Submission of the Writers' Union of Canada to The Standing Committee on Justice and Human Rights on Bill C-20

August 28, 2003

The Writers' Union of Canada is a national organization representing approximately 1500 book writers. Its objectives include protection and advancement of freedom of expression.

We have serious concerns regarding certain provisions of Bill C-20, An Act to amend the *Criminal Code.* While we strongly support the overall purpose behind the legislation—to protect children from sexual exploitation and abuse—we believe that the child pornography provisions of Bill C-20 are a misguided attack on freedom of expression and an infringement of the *Canadian Charter of Rights and Freedoms* that is unacceptable to a free and democratic society. In 1993 the Writers' Union made representations against Bill C-128, which introduced Section 163.1 into the *Criminal Code* and for the first time created an offence that dealt specifically with child pornography. In a press release following passage of that legislation through the House of Commons, Myrna Kostash, then chair of the Writers' Union, called unsuccessfully on the Senate to defeat the legislation:

> Government should focus its energies on making laws which prevent harm to real children who are hungry, poor and sexu-

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Written for The Writers' Union of Canada by its legal counsel, Marian Hebb. Reprinted with permission.

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> ally exploited and not try to hoodwink the public into believing that censorship laws in any way address these problems. The government has taken advantage of the public's concerns about these issues by ramming through poorly drafted, ill-considered legislation.…

This is happening yet again with Bill C-20, which purports "to close loopholes" in the child pornography law enacted in 1993 by deleting from the legislation the defences of artistic merit and educational, scientific or medical purpose. We have no quarrel with the law protecting real children. It should do this and it does. Already, before the enactment of legislation specifically dealing with so-called child pornography, in its 1992 landmark case on the test for obscenity, *R. v Butler,* the Supreme Court of Canada focussed on the risk of harm to vulnerable women and children and excluded certain material generally tolerated by the community from the definition of obscenity (within the meaning of the *Criminal Code* offence) but not where real children were involved in its production. The real problem is not that Canada has laws that are inadequate to protect children from sexual exploitation and abuse, but rather that Canada has inadequate strategies and insufficient resources to support the police in dealing with danger to real children.

Police forces have called for a national strategy on child pornography, complaining that local forces are usually overwhelmed and inexpert and cannot launch complex technical investigations, and officials of the Criminal Intelligence Service of Canada are swamped by calls from police for help in investigating Internet child pornography.[1] University of Toronto philosophy professor and pornography specialist Wayne Sumner has said: "I don't see any defect in the laws on the books at the moment. The law is just fine. The question is how effectively it can be enforced."[2] We share this view.

We submitted, when it was introduced, that Section 163.1 was an infringement of freedom of expression under the *Canadian Charter of Rights and Freedoms.* This existing child pornography legislation already has a chilling effect on expression, as authors and other creators tend to engage in self-censorship to avoid possible prosecution when writing or depicting characters who are under 18. By restricting or removing altogether the defences of artistic merit or educational, scientific or medical purpose, currently available to a person accused of a child pornography

1 *The Globe and Mail,* January 18, 2003.

2 *Ibid.*

The Writers' Union of Canada is the national organization for authors of fiction, non-fiction, poetry, history, essays and children's books, with a membership of some 1,500 professional published authors of trade books. Founded by writers for writers, it fosters a spirit of professionalism and self-respect among writers and provides business advice and professional support to members. The union, since it's inception in 1973, has worked continuously to improve the rights and condition of all writers in Canada.

offence, and by expanding the definition of "child pornography" to include written descriptions of certain acts that are offences under the *Criminal Code,* Bill C-20 will make the existing child pornography legislation even more intolerable to a free and democratic society.

What is "Child Pornography"?

"Child pornography" is very broadly defined in the existing legislation. The definition currently has three branches and Bill C-20 will add a fourth.

