Protecting "Pursuits that Relate to the Culture of the Country": Advocating for the Artistic Merit Defence in Bill C-12

Frank Addario
Sack, Goldblatt, Mitchell, attorneys at law

Megan Davis Williams
Canadian Conference of the Arts

James Missen
Canadian Conference of the Arts
School for Studies in Art and Culture, Carleton University

The Canadian Conference of the Arts (CCA) is a national, non-profit arts service organization based in Ottawa. 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 and media 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 believes that Bill C-12 (formerly C-20), an Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, endangers Canadians' fundamental rights to free expression. The CCA initiated an on-going public advocacy campaign, in which Canadian artists such as John Greyson, Richard Fung, Luis Jacob, Penny McCann, Ian Murray, Andrew J. Paterson and others spoke out against the draft

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Frank Addario is a lawyer with the Toronto firm Sack, Goldblatt, Mitchell. His practice focuses on criminal trial and appellate litigation and all forms of Charter litigation, with an emphasis on freedom of expression matters. He has argued numerous cases, including *Ontario v. Langer* and *Little Sister's Book and Art Emporium v. Canada*.

Megan Davis Williams has spent her life working in the arts as both artist and administrator and has been the National Director of the Canadian Conference of the Arts since 1998.

James Missen is the CCA's Cultural Policy Intern and is also a Sessional Lecturer in the School for Studies in Art and Culture at Carleton University. He has previously published in collections such as the journal *Public* and is a programmer and teacher of artists' video and film.

legislation in letters addressed to Members of Parliament. News stories on our concerns with Bill C-12 appeared in sources as varied as the CBC, the Sun newspaper chain and *Xtra,* and our opinions were also taken up in February 2004 editorials by the *Globe and Mail* and the *Ottawa Citizen.*

The CCA contends that all artistic endeavours relate directly to the core values that the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms is intended to protect, including the pursuit of truth and individual self-fulfillment. Art is indispensable to any democratic society as a form of expression that 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 Canadian courts in defining the breadth of freedom of expression in this country. Even before the advent of the Charter, 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 section 2(b) of the Charter of Rights and Freedoms (Reference re: sub-section 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* and Vladimir Nabokov's *Lolita,* widely considered as masterpieces of

20th century literature, are recognized as such not only because of their innovative use of language and narrative form, but also because of the candour and directness with which their sexually-charged subject matter is addressed. Well-known visual works, such as Michaelangelo's *David* and *The Last Judgement,* Goya's *Nude Majar,* and Manet's *Le Déjeuner sur L'herbe* all depict nudity or sexual themes. All of these art works caused scandal and challenged prevailing community values at the time of their creation and were the subject of censorship attempts by customs seizures, detention, destruction of the work, "draping" requirements, or threatened with criminal obscenity charges.

History is filled with accounts of attempts to regulate sexual expression that 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 merit 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 artistic merit defence applies not only to existing works, but to works which are being contemplated … 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 aimed at preventing harm to actual minors that is a direct result of criminal activity. 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, literary and visual representations involving teen sexuality, so-called "coming of age" books and films (such as John Greyson's Genie award-winning 1995 feature *Lilies* or Susan Swan's 2002 novel *The Last of the Golden Girls*), published diaries of teenage sexual experiences (such as the works of Evelyn Lau), classical and neo-classical paintings (such as the paintings of Paul Peel, which hang in the Art Gallery of Ontario), 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 merit defence." They are expressions of a fundamental aspect of the human condition and their creation harms no one and are, thus, not criminal offences.

