958.

85           Nonetheless, where indecency is concerned, place and context are relevant to the establishment of the applicable limits when assessing certain sexual acts and their conformity to the standards of tolerance of the Canadian community. By reason of the nature of the standard of tolerance, applying it necessarily entails a choice of values that relate to social or public morality and are recognized by the entire Canadian community as minimum, but mandatory, standards. The standard of tolerance does not impose a morality based on particular religious beliefs or particular ideologies. It implements a social morality that is the product of values characteristic of the entire community. These values generally reflect a social consensus that manifests itself through, for example, a concern for [TRANSLATION] “the dignity of individuals and their autonomy, potential for development and fundamental equality”: see L. LeBel, “Un essai de conciliation de valeurs: la régulation judiciaire du discours obscène ou haineux” (2001), 3(2) *Éthique publique* 51, at p. 57. What must be done is not, therefore, to choose the preferences of a particular social group and impose them on others. Rather, it is necessary to establish the degree of tolerance of the majority of the Canadian community as a whole toward sexual acts, taking their context, including the place where they occur, into account. The test for indecency thus remains sufficiently objective, because it is based on a social consensus among Canadians as to what is acceptable in terms of sexual practices.

86           The community standard of tolerance can be established in two ways. First, use can be made of factual evidence, such as surveys, reports or research regarding Canadians' sexual practices and preferences, and their attitudes toward and levels of tolerance of sexual acts in various contexts. Expert witnesses can help judges decide a case by providing this sort of information. The relevance of the information and the expert opinions is weighed on the basis of the extent of their connection to the impugned acts and the context of the case. However, judges are not bound by expert opinions and may make their own assessments without such assistance: *Towne Cinema*, at p. 517.

87           Second, judges may draw on the fundamental values and principles underlying legislation respecting sexual mores. The courts' determination of the standard is not strictly dependent on the existence of factual evidence: *Mara*, at para. 25. Establishing the standard is a question of law rather than a purely factual analysis. In *Mara*, at para. 25, Sopinka J. explained the nature of the analysis to be carried out:

This determination [of the standard of tolerance], then, can be made in the absence of evidence and is not susceptible of proof in the traditional way. It must perforce be a question of law, otherwise proof would be required based on evidence and according to the criminal standard.

88           Judges called upon to determine the standard of tolerance may therefore rely on principles of social morality drawn from legislation. Parliament has given effect to these principles by enacting statutory provisions banning such acts as child pornography or incest. It has also prohibited acts that constitute transgressions of social morality in the context and in the places in which they are performed. Thus, acts that encourage the exploitation of women, the exchange of sexual favours for money, and sexual violence offend against social morality: see, for example, *R. v. Butler*, [1992] 1 S.C.R. 452, at

pp. 478-79. These factors are indicia upon which judges may rely to reach a finding of indecency, since they are indicators of the level of tolerance of the community as a whole.

89           It is also important to explain the role played by the concept of harm in the analysis.

### 3.2 *The Concept of Harm and Its Role in the Analysis*

90           The recognition of the Canadian community standard of tolerance as the test for indecency originated in the definition of community standards given by this Court in the context of obscenity in *Brodie v. The Queen*, [1962] S.C.R. 681. It had become necessary to adopt a new test following the enactment of the former s. 150(8) of the *Criminal Code*, S.C. 1953-54, c. 51, as a result of which the test that had been applied up to that time — the test established by Cockburn C.J. in *R. v. Hicklin* (1868), L.R. 3 Q.B. 360 — had become obsolete: see *Towne Cinema*, at p. 503. Under the old test, images and texts tending to deprave or corrupt were declared obscene. The test was criticized for depending on the subjective moral views of the court. It is interesting to note that the majority in the case at bar has now adopted what might lead to anti-social behaviour as a type of social harm that would serve to establish indecency.

91           The general Canadian community standard of tolerance has become the fundamental test for establishing obscenity. The standard has been applied or cited consistently and uniformly in cases subsequent to *Brodie: Dominion News & Gifts (1962) Ltd. v. The Queen*, [1964] S.C.R. 251; *Provincial News Co. v. The Queen*, [1976] 1 S.C.R. 89, at pp. 98-99; *Dechow v. The Queen*, [1978] 1 S.C.R. 951, at pp. 962-63;

*Germain v. The Queen*, [1985] 2 S.C.R. 241, at pp. 253-54. It was in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1159, that this Court confirmed that the standard of tolerance test applies to indecency.

92           The case law was to start evolving, however, with *Towne Cinema*, in which this Court stressed the concept of social harm. As the majority points out, this concept was presented in that decision as an alternative way to establish indecency or obscenity. It should be noted, however, that the standard of tolerance test, as formulated in *Towne Cinema*, did not incorporate social harm as a criterion. The standard of tolerance and the concept of harm were two ways to establish that certain publications were “undue” under s. 159(8) *Cr. C.* (R.S.C. 1970, c. C-34). As Dickson C.J. wrote at p. 505:

There are other ways in which exploitation of sex might be “undue”. Ours is not a perfect society and it is unfortunate but true that the community may tolerate publications that cause harm to members of society and therefore to society as a whole. Even if, at certain times, there is a coincidence between what is not tolerated and what is harmful to society, there is no necessary connection between these two concepts. Thus, a legal definition of “undue” must also encompass publications harmful to members of society and, therefore, to society as a whole. [Emphasis added.]