First and most problematic, the existing definition includes visual representations that show a person who is or *who appears to be* under the age of 18 engaged in or *depicted as* engaged in explicit sexual activity. Notwithstanding that there is currently a defence of artistic merit, we are already concerned about how this might affect a stage or film production of works such as *Lolita, Romeo and Juliet* or *Westside Story, The Tin Drum,* or—closer to home—stories by Alice Munro, Margaret Laurence's *The Diviners* or Margaret Atwood's *The Handmaid's Tale.*

The second branch definition of "child pornography" in Section 163.1 includes visual representations "the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region" of a person under the age of 18 years. Unlike the general obscenity section, child pornography is not viewed in the context of community standards of tolerance.[3] Although identification of the "dominant characteristic" in subparagraph (a)(ii) of subsection 163.1(1) echoes the language in subsection 163(8) defining the general obscenity offence, obscene matter is related to "undue exploitation of sex, or of sex and any one of the following subjects, namely, crime, horror, cruelty and violence." This language has allowed the courts to consider community standards of tolerance when considering whether an accused is guilty of an obscenity offence. In *R. v. Butler* the Supreme Court set out a test of "internal necessities"—requiring the sexually explicit material that would constitute "undue exploitation" to be viewed in context to determine whether it was the dominant theme of the work as a whole. However, this test of internal necessities is not applicable

3 *R. v. Sharpe* (2001) per McLachlin. This was an appeal from a British Columbia case in which both the trial judge and the B.C. Court of Appeal ruled that prohibition of possession of child pornography under Section 163.1 of the *Criminal Code* was not justifiable. However, the Supreme Court allowed the appeal and returned the case to British Columbia for trial. The accused was then found guilty on two of the four counts against him but not with respect to charges that certain written material advocated or counselled the commission of sexual crimes against children. The trial judge went on to say that if he erred in this finding, the accused would be successful in his defence of artistic merit.

to child pornography offences. Only the reference to depiction "for a sexual purpose" may serve to narrow a little the scope of this branch of the definition of child pornography. Nevertheless it will sometimes be difficult to distinguish between sexual and artistic purpose, and even more so, if the defence of artistic merit has been deleted from the offence altogether.

The third branch of the existing definition of "child pornography" is "any written material or visual representation that advocates or counsels sexual activity" with a person under the age of 18 that would be an offence under the *Criminal Code.* While we strongly oppose the encouragement of such offences, we are acutely aware that there have always been and will be some persons in our society who feel strongly that exposure to certain books are tantamount to advocating certain actions or lifestyles, as seen for example in the furor over D. H. Lawrence's *Lady Chatterley's Lover* or in the constant debates involving parents, teachers and school boards over the contents of school libraries and curricula. Already under the existing law, a court needs to find that the material sends the message that sex with children could and should be pursued. We have previously wondered if a sympathetic portrait of a character who commits legal wrongs would lead a court to conclude that the writer is advocating the behaviour. Common sense says not, but this law is open to such an interpretation.

The proposed fourth branch is overkill in a definition that is already very broad and uncertain in meaning. If Bill C-20 passes, child pornography as defined by the *Criminal Code* will also include "any written material the dominant characteristic of which is the description, for a sexual purpose, of sexual activity" with a person under the age of 18 that would be a *Criminal Code* offence. The amended definition will create an offence based on mere descriptive language. Its broad wording targets written material that would encompass and surpass the third branch. Teenagers engaging in sexual activity is a fact of modern society and is a frequent theme of literature, past and present.

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The Existing Artistic Merit Defence

The Supreme Court of Canada in *R. v. Sharpe* decided that offences in Section 163.1 infringe the *Canadian Charter of Rights and Freedoms.* However, it also held that the child pornography law, even where it affected works of the imagination rather than depictions of actual people, is a reasonable and demonstrably justifiable limitation on freedom of expression, went on to remove two classes of activity from the offence of possession of child pornography, and pointed to the existence of certain defences including artistic merit. Broadly interpreted this may mean that the defence is

applicable where a work is produced within the context of accepted artistic conventions and, more narrowly interpreted, that good art is acceptable as opposed to bad or valueless art. Under the existing law, the defendant has to produce evidence that his or her work has artistic merit, and it is then for the Crown to disprove this defence. Bill C-20, if passed, will remove this defence and make publication or stage or film production of some stories increasingly risky enterprises, for example, coming of age stories. If convicted, a publisher or filmmaker, as well as the writer, may be imprisoned for up to 10 years.

Does a Work Serve the "Public Good"?

