House of Commons
CANADA

Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

JUST • NUMBER 027 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Tuesday, April 5, 2005

Chair

The Honourable Paul DeVillers

Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

Tuesday, April 5, 2005

● (0900)

[*English*]

The Chair (Hon. Paul DeVillers (Simcoe North, Lib.)): I call the meeting to order. This is a meeting of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. We're continuing our study of Bill C-2, an act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canadian Evidence Act.

We have witnesses with us today. On the agenda, members will see we have other business. We've received three motions, and in addition to that I'd like to have a session to discuss the witness list for Bill C-17 when we commence that study. I'd like to suggest that we arrange a special planning meeting when we can discuss these issues without trying to cram it in in the last two or three minutes before another committee is coming in to take over the room. I'd ask the clerk to try to find a convenient time and work it out with the offices, perhaps Wednesday at 3:30 or something of that nature. In deference to our witnesses to not cut their time short, that's what I'd suggest, and I'd look for consent from the members to do that. Are we agreed?

Some hon. members: Agreed.

The Chair: We'll commence then with our witnesses.

We have with us, from the British Civil Liberties Association, Mr. John Dixon, the vice-president; and from the Centre for Children and Families in the JusticeSystem we have Pamela Hurley, the director. Welcome.

[*Translation*]

We will also hear Mr. Marc David, Chair of the National Criminal Justice Section of the Canadian Bar Association,

[*English*]

and Tamra L. Thomson, director, legislation and law reform.

The Writers' Union don't appear to have arrived yet, but when they do arrive, we've had confirmation that from the Writers' Union of Canada, Mr. Bill Freeman, chair, and Marian Hebb, a representative, will presumably be joining us later.

I'd ask each of the witnesses to give us a presentation of approximately ten minutes, and then we'll go to questions from the members.

Mr. Dixon, you may commence with a presentation of roughly ten minutes.

Dr. John Dixon (Vice-President, British Columbia Civil Liberties Association): Thank you very much, Mr. Chairman.

Although I would love to be president of the British Civil Liberties Association, because I'd have a lot more constituents, I'm president of the British Columbia Civil Liberties Association.

In order to make the most of my time and be concise, I'll read some comments, and then if I have some time, I'll add some things. I'm going to concentrate on the de-invigoration of the artistic merit defence, which is what I'm most concerned to bring to your attention.

Bill C-2 aims, among many other things, to weaken the defence of artistic merit that is presently available to an accused who is charged with the possession of child pornography. The motive for this is clearly public outrage at the acquittal of John Robin Sharpe on possession charges in reference to his fictional stories, which the trial judge decided were innocent because they had the characteristics of art, to wit, literary art. So the government is under political pressure to meet public criticism of Sharpe's acquittal with legislation that changes the law in a way that would almost certainly have made that acquittal impossible.

All of this occurs in a climate of general ignorance of the actual content of the possession of child pornography statutes, ignorance of the constitutional faults found with those statutes by the lower courts, and most importantly, ignorance of the extraordinary measures taken by the Supreme Court of Canada to save the law dealing with possession of child pornography by rewriting it. Almost no one makes the crucial distinction between a crime of publishing child pornography and the crime of merely possessing it. Fewer still are sensitive to the crucial distinction between photographs and videos that are made possible through the sexual abuse of an actual child, and poems, paintings, stories, essays, and sculptures that are the work of the imagination, and are not the product of the abuse of anyone. And many do not even distinguish between laws that prohibit child pornography and laws that prohibit the actual sexual exploitation of children.

Finally, only a very small proportion of the public ever noticed that Mr. Sharpe, when sent back to trial, did not escape conviction on several counts of possessing pornographic photographs.

The original conception of the child pornography law, that is, when it was originally conceived in the early 1990s, during the ministry of the Honourable Kim Campbell, was limited to the criminal prohibition of photographic, video, or any other representations made possible by the sexual abuse of actual children. It was to be a law appropriate to Canada's signing of the International Convention on the Rights of the Child in 1990, uniting Canadians around the shared goal of protecting real children, in whatever jurisdiction, from sexual abuse.

It was also conceived as a bargaining counter in the attempt to obtain the consent of the family caucus of the Progressive Conservative Party to the inclusion of protections for gay persons in the Canadian Human Rights Act , which was due for modernization. The minister at the time, the Honourable Kim Campbell, and her deputy, Mr. John Tait—who I had the honour to serve at that time as a policy adviser—were mindful of the remarkable character of a law that prohibited the mere possession of expression materials and insisted on a tight focus on the goal of protecting actual children, while carefully avoiding turning the law into a freedom of expression culture war.

It quickly became apparent to them, however, in their consultations with the family caucus and religious groups, that once the possibility of child pornography legislation was on the table, it was impossible to control the agenda and retain the desired focus, so they shelved their work on the law. It was, however, introduced by a later Minister of Justice on the eve of a general election in what may be presumed to be an effort to unify the different factions within the Progressive Conservative caucus at that time.

As had been feared, it was impossible for the Department of Justice to manage the ensuing committee hearings and votes in the Commons, and the process became one in which parliamentarians vied to position themselves as more solicitous than any of their colleagues in the protection of the sexual innocence of young Canadians. Focus on the agenda of protection of real children was lost as the law's force was broadened to include all manner of works of the imagination.

● (0905)

Many realized at the time that much of what was added would not survive constitutional scrutiny, but the attitude, not unusual to the remarkable circumstances of a general election, was to discount that as a small price to pay for the immediate political credit to be gained.

When the inevitable constitutional scrutiny occurred in the case of John Robin Sharpe, the overbreadth of the law resulted in its being struck down by the B.C. Supreme Court, which then had its decision upheld by the B.C. Court of Appeal. When the case then came to the Supreme Court of Canada, there was enormous pressure on the court to “save the children” from the depredations feared by those who foolishly regarded the striking down of a possession of pornography law as the sweeping aside of all legal prohibitions on the sexual use of children.

In this atmosphere the Supreme Court strove mightily to save the law, and did so by reading down the “breadth of materials” attack to it and reading up the “defences available to the accused”, principally in its invigoration of the artistic merit defence. And I'm speaking particularly of Madam Chief Justice of Canada Beverley McLachlin's treatment of artistic merit in the special context of possession of child pornography.

Key among these moves was a liberal interpretation of the artistic merit defence. This was regarded as crucial by the court to remedying the faults of the law, which led to its being struck down at the lower courts. With its saving amendments and clarifications in place, the Supreme Court then reversed the lower courts and upheld the possession of the child pornography law. Sharpe, as you know, was then sent back to trial in British Columbia, where he was convicted for the photographs that showed the sexual use of children under the age of 17, and was acquitted in connection with his stories on the artistic merit defence.

Perhaps of greatest concern to the B.C. Civil Liberties Association is the extent to which the passage of this legislation will expose the Supreme Court of Canada to irresponsible and ill-informed public pressure. As I already noted, the Supreme Court of Canada made it clear in the Sharpe case that it was clarifying the importance and scope of the artistic merit defence because it felt that a statute that criminalized the mere possession of expression materials presented a greater threat to freedom of thought than do the ordinary obscenity provisions, which apply only to published materials.

Now, Parliament is considering sawing off the very branch upon which it sits with its law, a branch provided for it by a sympathetic Supreme Court mindful of its duty to show, up to a point, diffidence towards the law-making authority of Parliament. If this Robin Sharpe law is passed, there will surely be cases that test its constitutionality, and the Supreme Court will then face a Hobson's choice: it can act responsibly, consistent with its past decisions in Butler, in Little Sister's, and in Sharpe, when those cases appeared before it, strike down the provision, and then listen to opportunistic parliamentarians provoke the ire of the public with cries of judicial activism; or it can duck, sigh, give the new law a pass, inviting a new age of foolish prosecution of artists, writers, and diarists on the basis of whatever is discovered in their desk drawers, closets, or computers.

If we think that parliamentarians are incapable of such irresponsible partisanship, we need only recall Mr. Harper's attack upon Mr. Martin as being in favour of child pornography on the grounds that he had not rushed to amend the statute in the wake of the Sharpe trial. And if we think real art will somehow be safe, we need only recall that the very first prosecution under the child porn statute saw the Ontario police raiding an art gallery.

I want to speak very briefly about why possession of expression material is such a big deal.

If you're a student of English common law, you know that the great fruit of the Reformation and the Renaissance was getting the church and the state out of what they really liked, which was finding thought before it became words, finding things in the mind before they could possibly become acts. And the Inquisition and the state regarded the contents of people's drawers, and certainly the contents of their mind, as perfectly legitimate targets of state and church censure.

● (0910)

The great achievements of the Reformation and the Renaissance were the sequestering of state and ecclesiastical authority to concern itself with what people said, what they published, what they distributed, and what they did, keeping out of what they thought, what they had in their diaries, and what materials they merely possessed and did not publish.