93           It was in *Butler* that the concept of harm came to play a major role in establishing indecency and obscenity. However, it is essential to note that the test based on social harm, which is defined in that case as the predisposition of persons to act in an anti-social manner, was adopted to fill a vacuum. Its purpose was to establish the

relationship between the community standards test and the degrading or dehumanizing treatment test. As Sopinka J. wrote in *Butler*, at p. 483:

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

94           The harm-based test thus gained new importance in the establishment of the community standard of tolerance. The fact that there were harmful acts, that is, acts that predisposed individuals to anti-social conduct, was now sufficient to sustain a finding of indecency, provided that the degree of harm related to those acts was sufficient. Sopinka J. summed up this approach as follows in *Butler*, at p. 485:

The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The

stronger the inference of a risk of harm the lesser the likelihood of tolerance.

The inference may be drawn from the material itself or from the material and other evidence. Similarly evidence as to the community standards is desirable but not essential.

95 There can be no doubt that, since *Butler*, social harm has been a very important test for establishing indecency. For example, in *Mara*, at para. 33, this Court stated that the standard of tolerance test for a performance was “if the social harm engendered by the performance, having reference to the circumstances in which it took place, is such that the community would not tolerate it taking place”. See also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 52.

96 However, despite the importance of the social harm test, it cannot be said to be the only standard by which the tolerance of the Canadian community for sexual practices is to be measured. The very definition of social harm warrants closer examination before this test can be applied to determine the level of tolerance of the Canadian community. Apart from the conceptual and practical difficulties that arise out of adopting such an approach, which will be discussed below, it can be seen from the analysis of the emergence of the concept of harm in this Court’s decisions relating to obscenity and indecency that *Towne Cinema* has never been overruled or contradicted. Bearing in mind the reasons that led to the adoption of the social harm test, it does not follow from *Butler*, *Tremblay* and *Mara* that the courts must determine what the community tolerates by reference to the degree of harm alone, and in particular of harm as it is defined by our colleagues in the majority in the instant case. The standard of tolerance is established by means of a contextual analysis. Furthermore, it is interesting

to note that in *Tremblay*, which dealt with indecency, the majority's analysis did not rely on harm as its sole test. The analysis was based more on an overall assessment of the contextual elements specific to that case.

97           Thus, serious harm is not the sole criterion for determining what the Canadian community will tolerate. Harm is but one indicator of the community standard of tolerance. The cases cited by the majority must be placed in the context of a line of authority that focusses on determining whether the standard of tolerance has been violated, based on the nature of the acts, the places where the acts occurred and the context. In our opinion, therefore, the majority's analysis departs in practice from the case law by adopting an approach based solely on harm, whereas *Mara* and *Butler* did not break with the contextual approach.

98           In principle, we consider the change to the legal order proposed by the majority to be inappropriate, particularly because no valid justification is given for departing from the existing test. We are convinced that this new approach strips of all relevance the social values that the Canadian community as a whole believes should be protected.

99           First, our colleagues' approach changes the role of the judge in establishing the standard of tolerance. It is clear from the case law that the judge's role is, through contextual analysis, to interpret the community's view of sexual practices as expressed in various places at various times. Whether the impugned acts met the Canadian community standard of tolerance is thus a question of law: see *Mara*, at para. 26; *Tremblay*, at p. 946 (*per* Gonthier J., dissenting, but not on this issue). However, by adopting certain categories of harm that emphasize the mere exposure of the general

public to sexual acts or the risk of serious psychological or physical harm, the majority's approach tends to reduce the judge's analysis to a purely fact-based one. The inquiry into the standard of tolerance thus becomes more a question of fact, which is contrary to this Court's case law.

100       Second, when the standard of tolerance is established on the basis of the three categories of harm adopted by the majority, it becomes impossible to take into account the multitude of situations that could exceed the threshold for indecency. Granted, the harm-based test for indecency will in most cases yield the same result as a contextual approach. However, it is easy to conceive of situations in which the categories will not reflect the Canadian community standard of tolerance. For example, it is possible that, even in the absence of degrading acts or of harm to the participants, the Canadian community will not tolerate certain acts committed in a given context and place, regardless of whether spectators are present or whether they consent. In other words, sexual acts of any nature performed without an audience would *de facto* fall outside the ambit of the provisions aimed at prohibiting indecency. In our view, indecency cannot be based solely on the exposure of the general public to sexual acts. This outcome is unacceptable.

