SUBMISSION OF THE WRITERS' UNION OF CANADA TO THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS ON BILL C-2

The Writers' Union of Canada, representing approximately 1,500 professional writers, supports strong measures to combat sexual abuse and exploitation of children, but have serious concerns regarding some provisions of Bill C-2, An Act to amend the *Criminal Code.* We support the overall purpose behind the legislation - to protect children – but we believe that the child pornography provisions of Bill C-2 are a misguided encroachment on freedom of expression and an infringement of the *Canadian Charter of Rights and Freedoms* that is unacceptable to a free and democratic society.

We do not believe that censorship laws address the problems created by the sexual abuse and exploitation of children. The role of a writer is to hold up a mirror to society, to probe human experience and to explore the truth as he or she sees it. The whole of society is deprived if restraints are place on the writer's pursuit of his or her vision. Our members are potentially affected by child pornography legislation, not only because they are writers, but also because written works are translated into visual forms such as theatre, film and video or are first produced for performance, are recorded as talking books or broadcast, or are very often accompanied by illustrations. Writers must be able to portray children in sexual situations in a variety of works, including autobiographies, coming-of-age stories on page or stage, accounts of crime in books, newspapers or magazines, and sex education materials without fear of being penalized for crossing subjective, arbitrary barriers.

The effect of child pornography legislation is not only to bring to bear the sanctions of the *Criminal Code* on those writers unfortunate enough to transgress its censorship provisions. It also has the chilling effect of causing many writers to censor their own works. If writers have to fear being on the wrong side of the law, their creativity will be stifled.

In 1993 the Writers' Union made representations against Bill C-128, which introduced Section 163.1 into the *Criminal Code* and for the first time created offences that dealt specifically with child pornography. In a press release following the passage of that legislation through the House of Commons, Myrna Kostash, who was then the chair of the Writers' Union, called unsuccessfully on the Senate to defeat the legislation:

> "Government should focus its energies on making laws which prevent harm to real children who are hungry, poor and sexually exploited and not try to hoodwink the public into believing that censorship laws in any way address these problems. The government has taken advantage of the public's concerns about these issues by ramming through poorly drafted, ill-considered legislation...."

This happened again in 2003 with Bill C-20, which purported "to close loopholes" in the child pornography law enacted in 1993 by deleting from the legislation the defences of "artistic merit" and "educational, scientific or medical purpose", and yet again in 2004 with Bill 12, which also deleted "artistic merit" but redefined the existing defence of "public good" to include an artistic defence. Both Bills, which all of our organizations opposed, died on the order paper and did not become law, were the Government's please-the-public response to the notorious *Robin Sharpe* case.[1] We are once again alarmed by Bill C-2, which places unnecessary and undesirable restraints on freedom of expression.

Do prosecutors need more tools?

We have no quarrel with the law protecting real children. The law should do this and it does. Already, before the enactment of legislation specifically dealing with so-called "child pornography", in its 1992 landmark case on the test for obscenity, *R. v Butler*, the Supreme Court of Canada excluded certain material generally tolerated by the community from the definition of obscenity (within the meaning of the *Criminal Code* offences) but not where real children were involved in its production.

We believe that the real problem is not that Canada has laws that are inadequate to protect children from sexual exploitation and abuse, but rather that Canada has inadequate strategies and insufficient resources to support the police in dealing with danger to real children. Police forces have called for a national strategy on child pornography, complaining that local forces are usually overwhelmed and inexpert and cannot launch complex technical investigations, and officials of the Criminal Intelligence Service of Canada are swamped by calls from police for help in investigating Internet child pornography.[2] University of Toronto philosophy professor and pornography specialist Wayne Sumner has said: "I don't see any defect in the laws on the books at the moment. The law is just fine. The question is how effectively it can be enforced."[3] We share this view.

In January of this year, the federal government established a national hotline for fighting the on-line sexual exploitation of children under the name Cybertip.ca. The program gets tips from the public, assesses them for credibility and passes them on to local police.[4] We applaud such initiatives to rescue children from predatory pedophiles. It is our view that the sequence of please-the-public Bills introduced in reaction to the *Sharpe* case, including this Bill C-2, are, by contrast, window dressing to make the public believe that problems of child pornography are being addressed. It should remembered that Robin Sharpe was convicted on two counts of possession of child pornography involving photographs of real children, though not with respect to charges related to some stories he had written.