The proposed reform intends to inhibit artistic expressions involving people under (or depicted to be under) the age of 18 that are created "for a sexual purpose." If it is assumed that "for a sexual purpose" means describing sexual activities and if the definition is given an expansive interpretation, this change could criminalize the works of any Canadian artist who addresses themes such as "coming of age" and juvenile sexuality, not to mention criminalizing Canadians who merely possess or distribute those works, such as museums, libraries, schools, or galleries. If, on the other hand, "for a sexual purpose" is narrowly interpreted, its inclusion is rendered unnecessary, as it would be captured by the existing Criminal Code. Further, if the current Bill were to pass as drafted, numerous scenarios would ensue wherein Canada's police and courts would be left with vague language in order to interpret what creative and artistic works may or may not constitute "child pornography." For example, any Canadian teenager over the age of consent of 14 could face criminal charges if s/he decided to express her/his own personal experiences of a legal sex act with another teenager in the form of writing, painting, film, or song. This is the type of legal "Pandora's box" that C-12 would open and the CCA finds this unacceptable.

More alarming to the CCA is the proposal to remove the existing defense in cases of alleged 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." Thus, a reverse onus is placed on the accused artist whereby s/he must not only prove objectively that their creative work in question not only *serves* the public good, but it does not *exceed* the limits of the public good. Former Justice Minister Martin Cauchon practically conceded that the "public good" was a vague concept when he defined it during question period following his September 2003 testimony to the Standing Committee as "the standards of society." The CCA contends that the very notion of public good in this context runs contrary to "the standards of

(Canadian) society" because, in a democracy, freedom of expression *serves* the public good and is an end in itself, not the other way around.

The CCA opposes the elimination of the artistic merit defence in section 163.1 of the Criminal Code of Canada. Eight years after section 163.1 was inserted in the Criminal Code, the Supreme Court gave an extensive definition of the artistic merit defence in its 2001 ruling on the case of British Columbia pornographer John Robin Sharpe. The CCA was greatly relieved by this development, as the Supreme Court's definition is broad enough to ensure that 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 real children. Its effectiveness is best exemplified by the Sharpe case itself, wherein he was in fact tried, convicted, sentenced and served time for the crimes he did commit, namely the criminal possession and distribution of sexual images of actual children, but was acquitted of charges related to writing works of his imagination.

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Although the public good defence has been in the Criminal Code since 1892, it does not have an auspicious history. Replacing the defence of "artistic merit" by the phrase "public good" is inadequate; it is a vague and subjective notion, one which the CCA feels has not been adequately defined. The Department of Justice stated it has taken its definition of "public good" from the Supreme Court of Canada's ruling in *Sharpe*. However, 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." The defence 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 section 163.1 is subject to the exercise of discretion by the police and the Crown. Neither is 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 that face those charged with enforcement and prosecution when they are called upon to make determinations of this nature, the most infamous of them in Canada involves the Little Sister's Bookstore case in British Columbia, though a more recent incident involves the 2002 Halifax, Nova Scotia seizure of a video installation by artist Lyla Rye.*

Third, the judgment in Sharpe gave the artistic community the certainty that it was seeking since the enactment of section 163.1 in 1993. Bill C-12 effectively undoes this achievement by replacing artistic merit with its vague and subjective cousin, "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, in fact, most necessary. The defence will not apply to that which the consensus majority does not recognize as having merit—the controversial, the novel, the transgressive, 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 in the mid-1990s 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 section 163.1. Langer's illustrations, on display at the Mercer Union gallery, depicted young persons who appeared to be under the age of 18 engaged in sexual activity, in some cases with adults, and 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 section 163.1 today because the defence of artistic merit, as defined in the 2001 Sharpe decision, 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

* Editor's Note: For more analysis of the Rye incident, see Natasha Hurley's contribution to this forum, pp. 40–51.

attention to child sexual abuse and concluded, "Although the subject matter of the paintings and drawings is shocking and disturbing, the work as a whole is presented in a manner that is not intended to celebrate the subject matter. In other words, the purpose of the work is not to condone child sexual abuse, but to lament the reality of it." 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 asserts that Bill C-12 needs to be amended and positioned so that while it protects living children from sexual predators, it will also provide future generations with their Charter rights to freedom of expression. Elimination of the artistic merit defence will not eradicate the sexual abuse of minors, nor will it prevent child pornography from being produced and distributed; 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. The CCA submits that the artistic merit defence, as defined in *Sharpe,* should be retained. It protects artists. It protects art. It protects "pursuits that relate to the culture of the country."