101       The Canadian community's tolerance for sexual practices must be assessed independently of the presence of spectators. The nature of the principle that is to be applied must not be forgotten. It consists in establishing not what Canadians think is right for themselves, or what the spectators or participants in question think is right for themselves, but what Canadians would not abide other Canadians seeing: *Towne Cinema*, at pp. 508-9. In a situation in which the Canadian community's tolerance for sexual acts must be established, as opposed to the situation in *Mara*, which concerned

indecent performances, the principle will necessarily concern what Canadians would not abide other Canadians doing, taking into account the place and general context, of course. Another thing to bear in mind is that it is the standards of the community as a whole that must be considered and not the standards of a small segment of the community: *Towne Cinema*, at p. 508. Consequently, indecency cannot be based solely on the presence of participants or on their views. The contextual approach allows us to take into account the private nature of the place where the acts are carried out. But for sexual practices in places to which the public has access not to be subject to the standard of tolerance because of their allegedly private nature — we are referring here to the ambiguous concept of relatively private places — would be incompatible with a proper interpretation of the standard of tolerance. An approach that in many situations, like the situation in the instant case, systematically prevents the standard of tolerance from being established and applied must be rejected.

102           Furthermore, the majority's approach poses serious problems in light of the practical consequences that would result from adopting it. To successfully defend against a charge under s. 210(1) *Cr. C.* in a context in which there are no degrading acts or in which the participants do not suffer serious harm, it would be enough to ensure that the general public is not a spectator, regardless of the number of participants. It would then be difficult to characterize the acts as indecent, as there would be no evidence of harm.

103           In our opinion, the test adopted by the majority introduces a concept of tolerance that does not seem to be justifiable according to any principle whatsoever. This concept cannot be accepted on the pretext that harm is easier to prove or that it is desirable for this type of offence to have the same rationale as the vast majority of other criminal offences, namely the need to protect the community from harm. Social morality, which is inherent in indecency offences and is expressed through the application of the standard of tolerance, must still be allowed to play a role in all situations where it is relevant. Otherwise, the social values that the Canadian community as a whole considers worth protecting would be stripped of any relevance.

104           Furthermore, the existence of harm is not a prerequisite for exercising the state's power to criminalize certain conduct. The existence of fundamental social and ethical considerations is sufficient: see *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at p. 635. There is no principle that supports the harmonization of offences.

105           The philosophical underpinnings of the majority's harm-based approach are found in the liberal theories of J. S. Mill. This philosopher argued that the only purpose

for which state power can be rightfully exercised over a member the community is to prevent harm to others: see J. S. Mill, *On Liberty and Considerations on Representative Government*, at p. 8. This court had occasion to address the principle of harm in *Malmo-Levine*. Although that case concerned the constitutional limits on the state's power to legislate in criminal matters, the majority's reasons stressed that the justification for state intervention cannot be reduced to a single factor. There are multiple criteria for justifying state intervention in criminal matters, even if it restricts human liberty: see *Malmo-Levine*, at p. 632. Offences under the *Criminal Code* are thus based on principles and values other than harm. In the case at bar, the offence relates to social morality. To place excessive emphasis on the criterion of harm will therefore make it impossible to give effect to the moral principles in respect of which there is a consensus in the community.

106        Our colleagues' position also raises problems relating to the determination of the level of harm required for a finding of indecency. The proposed threshold is, in our view, too demanding and too abstract. There is no justification for adopting a threshold that would require neither more nor less than proof that the sexual practices in issue will lead to social disorder. The Court has not gone that far in its past decisions; rather, it has merely concluded that encouraging anti-social conduct would be incompatible with the proper functioning of society. Why should such a notion be adopted when tolerance is clearly linked to public morality and community values? What is meant by conduct that is incompatible with the proper functioning of society? How can proof that an act will lead to anti-social conduct be required, assuming that it is defined objectively, and why should it be required when the proceeding may concern acts that in fact fit that definition?

107           The position taken in *Mara*, in which tolerance was defined according to the harm suffered by those who view a performance, must be disregarded in the context of an offence under s. 210(1) *Cr. C.* Whereas the issue analysed in *Mara* concerned the indecency of a performance, the issue in the case at bar concerns the indecency of an act: see *Mara, supra* at para. 39. In the case of indecent acts, there is no need to consider the potential harm to spectators.

108           To adopt that position would have the effect of disregarding the community's judgment in respect of sexual practices and any application of the social morality associated with them. The standard of tolerance cannot exclude only those acts that cross the hypothetical line beyond which the proper functioning of society is compromised. It is also related to social order, insofar as what is acceptable to the community is expressed in terms of a known social morality. The concept of harm is thus linked to social morality, not just to societal dysfunction or to the creation of a predisposition to anti-social conduct.

109           According to contemporary Canadian social morality, acts such as child pornography, incest, polygamy and bestiality are unacceptable regardless of whether or not they cause social harm. The community considers these acts to be harmful in themselves. Parliament enforces this social morality by enacting statutory norms in legislation such as the *Criminal Code*. The community does not tolerate degrading acts or sexual exploitation either: *Butler*, at p. 485. Nor is the purchase of sexual favours in public places accepted, as evidenced by the various provisions of the *Criminal Code* that prohibit common bawdy-houses and prostitution. In this second type of situation, morality is conveyed by means of provisions that demand that each individual case be assessed in light of its specific context and circumstances in order to gauge the Canadian

community's tolerance for the acts in question. Certain acts are thus prohibited because of their harmful nature. Others are prohibited because of the context and places in which they arise, as in the case at bar. Harm is thus ultimately linked to a concept of social morality. There is also harm where what is acceptable to the community in terms of public morals is compromised.