Improvements and flaws in the proposed legislation

[1] *R. v. Sharpe* was an appeal to the Supreme Court of Canada from a British Columbia case in which both the trial judge and the B.C. Court of Appeal ruled that prohibition of possession of child pornography under Section 163.1 of the *Criminal Code* was not justifiable. However, the Supreme Court allowed the appeal in 2001 and returned the case to British Columbia for trial. The accused was then found guilty on two of the four counts against him but not with respect to charges that certain written material advocated or counselled the commission of sexual crimes against children. The trial judge went on to say that if he erred in this finding, the accused would be successful in his defence of artistic merit.

[2] *The Globe and Mail*, January 18, 2003.

[3] *Ibid*.

[4] *The Globe and Mail,* March 26, 2005.

We submitted, when it was introduced, that Section 163.1 was an unjustifiable infringement of freedom of expression under the *Canadian Charter of Rights and Freedoms*. This existing child pornography legislation already has a chilling effect on expression, as authors and other creators tend to engage in self-censorship to avoid possible prosecution when writing or depicting characters who are under 18. By expanding the definition of "child pornography" to include written descriptions of certain acts that are offences under the *Criminal Code*, Bill C-2 will make the existing child pornography legislation even more intolerable to a free and democratic society.

We acknowledge that the drafters of Bill C-2 have addressed a few of the problems presented by the child pornography legislation put forward in Bill C-20. We welcome the retention of "art" as a defence against a charge of child pornography. In 1992 we suggested that "artistic purpose" was more relevant than "artistic merit". Bill C-2 introduces a new defence based clearly on purpose, although in the meantime of course the Supreme Court of Canada has interpreted "artistic merit" liberally to include "any expression that may reasonably be viewed as art", even if its objective artistic value is very small.

We are pleased to note that Bill C-2, unlike Bills C-20 and C-12, has eliminated the sub-section of the existing *Criminal Code* child pornography legislation which provides that the motives of the accused are irrelevant. This follows several court decisions which found that such a provision infringes the *Canadian Charter of Rights and Freedoms* and is unconstitutional in treating the accused person's motives as irrelevant, in particular where the accused has made an honest and reasonable mistake of fact.

We are also pleased to see elimination of the vague concept of the "public good", which exists in the current legislation and was maintained in both Bills C-20 and C-12. Since the more specific defence of "artistic merit" was removed by each of these Bills, we feared that courts would not interpret "public good" as inclusive of "artistic merit" as liberally interpreted by the Supreme Court of Canada (in the case of Bill C-20) or as broadly inclusive (even as "public good" was defined as in Bill C-12). Had either Bill passed, creators would be more vulnerable than they already are.

On the face of it, the phrase "legitimate purpose related to…art" used in Bill C-2 may be objectively more favourable to artists than the defence of "artistic merit". However the Supreme Court of Canada has interpreted "artistic merit" liberally and we do not know how it will interpret this new language. As well, this artistic purpose defence does not stand-alone. In addition to a "legitimate purpose related to…art", the accused must put forward some evidence that his or her work "does not pose an undue risk of harm to persons under age of eighteen years." This potentially undoes or undermines the first branch of the defence and puts at risk serious works of art. The police, prosecutors and ultimately the courts of the day will decide whether a work poses undue risk of harm to children. Chief Justice Beverley McLachlin, writing for the majority of the Supreme Court in *Sharpe*, said: "To restrict the artistic merit defence to material posing no risk of harm to children would defeat the purpose of the defence."

We believe that it was the Supreme Court judges' liberal interpretation of the "defence of artistic merit" in the current legislation (and its potential availability to the accused if the Crown were to be unsuccessful in proving beyond reasonable doubt that his material advocated or counselled the commission of sexual crimes against children) that saved at least the particular child pornography offence in question from being struck down by the Supreme Court of Canada in the *Sharpe* case as an infringement of the freedom of expression not justifiable under the *Charter of Rights and Freedoms*. We are of the view that the artistic defence, now qualified by the need for a parallel assessment of whether the art nevertheless is pornographic because it may pose an undue risk of harm to children, will no longer be sufficient for courts to be able to save the child pornography provisions from violating the *Charter*. In other words, the requirement with respect to risk of harm is likely to negate, not just modify, the amended artistic defence of "legitimate purpose related to…art" and strip the *Criminal Code* offences of some "*Charter*-proofing".