If you're in this business, you'll know the cheapest thing the government can ever do is make tons of laws. When you can't do anything else, make some laws.

What is really hard to do, and I regard as very difficult to do, is attack actual child pornography. What child pornography means to Canadians is pictures and videos of people doing it with kids. At this point in history there is a lot of that on the Internet.

The purpose of the original child pornography law was to give Canadians at least the beginnings of a focused statutory instrument to target that. It would require an enormous amount of cooperation with other jurisdictions, but the beauty of a law that makes it a criminal offence to possess a photograph or a video representation of an actual child is that it acts to actually remove at least some of the motive for using children to make such representations, even if they're in some other jurisdiction, in Thailand or elsewhere in Asia, for example. If there's a market for this crap in North America, they will use kids there.

One of the ways to stop them doing that is to make it symmetrical with the possession of stolen property, which is how we originally conceived this bill. We don't let people who know the property is stolen possess it legally because we see it as an extension of the crime of theft. We sensibly see photographs and videos that are representations of the sexual use of actual kids as an extension or continuation of their abuse and legitimately criminalize the mere possession of them. If you stick to that focus, you can actually do something.

Then you can go on to pouring your money into actually working on the prevention of the use of children for this, but then we're into, as I suggested, a freedom of expression culture war.

Thank you.

● (0915)

The Chair: Thank you, Mr. Dixon.

I'm sure you'll have the opportunity to give us more of your views. I'm sure many of the questions will be directed to you.

We'll go to Ms. Hurley, from the Centre for Children and Families in the Justice System, for approximately ten minutes.

Ms. Pamela Hurley (Director, Child Witness Project, Centre for Children and Families in the Justice System): Thank you.

Good morning. Bonjour. I'm honoured to have the opportunity to speak before the committee today. I'm presenting this brief on behalf of the Child Witness Project of the Centre for Children and Families in the Justice System. We are in London, Ontario. The brief will focus on the procedural reforms proposed in Bill C-2, and in particular will address the proposed changes to section 486 of the Criminal Code.

A brief history of why I'm bringing this information today is we have worked for over 18 years with children who have been witnesses and victims, and who have testified in the court system. Since 1988 the program has provided court preparation services to over 1,000 children, and has maintained a database on 3,000 children that captures their experiences in the justice system from the time a charge has been laid until court outcome.

In addition, much of our knowledge has been learned from the children themselves. In two follow-up studies conducted by the project, we learned from children about the stressful court experiences that they identified. They were speaking in a public courtroom about details of their abusive experiences—harsh cross-examination—and facing the accused. Their recommendations included testifying from another room and having a support person beside the witness during their testimony.

Every year thousands of children in Canada are called upon to testify about their own victimization, or about acts of violence they have witnessed or experienced. In 1988 the majority of children who testified in criminal courts were testifying about sexual abuse and sexual assault. Over the last few years, children are now called upon in increasing numbers to testify about child abuse, physical abuse, and domestic violence they witness. The requirement to testify in an adversarial system is intimidating and places a huge emotional burden on children. Research and clinical practice have contributed to a better understanding of what special measures are necessary to benefit child witnesses, and what factors impede their ability to provide a full and candid account of their evidence to the court. In Canada, since 1988, innovative legal reforms have been made with respect to the participation of children in the justice system, and as a result the system has become less intimidating and more accommodating to the needs of children.

There are, however, considerable limitations to the current legislation as it relates to children and vulnerable adults. There is a concern that because many of the special protections are discretionary and their thresholds are too high, they are under-utilized. In addition, these evidentiary provisions apply only to specific offences in the Criminal Code. This means some vulnerable and traumatized children—children, for example, who are witness to murder or attempted murder—are denied access to testimonial aids; these are not enumerated offences.

Evidentiary accommodations and testimonial aids serve to reduce a child's anxiety about testifying, and create conditions whereby court witnesses can provide effective evidence. It is, therefore, our opinion that protective measures should be a readily available option for all children under 18, and for vulnerable witnesses.

As I mentioned, this brief will focus on the procedural reforms proposed in the bill. I'll start with exclusion of the public. This section recognizes testifying in an open courtroom is extremely difficult for child witnesses and vulnerable witnesses; many have expressed their intense discomfort in testifying in a courtroom filled with strangers or hostile observers. Their feelings of shame and humiliation may inhibit them from providing details of their abuse to the court. The presence of high school students making observation visits to the courtroom is also distressing, and can compromise a young person's right to dignity and privacy. Despite this, in our experience it is extremely rare for the public to be excluded from the courtroom in cases in which children are testifying. We are glad Bill C-2 will give the courts broader authority to limit public attendance when young people are testifying.

Second is the support person. This proposed section clearly recognizes the importance of emotional support for witnesses by extending this provision to include persons under 18 testifying in any proceedings.

● (0920)

Being in a witness box can be a frightening and intimidating experience. Children and vulnerable adults are often fearful for their own safety. The reassurance of having a support person close by can help reduce their anxiety, and thus facilitate the witness being able to provide a more complete account of their evidence to the court. Having a support person with a witness does not obviate the need for a testimonial aid. Children can benefit from having a support person accompany them while they testify via closed-circuit television or from behind a screen.

Concerning remote testimony and testifying via closed-circuit television, testifying in front of or in the presence of the accused has been recognized as the most significant stressor for child witnesses. Young and vulnerable witnesses are frequently intimidated by seeing the accused; as a result, they are unable to provide a complete account of their evidence. Research, court observation, and feedback from young witnesses have shown that children who testify via closed-circuit television are less anxious and more effective witnesses. The devices provide children and vulnerable witnesses with a sense of safety and security, and they shield them from seeing the accused. They create the conditions that reduce stress, and they maximize the quality and effectiveness of a child's evidence. The accused person, judge, and jury still have the opportunity to observe the demeanour of the child during his or her testimony.

Testimonial aids are used infrequently and inconsistently across the country, and the experiences of children testifying in court vary greatly. Factors contributing to this situation include the limitations of the legislation as it now exists, as well as the attitudes of justice personnel, and the availability of resources and equipment.

We applaud this section, as it creates a presumption that closed-circuit television and a screen will be available to children under 18, and to vulnerable witnesses in any proceeding. The change will provide more consistency and predictability for children and vulnerable witnesses.

I have a short comment on cross-examination by the accused. We are pleased to see that this section provides protection to witnesses under age 18 in any proceeding.

We are also supportive of the section on the publication of identifying material. We would respectfully suggest that the identity of children who are called to testify in cases of domestic violence involving their parents would also be protected under this section.

Last, I'll make a comment on the Canada Evidence Act. It will be a short comment, as we support the changes in this section whereby a person under the age of 14 years is presumed to have the capacity to testify. We are glad to see that children under age 14 will not be required to take an oath or to make a solemn promise or affirmation, but instead will merely be required to make a promise to tell the truth.

We are glad to see this section simplified, as there has been great variability in the nature and level of difficulty of questions set out for children to respond to in the courtroom. This section will make it consistent and predictable for all children, under this presumption.

Thank you.

● (0925)

The Chair: Thank you very much, Ms. Hurley.

I see that Mr. Freeman and Ms. Hebb have joined us now.

We're just in the process of making the opening statements by the witnesses. We'll go to the Canadian Bar Association first, and then you will have your opportunity.

Mr. Bill Freeman (Chair, Writers' Union of Canada): Thank you.

[*Translation*]

The Chair: We will now hear Ms. Thomson, from the Canadian Bar Association. You have 10 minutes, Madam.

[*English*]

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): I will start and then Mr. David will continue.

The Canadian Bar Association is very pleased to appear before the committee today on Bill C-2.

The CBA is a national organization representing about 38,000 lawyers across Canada, and the remarks today have been prepared by members of the national criminal justice section. The members of the section comprise both crown and defence counsel, and bring that balance of view to the deliberations on this bill.

The primary objectives of the CBA include improvement in the administration of justice and improvement in the law itself, and it is in that optic that we have prepared the submission before you and in which we make our comments today.

I will ask Mr. David, who is chair of the national justice section, to comment on the substantive matters in the bill.

Mr. Marc David (Chair, National Criminal Justice Section, Canadian Bar Association): Thank you.

I assure the committee members I will not be reading our brief. You have the brief; it's 14 pages. We, in general, support the legislation. There are recommended changes to the legislation, and if, in view of those recommendations, the legislation is amended, we would be in support, in general terms, of the provisions of this piece of legislation.

My comments, given the limited time we do have, will address what we have identified as being one of the more essential aspects of the legislation—that is, the provisions that deal with child pornography. First, let me remind the committee members what is presently criminalized in the code. This legislation, this bill, is not occurring in a vacuum. It is not criminalizing new behaviour. There are provisions in the code that exists at present that criminalize child pornography and they criminalize the showing or the depiction of sexual activity where the sexual activity is explicit, with regard to people who are below 18. It also criminalizes the depiction, for a sexual purpose, of any sex organ or anal region of a young person; that is presently in the code. It also criminalizes written material or visual representations insofar as those materials or representations advocate or counsel sexual activity with people who are less than 18. Thus, I call it the preaching provision. It is illegal in Canada to preach to have sexual activity with minor children.