110           Thus, the need to prove societal dysfunction to a degree approaching social disorder would appear to unduly restrict the situations in which a court could reach a finding of indecency. The importance of this requirement profoundly alters the traditional concept of tolerance by suggesting that the public will tolerate anything that is contrary to public morals unless it can be established that an act will cause significant social disorder.

111           Furthermore, analytical problems would seem to arise when only the harm test is taken into account in the context of s. 210(1) *Cr. C.* In *Mara*, the appellants had been charged under s. 167(1) *Cr. C.* with presenting "an immoral, indecent or obscene performance, entertainment or representation". However, this Court held as follows, at para. 37:

A finding of an indecent performance depends on a finding of harm to the spectators of the performance as perceived by the community as a whole. The potential harm to the performers themselves, while obviously regrettable, is not a central consideration under s. 167.

112 The Court thus played down the importance of the factor of risk of harm to participants. Nevertheless, it considered that this principle does not apply to offences under s. 210(1) *Cr. C.* At para. 39, Sopinka J. wrote the following:

I note, however, that this Court in *Tremblay* and the Court of Appeal in the present case placed significance on the risk of sexual assault and transmission of disease which I do not, but it is important to recall that *Tremblay* involved an analysis of whether acts performed in a private room were indecent, whereas the present case involves an analysis of whether a performance was indecent. The charge in *Tremblay* was under s. 193(1) of the *Criminal Code* (now s. 210(1)). The gravamen of that offence is the keeping of a place for the purpose of the practice of acts of indecency. The presence of spectators and the effect on spectators is relatively unimportant. On the other hand, the gravamen of the offence under s. 167 is giving or allowing an indecent performance. The presence of spectators and of “performance” under s. 167(1), changes the emphasis in the present case largely to an analysis of the effect on the spectators, rather than the performers. While I do not share the view of the Court of Appeal with respect to the importance of the risk of infectious diseases to a finding of an indecent performance, I otherwise fully agree with the manner in which Dubin C.J.O. admirably set out the differences between the present case and *Tremblay* and *Hawkins*, and explained why the activities in the present case were indecent. While it is unnecessary to repeat verbatim what was said, the principal distinctions may be summarized as follows. [Emphasis added.]

113            Thus, whereas the effect on spectators is a central factor in the establishment of indecency for the purposes of s. 167(1) *Cr. C.*, the impact on participants remains important in the context of s. 210(1) *Cr. C.* In other words, in determining whether the offence of keeping a common bawdy-house has been committed, the relevant harm is not “the attitudinal harm on those watching the performance as perceived by the community as a whole” (*Mara*, at para. 34), but the harm sustained by those who participate in the acts as perceived by the community as a whole. These remarks clearly illustrate the inadequacy of an analysis based entirely on the concept of serious harm.

114            A problem thus arises, as the analysis becomes circular. If it is accepted that the test for indecency in the context of s. 210(1) *Cr. C.* consists in determining whether those participating in the acts are predisposed to act in an anti-social manner (one of the three types of harm proposed by the majority), it seems illogical to ask whether the individual committing an allegedly indecent act is predisposed to act in an anti-social manner. The person is already acting in an anti-social manner. In the context of indecent acts, as opposed to indecent performances, the issue of predisposition to act in an anti-social manner would seem to be irrelevant. The harm would be more the result of a violation of social norms, as we saw above.

115            Consequently, in the context of an offence under s. 210(1) *Cr. C.*, we are of the opinion that it is not absolutely necessary to consider the harm done to society, such as the predisposition to act in an anti-social manner. This type of harm will be present where there is evidence of dehumanizing, degrading or demeaning acts. In our view, *Tremblay* appears, given that the analysis did not focus on the predisposition to act in an anti-social manner, to confirm this approach. To sum up, it is simply not possible to carry out a rational analysis in this area by limiting the test for tolerance to evidence of

serious harm and, in particular, by equating serious harm with a predisposition to act in an anti-social manner.

116           These reasons are sufficient for rejecting a test for the standard of tolerance that is based solely on harm. Our colleagues' approach has too many shortcomings, both practical and theoretical. It introduces a concept of tolerance that appears to be supported by no principle whatsoever. It is also hard to find support for this position in the case law. We will now set out what we feel to be a more appropriate approach.

### 3.3 *A Context-Based Standard of Tolerance*

117           The analysis to establish the standard of tolerance should be based on two main factors: the nature of the acts and their context.

#### 3.3.1 Nature of the Acts

118           It seems hard to dispute that, in a given context, the Canadian community's tolerance for sexual acts varies depending on the nature of the acts. In our opinion, this explains why, in cases involving indecency, the courts have taken the nature of the sexual acts into consideration in establishing the standard of tolerance: see *Tremblay*, at pp. 957, 969 and 971; *Mara*, at para. 40; *Roux v. La Reine*, [2001] R.J.Q. 567 (C.A.). The testimony of expert witness Michel Campbell in the instant case also confirms the relevance of this factor: A.R., vol. VIII, at pp. 1247, 1251 and 1297. The nature of the sexual acts and the context in which they were performed are thus two factors that interact dynamically to influence the Canadian community's threshold of tolerance.

