

Submission on Bill No.17 Criminal Notoriety Act

The Writers' Union of Canada's brief to the Law Amendments Committee of the Nova Scotia Legislature

Introductory remarks

Good afternoon. I am Harry Thurston. I am a non-fiction writer, poet and playwright, here today to speak to you as a representative of The Writers' Union of Canada. I am a board member of the Writers' Union in my role as the representative of our members living and working in Nova Scotia. The Writers' Union of Canada is a national organization representing the interests of Canadian writers, including our membership of approximately 1,600 professional writers of books.

First of all, I want to thank you for the opportunity to present our views on this legislation for Nova Scotia. I also wish to emphasize at the outset that our opposition to Bill 17 is not intended in any way to be unsympathetic to victims. We understand the concern that underlies Bill 17. Without it, a few persons who have gained notoriety because they have committed terrible crimes may profit in future from works about their crimes. We deplore these crimes, but we have greater concerns.

Since its founding in 1973 the Writers' Union has evolved into the national voice for writers of books with a mandate to promote their common interests and foster writing in Canada. Part of the mandate of the Writers' Union is to protect freedom of expression for the benefit of everyone in Canada.

We believe that Bill C-17, if it becomes law, will infringe the freedom of expression guaranteed by the federal *Charter of Rights and Freedoms* because it will have the potential to stifle both new and old stories and opinions. This encroachment on freedom of expression is not just an infringement of the right of certain writers and others to write about their crimes or to collaborate with professional writers to tell their stories. Rather, it is an infringement of the right of all Canadians to be participants in a democratic society without unjustifiable restrictions on their right to know.

What does Bill 17 do?

Bill 17 confiscates money or other economic benefit from a person convicted of or even charged with various serious crimes under the *Criminal Code of Canada*, where such payment results from a “contract for the recollection of a crime”. The payment that would go to the person recollecting his or her crime – usually royalties on on-going sales in the case of a book – is to be paid to the Minister of Justice of Nova Scotia. The Bill does provide that a person may apply to the court for payment to be made in accordance with the contract on the grounds that “the value to society of the recollection justifies some or all of the consideration being paid” after taking into account the importance of “not allowing criminals to financially exploit the notoriety of their crimes”.

Even so, we should recognize that this proposed law is a punishment for creating a work, not for a crime, and it will inhibit writing, filming, or even reciting a poem, singing or drawing where the perpetrator is recounting or depicting a crime. We believe that it is wrong to punish expression of this sort.

Infringement of the Charter of Rights and Freedoms

We submit to you that Bill 17 constitutes an infringement on freedom of expression. Without the possibility of making money, some books and articles will never be written. The convicted person may receive nothing or may be entitled to receive royalties or other proceeds because of his or her involvement in the writing or other collaboration with the author. Where there is likely to be forfeiture of the proceeds from a work that would go to the convicted person, their stories are less likely to be told.

In 1991, in striking down the original so-called “Son of Sam” legislation in New York State, the Supreme Court of the United States in a unanimous decision used reasoning that we think should apply equally in Canada:

A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech... the government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace... The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income and it is directed only at works with a specified content.

Bill 17 does exactly that. If this legislation is passed by the Nova Scotia Legislature, it will be an encroachment on the right to freedom of expression guaranteed by Canada’s *Charter of Rights and Freedoms* to all Canadians including convicted criminals.

We further submit that confiscating economic benefit from a convicted or charged person is an additional penalty not inflicted on any person who is not an author or a person who has conveyed his or her recollection to the author, and is a breach of equality rights under the *Charter*. In the case of a person who has only been charged but not convicted, this law is also a clear violation of the principle “innocent until proven guilty”.

Encroachment on Federal Jurisdiction

We also submit that parts of Bill 17 are unconstitutional because they encroach on the jurisdiction of the federal Parliament to legislate on criminal matters.

By depriving a person of compensation earned through the writing of his or her story, this proposed law imposes an additional penalty on a convicted person who has already been sentenced or has served a sentence with respect to criminal behaviour. Criminal law is a matter for federal jurisdiction while property matters fall within the jurisdiction of the province. Bill 17 is criminal law in the guise of a law relating to property and civil rights in order to give the appearance of falling within provincial jurisdiction.