Attempts to establish the actual meaning of this new defence will be costly, both to the community (especially, in policing and court time) and to the individuals charged. We submit that the existing provisions of the *Criminal Code* already more than adequately cover the material which this new legislation is supposedly intended to target.

What is "child pornography"?

"Child pornography" is very broadly defined in the existing legislation. We are disappointed that the drafters of Bill C-2 did not take the opportunity to change the overbroad, sweeping definitions of "child pornography" as they were enacted in 1993. The existing definition has three branches and Bill C-2 will add a fourth and fifth.

First and most problematic, the existing definition includes visual representations that show a person who is or who appears to be under the age of 18 engaged in or depicted as engaged in explicit sexual activity. We are concerned how this might affect a modern stage or film production of works such as *Lolita, Romeo and Juliet* or *Westside Story, The Tin Drum,* or - closer to home - stories by Alice Munro or Margaret Laurence's *The Diviners*. Literary critics say that Shakespeare's Juliet was only fourteen years of age. Is the CBC's coming-of-age film GENTLE SINNERS, based on Bill Valgardson's novel, pornographic? This branch of the definition should contain the phrase "for a sexual purpose", as do the second, fourth and fifth branches. Combined with section 163.1(5), it requires older actors necessarily playing the characters who are intended to be under age 18 to act their age and spoil the on-screen or on-stage illusion. The price of compliance with this law will be bad art. An internationally known author and past chair of the Writers' Union, Atwood will no doubt not have to defend the sexual reproduction rite depicted in *The Handmaid's Tale* (do the actresses in the film or opera versions appear to be under 18?), but beginning and less established authors will be more vulnerable to prosecution.

The second branch definition of "child pornography" in Section 163.1 includes visual representations "the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region" of a person under the age of 18 years. Unlike the general obscenity section, child pornography is not viewed in the context of community standards of tolerance.

Although identification of the "dominant characteristic" in sub-paragraph (a)(ii) of subsection 163.1(1) echoes the language in subsection 163(8) defining the general obscenity offence, obscene matter is related to "undue exploitation of sex, or of sex and any one of the following subjects, namely, crime, horror, cruelty and violence." This language defining "obscene" material as part of the description of the offences has allowed the courts to consider community standards of tolerance when considering whether an accused is guilty of an obscenity offence. In *R. v. Butler* the Supreme Court set out a test of "internal necessities" - requiring the sexually explicit material that would constitute "undue exploitation" to be viewed in context to determine whether it was the dominant theme of the work as a whole. However, this test of internal necessities is not applicable to child pornography offences. Only the reference to depiction "for a sexual purpose" may serve to narrow a little the scope of this branch of the definition of "child pornography".

The third branch of the existing definition of "child pornography" is "any written material or visual representation that advocates or counsels sexual activity" with a person under the age of 18 that would be an offence under the *Criminal Code*. Bill C-2 expands this to cover audio recordings. While we are against the encouragement of such offences, we are acutely aware that there have always been and will be some persons in our society who feel strongly that exposure to certain books is tantamount to advocating certain actions or lifestyles, as seen for example in the constant debates involving parents, teachers and school boards over the contents of school libraries and curricula. We wonder if a sympathetic portrait of a character who commits crimes could lead a court to conclude the writer is "advocating" that behaviour. Does a novelist have to make plain his or her disapproval of such behaviour by a fictional character? Common sense says not, but this law is open to such an interpretation.

The proposed fourth branch – entirely new - is overkill in a definition already very broad and uncertain in meaning. If Bill C-2 passes, child pornography as defined by the *Criminal Code* will also include "any written material the dominant characteristic of which is the description, for a sexual purpose, of sexual activity" with a person under the age of 18 that would be a *Criminal Code* offence. This will be an offence based on mere descriptive language. Its broad wording targets written material that would encompass and surpass the third branch. Teenagers engaging in sexual activity is a fact of modern society and is a frequent theme of literature, past and present. Off limits to film and theatre producers would be non-fiction works such as Charlotte Vale Allen's DADDY'S GIRL or Sylvia Fraser's MY FATHER'S HOUSE, both moving accounts of the author's own experience of being sexually abused as a child and instrumental in first bringing the issue of child abuse to public attention. What about an article, play, novel or poem dealing with sexual child abuse? We submit that this new provision is an unreasonable restraint on the freedom of expression guaranteed to every Canadian under the *Charter of Rights and Freedoms*. Because so much falls within the new expanded definition of "child pornography", there are greatly increased opportunities for the arbitrary exercise of discretion to prosecute and convict.

