



CONFÉRENCE CANADIENNE
DES ARTS

CANADIAN CONFERENCE
OF THE ARTS

The CCA and Freedom of Expression – The Endless Battle

*Paper presented at the Public Issues Community Forum
University of Victoria, October 23, 2008*

“The free communication of thought and opinion is one of the most precious rights of man; every citizen may therefore speak, write and print freely.”
French National Assembly, 1789

Freedom of expression is one of the hallmarks of a truly democratic society. In Canada, as in other nations around the world, this freedom is enshrined in the Constitution Act as an essential element of the Charter of Rights and Freedoms. This annotated timeline will explore the evolution of Freedom of Expression in Canada – through judicial processes, law, and the institutionalization of the Charter of Rights and Freedoms.

Timeline

- 1959** The [Criminal Code](#) was amended to include a new definition of obscenity specifying that “any publication a dominant characteristic of which is the undue exploitation of sex” would be deemed to be obscene.
- 17 April 1982** The [Constitution Act](#) and the [Charter of Rights and Freedoms](#), which contains a guarantee of freedom of expression, was proclaimed in force.
- 23 June 1983** The Minister of Justice announced the formation of the Special Committee on Pornography and Prostitution (the Fraser Committee)
- 7 February 1984** Bill C-19, an amendment of the *Criminal Code*, was given first reading in the House of Commons. Through this bill the definition of obscenity within the code would have been amended to the effect that obscene material would no longer be required to have a sexual element. Bill C-19 also specified degrading representations as a means of “undue exploitation” and substituted “matter or thing” for “publication” in the definition. The bill died on the *Order Paper* in July 1984.
- 3 April 1985** Bill C-38 received Royal Assent. The bill amended the [Customs Tariff](#) to incorporate the obscenity standard in the *Criminal Code* by reference. It was necessitated by a court decision striking down the previous prohibition on the importation of “immoral or indecent” material as contrary to the *Charter of Rights and Freedoms*. Originally slated to expire on 30 June 1987, the tariff item was extended on an annual basis until 1989, when it was made permanent. It is now Tariff Item 9956 of Schedule VII to the *Customs Tariff*.
- 23 April 1985** The Fraser Committee’s report on pornography and prostitution was released, recommending extensive revision of the law. The most notable aspect of these proposals was the jettisoning of the “community standards” test. It was intended that pornography would be subject to an assessment based not on “taste,” but on more objective grounds, although the defenses of scientific or educational purpose, or of artistic merit with respect to sexually violent or degrading pornography, would continue to require a large element of subjective analysis.

The report also set out recommendations with respect to child pornography. Perpetrators of child pornography would be subject to the severest punishment. It would also be an offence to “induce, incite, or coerce” a person under age 18 to participate in any representation of explicit sexual conduct. Significantly, the Committee also recommended an offence, punishable on summary conviction, of being in possession of child pornography. Possession of adult pornography would be an offence only where that possession was for the purposes of sale or distribution.

10 June 1986

The government introduced Bill C-114 repealing the obscenity provisions within the *Criminal Code* and bringing in strict and more objective provisions for a variety of pornographic material. The legislation died on the *Order Paper* in August 1986.

4 May 1987

The government introduced Bill C-54, which constituted a revision of Bill C-114, and proposed amendments to the *Criminal Code* and the *Customs Tariff* that were similar in structure to the recommendations of the Fraser Committee, with some significant differences.

The bill outlined a series of “tiered” offences, the severity of punishment depending on the nature of the material in issue. With the exception of child pornography and pornography showing physical harm, each type of pornography would have been subject to a defense based on artistic merit, or scientific, medical or educational purpose. However, subject to the defenses just noted, Bill C-54 would have prohibited the manufacture, distribution, sale and any other dealing in “simple” pornography, i.e., the depiction of non-violent, non-degrading sex acts involving consenting adults.

Child pornography would have been treated harshly, with the use of persons under the age of 18 in the production of sexually explicit material severely punished. Simple possession (i.e. not for commercial or distribution purposes) would also have been made a summary conviction offence.

In a new departure, dealing in a matter of “commercial communication” that “incites, promotes, advocates or encourages” any of the conduct covered by the definition of the various types of pornography (except simple pornography) would have been made a severely punished offence.

