BRIEF OF THE
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REGARDING BILL C-2

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Background

(a) Artistic Endeavours and Sexual 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 the freedom of expression in Canada. Even before the advent of the *Canadian Charter of Rights and Freedoms,* Justice Bora Laskin in the *Cameron* case said:

The Court can take judicial notice of the fact that the engagement of citizens or inhabitants in the execution of art (whether drawing or painting or sculpting), the training of students in art, the exposure of art to public appreciation, all of this leading to the refinement of public taste, are pursuits that relate to the culture of the country.

Similarly, the former Chief Justice of Canada, Antonio Lamer, said this about art in a case concerning s.2(b) of the *Charter of Rights and Freedoms (Reference re: ss.193 and 195.1 of the Criminal Code)*:

As with language, art is in many ways an expression of cultural identity, and in many cases is an expression of one's identity with a particular set of thoughts, beliefs, opinions and emotions. That expression may be either solely of inherent value in that it adds to one's sense of fulfillment, personal identity and individuality independent of any effect it may have on a potential audience, or it may be based on a desire to communicate certain thoughts and feelings to others.

Sexual expression is related to virtually all of the key values underlying the freedom of expression: the search for truth, individual self-fulfillment and political participation. The exploration of the sexual aspects of human existence has always been a central concern of artists. Breakthroughs in popular culture have often dealt with the depiction of the sexual nature of humanity and the human body. Sexual expression plays a central role in our understanding of human identity and consequently constitutes an indispensable subject of textual and visual art. James Joyce's *Ulysses*, widely considered the masterpiece of twentieth century literature, is recognized as such not only because of its novel use of language and narrative form, but also because of the candour and directness with which its sexually explicit subject matter is addressed. Well-known works such as Michelangelo's *David* and *The Last Judgement*, Goya's *Nude Majar* and Manet's *Le Déjeuner sur L'herbe* all depict nudity or sexual themes. Each of them caused scandal and challenged prevailing community values at the time of their creation. Each of the great works listed above were the subject of censorship attempts by customs seizures, detention, destruction of the work, "draping" requirements (Michelangelo, Goya, Manet) or threatened obscenity charges against the exhibiting gallery. History books are filled with accounts of attempts to regulate sexual expression which exploits no one and is not the product of any criminal activity. These attempts have failed because it is impossible to draw a line between prohibited sexual expression and protected artistic expression, in cases where nobody is harmed in the production of the material in question.

(b) The Artistic Defence

It is as a result of this history that the Courts have created an "artistic defence" to governmental action against expressive works with sexual content. This defence now has an established position in Canadian law, summarized by the Supreme Court of Canada in its 1992 judgment in the *Butler* case as follows:

Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression. .... the court must be generous in its application of the "artistic defence".

The depiction of sexual activity involving persons under the age of 18 years should not be invariably suppressed. The CCA accepts that Parliament may legitimately enact legislation that is aimed at preventing harm to minors which can be shown to be a direct result of child pornography. The CCA shares the widespread public abhorrence for the sexual abuse of minors and acknowledges the permissibility of criminal sanctions in connection with material that involves or is held out as involving the unlawful abuse of real children. On the other hand, visual representations involving teen sexuality, so-called "coming of age" films and books, published diaries of teenage sexual experiences, classical paintings (such as the painting of Cupid, depicted as a child, fondling the nipple of the goddess Venus), stories that explore child sexual abuse (such as the CBC's production of *The Boys of St. Vincent*) or self-depictions of artists (or would-be artists) under the age of 18 years are all properly protected by the "artistic defence". They are expressions of a fundamental aspect of the human condition and their creation harms no one.