119           Two points require clarification at this stage. First, judges should not pass judgment on the morality of the acts themselves without regard to the context. Taking the nature of the acts into account simply offers the possibility of comparing them with other acts in a similar context. For example, if the courts have found a sexual practice to be indecent in a similar context, the nature of more degrading or dehumanizing acts will lead more easily to a finding of indecency. The public will be less tolerant of these acts because of their potential for causing social harm.

120           Second, the assessment of the acts' nature should not be influenced by the sexual orientation of the participants. The standard of tolerance cannot incorporate a discriminatory attitude based on sexual orientation. As Binnie J. explained in *Little Sisters*, at para. 119, “[i]t is antithetical to the remedial reasons underlying adoption of the community standard to single out a particular minority as being less worthy than others of protection and respect.”

### 3.3.2 Context

121           In light of its relationship to indecency, s. 210(1) *Cr. C.* necessarily imposes restrictions of time (such as the time of day) and place on sexual practices. Indecency concerns sexual behaviour or the representation of sexual behaviour that is neither obscene nor immoral, but inopportune or inappropriate according to Canadian standards of tolerance because of the context in which it takes place: *Tremblay*, at p. 962, quoting Boilard J. in *R. v. Pelletier* (1985), 27 C.C.C. (3d) 77, [1986] R.J.Q. 595, at p. 604. From the perspectives of both statute and case law, indecency thus requires a contextual analysis of the acts in issue.

122 It can be seen from this Court's case law on indecency and obscenity that the following contextual factors may be taken into consideration in determining the standard of tolerance: (1) the private or public nature of the place; (2) the type of participants and the composition of the audience; (3) the nature of the warning given regarding the acts; (4) the measures taken to limit access to the place; (5) the commercial nature of the place and the acts; (6) the purpose of the acts; (7) the conduct of the participants; and (8) harm suffered by the participants (see *Tremblay*, at pp. 960-61; *Mara*, at para. 32). This list is not exhaustive, however. In our opinion, the nature of the factors adopted by the courts reflects the community's desire to limit the performance of sexual acts in public, especially in a commercial context.

123 It would be helpful to elaborate on some of these contextual factors. First, a consideration of the public or private nature of the place where the acts are performed should not be based on a simple public/private dichotomy. In light of the large number of situations in which the courts may be called upon to rule on the indecent nature of sexual practices, this simplistic dichotomy must give way to an analysis based on a continuum of situations and contexts. In our view, the expert testimony of Mr. Campbell cited in *R. v. Angerillo*, [2003] R.J.Q. 1977 (Mun. Ct. Montreal), at paras. 129-30, reflects the fact that tolerance varies in degree according to the public nature of the place:

[TRANSLATION] However, the Court understands from Dr. Campbell's testimony that for Canadians, in all cases, swinging is understood to mean that the swapping of sexual partners is done in private, that is, "among themselves". The witness referred to a kind of "social contract" that is entered into, tacitly or specifically, between those who wish to participate in

swapping. Thus, the more closed and off-limits the “social contract” is to third parties, the closer it is to falling within the “classical” definition of swinging. According to the witness, this is where the threshold of the contemporary Canadian community lies, that is, on the condition that the sexual activities take place in private.

Similarly, if the sexual activities take place in public, what is happening is no longer “swinging”, but an “orgy”. According to Dr. Campbell, Canadians clearly do not tolerate orgies and do not accept that other Canadians, even informed and consenting adults, participate in them. [Emphasis added.]

Mr. Campbell confirmed this approach several times in his testimony at trial: A.R., vol. VIII, at pp. 1292 and 1313.

124 For these reasons, a swingers’ club cannot automatically be characterized as a “private” place on the basis that the general public is not permitted to circulate freely within it. The place may retain a public dimension that is sufficient to support a finding of indecency. If the contrary position were adopted, it would be impossible, provided that the participants consent and that the spectators are considered only to be participants, to sanction any sexual act that is not degrading or harmful to the participants. As we have seen, this unacceptable solution amounts to denying that the standard of tolerance can be applied to sexual acts performed in establishments that are accessible to the public. Such a solution does not take into account the fact that indecency is based on what Canadians do not abide other Canadians seeing or

doing: *Towne Cinema*, at p. 508. It would also amount to saying that only the morality of the participants themselves is relevant.

125 Section 150 of the *Criminal Code* also limits the possibility of characterizing every place where the general public does not circulate as a private place. It defines a “public place” as “any place to which the public have access as of right or by invitation, express or implied”.

126 For the same reasons that have compelled us to reject the public/private dichotomy, we find it impossible to accept the validity of the concept of “relative privacy” proposed in the Court of Appeal by Proulx J.A. ([2004] R.J.Q. 2076). This vague concept can serve only to create a new category under which an act is tolerable if a certain degree of privacy — based on the unforeseeable definition that may be given to the concept — is maintained while the act is being performed. In *Tremblay*, Cory J. referred to this concept only to sum up the context in which the acts took place, that is, in a closed room where only two adults were present (at p. 970). This differs from the facts in the instant case, as we will see below.