What the legislation does, in terms of expanding the scope of the offences, is now it has criminalized the description of sexual activity, for a sexual purpose, in written material. It also seeks to criminalize description of sexual activity for a sexual purpose in audio recordings. This is the new aspect that is brought in, in terms of the definition of the offences. The legislation also, in a very important way, redefines and refocuses the available defences that exist with regard to child pornography. I will be addressing those issues in detail.

At present, the legislation has been declared to be constitutional. This was a result of the Supreme Court of Canada's decision in 2001 in the Sharpe decision. You therefore are amending legislation that has been judged, by our Supreme Court, to be valid, to be constitutional, and to meet the constitutional challenges with regard to the freedom of expression contained in section 2(b).

This legislation addresses that balance, and the balance is between criminalizing behaviour and between protecting and enshrining the freedom of expression. The balance is being shifted in two ways. One, as I've already addressed, the legislation expands the scope of defined offences. It also restricts and diminishes the availability of certain defences. It's this balance that was at the very core of the Supreme Court's decision to hold the present piece of legislation as being constitutional.

As I said, I will have specific comments with regard to both the new offences and the defences, but before doing that, I wish to highlight to the committee members nine points that I think are the very basis of the analysis this committee has to do of this legislation. It is therefore what I call the starting point for this committee to take into account in analyzing the legislation.

The first point is that Canadians abhor child pornography. There is no debate about the issue. The mores of our Canadian society are not changing in this regard. That is a given. I can give you examples of situations where the mores of the Canadian society have changed over time, but with regard to child pornography, that is not the situation. All are unanimously against child pornography. It's a very different situation if you take the example of the depiction of sexual activity of adults on television.

● (0930)

When I was a child, I can tell you that what I saw on TV in terms of depiction or showing of sexual activity was very different from what it is thirty or forty years later in today's world. You can see this as an example of where the mores have changed. But this not the case with regard to child pornography.

The second fundamental issue with regard to the announcement of this legislation—and I've said it already—is that the present legislation is constitutional. This present legislation is being applied; prosecutions under it are successful in the vast majority of cases. It works.

The third point is that you have to understand that our Supreme Court has stated very clearly that it is not possible to criminalize all behaviour in regard to child pornography. It is impossible to define an offence in the Criminal Code that would render illegal all forms of child pornography, and I would refer the members of this committee to paragraphs 79 and 81 of the Sharpe decision in that regard.

So if the objective of Parliament is to render illegal and render criminal all forms of child pornography, that objective is not possible. I refer you to the words of Justice McLachlin of our Supreme Court in that regard.

The fourth point I wish to make is that defences and exceptions must exist, and they must be liberally construed. That is the very teaching of our Supreme Court in the Sharpe decision, so any new legislation in this regard must take that into account. I would refer the members to paragraphs 60 and 74 of Justice McLachlin's decision in that regard.

The fifth point is that criminalizing behaviour relating to the phenomenon of child pornography must be balanced against freedom of expression. There's no avoiding that balance. Freedom of expression has also been defined to include the concept of individual self-fulfilment and the concept of the right to possess expressive materials. Those, again, are the teachings of the Supreme Court in the Sharpe decision, and I refer the members to paragraphs 24, 34, 72, and 73 of the Sharpe decision in that regard.

My sixth point is that the courts will balance these interests, the interest of criminalizing child pornography versus the interest of protecting freedom of expression. I remind the committee members of the prophetic words of Senator Beaudoin that were quoted in the Sharpe decision that the vaguer the legislation, the more you empower the court system. The full quote can be found in paragraph 127 of the Sharpe decision.

The courts will also analyze this legislation in light of the fact that there is a unanimous Canadian value against child pornography, so the courts will have the greater role in protecting freedom of expression in that context because there will not be a general public outcry against any legislation in that regard. For instance, I give as an example that if Parliament were to pass a bill that would forbid the broadcasting of any form of violence on television, this in itself would be an issue that would bring to the forefront in terms of our society the protections of freedom of expression. That momentum of our society is not going to exist in regard to child pornography, and it's in this sense that I'm telling you that the courts will have the role of protecting freedom of expression in the context of child pornography because there will not be any other counterbalance effect in our society.

The seventh point is that the phenomenon of child pornography is more prevalent today and more accessible, and it's all because of dissemination through the Internet. This is a reality of today's world too.

My eighth point, and I've said this before, is that the present legislative scheme is constitutional because the Parliament has allowed in the present scheme the weighing of competing interests in light of expansive defences. In that regard I refer you to paragraphs 34, 74, and 110 of the Sharpe decision.

Finally, my last point in terms of underlying premises in analyzing this new legislation is that the exceptions created by the Sharpe decision are very narrow exceptions. They concern the self-created expressive material for exclusive personal use and the private recordings of lawful sexual activity for private use. The example given by the Supreme Court is of minors who would be legally engaged in sexual activity, filming themselves, and that would not be prohibited in terms of the exceptions defined by the Supreme Court. In that regard, I would refer you to paragraphs 110 and 115 of the legislation.

● (0935)

Let us look at the new offences and our comments with regard to them, and we would refer you to paragraph—

The Chair: Mr. David, I'm going to have to ask you to wind up. You're well over the ten minutes.

Mr. Marc David: Okay.

We have concerns with regard to the defences that are being proposed in the legislation. The concept of legitimate purpose is vague. It is undefined. It is unknown to criminal law. I would ask the members here to consider, if you were drafting an instruction to the jury, how you would define “artistic legitimate purpose”. It is vague. It will bring on constitutional challenge; that is a given. You're going to find yourselves again in the situation of Sharpe 2 being litigated and again putting this country in a situation where the core material that should be prohibited, that should be prosecuted, will not be prosecuted, because our legislation will be in constitutional voidland for many years.

The second point is that in terms of the defence, it now requires in the proposed legislation that it does not pose an undue risk of harm to children. That the Supreme Court has always put in terms of defining the offence and not in terms of defining the defence.

Those are my comments. Thank you.

The Chair: Good. Thank you very much.

Now, for the Writers' Union of Canada, is it Mr. Freeman who will commence?

Mr. Bill Freeman: Thank you very much. We apologize again for being a little late.

My name is Bill Freeman. I'm the chair of the Writers' Union of Canada. I'm with Marian Hebb, who is the union's legal counsel. We've written a submission and I hope you find time to read it.

I want to point out that I'm also here on behalf of the League of Canadian Poets, the Periodical Writers Association of Canada, and the Playwrights Guild of Canada. These are all national organizations representing approximately 3,000 professional writers in Canada. We're also supported by the Book and Periodical Council.

Freedom of expression, members, is a very important issue for our members. You can appreciate that. We want to be clear about this: although we have some criticisms of the bill, our organizations support strong measures to combat sexual abuse and exploitation of children. But we have serious concerns regarding some of the provisions of Bill C-2.

The reason for this, clearly, is because many of our members, because we're writers, are vulnerable to these issues. Here's just a brief play on this from some of our members. Margaret Atwood has explored the issue of the sexuality of children under the age of 18. Margaret Laurence, in *The Diviners*, dealt with that. Susan Swan, Alice Munro, who many people consider the finest short story writer in the English language these days, Ann-Marie MacDonald—these are the major writers in Canada. They explore the issue of the sexuality of children, there's no question. So many of them are feeling very vulnerable about the changes in this—and not only these writers. I should point out that writers of young adult fiction often explore the issue of the sexuality of children. This is considered, across the English-speaking world at any rate, to be a legitimate literary issue that is explored.

The effect of this child pornography legislation is that not only is it going to bring to bear sanctions of the Criminal Code on those writers unfortunate enough to transgress the censorship provisions, but another thing that writers are concerned about, a lot, is that it creates a chill for writers. It becomes, if you will, illegitimate to be able to explore these issues. This in fact is a very serious problem.

Marian is going to deal with some of the more legal issues here.

● (0940)

Ms. Marian Hebb (Representative, Writers' Union of Canada): As my colleague has said, we have no quarrel with the law protecting real children. The law does this, and it should do this. In 1992, in the landmark case on the test for obscenity, the Butler case, the Supreme Court of Canada excluded certain material generally tolerated by the community from the definition of obscenity, but not where real children were involved in its production.

We believe 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. In January the federal government established cybertip.ca, a national hotline for fighting online sexual exploitation of children. The program gets tips from the public and passes them on to police.

We applaud such initiatives to rescue children from predatory pedophiles. The sequence of bills introduced in reaction to the Sharpe case are, by contrast, window dressing to make the public believe the problems of child pornography are being addressed. It should be remembered that Robin Sharpe was convicted on two charges of possession of child pornography, photographs of real children, and sentenced, although he was not convicted with respect to a couple of stories he had written.