(c) The *Sharpe* Problem

Eight years after s. 163.1 was inserted in the *Criminal Code*, the Supreme Court in *Sharpe* gave an extensive definition of the artistic merit defence. The CCA was greatly relieved by this development because the definition is broad enough to ensure that young artists or artists working with novel or transgressive subject matter would not suffer the ignominy of being prosecuted in the criminal courts. Although the Court also went on to carve out two exceptions to the offences of possessing or making child pornography, it did so in order to avoid having to strike down the entire law on the ground that it was an overbroad infringement of the freedom of expression. As a result, the child pornography law has largely been "saved" and is wide enough to capture virtually all situations in which expressive material could lead to harm to children. After the Supreme Court's ruling, Sharpe's prosecution was allowed to proceed. Sharpe faced a number of charges of possession of child pornography, relating to material that the police had seized from him when he was arrested. Some of the material was photographic and he was convicted of possession of this material and given a jail sentence. The photographic material involved depictions of real children involved in sexual acts. As noted above, the CCA supports the existence of a law making this an offence and agrees that Sharpe was properly convicted. However, Sharpe was also charged with the possession of written material that described sexual acts involving children. He raised the defence of artistic merit and called two experts who testified that the stories, some of which Sharpe had written himself, had some literary merit. The judge accepted the defence experts' view and Sharpe was acquitted of the offences relating to the written material. This acquittal has inspired the move to eliminate the artistic merit defence. While the concern that a pedophile like Sharpe might raise the defence to avoid successful prosecution for material in his possession is understandable, it is also misplaced. There are several reasons why eliminating the defence is unnecessary and ill-considered:

- it bears recalling that Sharpe was convicted of two offences involving what is correctly defined as child pornography. The stories that were the subject of his acquittal were a small part of his collection. The decision to make these the subject of charges was unnecessary to Sharpe's successful prosecution and imprisonment. The assumption of those who have not seen the stories is that a pedophile could never be in possession of anything except prurient material involving children. Obviously, this is illogical. His acquittal on some counts should be seen as a reflection of over-charging by the police rather than a flaw in the *Criminal Code* that needs fixing

- the fact that Sharpe himself wrote the stories that were the subject of the prosecution and acquittal on two of the counts relating to the written material has likewise offended many people. But if the law will not support a prosecution of someone for possession of material with the genuine qualities of literature involving children and sexuality (Nabokov's *Lolita*, for example) it is illogical to think it should support a prosecution of the same material because it was written by the possessor. It is hard to imagine anything more destructive of liberty than to insist that the law should be re-written to support the criminalization of works of the imagination because of the identity of the person who created expressive material

- in practical terms, the seizure of materials from real pedophiles almost always involves the depiction of real children involved in sexual acts---either with other children or adults. Literature of the type put on trial in Sharpe's case is virtually never the principal material seized from real pedophiles. Sharpe's prosecution is a good illustration of this: when he was arrested, the police seized hundreds of photographs from him, containing actual child pornography. For this reason, eliminating the artistic defence to get Sharpe may correctly be seen as an over-reaction to the perceived problem that he had a defence to <u>any</u> of the charges. But the many artists who choose to tackle the topic of sexuality involving persons under 18 should not be put at risk of prosecution because a pedophile was able to invoke the artistic defence successfully in relation to a very small amount of his collection

- lurking behind the arguments that the artistic merit defence should be eliminated is a suspicion that legitimate artists are not interested in the issue of sexuality of persons under 18. This is problematic for at least two reasons. First, as noted above modern art has long been concerned with sexuality and the sexuality of youth has been an important part of this. Part of the function of art is to challenge us to think about our condition, why things happen, the source of pain and happiness and the relationship that we have with one another. Art that requires us to contemplate those questions is successful. Sexuality, including that of persons under 18, is not only legitimate but an important topic for artists to address. It is inconsistent with our respect for the role of art in a free society to declare, through legislation, that some topics are off-limits for discussion. There is no contradiction in denouncing the sexual exploitation of children and at the same time permitting artists to enquire into the topic. Second, the current child pornography provisions create an anomaly for artists exploring the topic of teen sexuality. It is legal in Canada for anyone over 14 years of age to have sex (provided the other person is not a relative or in a position of trust with the young person). Yet this activity cannot be depicted because the definition of child pornography applies to anyone under the age of 18. Something which occurs every day and is central to the development of young adults is a forbidden topic for artists, since any depiction of sexual activity involving someone under 18 is deemed to be child pornography