127 The commercial nature of the place and acts plays an important role in the establishment of the Canadian community’s threshold of tolerance. In *Mara*, this Court took into consideration the fact that the commercial transaction contributed to the degrading and humiliating nature of the impugned acts by contributing to the use of women as sexual objects (at para. 34). Gonthier J. also referred, in dissent, to the commercialization of certain sexual activities as establishing the existence of harm that can arise in the public sphere:

While exposure of persons is one of those harms, there are many others which are undoubtedly important, and they include exploitation, degradation, the undue commercialization of certain activities, and the dangers these harms entail

(*Tremblay*, at p. 943).

128        Conversely, the absence of a commercial dimension to an impugned act can also be a factor in favour of tolerance: *R. v. Jacob* (1996), 31 O.R. (3d) 350 (C.A.), at p. 365, *per* Osborne J.A. Finally, the numerous offences in the *Criminal Code* respecting common bawdy-houses (ss. 210 and 211 *Cr. C.*), procuring (s. 212 *Cr. C.*), and soliciting sexual services (s. 213 *Cr. C.*) testify to our community's low level of tolerance for the commercialization of sexual acts.

129        Consequently, the commercial nature of sexual practices cannot be disregarded in establishing indecency. This factor is relevant because the association of sexual acts with a commercial transaction has an impact on community tolerance, particularly because the persons involved in this type of transaction are exploited and experience a loss of dignity or autonomy.

130        The purpose of the acts is a factor that takes the intention or objective underlying the allegedly indecent practices into account. For example, in respect of obscenity and indecent performances, indications of an artistic purpose will generally result in greater tolerance (see *Towne Cinema*, at p. 512; *Butler*, at pp. 482-83; *Little Sisters*, at paras. 65 and 195). Where indecent acts are concerned, practices intended to inflict bodily harm or to commit degrading acts will be perceived negatively by the community.

131 Harm to the participants is also relevant. Attention must therefore be paid to the risk of physical or psychological harm. This approach permits the risk of spreading sexually transmitted diseases (“STDs”) to be taken into account: *Tremblay*, at pp. 970-71. If the evidence demonstrates a real risk of transmission linked to the systematic absence of protective measures, this factor will be relevant. We do not agree with the majority on this point, since Canadians’ tolerance of sexual practices is influenced by the risks of spreading STDs.

132 Finally, the consent of the participants or the fact that those present are informed adults is not in itself a determinative factor. A consensual sexual act that is totally acceptable in another situation may be indecent if it is performed in a context in which it offends the Canadian community standard of tolerance. Once again, it is the tolerance of the general public that counts, not the tolerance of the participants or spectators: *Towne Cinema*, at p. 508. Moreover, Sopinka J. stated the following in *Butler*, at p. 479:

In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. . . . Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.

See also *Mara*, at para. 35. It is even necessary to avoid relying on the consent of the participants as a determinative factor. The absence of consent may nevertheless contribute to the characterization of acts as degrading or dehumanizing. This is how we interpret Cory J.’s discussion of informed consent in his reasons in *Tremblay*, at p. 971.

#### 3.4 *Role of the Judge*

133 Before applying these principles to the facts, we will discuss the issue of the role of judges in identifying and applying the standard of tolerance. A precise understanding of the role of the judge will help to explain why a contextual analysis of the standard of tolerance offers a sufficient degree of objectivity. It will also reduce the need to change the state of the law on indecency on the basis that the analysis must be made more objective.

134 In support of using harm as the basic test for establishing indecency, the majority cites the need to make the analysis more objective. It must be acknowledged, however, that a certain degree of subjectivity is inherent in the establishment of the standard of tolerance because of the judge's role as interpreter of the community's minimum standards regarding sex. Despite this problem, the analysis remains objective on the whole as long as the judge ignores his or her personal convictions and instead tries to determine the nature of the social consensus. Judges must not only identify the harm addressed by the *Criminal Code*'s provisions on indecency, but also determine the nature and content of the moral values of the community in which they perform their functions in order to establish the standard of tolerance.

135 The judge's role is not to review the evidence for the sole purpose of determining whether or not a particular social harm has been sustained and establishing the degree of that harm. His or her role is to resolve a question of law by assessing the nature of the acts in their context and evaluating them in relation to the practices and attitudes of Canadians. It is a difficult task, but [TRANSLATION] "[as] a product of his or her times, shaped by his or her culture and concerns, the judge must assume the risks of the problems involved in identifying and reconciling values that are, at times,

contradictory”: see LeBel, at p. 57. Despite the difficulties, the original test for tolerance should not be set aside to make way for a new one based solely on harm. The test was from the start designed to be a sufficiently objective standard, both conceptually and when applied to the facts: see *Towne Cinema*, at pp. 503, 508, 515 and 516. Judges inquire into the behaviour and attitudes of Canadians relating to morals and then consider the parties’ evidence on this issue. A choice of values is made, but the judge must subordinate his or her personal views on morality to community-wide standards. This approach makes it possible to uphold the values on which there is a social consensus and thereby ensure a sufficient level of objectivity. Following it does not appear to pose insurmountable problems for the courts: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, at p. 1159. Nor is this the only area in which judges must engage in such an exercise.