In 2003 Bill C-20 purported to close the loopholes in the 1993 pornography law by getting rid of the defences, including artistic merit. Then there was Bill C-12, which did something along the same lines. Now we have Bill C-2, which places unnecessary and undesirable restraints on freedom of expression.

When it was first introduced, we submitted that the section on child pornography was an unjustifiable infringement on freedom of expression under the charter. It has a chilling effect on expression, as authors and others tend to engage in self-censorship to avoid prosecution. We were very relieved when the Supreme Court of Canada, although it upheld the constitutionality of the child pornography legislation, gave a broad interpretation to the defence of artistic merit.

We believe Bill C-2 will infringe the charter by expanding the definition of child pornography to include descriptions of certain acts that are offences under the Criminal Code, while replacing the defence of artistic merit with another defence. The new artistic purpose defence doesn't stand alone. In addition to a legitimate purpose related to art, the accused must put forward some evidence that his or her work does not pose an undue risk of harm to persons under 18. This potentially undoes or undermines the first branch of the defence, and puts at risk serious works of art. It's the police and the prosecutors and ultimately the courts that will decide whether the work does pose an undue risk of harm to children.

We don't know how the Supreme Court will interpret this. We note, however, that Chief Justice Beverley McLachlin, writing for the majority in the Sharpe case, said, “To restrict the artistic merit defence to material posing no risk of harm to children would defeat the purpose of the defence”. I think you should keep that in mind.

We believe it was this broad interpretation of the defence of artistic merit in the current legislation that saved at least that particular child pornography event in question from being struck down by the Supreme Court, in the Sharpe case. We think the artistic defence now qualified by this parallel assessment, because it may pose an undue risk of harm to children, will no longer be sufficient for the courts to be able to save the child pornography provisions from violating the charter.

Attempts to establish the actual meaning of this new defence will be costly to the community, in policing time and court time, and to the individuals charged. We submit that the current provisions of the Criminal Code already more than adequately cover the material that this new legislation is supposed to target. We are very disappointed that the drafters of Bill C-2 did not take this opportunity to change the over-broad, sweeping definitions of child pornography as they were enacted in 1993. Without the existing defence of artistic merit in the Supreme Court, the existing law once again causes us grave concern.

● (0945)

Mr. Bill Freeman: The concern is very real. When we look at some of the works of writers, writers have existed.... A lot of the most controversial material, most interesting material to a lot of writers, explores issues of sexuality. I can talk about *Lolita, Romeo and Juliet*—Juliet was supposedly 14 years old—*West Side Story, The Tin Drum*. Closer to home, there is Alice Munro, or Margaret Laurence. The CBC's coming-of-age film called *Gentle Sinners* is based on Bill Valgardson's novel. Would it be pornographic? Again it's exploring these issues.

If you're going to change the law in this way, in our view you're putting writers in the position where they're going to have to defend themselves against these issues. If Bill C-2 passes, child pornography as defined by the Criminal Code will also include any written material whose dominant characteristic is “the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years”. That would become a Criminal Code offence, and I point out to the members here that many of our artist writers explore these themes. You're going to be putting them at risk.

For example, is it off limits for film or theatre producers to produce fiction work on Charlotte Vale Allen's *Daddy's Girl* or Sylvia Fraser's *My Father's House*? These novels were exploring not only child pornography but exploitation and child abuse by parents —dreadful issues. But these issues, and the writing of these novels, allowed the Canadian public to be able to express and discuss these issues. Writers particularly do not agree on keeping secrets in this way. Secrets can be very damaging, especially in this area. To close off the ability to be able to talk about these things is a very serious issue.

I'm going to turn it over to Marian.

Ms. Marian Hebb: Just as a footnote to that, those books actually are written like fiction. They're what you call creative non-fiction, but they are actually non-fiction stories of children growing up with incest in their family.

In conclusion, we are of the view that the proposed changes to the child pornography offences of the Criminal Code will create offences that infringe the charter. The language remains vague, and the changes will increase the likelihood of arbitrary exercise of the prosecutorial discretion to lay charges against creators of written, visual, and auditory material.

We submit that if the legislation is to be amended, it should be amended to deal with the abuse and exploitation of real children, and not fictional or imaginary ones. To insert the phrase "for a sexual purpose" into the branch of the offence that we call the Romeo and Juliet visual depiction clause; to make it so the prosecution would have to prove as part of the offence of which the writer is accused both the absence of legitimate purpose related to art and also undue risk of harm to persons under the age of 18—these should not be defences with the burden on the accused to put forward some evidence.

● (0950)

Mr. Bill Freeman: As it is for the law society, which spoke before us, freedom of expression is a grave concern to everybody in our society, and I think particularly for writers and creators generally. We believe the proposed changes to the law will lead to an increased self-censorship by writers and other artists and cast a chill on the expression of ideas. This is frankly unacceptable to a society that values freedom of expression. We call on Parliament particularly to remove those amendments to section 163.1 of the Criminal Code from this important bill intended to protect children.

I think you need to ask yourself the question whether you want to make writers vulnerable in this way. It's a free and open society. Writers are very vulnerable. There are numbers of cases where writers have been attacked and have had to defend themselves—and creators generally. We're on the cutting edge of this, and we need legislation that helps to protect people who are exploring clearly difficult issues.

Thank you very much.

The Chair: Good. Tthank you very much.

We'll now go to rounds of five minutes of questions and answers from the members. We'll start with Mr. Thompson for five minutes.

Mr. Myron Thompson (Wild Rose, CPC): Thank you all for being here.

Five minutes is very short, so I'd appreciate short answers if possible, and I'll try to make short questions.

I'm going to ask a question and I'd like all of you to respond. I believe that as legislators we do have a duty to protect our children; that's one of our most elemental and most important duties in this job. I prefer to err on the side of safety of children over freedom of expression. Is that wrong?

The Chair: Mr. Dixon.

Dr. John Dixon: Well, if you're going to fight, fight smart. You've divided significant portions of people in Canada with this bill, whereas if you actually went after child pornography, which everybody in Canada believes is photographs and videos that show kids being used sexually, you wouldn't have anybody against you except Robin Sharpe. Then we could focus on putting in place some measures that would perhaps work to prevent the use of children in that way.

The Chair: Mr. David.

Mr. Marc David: The problem we've identified is that this legislation is going to recast the constitutional debate. It's going to bring about, again, uncertainty in the application of the law for years to come, and that's our main message. You're shifting the balance between freedom of expression and the criminalization of child pornography in a way that goes beyond the parameters set down by the Supreme Court in Sharpe, so you're going to be reinviting a constitutional debate.

The Chair: Mr. Freeman.

Mr. Bill Freeman: Well, it's up to the legislators to reach a balance; I strongly believe that's your responsibility. I can tell you that from our point of view as writers, the balance is not there. You're going to be making our writers vulnerable, and I think that's a mistake.

The Chair: Ms. Hurley.

Ms. Pamela Hurley: My belief is that children do need to be protected from exploitation and abuse. I would have a concern about written material and the discussion around it being used for a sexual purpose. I would say some literature does describe sexual acts, but on the other hand I would see pornographic magazines containing content about children's activity as being very dangerous.

Mr. Myron Thompson: Thank you.

I didn't really get an answer, I don't believe. You haven't been able to help me understand any better. I still want to protect children; it is far more important to me than any side issues.

Ms. Marian Hebb: I want to answer a little differently. I think it's very hard to quarrel with your statement that one should err on the side of protecting children. Yes, of course we should, but the problem with this is, if you do err on the side of protecting children, the Supreme Court is going to strike it down.

● (0955)

Mr. Myron Thompson: I think I heard a statement to the effect that to make all forms of child porn illegal is not possible. That sounds pretty pessimistic. It's not optimistic.

Mr. Marc David: I said that, but I'm not the one who says it; it's the Supreme Court that says that.

Mr. Myron Thompson: But if it's not possible, why not? Because of the charter?

Mr. Marc David: Because if you make it too broad, too expansive, and too inclusive in terms of what is criminalized, it will end up being a violation of freedom of expression. That's clearly stated by the Supreme Court.

The Chair: Mr. Dixon.

Dr. John Dixon: Part of the problem, sir, is the definition of child pornography. If positive law said child pornography was the sexual representation of anyone under the age of 25, I expect you would see problems. When you define child pornography as anyone under the age of 18, you have huge problems.

Jay Leno the other night was talking about three 17-year-old youths who had sex with their 24-year-old teacher. The teacher was fired. Leno waited and then said the boys were out trying to raise bail. We don't ordinarily think of 17-year-old boys wishing for protection from the sexual blandishments of 24-year-old women.

If you want to talk about child pornography, talk about kids, and then you don't have any problem with Canadians at all.

The Chair: Mr. Thompson, 30 seconds.

Mr. Myron Thompson: Thirty seconds. I'm going to need another 15 minutes.