If Bill C-20 is passed with the defences of artistic merit and educational, scientific or medical purposes removed, the single defence remaining will be that the acts alleged to be child pornography "serve the public good and do not extend beyond what serves the public good." It is important to realize that it is the defendant who must demonstrate that there are facts that show that the work serves the public good. The Crown then has the opportunity to disprove the defence, which is currently part of Section 163, the general obscenity provision, but also applicable to Section 163.1 on child pornography. The definition of the "public good" accepted by the Ontario Court of Appeal in a 1957 obscenity case was something "necessary or advantageous to religion or morality to the administration of justice, the pursuit of science, literature or art, or other objects of general interest."[4] Even if a work apparently contributes to the pursuit of literature or art, it would be difficult for a court to find a work of literature or art to be for the public good if Parliament had deliberately amended child pornography offences to remove the defence of artistic merit.

Interpreting the Law

All branches of the definition except the first branch involving visual representation of characters under 18 engaged in explicit sex require courts to engage in some analysis of purpose when determining whether an offence has been committed. It is therefore appropriate to look at the purpose of material, but determining purpose cannot be relied on to protect freedom of expression. We submit that the defence of artistic merit must remain available to the accused person. As the majority in the Supreme Court of Canada in *R. v. Sharpe* commented, material, when viewed objectively,

4 *R. v. American News Co. Ltd* (1957) took this definition from *Stephen's Digest of Criminal Law.*

may serve a purpose other than the purpose for which the accused actually holds it. The possessor may or may not be the maker of the material, or a court may determine that the material has more than a single purpose. Even an artistic purpose does not provide carte blanche to offend. Although the offence in question was very different, the Ontario Court of Appeal has recently ruled that the torture of a cat by an art college student was not art, but rather torture for torture's sake.[5]

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In *R. v. Sharpe* the Supreme Court of Canada focussed on the prevention of harm to children, but declined to interpret the existing child pornography law to exclude children that are creatures of the imagination. Weighing the cost to freedom of expression of prohibiting materials constituting child pornography against the risk of harm to children, the majority of the Supreme Court including Chief Justice McLachlin carved out of the offence of possession of child pornography specific sorts of possession that present little or no risk of harm to children. The minority of the Court did not narrow the possible scope of the offence in this way but placed importance on the availability of the defence of artistic merit.

We submit that the proposed removal of the defence of artistic merit from Section 163.1 would affect how police, prosecutors and ultimately the courts would likely interpret both the existing and added paragraphs of the definition of child pornography—clearly putting works of art and literature at greater risk than they already are. Courts rely on the evolution of legislation to assist them in interpretation.

> It is presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify the meaning, to correct a mistake, to change the law.…When two successive versions of a provision are compared to one another, it is often apparent that a substantive change was intended.… Examining successive amendments to legislation often reveals the direction in which a legislative policy is evolving.[6]

If Parliament deliberately removes the defence of artistic merit, courts will not be willing to interpret "the public good" to include a defence involving artistic merit or purpose.

5 *National Post,* June 14, 2003.

6 *Drieger on the Construction of Statutes,* 3rd edition by Ruth Sullivan (Toronto and Vancouver, 1994), pages 450–452.

Motivation Irrelevant?

Subsection 163.1 (7)(c) of the proposed revision states that the motives of the accused are irrelevant. This paragraph repeats a provision of Section 163 which was already applicable to the existing child pornography offences. However, we are surprised and dismayed that it is included in the revised legislation since several decisions have already found that it infringes the *Canadian Charter of Rights and Freedoms* and is unconstitutional in treating the accused person's motives as irrelevant, in particular where the accused has made an honest and reasonable mistake of fact. To take a practical example, teachers and librarians are potentially at risk as possessors or distributors of material alleged to constitute child pornography, along with the writers and other artists who have created the material.

Summary

We believe that the proposed changes to the child pornography provisions of the *Criminal Code* set out in Bill C-20 are overbroad and infringe the *Canadian Charter of Rights and Freedoms.* They will greatly increase the likelihood of the arbitrary exercise of prosecutorial discretion to lay charges against creators of written and visual material falling within a broadened definition of child pornography, particularly without the existing defence of artistic merit. Our greatest concern is that the sole remaining defence of the public good will not be interpreted by courts to encompass a defence of artistic merit or purpose because Parliament has deliberately chosen to remove this defence from the existing legislation.

We submit that the proposed changes to the law will lead to increased self-censorship by writers and other artists and cast a chill on expression of ideas. This is unacceptable to a society that values freedom of expression and we call on Parliament to remove these amendments to Section 163.1 of the *Criminal Code* from this important Bill intended to address the vulnerability of children to exploitation.

All of which is Respectfully Submitted
On Behalf of the Writers' Union of Canada
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