136           Judges uphold a social morality that is not necessarily attached to personal beliefs, but is grounded in the values of the general public, particularly those values that are reflected in legislation dealing with sexuality. In such a context, judges can, despite their role as interpreters of social morality, maintain a sufficient degree of objectivity by relying on values asserted in legislation. Expert witnesses, often specialists in social sciences, can also assist judges in their work and help ensure a sufficient degree of objectivity.

#### 4. Applying the Principles to the Facts

137           In the case at bar, we find that the sexual acts in issue were indecent, given their context. In our opinion, the community does not tolerate the performance of acts of this nature in a place of business to which the public has easy access. The appellant's establishment was therefore a common bawdy-house.

##### 4.1 *Nature of the Acts*

138           The nature of the sexual acts in the instant case contributes to their indecency. Objectively, irrespective of the context and of views regarding the morality of the acts themselves, it must be recognized that group sexual practices are not the norm. At page 34 of his expert report, and in his testimony, Mr. Campbell indicated that [TRANSLATION] "most Quebeckers do not wish to take part in partner swapping or group sex": A.R., vol. VIII, at pp. 1244 and 1400. Only two to five percent of the population engages in these practices: A.R., vol. VIII, at p. 1196. It should be recognized that although the expert maintains that Canadians generally tolerate partner swapping, his comments clearly indicate that it would not be tolerated in a public place. The context will be discussed below. Moreover, the type of partner swapping that occurred in the appellant's establishment involved the widest range of practices, including acts of penetration, fellatio and masturbation performed simultaneously or in turn by several men with a single woman.

139           In our view, it would be possible to characterize some of these acts as degrading, given that the types of sexual acts between several men and a single women could lead to the exploitation or degradation of women or to the use of women or their

bodies as objects of sexual gratification. However, this issue does not need to be resolved in the case at bar, since the nature of the acts must always be considered in their context. A contextual analysis shows that the impugned acts exceed the Canadian public's threshold of tolerance.

#### 4.2 *Context*

140       The majority discussed the fact that all the participants were informed adults whose actions were consensual and voluntary. As we saw above, the participants' consent and their membership in a club or adoption of a collective philosophy are not determinative factors for establishing the general standard of tolerance or determining whether the acts were indecent. The fundamental question is whether Canadians tolerate other Canadians participating in or witnessing the sexual acts in issue, having regard to the context in which they occurred. In the analysis in the instant case, five contextual elements must be considered.

##### 4.2.1 Private or Public Nature of the Place

141 An analysis of the place where the acts were performed shows that the establishment is a public one. Although advertised as a private club, L'Orage was a place to which the public had ready access "by invitation, express or implied", within the meaning of s. 150 Cr. C. Several facts illustrate this public dimension and the ease with which the public could enter the establishment. It should be noted that, despite the measures allegedly taken to limit access, members of the general public were on many occasions invited to join the club and to take part in sexual activities on the third floor. The number of people who had access to the establishment and, potentially, to the third floor was also very high, about 800. All that was necessary to gain access to the establishment was to pay the requested fee after a cursory interview that was quite superficial. It was even easier to gain access to the establishment and to the third floor simply as the guest of a club member. Neither the appellant nor his employees interviewed guests or gave them an official warning. They merely relied on the members to tell their guests about the exact nature of the sexual acts taking place on the third floor and to ensure that those guests shared the philosophy of partner swapping and would not be shocked by what they saw.

142 To sum up, this was a place with a decidedly public character. The appellant's establishment was not just a place to which the general public had access by express or implied invitation. The public could enter it very easily. The evidence demonstrates the ease with which members of the general public could gain access to the club and to the third floor to witness or take part in sexual acts. This was not a closed circle whose members shared the same philosophy and swapped partners in private. The situation in the case at bar has nothing in common with that of *Tremblay*, in which those involved were able to isolate themselves in a place that, in the circumstances of that case,

offered relative privacy. We therefore agree with the conclusions drawn by the trial judge at pp. 2807-8:

[TRANSLATION] Having reviewed the evidence, the Court finds that Mr. Labaye intentionally characterized the third floor as a private apartment even though all the members and their guests had access to it. The distinction made by Mr. Labaye between his “public” club and his allegedly “private” apartment is but a smokescreen that fails to hide the incontrovertible reality that sexual relations of all sorts were taking place in public inside a licensed establishment that was accessible to a large number of clients who had paid to enter it.

([1999] R.J.Q. 2801)

143       The majority’s reasons for judgment appear to indicate that since the “public” in the case at bar consisted solely of club members and their guests, the “general public” was at no risk of seeing the acts in question. We cannot subscribe to this interpretation. The “public” in the instant case consisted of people who were both participants and spectators. A place can be sufficiently public even though the people gathered there are members of a “private” club or the guests of members. It should be noted here that in the context of an offence under s. 210(1) *Cr. C.*, tolerance, and thus indecency, concerns persons who take part in acts, their consent notwithstanding and regardless of whether spectators are present. The fundamental issue remains whether the community tolerates having these individuals witness these activities or take part in them in this context.