It appears to me there's an attitude among a number of Canadians that the protection of children is extremely important, but a lot of other things are equally important. I mean, you're talking about 17-year-old and 16-year-old youths. There's going to have to be some pretty...whatever the term is, with the police when they come to make arrests and charges, and all those things. There has to be quite a bit of flexibility in their hands.

I think that good common sense is really running short in this country, mainly because we make statements saying that certain things aren't possible. Well, they are all possible. Even in the Charter of Rights, there's section 33. People who love the charter may not love section 33, but I, for one, would use it, if necessary, to put an end to child pornography.

I have visited hundreds and hundreds of victims. I have been in the prisons where I've seen a number of convicts who stated loudly and clearly to me that it was child pornography that put them there in the first place. All their case workers verified it, and psychologists. There are no excuses to allow pornography to any degree, on that basis alone.

The Chair: Thank you, Mr. Thompson.

I was going to congratulate you on making better use of the witnesses' time, but you slipped at the end.

Mr. Myron Thompson: I wouldn't want to break my record.

[*Translation*]

The Chair: Mr. Marceau, you have five minutes.

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Thank you, Mr. Chair.

I want to thank the witnesses for being here today.

First to Mr. David. You had a lot to say but little time to do it. About testimonial aids, a witness suggested last week the legislation should be amended so the Crown could ask for closed-circuit television to be used for young witnesses before trial, which is not possible right now. Presently, the Crown must apply for that during the trial. It was suggested the Crown should be allowed to ask for that before the trial starts.

Mr. Marc David: Through a pre-trial motion.

Mr. Richard Marceau: Do you agree with that?

Mr. Marc David: I will give you the answer I should give you. The Association I represent has not studied this question. I therefore can't take a stand on that in the name of my association.

Mr. Richard Marceau: What do you think of it personally?

Mr. Marc David: I don't see any problem with a pre-trial motion. Questions of law may be raised before trial to make the trial more effective, especially when there is a jury. With a jury, the court want to act speedily and parties present pre-trial motions about questions of law the judge must decide, like the admissibility of evidence. I think this could very well be done in the case of a person who should be allowed to testify through a television system.

● (1000)

Mr. Richard Marceau: Madam Hurley, what do you think of this question?

[*English*]

Ms. Pamela Hurley: I would be concerned that the motions might delay the time that the child would spend in the criminal justice system even longer. I believe that children are stressed by having to testify twice. I know that the video recording of the preliminary hearing is done in the U.K. at the moment, and it works.

[*Translation*]

Mr. Richard Marceau: The aim would be to keep the child out of the courtroom during this debate, so that he spends as little time in court as possible. The request would be presented before the trial so the child wouldn't have to experience such a stressing event.

[*English*]

Ms. Pamela Hurley: I would agree, if the motion was a matter of a simple application. The situation is such, even around testimonial aids now, that the lengthy legal arguments around closed-circuit television, etc., take months to get into the courtroom and need expert opinion. If it was a simple motion that would require a yes or no answer, then I would be totally in agreement and have the child only testify once.

[*Translation*]

Mr. Richard Marceau: Thank you very much.

Mr. David, did you want to add a few words?

Mr. Marc David: I would like to add to my answer, still on a personal level.

Of course, if the pre-trial motion was rejected, would the necessity of the testimony be reassessed? That could be a consequence of a pre-trial motion.

Mr. Richard Marceau: You are an expert in criminal law, Mr. David. Bill C-2 is the new breed of another bill that died on the Order Paper, during last legislature. Do you see a difference between the legitimate purpose defence which is part of Bill C-2 and that of the public good that was mentioned in the former bill?

Mr. Marc David: Yes. The public good defence is mostly used with the obscenity offences. In fact, in this bill, the concept of the public good is incorporated in the issue of child pornography. In a Supreme Court case, Judge McLachlin talks about the concept of public good. In the context of child pornography, this term has not been interpreted by the courts. She did not discuss this concept because it was not in issue in that case.

Yes, it exists, but up to now, it has never been used or interpreted in the context of child pornography.

Mr. Richard Marceau: Mister Freeman, please don't take it personally, because I will play the role of the devil's advocate for a while.

It seems quite clear that the concern of the artistic professions, at least of the people I have met with since this debate started, is about being convicted of a child pornography offence and not about being accused of that offence.

[*English*]

is that it puts a chill on writers.

[*Translation*]

If Mr. and Ms. So-and-So looked at that issue, they would say that to reach a balance between this concern which is not about being convicted but about having legal problems, and the protection of children, we should focus on the protection of children because the artist will probably not be declared guilty. People often mention the Langer case, the artist from Toronto who was charged but he was never declared guilty.

What do you answer to that?

● (1005)

[*English*]

Mr. Bill Freeman: I'll respond in English, if I can.

The issue is one of fear. I don't think there's any doubt about that. There is real fear that goes through the community when legislation.... If artists know very well that they're going to be subjected to legal proceedings, if there's a fear of being subjected to legal proceedings, it does create a chill through the whole community.

I can tell you a little story. Margaret Laurence, one of the great English Canadian novelists, wrote the book *The Diviners*, which in part explored the sexuality of children under the age of 18, and her book was removed from libraries. She was enormously hurt by this. I knew her personally. This was a chill that went through.... This was libraries. She was not ultimately convicted.

But I think the other side of it is that the writers would say, “If you pass this legislation, then some poor sod is going to have to defend these issues, and it's going to have to go right through to the Supreme Court”.

I'll tell you another story, that of Susan Swan, who just got a new book out, one of the most prominent novelists. Two teenage girls discussed sex in this novel of hers. There was no portrayal, in fact, of sexual acts. Some people in Alberta, actually, Mr. Thompson, complained. Fortunately for her, the RCMP officer who read this said “Ah, that's not pornography”, and the whole issue was dropped.

Susan is quite a close friend of mine. She told me that she was terrified.

The Chair: I'm going to have to move on at this point. Merci, Monsieur Marceau.

Mr. Comartin, for five minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you all for being here.

Ms. Hurley, I don't know if I misunderstood you, but I think you indicated that we had missed something, that there was a provision in terms of not identifying child witnesses and we had missed something. I think you put it in the context of their testifying in cases involving their parents.

I quickly looked at the act. I thought we had covered all of that, that child witnesses would be completely protected from being identified, but if you've caught something there, could you point it out to us?

Ms. Pamela Hurley: Yes, I will.

Maybe I've misunderstood it, but it's with the publication of identifying information where parents are involved in a domestic violence case and children are called to testify in those matters. It recently came to my attention that children were identified in a small community, although not named, because the identifying information about their parents enabled them to be identified within their community.

So I'm not too sure if that proposed section is a blanket section for protecting all children or not, but I did identify that these are the cases, because others were enumerated.

Mr. Joe Comartin: Okay, we'll take a look at that a little more closely. Thank you.

Ms. Pamela Hurley: Thank you.

Mr. Joe Comartin: Mr. Freeman, I'm going to ask a question for Mr. Thompson, because he didn't get a chance to. He was just finishing, and I think he was getting to it.

His point, which he's made with other witnesses, is the issue around child pornography, even the child pornography that the Supreme Court says we can't prohibit, acting as an incentive to criminals to commit other acts of abuse toward children. It's that theme. It's the same argument we hear that we can't have violence on television because it produces violence in society. Mr. Thompson's point is that if we allow even the depiction of child pornography, it will lead people who are susceptible to commit criminal acts of a sexual nature against children.

● (1010)

Mr. Bill Freeman: I don't believe that's true.

I have four children, incidentally, and I've sort of struggled with this personally. One of the things I've always found in my own family was that the worst things are the secrets that can happen. I believe, and I know writers believe, that things need to be discussed, things need to be out in the open. Now, does that encourage this behaviour? Would a book, a memoir of incest, encourage incest? I don't believe that. I don't believe that for a moment.

Do we want to have laws that are going to shut down the discussion of these issues? I think quite the contrary. One would hope that we can have laws that will openly talk about them.

Marian brought along a book called *Change*, written by Paulette Bourgeois, who is one of the leading children's writers, and its subject is puberty, mostly for girls. I mean, there was a time, a number of years ago, when parents found it very difficult to talk to girls about certain specific subjects. We've moved away from that. We don't want to go back to that. We want to have a society where there is open discussion about things, even things that are difficult and hard.

If you write legislation that puts writers in the position where they're at risk, they may either not do that, or maybe it will be underground—I don't know.

The Chair: Mr. Dixon.

Dr. John Dixon: I think it's important to remember that nested in this is the offence of possession of pornography.

This came up at the court of appeal in British Columbia when Madam Justice Mary Southin raised the example of two 17-year-olds who get married and make a home video of themselves having sexual relations and they put it in a drawer, to establish a benchmark to refer back to in later years perhaps. This is child pornography. At least it was until the law was read down by the Supreme Court of Canada. Madam Justice Southin thought it was the sort of thing that it didn't make sense to criminalize. Chief Justice Alan McEachern said, “Wait a minute. I think we should criminalize that too, because what if somebody broke into the house and got the video and then took it away?”