The bill would have incorporated the new pornography standards into offences dealing with theatrical performances and into that provision of the *Customs Tariff* dealing with prohibited imports.

Bill C-54 died on the *Order Paper* when Parliament dissolved on 1 October 1988.ⁱⁱ

21 August 1987

In August 1987, Donald Victor Butler opened the Avenue Video Boutique - a video, magazine and sex toy shop located in Winnipeg, Manitoba.

On August 21, 1987, the City of Winnipeg Police entered the store with a search warrant and seized all inventory. Mr. Butler was charged with various counts of selling obscene material and exposing obscene material to public view.

The trial judge concluded that the obscene material was protected by the guarantee of freedom of expression and that only those materials which contained scenes of violence or cruelty intermingled with sexual activity or depicted lack of consent to sexual contact were legitimately proscribed under s.1 of the *Charter of Rights and Freedoms*.

In a subsequent appeal made by the Crown, the Court entered convictions on all of the counts, concluding that the materials in question fell outside the protection of the *Charter* since they constituted purely physical activity and involved the undue exploitation of sex and the degradation of human sexuality.

The Butler decisions set new standards for the definition of pornography.ⁱⁱⁱ

10 December 1991

The Supreme Court heard the appeal of Ernst Zundel, charged and convicted with promoting hatred and the

denial of the Holocaust. The charge arose out of Mr. Zundel's publication of a pamphlet entitled *Did Six Million Really Die?* The pamphlet, part of a genre of literature known as "revisionist history", suggests that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy. The accused was convicted after a lengthy trial.

In his appeal, Mr. Zundel argued that the charges laid against him constituted a denial of his right to freedom of expression guaranteed under the *Charter*. The Court upheld the conviction and once again clarified the extent of the freedom of expression provision within the *Charter*.^{iv}

13 May 1993

Bill C-128, again dealing with the issue of child pornography was introduced.^v The new bill contained the defense of artistic, scientific or educational merit, but reversed the onus of proof requiring anyone charged under the Act to be able to demonstrate merit on the basis of any of the three grounds. The reverse onus places an inordinate legal and financial burden on the accused. Bill C-128 received Royal Assent on 23 June 1993.

The CCA and other arts organizations expressed concern that the provisions of the legislation could be used against artists, or arts and cultural institutions featuring works as innocuous as Paul Kaine.

The then Deputy Prime Minister, the Hon. Don Mazankowski, assured the CCA and the arts and culture sector that the legislation would never be used against a professional artist or cultural institution.

3 December 1993

On December 3rd, 1993, Toronto police raided Mercer Union art gallery and seized 35 works by Toronto artist Eli Langer. They later charged Mr. Langer under provisions contained in Bill C-128.

On February 24, 1994, police withdrew charges against Mr. Langer and the staff of Mercer Union and decided instead to try the works of art in question through a forfeiture hearing.

Through the testimony of many respected figures in the world of Canadian visual arts, the artistic merits of Mr. Langer's work was validated and on April 20th, 1995, the images were ruled by Mr. Justice David McCombs not to pose a "realistic risk" of harm to children.^{vi}

April 1995

John Robin Sharpe was charged with two counts of child pornography under [s.163.1\(4\)](#) of the *Criminal Code* and two counts of possession of child pornography for the purposes of distribution or sale under [s.163.1\(3\)](#).

Mr. Sharpe contended that the interpretation of child pornography provisions within the *Criminal Code* was a violation of freedom of expression. Mr. Sharpe alleged that the seizure of the material and the subsequent charges were also a violation of his right to privacy.

At issue were drawings and writings about the sexual abuse of children held by Mr. Sharpe in his domicile. There was no evidence that Mr. Sharpe intended to distribute these materials or to share them with others.

The Court noted the issue of potential harm to children from the production of child pornography was at the heart of this case.

In 1999, a B.C. trial judge dismissed the charges, ruling that the law banning possession of child pornography was an unconstitutional breach of the freedom of expression.