144 In our view, the standard of tolerance is offended when acts of partner swapping such as those performed in the case at bar occur in a place whose public nature is undeniable. We rely in particular on the testimony of Mr. Campbell cited above and on the analysis of his testimony by Judge Boisvert in *Angerillo*, at para. 129. Although the expert in the instant case relied on erroneous facts in concluding that the apartment on the third floor of Labaye's building was a private place, the principles that can be drawn from his testimony are still applicable here. The ease with which the public had access to the appellant's establishment where acts as explicit as these were taking place and the absence of privacy provide strong support for the conclusion that the community's tolerance does not go so far as to include these practices.

#### 4.2.2 Composition of the Group of Participants and the Audience

145 As we have already mentioned, this is a case involving informed adults who presumably shared the philosophy of partner swapping. However, this characteristic of the participants is not relevant under s. 210 *Cr. C.* other than to demonstrate the existence of degrading or dehumanizing acts.

#### 4.2.3 Measures Taken to Limit Access to the Place

146           In the case at bar, the appellant claims to have set up an adequate system for limiting access to the establishment and to the third floor to individuals who shared the philosophy of partner swapping and who knew what to expect when they entered the establishment. Our colleagues agree with him that the initial interview, the membership fees, the doorman on the first floor, the word “PRIVÉ” (private) on the door leading to the third floor and the numeric lock on the door to the appellant’s apartment were effective and appropriate measures for controlling access.

147           With respect, these conclusions contradict the trial judge’s findings, and we see no fatal error in her analysis. The interview with prospective members served merely to answer their questions, they were given no warning or official explanation regarding the sexual acts taking place in the establishment, and the veracity of their statements was not verified. The membership fees only confirm the commercial nature of the place and of the impugned acts, as we will see below. The purpose for which the money was collected is irrelevant, as the only material question is whether it was necessary to pay to take part in the acts. The notice on the door to the third floor was just as ineffective, since there was, as the trial judge indicated, a constant flow of people between the establishment’s three floors. The trial judge pointed out that the third floor was a dependency of the two lower floors (at p. 2807). Finally, the evidence shows that all club members were given the combination to the numeric lock on the apartment door upon joining the club and that they were all free to take guests there. In short, these measures did not adequately limit the public’s access to a place where very explicit sexual acts were performed. In our view, the degree of privacy was therefore insufficient.

#### 4.2.4 Commercial Nature of the Place and the Acts

148           An analysis of the establishment's operations reveals the commercial nature of the activities that took place there. Several of the facts mentioned above testify to the commercial nature of the appellant's business. Sexual acts could be performed on the third level of the establishment only after a mandatory commercial transaction between the participants and the owner of the establishment, since everyone had to pay a fee to become a member. The participants essentially purchased sexual services provided by other participants, although the commercial operation was less direct or significant than in *Mara*, in which the payment was made in exchange for the right to perform certain acts with a dancer.

149           Canadians are not inclined to tolerate the commercial exploitation of sexual activities, which is contrary to a number of values of the Canadian community, such as equality, liberty and human dignity. The existence of facts that appear to be indicative of the commercial exploitation of sexual acts, while not in itself sufficient to support a finding of indecency, does clearly support the conclusion that the community standard of tolerance has been offended in the case at bar.

#### 4.2.5 Resulting Social Harm

150           Under s. 210(1) *Cr. C.*, whether or not social harm has been sustained is not a determinative factor in establishing indecency. It may, however, assist in gauging the degree of community tolerance when humiliating, degrading or demeaning acts are performed.

151           In the instant case, it is still possible to conclude that a form of social harm has been sustained that indicates that the level of tolerance of Canadians has been exceeded. This harm results from the failure to meet the minimum standards of public morality rather than from incompatibility with the “proper functioning of society” or from predisposing others to anti-social behaviour. This conclusion is specific to s. 210(1) *Cr. C.* and results from the establishment of the standard of tolerance on the basis of an objective, contextual analysis of the sexual acts.

152           Thus, an analysis of the context in which the acts took place may make up for the absence of harm as defined by the majority, as whether or not such harm has been sustained is just one of the factors to be considered. In the instant case, the public and commercial dimensions of the sexual practices in issue would lead to the conclusion that those practices were indecent even if there were no harm.

### 4.3 *Conclusion Regarding Indecency*

153           In the case at bar, the impugned sexual acts were very explicit acts, and they took place in a commercial establishment that was easily accessible to the general public. This situation caused a certain form of social harm resulting from the failure to meet the minimum standards of public morality. In light of these contextual factors, we are of the opinion that the sexual acts performed in the appellant's establishment clearly offended the Canadian community standard of tolerance and were therefore indecent. Our analysis does not permit us to conclude that the Canadian community would tolerate the performance, in a commercial establishment to which the public has easy access, of group sexual activities on the scale of those that took place in this case. The appellant's establishment is therefore a common bawdy-house within the meaning of s. 210(1) *Cr. C.*

### 5. Disposition

154           We would have dismissed the appeal and upheld the appellant's conviction.

*Appeal allowed, BASTARACHE and LEBEL JJ. dissenting.*

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*Solicitor for the respondent: City of Montréal.*