That's the point at which our Supreme Court said, as did two of the three justices of the court of appeal, this is defined as child pornography under this act of Parliament, but we can't possibly continue the criminalization of it without seriously infringing upon freedom of thought.

So if you want everything that can be described as child pornography under this act never to have a defence available to it, that's an insupportable situation for common sense.

There's another terrible problem, and again Mary Southin identified it. It goes to the point made by Mr. David about preaching. Madam Justice Southin said, “Can't I go out on to Hornby Street right now and stand on my soapbox and advocate for the violent overthrow of the Canadian government and advocate earnestly for relations between persons that would be unlawful? I can do that. We have laws that protect advocacy. I'm not conspiring. But if I write that down and secrete it in my drawer, I now possess written advocacy, and that is an offence under the pornography provisions. It's crazy that I can say something on the street, I can publish it, I can earnestly argue it, I can distribute it, and I can advocate for it, but it's unlawful for me to simply possess it hidden in my drawer.”

That wasn't addressed at the Supreme Court of Canada, but if an angered Supreme Court has a chance to look at this again, I expect it will be.

The Chair: Thank you, Mr. Comartin.

Mr. Macklin, for five minutes.

● (1015)

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you, Mr. Chair.

I'd like first to address a question to the CBA. Others may wish to respond. In your brief you do zero in on the legitimate purpose defence, and you're concerned that it may lead to further litigation.

The two defences that currently exist for child pornography are under subsubsection 163.1(6), a defence for material that has artistic merit or an educational, scientific, or medical purpose, and subsection 163.1(7), the public good defence incorporated from the obscenity provisions of section 163, which we know from Bill C-2's predecessor, the former Bill C-12, provided a defence for material that serves the public good, such as the administration of justice, education, science, medicine, or art, and does not go beyond what serves the public good.

These concepts are retained within the proposed legitimate purpose defence in its two-step test. If you look at the Supreme Court of Canada's interpretation of the child pornography provisions in Sharpe, including the existing defences, it seems to me that the court provided a very useful and welcomed guidance in how these terms would be interpreted.

With this in mind, I'm trying to understand why you think the proposed legitimate purpose defence is so radically different that we will not be able to benefit from the Supreme Court of Canada's analysis in Sharpe to interpret and apply this new defence.

Mr. Marc David: My first response is that legitimate purpose is not a term of art in criminal law. You don't find it anywhere else. It's new. It's the first time it's used in the Criminal Code. That will bring on litigation, for sure.

Define “legitimate purpose”. You're the judge. You're instructing the jury, okay, we have a book, we have a painting, we have a picture, and the defence raised is legitimate artistic purpose. Contrast the concept of legitimate artistic purpose to the contrary, illegitimate artistic purpose. Define what “illegitimate artistic purpose” is. It's an unmanageable concept. It's vague, it's uncertain, and it's simply unmanageable, in our opinion.

The second point is you have combined an unchartered concept with the obligation of establishing that there is no undue risk to harm children. That concept of risk of harming has been associated by the Supreme Court with the definition of the offences and not with the definition of the defences. In other words, the legislation has done a 180-degree spin in terms of the Supreme Court concept of where the concept of undue risk to children should be situated. The point is simply that it's a concept that is associated with understanding what should or should not constitute an offence, and not a defence. The burden you're imposing on an accused becomes extremely onerous.

Hon. Paul Harold Macklin: When we also look back at the Sharpe case, because the Sharpe case has had an enormous influence on where we're going in this area—all kinds of media attention and the public reaction to the decisions that have given this debate legs that seem to go on forever—I suppose we really boil it down to a question of the freedom of expression, which we're getting a great deal of input on today, against the protection of children. Although you argue that we shouldn't necessarily go forward with this legislation using those terms because in fact it will invite litigation, isn't it really inevitable that there's going to be some form of litigation, no matter what reforms we bring forward in this area? In other words, I don't think it's exclusively locked up in your argumentation.

Mr. Marc David: Reform of legislation is the benchmark of lawyers' works. We love taking you on. So yes, any new legislation has that potential and it's undeniable.

The question is you have to measure the risks, I think. This legislation is an invitation to take it on, because it was a benchmark ruling in 2001. It's a recent debate that was made. Chief Justice McLachlin's decision is a very clear decision. She sets out the parameters, she sets out the balance that you have to consider, and she sets out the parameters of criminalization of child pornography versus the parameters of defences. She says to make it constitutional, one of the considerations is that the defences have to be liberally construed. You're narrowing the construct of the defences. You're adding an additional burden on the shoulders of the accused to establish their defences.

Again, it's a question of measure. If you go this way our prediction is that it simply invites constitutional challenge.

● (1020)

The Chair: Thank you, Mr. Macklin.

Did you have a comment, Mr. Dixon?

Dr. John Dixon: Looking at this in big picture terms, you have to see a law that everybody understood at the time of its crafting was imperfect and would invite constitutional challenge, very overly broad. It gets struck down by the Supreme Court of British Columbia...a very good judge, Duncan Shaw. It goes to the Appeal Court of British Columbia, where a panel of three justices, the best actually on that court, strike it down.

Now it goes to the Supreme Court of Canada. What are we going to do? The whole country is screaming. They really stretched themselves in writing up and writing down elements of this law to save Parliament's bacon. And the artistic merit defence was key in Madam Justice McLachlin's mind. She makes it clear. We're not talking about freedom of expression, we're talking about freedom of thought. Again I would emphasize that this is a law that prohibits the mere possession of expression materials, unique in Canadian law. So the justices over there saved Parliament's bacon.

If you go back with a law that fools around with artistic merit—and everybody understands that the whole purpose of fooling around with artistic merit is clearly to weaken it—I don't know what the court will do, but I would bet that 70% to 80% whack the whole thing.

The Chair: Thank you, Mr. Dixon.

Mr. Moore, five minutes.

Mr. Rob Moore (Fundy Royal, CPC): Thank you.

Mr. Freeman and Ms. Hebb, I have a question for you on what was already in place in the law and was dealt with in Sharpe on counselling—written work that counselled what would be unlawful sexual activity involving children.

I may have missed it, but do you have a position on that written work that was an offence before? Now, with the changes that have been made, we're talking in this bill about the dominant characteristic is a description for a sexual purpose. You've raised some concerns with regard to that broadening of the offence. What about what was previously in place?

Ms. Marian Hebb: The court found that in fact there wasn't counselling, and then the court said if we're wrong about that, then there's the artistic merit defence. So that was the....

Mr. Rob Moore: It was probably the public reaction somewhat to the Sharpe decision that allowed some of those materials that were found not to have involved counselling to lead to the legislation we have before us today.

The point I'd like to make is that with written material—and that's what we're talking about, or what you've raised—there's always going to be a line somewhere. I'm wondering if you have a position. Should there be no line, or should there be a line somewhere?

I would suspect there's always going to be someone who pushes that envelope. You've mentioned many notable artists and writers and how they feel this could have a chilling effect on their work. But if there's a line anywhere, then there's going to be someone pushing that line. I'm wondering, is there a line in your mind that we should not cross with written work? And specifically, what about what is already in place with regard to counselling?

Ms. Marian Hebb: We think there should be a line. The line is the difference between real and imaginary children. Otherwise, I think it's very hard to draw the line anywhere else.

● (1025)

Mr. Bill Freeman: I think we're also concerned about the defence. The artistic merit defence, in our view, worked quite well for us. It allowed writers to have confidence in the courts and there was a norm out there that was expected. With this new set of defences, it does sincerely worry us.

I'll just get my glasses on and talk about “legitimate purpose related to art”. I don't know what that is. Does not pose an “undue risk of harm” to persons under the age of 18—well, does this book, which is very much directed at girls going through puberty? I don't know. These are definitely legitimate concerns.

The Chair: Mr. Dixon had a comment.

Dr. John Dixon: I can tell you what was in the minds of the people when they put in the advocator counsel. What they were thinking about were magazines like the *Man/Boy Love* network. Those magazines sometimes have sections in which advice is given to the readers on how to make more effective their exploitation and their seduction of children.

There's something about which, if you go around the board table of a civil liberties association, you find people deeply divided. That's a really tough one. Our view of it is that it's a mistake to try to capture it with this kind of law, certainly, with possession law.

Again, it's so important to remember the difference between a law that attacks the mere possession of materials and a law that attacks and now you deal with the obscenity law and all the laws against counselling. We have all kinds of laws already that protect us against people who are counselling and conspiring to commit criminal acts; use those.

The Chair: Mr. Moore.