Chill

Bill 17 will chill expression. Who gets to decide whether a contract is a “contract for the recollection of a crime”? Only the court and after the fact. But what author can risk loss of earnings and an additional fine of up to \$50,000 for failing to direct any compensation owing to him, or a collaborator whose story he has told, to the Nova Scotia Minister of Justice? What Nova Scotia publisher or producer will risk publication that may bring a fine of such magnitude in addition to an obligation to pay the Minister any money already paid to the author or author’s convicted collaborator? This will mean some books are not written, others not published, and some films never made, including films such as the Nova Scotia film based on Brian Vallée’s book *Life with Billy*, the story of a horrifically abused Nova Scotia woman who eventually killed her husband.

Many books have been written by persons who have committed a crime and have contributed to public awareness and understanding of important issues. Writing in prison has been a time-honoured way through which many prisoners have found their own redemption. In doing so, some have made a significant contribution to literature, history, psychology and society’s knowledge of its own frailties and failures: *Go-Boy* by Roger Caron, bank robber and Governor General award winner, to cite a Canadian example.

In the past, probing articles, books, films and documentaries have also played a key role in the release of wrongly convicted persons, for example, books and documentaries on Guy Paul Morin, David Milgard and very likely Stephen Truscott, who is currently awaiting the decision of the Ontario Court of Appeal. Without the journalism of Michael Harris and others who worked with Donald Marshall to bring the injustice against him to light, the Nova Scotia Government would not have established the Marshall commission.

In all of these instances, the convicted person may not have received payment, but sometimes payment does go to the person whose recollection forms the basis for an article, book or documentary. If you pass this law, you will increase the likelihood that sometime in the future the story of another convicted innocent person will not reach the public. If even one more such person were to remain in prison – who might obtain redress with the help of raised public awareness due to a publication – this would be sufficient reason for you to reject this law.

We pride ourselves in Canada on not having political prisoners. But it is sobering to think that a person such as Martin Luther King, author of *Letters from the Birmingham Jail*, would not receive royalties from a published account of his unlawful political protest in a Nova Scotia with Bill 17 as law. King's royalties from this book helped to fund the civil rights movement in the United States.

Bill 17 theoretically allows such a story to be published, but it does not deal with the fact that depriving a convicted author of payment, forcing that author or his or her publisher to make payments to the Minister or requiring them to apply for an exemption to be able to receive or make payment may well result in material never being written or published.

Retroactivity and Reverse Onus

It is generally accepted that laws should not have retroactive effect. This law is retroactive because it penalizes behaviour that took place before the law's enactment. Crimes are relevant "whether the act or omission occurred before or after this Act comes

into force.” For example, if someone has written a memoir involving drug offences in his or her long ago youthful past, the book was published years ago, but he or she continues to receive royalties. This Act would prohibit the publisher from paying the author further royalties, which must instead be paid to the Minister of Justice.

The publisher is subject to a fine of up to \$50,000 if he makes the payment and the author is also subject to a fine of up to \$50,000 if he receives the payment. In both instances the fine could be higher if the royalty payment were to be higher. The author or publisher may ask the court to allow the author or other convicted person to receive some or all of the money but must persuade the court of the value of the story to society.

It is usual for a prosecutor or a plaintiff to have to establish their case against an accused or defendant. In this instance this law is drafted so that the burden is placed on the author or publisher to prove the value to society in order to be exempted from the forfeiture of proceeds from “a contract for the recollection of a crime” and spared the possibly huge fine for failing to comply with the Criminal Notoriety Act. This reversal of the burden of proof is called a “reverse onus” and is generally considered unacceptable in a free and democratic society.

Concluding remarks

We submit that the feared harm that is put forward as the justification for Bill 17 is hypothetical. Which published works should have been treated in the way in which Bill 17 proposes to treat some works in future? Which books and articles should not have been published? Which documentaries not made? Who are the persons who should not have been paid? What pressing social ill or problem is addressed by this proposed legislation? Do we as Nova Scotians or Canadians want, on our law books and on our consciences, a law that makes it less likely that we will hear certain stories?

In conclusion, Canadian writers call on you as legislators not to pass a law that will make it an offence to pay or receive payment for writing or creating a work which may be

viewed as a “recollection of a crime”. Bill 17 may assuage public indignation at the idea of a publicity-seeking criminal making money in this way. But it is unjust to pass a law which inhibits the telling of their stories by convicted or charged persons, a few of whom may be wrongly convicted and many who may, through the telling, be able to turn their lives around, and even others though they may be much less repentant. It is wrong too that the rest of us will have less opportunity to hear such stories. We fear what will happen if Bill 17 passes and we call on you to reject it.

Respectfully submitted by Harry Thurston
On behalf of The Writers’ Union of Canada

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