

## BRIEF OF THE CANADIAN CONFERENCE OF THE ARTS

To: The House of Commons Justice Committee  
Re: Bill C-20

### 1. WHO WE ARE

The Canadian Conference of the Arts ("CCA") is a national, non-profit arts service organization. It is the largest and oldest arts advocacy organization in Canada, with members in all of the provinces, major arts disciplines and cultural industries, including writing, publishing, and the visual arts. As a national advocacy group, the CCA represents approximately 200,000 artists and cultural workers and among its organizational membership are some 400 arts organizations from every artistic discipline and cultural industry. The CCA is appearing before the Committee in this case because freedom of expression is fundamental to artists. We believe that Bill C-20 endangers the fundamental freedom of artistic expression.

### 2. 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.

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 that is 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 freedom of expression "artistic defence". They are expressions of a fundamental aspect of the human condition and their creation harms no one.

### **3. AN EXPANSIVE INTERPRETATION OF "SEXUAL PURPOSE" WILL INFRINGE ON NEW AND EXISTING LITERARY WORKS**

The proposed reform intends to inhibit artistic expressions involving people under the age of eighteen which are created with a "sexual purpose". If it is assumed that "sexual purpose" means describing sexual activities and if the definition is given an expansive interpretation, this change could implicate writers who are working with themes such as coming of age and juvenile sexuality. This could potentially bring books before the courts that have long been accepted as part of the literary canon, for example: Gunter Grass's The Tin Drum; Alice Munro's Lives of Girls and Women and Vladimir Nabokov's Lolita. If, on the other hand, "sexual purpose" is narrowly interpreted, its inclusion is rendered unnecessary as it would be captured by the existing criminal code.

### **4. ELIMINATING THE ARTISTIC MERIT DEFENCE WILL CREATE CONFUSION AND PUNISH ARTISTS**

The CCA opposes the elimination of the artistic merit defence in s.163.1. 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.

### **5. THE PUBLIC GOOD DEFENCE IS AN INADEQUATE REPLACEMENT FOR THE ARTISTIC MERIT DEFENCE**

Although the public good defence has been in the Criminal Code since 1892, it does not have an auspicious history. It is, by its terms, vague. It invites purely subjective assessments resulting in criminal liability being dependent on judicial personal taste. It will inevitably have a chilling effect on the creation of important works of art by Canadian artists. This is so for three reasons.

First, the public good is an inherently subjective concept. In a democracy, free expression itself serves

the public good. It is an end, not a vehicle to producing expressive material consistent with some secondary value.

Second, the enforcement of s.163.1 is subject to the exercise of discretion by the police and the Crown. Neither are equipped to judge whether the "public good" will be served by a particular piece of expressive material. Unlike the courts, the police and the Crown are not obliged to hear all sides before they make their decision. A number of now-notorious examples illustrate the difficulties which face those charged with enforcement and prosecution when they are called upon to make determinations of this nature. A list of those examples which arose in the obscenity context are attached as Appendix "A".

Third, the judgment in Sharpe gave the artistic community the certainty that it was seeking since the enactment of s.163.1 in 1993. Bill C-20 effectively undoes this achievement by replacing artistic merit with its vague and, more subjective cousin, "the public good". The theory that public good can be quantified ignores the experience of artists and promotes only "consensus art" of the most timid variety. The defence will thus be incapable of protecting freedom of expression where it is most necessary. The defence will not apply to that which consensus does not recognize as meritorious - the controversial, the novel, and expression that is not part of the mainstream. The very subjectivity of the term "public good" and the self-limiting definition 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.

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 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 court 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 replacement "public good" defence. As the trial Court found in Langer, one of the purposes of his work was to draw attention to child sexual abuse. Under the definition in Sharpe, Langer could not be prosecuted regardless of the success of his work. Under the public good defence, he could. 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 public good defence, he could. The CCA submits that the artistic merit defence, as defined in Sharpe, should be retained. It protects artists. It protects art. It protects "the culture of the country".