Mr. Rob Moore: Mr. Dixon, yours was the first presentation, and to my mind it was a scathing review of the work of parliamentarians. I was just elected in the last election. This is an issue with our constituents and I believe rightfully so. People toss around the term "mere possession". I would like comment on this. We've seen some of the works that can be done without real people, in animation and so on. These do not depict actual children. But couldn't this material, if it looks like actual children engaged in activities that would be unlawful if the participants were real, be used by those who would seek to abuse and victimize children? We know that it is, and we know that child sexual abusers will use different aids to facilitate their abuse of children. I'd like your comment.

Dr. John Dixon: I think the first thing you want to do is make it easy to prosecute child pornography. If it looks like child pornography, if it's a photograph or a video representation of a child, bust them. If you're talking about possession, make available the defence that it wasn't a kid. The comment was made that Canadians are of one mind about child pornography. They certainly are, but Canadians are deeply ambivalent about sexual activity in young persons. Open any fashion magazine and you'll be struck by the extreme youth of the models, and they're not posed in ways to emphasize their demure or chaste qualities. They're posed in provocative ways. I think it's a cultural issue, the sexualization of youth, and I think there is ambivalence and anxiety about it. I have children as well. They're grown up now, but they weren't always so. It's an anxious issue and some of that anxiety spills over into the child pornography issue, to the detriment of crafting legislative remedies that would focus and unite the interests of Canadians and their legal resources in combating the abuse of children.

● (1030)

Mr. Rob Moore: I want to give everyone a chance to comment on child abusers having materials that would facilitate what they do. There's the issue of how these materials might fuel their propensity to abuse. They might also use these materials to bring a child's guard down and to introduce children to the concept of abuse. I think that's a line that many Canadians feel should not be crossed, even in the case of mere possession of material not depicting actual children.

So just a quick comment on that.

Dr. John Dixon: If I find someone like that in the sandbox with a kid and a magazine, the last thing I'm going to be worried about is the magazine as I handcuff him and drag him away. I'm interested in him. He's using his influence as an adult to seek the seduction of a child, and off he goes. Nobody has any patience with adults using their authority to use children.

The Chair: Thank you, and your time is up, Mr. Moore.

Mr. Marceau.

[*Translation*]

Mr. Richard Marceau: Mr. David, you have often mentioned the Sharp case. In your view, if Bill C-2 had been in force at the time, would the result have been any different?

Mr. Marc David: This a highly hypothetical question.

Mr. Richard Marceau: I know this a very hypothetical question, but I am trying to see...

Mr. Marc David: I don't think the Supreme Court would analyse that issue if it had to reexamine that law. Again, I cannot speak for the Canadian Bar Association.

Mr. Richard Marceau: I am satisfied with Mr. David's opinion.

Mr. Marc David: Given the parameters defined by Judge McLachlin, the law would probably not have been declared unconstitutional.

Mr. Richard Marceau: Thank you.

The Chair: Thank you, Mr. Marceau.

[*English*]

Mr. Comartin.

Mr. Joe Comartin: I guess to all of you, in between the amendments being passed to the Criminal Code in 1993 through until Sharpe, how often was it used? Mr. David, and perhaps Mr. Dixon, you might be of most help in this regard.

I want an answer in the context of whether we are seeing a problem that doesn't exist. How many times have defences of artistic merit been used? Do we need to change artistic merit? Was the system working, and was it more of an issue...? I forget whether it was Ms. Hurley or somebody who talked about dumping our resources into enforcement, versus trying to redefine child pornography and the defences around it.

I've asked this of a couple of other police officers, and I haven't got much of an answer as to what we've really been dealing with in the last seven or eight years, between the amendments going through and Sharpe coming forward. Has it been a major problem for our society? Have the defences been used overwhelmingly to promote child pornography, or are we dealing with child pornography because of the Internet and being much more concerned about it because of the ability of child pornographers to disseminate the information?

Dr. John Dixon: Very briefly, it's the Internet. In 1989-90, the justice department funded a project with the Toronto police to try to discover how much child pornographic material was coming into Canada, and there was virtually none. In fact, most of what was apprehended had been sent in by the American postal service mistakenly, as part of a sting operation they were running to try to catch child pornographers in the United States.

Now I think it's endemic on the Internet. I believe the last time I asked enforcement officials there were hundreds of cases, but they typically involved photographs of the actual use of children. They didn't represent a controversy for civil libertarians.

I'm not aware of additional cases after Sharpe that involved the artistic merit defence, although there may be some waiting upon the fate of this bill.

● (1035)

The Chair: Mr. Freeman, do you have a comment?

Mr. Bill Freeman: I really think the Sharpe case was followed very closely. A lot of our members in British Columbia—we're a national organization—were very concerned about this. But on the amount of child pornography that's being published in this country, I have not seen it. It clearly is a problem on the Internet.

We come back to our concern that if you redesign the legislation, are you putting legitimate artists at risk here? That's what we're very concerned about.

Ms. Marian Hebb: In the Eli Langer case, there was a huge cost to him. It went on and on, and was a cost to the community. There was fundraising to help him with that case. The Writers' Union made the point that we would like to see more money put into the prosecution and—

The Chair: Yes.

Ms. Hurley, do you have other comments?

Ms. Pamela Hurley: I'm not familiar with any cases-in-waiting following Sharpe, but what I am very aware of is the number of children who have been sexually abused and were introduced to pornography, as Mr. Moore says, as a method to desensitize them and groom them before they were abused. That's happening in a huge number of cases, and those kinds of situations are charged.

Just as a general comment, if we would weigh and err, I would support erring on the side of protecting children from this kind of exploitation.

The Chair: Thank you.

Mr. Comartin is next, for 30 seconds.

Mr. Joe Comartin: Monsieur David, on voyeurism, I'm trying to figure out what the defence does, and I'm asking strictly as a lawyer. The defence makes no sense to me. On one hand, if we are saying you're doing this in a surreptitious fashion, how can you possibly have a “public good” defence?

Mr. Marc David: I'm going to answer as a lawyer. I agree with you. There is no defence.

Mr. Joe Comartin: Thank you.

The Chair: We won't hire you.

Voices: Oh, oh!

Mr. Marc David: Furthermore, we make this point in our brief. You're removing the ability from the accused to show what his motive was, when one of the offences is that he's doing it for a sexual purpose. It is totally contradictory in terms of approach. It's wrong, simply wrong.

The Chair: Mr. Macklin, for five minutes.

Hon. Paul Harold Macklin: Thank you very much, Chair.

I'll go back to the CBA again, and follow up with another one.

Your brief was so inclusive in some ways, and critical in other ways. I just want to get a clarification. In your brief, you comment on these proposed amendments that restrict personal cross-examination of a witness by a self-represented accused. Of course, over the course of time there have been all kinds of studies on the role of victims within the criminal justice system and how we might better deal with them.

What it draws me down to is that, based on your brief, I'm not really clear on the CBA's position. On the one hand, you're critical of the inclusion of adult witnesses in the category of those who the judge may determine need to be protected in appropriate cases. On the other hand, you're then critical of the failure to specify domestic violence victims and sexual assault victims who need protection. The brief also criticizes the requirement of the witness or the crown to make an application.

On this appointment of counsel in such cases, is it the CBA's view that it should be automatic to avoid an application by the crown or the witness and any exercise of discretion?

● (1040)

Mr. Marc David: I'll start with your last concern and the means that we use to raise the issue or to flag the issue. The point is simply that if you require it to be by way of application, it may be missed by certain people. One alternative—and it's not suggested because it's not necessarily our role to suggest how legislation should go or should work, but I can again say it on a personal basis—is that you may want to make it the duty of or place the onus on the judge to raise this possibility. It's then up to the judge to offer it to or remind a witness or a complainant that this possibility exists. That's another alternative in terms of requiring application.

In terms of the concerns that you have on cross-examination, our point is simply that the legislation that is proposed is appropriate for cross-examination of complainants; however, it's too expansive when it comes to the cross-examination of anybody else other than the complainant, unless that person who now has the status of a witness is somebody who is disadvantaged either because of mental capacity or for other reasons of disadvantage. That's fundamentally our point.

Hon. Paul Harold Macklin: What would you propose in order to ensure that neither these victims and witnesses under 18 nor adult witnesses including those in sexual assault and personal violence are exposed to cross-examination by the accused who is self-represented?

Mr. Marc David: We're in favour of the legislation in that regard when it concerns the complainant. There again you're balancing the right to a full answer in defence. You're balancing the right to self-representation. Nowhere in this country is an accused ever required to have a lawyer. He can defend himself or she can defend herself. We recognize that in the cases of complainants under 18, the legislation is appropriate. We don't have an issue with what's being proposed in the bill.

Hon. Paul Harold Macklin: Under 18?

Mr. Marc David: Yes.

Hon. Paul Harold Macklin: Thank you.

The Chair: Thank you, Mr. Macklin.

Mr. Warawa, for five minutes.

Mr. Mark Warawa (Langley, CPC): Thank you, Mr. Chair.

I'd also like to thank each of the witnesses for being here today. I didn't necessarily agree with all of the comments, but I found all of them informative, and I appreciate your sharing your opinion.

