



BULLETIN

Canadian Conference of the Arts ~ Conférence canadienne des arts

'DÉJÀ VU ALL OVER AGAIN': THIRD ATTEMPT AT BILL C-2 STILL JEOPARDIZES CANADIANS' CHARTER RIGHT TO FREE EXPRESSION

Ottawa, 7 April 2005 - After its first reading in the House of Commons last October, Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, was referred to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. The Standing Committee commenced their study of Bill C-2 on February 22nd 2005 and is currently holding public hearings in Ottawa. Today the Canadian Conference of the Arts (CCA), represented by National Director Jean Malavoy and CCA Board member Frank Addario, who is a criminal lawyer with the Toronto firm Sack Goldblatt Mitchell, appeared before the Committee in order to convey CCA's concerns about the draft bill's proposed deletion of the artistic merit defence from Section 163 of the *Criminal Code*.

As leaders for 60 years in advocating on behalf of Canadian artists and cultural workers to defend their rights and articulate their needs as citizens, and as part of our commitment to ensuring that artists are able to freely and fully contribute to Canadian society, CCA argued that the artistic merit defence must be maintained in order to protect Canadians' Charter right to free expression.

"If passed as drafted, Bill C-2 will risk the criminalization of artistic works that address themes such as 'coming of age' and teenage sexuality," says CCA National Director Jean Malavoy, "Not to mention potentially criminalizing Canadians who merely possess or distribute them, such as museums, libraries, schools or galleries. The scope of the current draft legislation is dangerously broad and will not help authorities address the real problem that all Canadians want addressed, which is the actual abuse of actual children."

CCA opposes the replacement of the artistic merit defence with a new test that asks whether an accused, first, has a "legitimate purpose" for making artistic work and, second, whether her or his artistic expression poses "an undue risk of harm to children", as outlined in the text of the draft bill. CCA's opposition is based on the following points, which are excerpted from our full written submission, available online at

<http://www.ccarts.ca/en/advocacy/publications/policy/documents/C-2law-ENG.pdf>:

- A legitimate purpose test introduces an element of subjectivity that will put artists at risk of criminal prosecution. The current defence has the beneficial effect of discouraging marginal prosecutions based on the subjective evaluation of art by police officers. This is because the artistic defence has been authoritatively described by the Supreme Court of Canada to extend to any work with "objectively established artistic value, however small". In contrast, a legitimate purpose test will engage the police and the court in judging the art from the subjective view of whether there is "too much" emphasis on sex or sexuality or whether the emphasis on sex or sexuality appears to be gratuitous or superfluous.
- A legitimate purpose test will inevitably invite the police to judge whether art is successful. If the police consider that the art is unskilled or displays few characteristics of conventional art, they are more likely to lay a charge. In contrast, the artistic merit test was intended to protect just such artists. As Chief Justice McLachlin put it in the 2001 *Sharpe* decision: "It would be discriminatory and irrational to permit a good artist to escape criminality, while criminalizing less fashionable, less able or less conventional artists." There is no reason to think that a police officer will err on

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the side of the artist, where the work at issue is inept, unconventional or controversial. The temptation to compare it with established or consensus art will be too difficult to resist, and the result will be artists not doing what we expect them to do. The theory that “legitimate purpose” is readily obvious to police and prosecutors ignores the experience of artists and promotes “consensus art” of the most timid variety. The self-limiting nature of the defence means that it will offer protection against censorship and criminal conviction only to those whose expression represents consensus values. This is inimical to the concept of free expression

- The second branch of the proposed legitimate purpose test, which requires proof that the art poses no “undue risk of harm” to children, would engage artists in expensive litigation in which the risk of losing entails being labelled a “child pornographer”. The argument is frequently made in obscenity law that the “undue exploitation of sex” is established when the risk of attitudinal harm (in the form of a belief, for example, that women are mere sexual objects for men) is established. This is a very low standard of proof and could support a finding of obscenity in many cases where the material poses no risk of actual harm. In the context of obscenity prosecutions, however, this is not the only test as the court must also consider the overriding issue of the community standard of tolerance. Hence, the low standard of risk of harm is mitigated by other considerations. Inevitably, the same arguments will be made in the context of a prosecution for possession of or making child pornography, without the mitigating safeguard of the community standard of tolerance. Since virtually anything involving children and sexuality could confirm the cognitive distortions of those who see children as sexual actors, the defence is essentially a thin one. Further, very few artists will want to see their work subjected to analysis by psychiatrists, social scientists and judges. It will be far easier simply to avoid topics that will inspire this type of contest, despite the importance that the subject matter plays in our lives

For further details about CCA’s April 7 presentation, including questions and answers with Standing Committee members, the minutes of the meeting will be available soon at: <http://www.parl.gc.ca/committee/CommitteeList.aspx?Lang=1&PARLSES=381&JNT=0&SELID=e22.2&STAC=966174>

In order to have legislation that is, “able to focus on its legitimate objective, the protection of children,” while keeping intact, “a more viable regime for freedom of expression,” the *Canadian Civil Liberties Association* proposed to the Committee on March 24th that, “the definitions of child pornography in the legislation be narrowed so that it applies only to material that involved, or is held out to have involved, the unlawful abuse of real children.” The CCLA’s problem with the proposed definition, which is supported by the CCA, is that it is “excessive” because it will broaden what constitutes pornography to include fictional depictions, imaginary descriptions, and imaginary images.

The *Canadian Bar Association’s* objection is that, “the proposed *Criminal Code* amendments may lead to further challenges to the law”, as stated on April 5th. While they welcomed the government’s attempts, “to protect a group that is one of society’s most vulnerable,” they argued that, “expanding the scope of child pornography offences while at the same time limiting the scope of available defences could result in lengthy constitutional challenges based on freedom of expression.”

Artistic endeavours relate directly to the core values that the guarantee of freedom of expression in section 2(b) of the *Charter* is intended to protect, including the pursuit of truth and individual self-fulfillment. Art is indispensable to modern society as a form of expression which describes and comments on human, social and political conditions. It plays a critical role in enabling individuals to explore, understand and become more aware of themselves and the world in which



they live. This has been recognized many times by our courts in defining the breadth of freedom of expression in Canada and CCA believes this must continue to be defended in the face of poorly drafted legislation.

CCA encourages all of our member organizations and members to convey this message to Members of Parliament and to not pass Bill C-2 without re-drafting the sections pertaining to the proposed “legitimate purpose” defence.

The text of Bill C-2, as well as relevant background information prepared by the federal government, can be found online at:

<http://www.parl.gc.ca/legisinfo/index.asp?Lang=E&Chamber=C&StartList=2&EndList=200&Session=13&Type=0&Scope=1&query=4199&List=toc-3>

CCA’s backgrounder on Bill C-2 and issues related to freedom of expression can be found on our website at: <http://www.ccarts.ca/en/advocacy/publications/policy/index.html#expression>