The fifth branch – also new – extends to any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under 18 years that would be a *Criminal Code* offence. This would cover the talking books or radio programs that have so far escaped falling within the *Criminal Code*'s "child pornography" definitions.

The existing" artistic merit" defence

The Supreme Court of Canada in *R. v. Sharpe* decided that offences in Section 163.1 infringe the *Canadian Charter of Rights and Freedoms*. However, it also held that the child pornography law, even where it affected works of the imagination, not just depictions of actual children, is a reasonable and demonstrably justifiable limitation on freedom of expression, went on to remove two classes of activity from the offence of possession of child pornography, and pointed to the existence of defences including artistic merit. Broadly interpreted this may mean that this defence is applicable where a work is produced within the context of accepted artistic conventions and, more narrowly interpreted, that good art is acceptable as opposed to bad art. Under the existing law, the defendant has to produce evidence that his or her work has artistic merit, and it is then for the Crown to disprove this defence. Bill C-2, if passed, will remove this defence, although it will substitute a new defence, the scope of which is unknown to us. For writers, this uncertainty will make publication or stage or film production of some stories increasingly risky enterprises, for example, coming-of-age stories. If convicted, a publisher or filmmaker, as well as the writer, may be imprisoned for up to 10 years. Better the devil we know. We urge you to leave the current legislation with its defence of artistic merit in place.

Reverse onus

In *R. v. Sharpe* the Supreme Court of Canada focussed on the prevention of harm to children, but declined to interpret the existing child pornography law to exclude children that are creatures of the imagination. Weighing the cost to freedom of expression of prohibiting materials constituting child pornography against the risk of harm to children, the majority of the Supreme Court including Chief Justice McLachlin carved out of the offence of possession of child pornography specific sorts of possession that present little or no risk of harm to children. The minority of the Court did not narrow the possible scope of the offence in this way but placed importance on the availability of the defence of artistic merit. The defence now proposed in Bill C-2 may seem to pick up somewhat on the Supreme Court's language but not its message and, in doing so, it creates a further reverse onus – not only requiring an accused person to present evidence to support his or her artistic defence but also evidence that there is no undue risk of harm to persons under 18.

Outlaw behaviour not free expression

We believe that the legal system should focus on the abuse and exploitation of real children and not fictional or imaginary ones. We are also of the view that the proposed changes to the child pornography offences of the *Criminal Code* set out in Bill C-2 will create offences that infringe the *Canadian Charter of Rights and Freedoms.* The language remains vague, and consequently interpretation is necessarily arbitrary. The changes will increase the likelihood of the arbitrary exercise of prosecutorial discretion to lay charges against creators of written, visual and auditory material falling within a broadened definition of child pornography, particularly without the existing defence of "artistic merit" as it has been interpreted to us by the Supreme Court of Canada.

It is likely that future generations will be contemptuous of how our society may have treated certain works. Many great works, some of them today's classics, were largely unappreciated when first published - we think of James Joyce and D.H. Lawrence when we think of banned books. Why should we assume that our courts will do any better than the courts of the past? If courts must continue to engage in the absurd exercises required to determine whether a work constitutes child pornography, and if the sections amending the *Criminal Code* are not withdrawn from Bill C-2, we submit that the Bill should be amended so that the prosecution would have to prove, as part of the offence of which the writer is accused, both the "absence of legitimate purpose related to… art" and "undue risk of harm to persons under the age of eighteen years".

We believe that the proposed changes to the law will lead to increased self-censorship by writers and other artists and cast a greater chill on expression of ideas. This is unacceptable to a society that values freedom of expression and we call on Parliament to remove these amendments to Section 163.1 of the *Criminal Code* from this important Bill intended to protect children. By discouraging works that deal with child abuse or teenage sex, the new legislation would result in less public discussion and make it more difficult for society to deal with real abuse of real children.

Laws repressing free expression can never be the magic which will eliminate the sexual abuse and exploitation of children. By opposing censorship, and specifically the amendment of the offences relating to child pornography, we do not condone the actual offensive conduct directed against children which takes place in our society. We urge the Government to address its corrective measures to controlling and stopping this behaviour and not to take aim at the expression or depiction of material arbitrarily labelled as "child pornography". Bill C-2 is another unacceptable attack on freedom of expression.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF THE WRITERS' UNION OF CANADA

by:

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