I have a simple question and would appreciate your input on that question, if you feel comfortable in doing so. It regards the age of consent.

Before I go into that, I also wanted to comment that I agree with Mr. David's position that the term “legitimate purpose” is vague and not defined. I think we need to look at that.

There is consensus in Canada that child pornography is wrong and abhorrent, and Canadians in general do not support child pornography. They also do not support child prostitution. My concern is that child pornography is a way of grooming children and attracting them and desensitizing them into child prostitution; we have children aged 14 and 15 who are being told things and desensitized to draw them into an environment that they don't realize the risk of. They end up being drawn into child prostitution. I believe that Canadians generally, or the vast majority, including the Federation of Canadian Municipalities, have asked that the age of sexual consent be raised to 16—it's 14 now. That's been another one of the critiques of Bill C-2, that it doesn't address that. Nationally, 16 seems to be the benchmark age.

If you're comfortable, would you please comment on whether you believe that would be an appropriate issue for Bill C-2 to deal with in raising the age of consent. If so, what is your opinion and why?

Thank you.

The Chair: This time we'll start with Ms. Hurley.

Ms. Pamela Hurley: I got the hard one first.

This is a very difficult issue to address, and one of the larger reasons is that youth are engaged in sexual activity at an early age. There would be a concern about criminalizing their behaviour amongst one another. For example, if children or youth are engaged in having sexual intercourse with one another at the same age of 15, there would be concern about criminalizing that. At the same time, there has to be protection or legislation that will protect children from exploitation where there is a relationship of trust or authority—or what Bill C-2 captures, the area of exploitation of youth.

I'm not quite sure how that would be captured in the laying of a charge, but certainly it needs to be recognized that children need to be protected from having sexual relationships and being exploited by adults.

This doesn't really answer your question about age 14 to 16. Age 14 is in the legislation now, and I think it would be very hard to change it. I think, instead, the way to go would be to protect youth from exploitation.

● (1045)

The Chair: Ms. Hebb.

Ms. Marian Hebb: I'm not sure how directly it relates to the child pornography offence, but your question makes me think of whether it matters in a situation where you have a 24-year-old actress pretending to be or playing a 12-year-old, or a 16-year-old or 17-year-old playing that role. I don't know that it makes any difference, because the problem with the child pornography offence is that it in fact affects people who are being portrayed as being under a certain age, whether or not they actually are.

I don't know if that addresses your issue or not, but it made me think of that issue. You start to have bad theatre when you have someone playing a 12-year-old while having to make themselves look 24 or 16, because otherwise they're in danger of offending the Criminal Code.

The Chair: Mr. David.

Mr. Marc David: To answer your question very directly, the CBA's position is against raising the age of consent. We support the approach that is being taken in the present legislation, and that approach is one expanding the situations where there's a notion of exploitation. So we're in favour of expanding the idea of the exploitative relationship, which adds on to the breach of trust, the abuse of authority, or where a relationship of dependency exists, though we have flagged issues again in terms of vagueness, in the definition that is provided in proposed subsection 153.(1.2), which is the definition of what sexual exploitation is.

The other thing that we favour in lieu of raising the age of consent is the increase in penalties that is being proposed in the legislation, in terms of both indictable offences and summary conviction offences. In our brief we call for making them into summary conviction offences, which is essentially raising the potential for jail time to 18 months, instead of six months, and in terms of indictable offences, raising the number of years of imprisonment from five years to ten years, thereby clearly giving the message to Canadians that abuse of children in any sense in terms of getting their consent to sexual relations is not tolerated.

The Chair: Mr. Dixon, go ahead please.

Dr. John Dixon: The age of consent to prostitution is 18 in Canada. You can't induce a young person, described in our law as 14 to 17 inclusive, with money to have sex with you if you're an adult. It's against the law. You can do it when they're 18, as long as you of course don't solicit it in a public place, and so on. That's why it all occurs nowadays in massage parlours and escort agencies, and so on.

But with respect to young people and prostitution, that's something I know a bit about, because it's a big problem in Vancouver. The Civil Liberties Association has been involved for a long time. If you talk to young people—15-, 16-year-olds—who are on the street practising street prostitution, and you apprehend them—we have lots of people in B.C. who work with them—usually they have run away from home because they have been abused at home; it's not always the case, but it's often the case. I've very seldom heard them say they were induced to become prostitutes through being shown pornography.

If you really want to do something about that... The great disgrace in our province, in our city, is we have many young prostitutes coming forward who are usually addicted, who have multiple addictions. They want to get off drugs; they want to get out of the life. I think we have six beds in British Columbia to serve or help those people who volunteer to come forward. Almost any consideration you have about the horror of child prostitution pales beside the disgraceful lack of resources that we provide, even for those young people who identify themselves as wanting to get out of the life.

However, the age of consent for prostitution is already 18.

● (1050)

The Chair: Thank you, Mr. Dixon.

Mr. Mark Warawa: My time is up?

The Chair: Yes, it is.

Mr. Thompson is the last one on the list, and that will have to conclude our session.

Mr. Myron Thompson: Have any of you people visited the police departments' child protection units and seen examples of what they're confiscating from potential child pornographers?

Ms. Marian Hebb: I have. I haven't visited the police department, but I have been at a session of the law society where in fact we were given a show-and-tell about what they had confiscated.

Mr. Myron Thompson: You realize it's millions and millions of pieces.

Ms. Marian Hebb: I understand that. I'm a mother and a grandmother.

Mr. Myron Thompson: Yes. You and I think a lot alike, because I'm a grandpa seven times.

For the life of me, I fail to understand why we should put our police authorities through a process where they confiscate maybe 500 or 600 items, and they have to go through each and every one of those, one by one, to determine if there's any possible defence of artistic merit, or things of that nature. They're not allowed to take a sampling of these items and lay a charge; they have to go through them all.

The Chair: Mr. Dixon, go ahead. please.

Dr. John Dixon: I wish I had my notebook computer here and a wireless network. I could show you millions of these images, and you wouldn't have an instant's doubt—neither would the police, neither would anyone in this room. You would see young people, children, being used sexually, actually being used, and there's no question of artistic merit. Nobody ever brought up that defence with respect to photographic and video representations of real kids being used.

Mr. Myron Thompson: The point I'm trying to make is they have to process each and every item according to law. You have to.

Ms. Marian Hebb: You don't really have to, because in the Sharpe case they made a selection of what they would actually prosecute. When they're doing their preparation work, they're going to choose the ones most likely to get them a conviction.

Mr. Myron Thompson: But they have to go through it all because they don't want any of this stuff that might get them out of a conviction mingling with those things that wouldn't.

Ms. Marian Hebb: When it's photographic material, I think they should go through each and every one, because they may be able to identify real children. That's where the issue with this is.

Mr. Myron Thompson: That's the main reason they do it.

I just wanted to know if you're aware of what the magnitude of the problem is and that it's a very big industry at the present time in terms of dollars even.

I look at the scientific purpose, the educational purpose. I think the book that you brought here today is very good educational material. I see nothing wrong with it. I don't believe that's what we're talking about at all as legislators, that we want to go after those kinds of things. I think that kind of material could be very valuable to parents because I believe parents have the duty of bringing their children up with as much knowledge as they can provide.

I also look at the issue of possession for the purpose of enforcing the law, which protects our police departments and those police officers who may have it in their possession. I also look at the doctors' offices where there may be a picture of a small child with arrows pointing at various areas, a picture that one uses for medical purposes, at these and many other illustrations. I don't I believe anyone at this table has any problem with that.

Our problem boils down to the fact that this bill says exceptions can be made for educational, scientific, medical, law enforcement, or artistic reasons. It's the exception for art that we have a big problem with. I particularly have a huge problem with that.

The Chair: Is there a final response to Mr. Thompson's comments?

Mr. Bill Freeman: I'd like to respond, sir.

I think we agree on a great deal here. But I think the danger is that if you write the legislation in such a way that you don't provide legitimate artists with a defence to be able to show how their work in fact does have artistic merit, for want of a better term, then it's bad law. That's what we're very concerned about.

● (1055)

Mr. Myron Thompson: It goes back to protecting artistic freedom as being top priority over anything else.

Mr. Bill Freeman: But, sir, surely you have a responsibility to protect artists as well, to protect artistic expression and the free expression of views.

Mr. Myron Thompson: I'll err on the side of children.

The Chair: Thank you. I'm going to have to cut it off at this point.

Thank you very much to all the witnesses for their attendance and their input. We appreciate it very much.

Members, the clerks will be in touch with your offices to try to find a time when we can do future business.

We're now adjourned, and we need to make room for the next committee.

Thank you.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

Also available on the Parliamentary Internet Parlementaire at the following address:
Aussi disponible sur le réseau électronique « Parliamentary Internet Parlementaire » à l'adresse suivante :
http://www.parl.gc.ca
