



# Backgrounder

Canadian Conference of the Arts ~ Conférence canadienne des arts

## Canadian Conference of the Arts' Backgrounder on Bill C-20

Bill C-20, an Act to amend the Criminal Code for the protection of children and other vulnerable persons, was introduced to the Standing Committee on Justice and Human Rights on September 25th by Justice Minister Martin Cauchon. The Committee is now in the process of calling witnesses and is rushing to pass the Bill as the House is rumoured to be slated to rise on November 6th. This Bill contains clauses that will cast a chill over Canadian artists and in cases of artists working with themes of young people and sexuality, may criminalize their work. The **Canadian Conference of the Arts (CCA)**, the **Writers Union of Canada**, **Union des écrivains du Québec**, and the **Canadian Artists Representation (CARFAC)** are all appearing as witnesses before the Justice Committee in the coming week to persuade them that the Bill must be amended to provide for the defence of artistic merit.

While arts groups support new measures to protect children from pornography, sexual exploitation and the trauma of testifying against their aggressors, the Bill reaches further than necessary in targeting work depicting young people in sexual situations without making allowance for the fact that such work may have artistic merit, or an educational, scientific or medical purpose.

The proposed changes appear to be motivated by the controversial case of John Robin Sharpe, the B.C. pornographer, where the Supreme Court of Canada ruled in 2001 that it was not an offence under the law to possess material produced from one's own imagination for one's personal use. In urging politicians not to over-react, it must be pointed out that Sharpe was indeed convicted on charges relating to the pornography he possessed, for which he is serving time in jail. The current criminal code functions adequately to convict pornographers while allowing for the defence of artistic merit and the right of individuals to possess in privacy the products of their own imaginations.

While the Bill makes excellent proposals for amending the Criminal Code to further protect children from particular types of abuse, the proposed legislation contains terms that will severely curtail artistic freedom of expression. It effectively removes the defence of artistic merit from the assessment of what constitutes pornography and replaces it with a defence based on the nebulous notion of "public good". It is also worth emphasizing that Parliament should be wary of passing legislation that will run afoul of the Supreme Court which in the past has demonstrated that it understands artistic endeavours to be directly related to the core values that the *Canadian Charter of Rights and Freedoms* guarantee of freedom of expression is intended to protect.

The proposed reform, to quote the Department of Justice press release, "would also expand the existing definition of written child pornography to include material that describes prohibited sexual activity with children, where the description is the predominant characteristic of the work and it is done for a sexual purpose". Specifically, the current proposal is to remove the existing defense in cases of child pornography (paragraph 163.2 of the Criminal Code) which reads:

*"... the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose."*

And replace it with:

*"No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence, or if the material related to those acts that is alleged to contain child pornography, serve the public good and do not extend beyond what serves as the public good."*

The Bill can be found, in its entirety, at:

[http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-20/C-20\\_1/90207bE.html](http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-20/C-20_1/90207bE.html)



**Other background references include:**

[www.parl.gc.ca/JUST](http://www.parl.gc.ca/JUST)

List of Members of the Justice Committee and Meeting Schedules

[www.ccarts.ca/eng/01new/01\\_03billc20\\_e.html](http://www.ccarts.ca/eng/01new/01_03billc20_e.html)

CCA's and CARFAC's brief

[www.writersunion.ca/justice.pdf](http://www.writersunion.ca/justice.pdf)

The Writers Union of Canada's brief

[www.bccla.org/othercontent/c20children.html](http://www.bccla.org/othercontent/c20children.html)

The B.C. Civil Liberties Association's brief

[www.cbc.ca/news/indepth/background/sharpe\\_pornography.html](http://www.cbc.ca/news/indepth/background/sharpe_pornography.html)

(CBC backgrounder to the John Robin Sharpe case)

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**\* KEY MESSAGES \***

***1. BILL C-20 IS AN ATTACK ON THE FREEDOM OF EXPRESSION OF ARTISTS IN THIS COUNTRY, AND OF CANADIANS IN GENERAL***

- Under the Canadian Charter of Rights and Freedoms, Canadians from all walks of life have the right to freedom of expression; Bill C-20, as currently drafted, would curtail that right for artists

We believe this legislation, as currently drafted, will result in frequent challenges under the Canadian Charter of Rights and Freedoms at the Supreme Court of Canada. An expansive interpretation of "sexual purpose" will infringe on new and existing artistic works (including literature, visual art, film, and theatre).

- Artists from all disciplines who innocently create works on themes relating to young people and sexuality, risk having their work criminalized. The effect would be to cast a chill over the country, causing artists to censor their own works. The last time artists in the Western world experienced such a crackdown of freedom of expression was in the United States during the McCarthy era.

We believe Bill C-20 will jeopardise the rights of artists to create freely. Elimination of the artistic merit defence will not eradicate sexual abuse of minors nor will it prevent child pornography; it will only serve to create confusion among the public and punish artists whose works, created in good faith, could be deemed in contravention of the new legislation.

- Under this legislation, artists whose work contains such themes would be deemed to be guilty until they can prove themselves innocent of the charge (reverse onus).

Under the legislation, as drafted, artists risk personal, professional, and financial ruin if charged with a criminal offence. They also risk personal humiliation by having to defend work made in the honourable tradition of artistic enquiry.

***2. THE LEGISLATION AS PRESENTED IS POORLY CRAFTED***

- Replacing the defence of "artistic merit" by the phrase "public good" is inadequate. This is a very subjective notion, one which we feel has not been adequately defined. The Department of Justice states it has taken its definition of "public good" from the Supreme Court of Canada's
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## CCA Backgrounder — continued

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ruling in the John Robin Sharpe case. In paragraph 70 of this ruling, the Supreme Court states that "The public good defence has received little interpretation in the obscenity context, and a precise definition of its ambit is beyond the scope of this appeal".

We believe the term "public good" used in the legislation has not been adequately defined by the Department of Justice, and feel the "public good" defence is an unacceptable substitute for the defence of artistic merit. We believe the use of this phrase will result in frequent challenges under the Canadian Charter of Rights and Freedoms at the Supreme Court of Canada.

- Removal of the defence of artistic merit would affect how police, prosecutors and ultimately the courts would interpret child pornography, putting works of art and literature at greater risk than they already are.

We seek a reframing of the legislation to better protect children while allowing artists the freedom to create.

- Having an artistic purpose does not provide *carte blanche* to offend.

We believe the retention of the defence of artistic merit in the criminal code will better serve the people of Canada.