The matter was appealed to the Supreme Court of Canada in 2001. The Crown conceded that s. 163.1(4) infringed [s. 2\(b\)](#) of the *Canadian Charter of Rights and Freedoms* but argued that the infringement was justifiable under [s.1](#) of the *Charter*. Both the trial judge and the majority of the British Columbia Court of Appeal ruled that the prohibition of the simple possession of child

pornography as defined under s. 163.1 of the *Code* was not justifiable in a free and democratic society.^{vii}

Mr. Sharpe was convicted for the photographs of real children engaged in sexual activity, but not for his written works, which were works of the imagination and not intended for distribution.

16 March 2000

The Supreme Court heard an appeal from the Little Sisters Book and Art Emporium, the B.C. Civil Liberties Association and others regarding the seizure by Canada Customs of imported materials being shipped to the bookshop on the basis of obscenity.

After a lengthy trial, the trial judge found not only that the Customs officials had wrongly delayed, confiscated, destroyed, damaged, prohibited or misclassified materials imported by Little Sisters on numerous occasions, but that these errors were caused by the “systemic targeting” of the store’s importations.^{viii}

In its’ ruling, the Court rejected the interpretation of Canada Customs and the reverse onus placed on the bookstore to prove that the materials in question were not obscene.

Little Sisters continues to face legal challenges on the materials it imports and the extensive legal costs it has incurred in defense of freedom of expression have led the owners to shut the bookstore’s doors.

8 October 2004

Parliament introduced Bill C-2, proposing a new test for the determination of artistic merit that asked whether a work of art has a legitimate purpose or poses an undue risk of harm to children.

The CCA intervened with the Parliamentary Committee upholding the need to protect children from sexual exploitation, but stressed the importance of maintaining the exception for artistic merit without the encumbrances of tests for legitimate purposes or the undue risk to children.

The amendments were passed by Parliament, receiving Royal Assent on 20 July 2005.

29 October, 2007

Bill C-10; [an Act to amend the *Income Tax Act*](#) dealing with foreign trusts and other taxation issues, received First Reading in the House of Commons on October 29, 2007^{ix}.

Through this bill, the Department of Finance had decided to revise the criteria for the certification of film and video productions for the purposes of receiving a federal tax credit to provide financial support for these ventures.

Amongst the criteria, drafters of the legislation added that to be considered for a tax credit, the production could not be “contrary to public policy.” This clause prompted an outcry not only among the cultural community, but was also taken up by vocal speakers within civil society, including the mayors of Montreal and Toronto.

Several Senators and witnesses have been outspoken about the potential economic damage these four words, “contrary to public policy”, if used retroactively, could render to the film and video production industry in Canada, and the exercise of freedom of expression.

The Senate Committee on Banking Trade and Commerce was in the process of studying the proposed legislation when the election was called in September 2008. During the electoral campaign, Prime Minister Harper stated that the discussed clause will be withdrawn from the bill when it is reintroduced before the Parliament.

ⁱ Casavant, L., Robertson, J.R., [The Evolution of Pornography Law in Canada](#), Law and Government Division, (Revised October 25, 2007)

ⁱⁱ Robertson, J.R., [Pornography](#), Law and Government Division (Revised Sept 2002): <http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/CIR/843-e.htm>

ⁱⁱⁱ *Judgments of the Supreme Court of Canada*; website provided through a collaborative effort of the Supreme Court of Canada and the LexUM laboratory in University of Montreal's Faculty of Law: <http://scc.lexum.umontreal.ca/en/1992/1992rcs1-452/1992rcs1-452.html>

^{iv} *Judgments of the Supreme Court of Canada*; <http://scc.lexum.umontreal.ca/en/1992/1992rcs2-731/1992rcs2-731.html>

^v Robertson, J.R., [Pornography](#), Law and Government Division (Revised Sept 2002): <http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/CIR/843-e.htm>

^{vi} Tracey Tyler, [the Globe and Mail](#), April 21 1995

^{vii} *Judgments of the Supreme Court of Canada*; <http://scc.lexum.umontreal.ca/en/2001/2001scc2/2001scc2.html> , October 15, 2008.

^{viii} *Judgments of the Supreme Court of Canada*; <http://csc.lexum.umontreal.ca/en/2000/2000scc69/2000scc69.html>, October 20, 2008.

^{ix} *LEGISinfo website:*

<http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=5296&Session=15&List=stat>,
October 20, 2009