(d) The Legitimate Purpose / No Undue Risk Test

The CCA opposes the replacement of the artistic merit defence with a new test that asks whether the artist had a legitimate purpose and whether his or her art poses an undue risk of harm to children. Our opposition is based on the following points:

- as noted above, there is no reason to think that the current defence will not work to weed out that which truly exploits children: depictions involving real children in sexual acts that are themselves a sexual offence under the existing provisions of the *Criminal Code*

- as noted above, there is no practical risk that pedophiles will escape conviction for possession of real child pornography. If they happen to possess some material with artistic merit, both the child pornography law and the artistic defence will have served their purpose

- a legitimate purpose test introduces an element of subjectivity that will put legitimate artists at risk of 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 to extend to any work with "objectively established artistic value, however small". In contrast, a legitmate purpose test will engage the police 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 *Sharpe*: "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 the side of the artist, where the work at issue is inept, unconventional or controversial. The temptation to compare it with established or majoritarian 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 new 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 labeled 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

These concerns are not hypothetical. The prosecution of the Toronto artist Eli Langer and the subsequent attempt by the Crown to destroy his works illustrate the difficulties faced by legitimate artists when they employ themes that fall within the terms of s.163.1. Langer's works depicted young persons who appeared to be under the age of 18 arguably engaged in sexual activity, in some cases with adults. He was initially charged with making and possessing child pornography. After several months, the Crown withdrew those charges but sought a forfeiture of his works in order to destroy them. The Crown's application was dismissed after a judge concluded that the works had artistic merit. Langer could not be prosecuted under s.163.1 today because the defence of artistic merit as defined in *Sharpe* would protect him. However, he could easily be prosecuted under the proposed legitimate purpose/undue risk test. This could happen despite the fact that a judge found that one of the purposes of his work was to draw attention to child sexual abuse. Under the definition of artistic merit in *Sharpe*, Langer could not be prosecuted even if the Court thought his work was excessively explicit. Under the legitimate purpose/undue risk test, he could. The CCA submits that the artistic merit defence, as defined in *Sharpe*, should be retained. It protects artists and art.

(e) Written Material

- Bill C-2 also defines child pornography as written material "whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under [the *Criminal Code*]". This provision raises several concerns for artists. The first is that the provision invites an interpretation at odds with its plain meaning. As it replaces a section that required proof that the material advocated or counseled sexual activity with a child, the courts will interpret the "sexual purpose" component broadly, on the assumption that Parliament intended to tighten the law to catch more material. This in turn will lead to a broad definition of "sexual purpose" and the result will be that any literature or written material that is not plainly condemnatory of sexual activity involving children (such as incest, or relationships between adults in a position of trust and children) will come within it. The previous definition, which was understood to exclude the mere description of such activity (as a result of the judgment in *Sharpe*) erred on the side of permitting artists to make art. It is no part of a liberal democracy's relationship with artists to require that they may only describe virtue and happiness or condemn all that the majority views as wrong. As noted above, this is a another over-reaction to the trial judgment in *Sharpe*. It is not inconceivable that an artist can also be a pedophile. This is precisely what we now know about John Robin Sharpe. But, that does not mean that all artists need to be put at risk. Sharpe was punished for what he did, but not punished for what he wrote.

This is as it should be. Second, an offence-creating provision that makes illegal the possession of material created by the accused exclusively for his or her own personal use, comes perilously close to punishing thought crimes. Despite the fact that such material can itself pose no risk of harm to children, it will be a crime to put it down on paper. Closely related to this is the consideration that it will be impossible for an artist whose work is caught by this section to access the statutory defence. Once material has been found to have a "sexual purpose" (which is by definition proscribed), it cannot logically have a "legitimate purpose". Hence the only defence for artists in such circumstances is an illusory one.