House of Commons
CANADA

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

JUST • NUMBER 029 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Thursday, April 7, 2005

Chair

The Honourable Paul DeVillers

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

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● (0905)

[*Translation*]

The Chair (Hon. Paul DeVillers (Simcoe North, Lib.)): We are ready to begin this meeting of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. We are resuming our consideration of Bill C-2, an Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act.

[*English*]

This morning we have as witnesses, from the Federation of Canadian Naturists, Judy Emily Williams, government affairs officer,

[*Translation*]

and Stéphane Deschênes, President; from the Union des écrivaines et des écrivains québécois, Mr. Charles Montpetit, responsible for the Committee for the Freedom of Speech; from the Canadian Conference of the Arts, Mr. Jean Malavoy, National Director.

[*English*]

and Frank Addario, counsel; and from the Entrepreneurs Against Pedophiles, Harold Douglas Stead, director.

The procedure is that we start with a ten-minute submission from each of the groups of witnesses and then we go to questions.

We will start with the Federation of Canadian Naturists.

Will it be Ms. Williams or Mr. Deschênes

[*Translation*]

Who will begin?

[*English*]

Ms. Judy Williams (Government Affairs Officer, Federation of Canadian Naturists): Thank you for the opportunity to appear before you today.

I'm joined at the table by Stéphane Deschênes, FCN president. Diane Archambault, the FQN president, was to be here today. I don't see her, but she may yet come.

We have distributed two naturist magazines dealing with children and naturism to you this morning.

One of the most important tasks we face today is the protection of our children. Nothing matters more. Therefore, no one can fault the intent of Bill C-2. Naturists and nudists, however, are concerned that Bill C-2 as it is now worded equates our naturist way of living with pornography and voyeurism. Throughout my 40 years of teaching, I have witnessed the impacts of child abuse and pornography on children's lives. Naturists are concerned that proposed Bill C-2 may criminalize the naked body and discourage normal, innocent, and harmless interactions between naturist community members. It discriminates against our rights to raise our children to accept their bodies without shame.

Naturism is integral to our sense of identity and allows us to teach our children respect and tolerance toward themselves, others, and the environment. It allows our children to grow up accepting the physical nature of both sexes and of all ages without fear or shame. Today, we literally represent millions of naturists worldwide. A recent poll commissioned by the FCN found that 6.1 million Canadians either participate in naturism or have an interest in doing so. Millions of naturist travellers contribute between $4 billion and $7 billion in goods and services to the North American economy annually.

While we too support artistic and journalistic freedoms in Canada, others are covering those rounds today, so we will focus on references to surreptitious observation or recording, the attendant voyeurism, and the equation of mere nudity with pornography. Such language places restrictions on naturists to freely depict their children actively engaged, without clothing, in the same activities typically pursued by clothed children worldwide in normal play and activities.

The FCN/FQN's first concern is about the over-broad application of the word “surreptitiously” as it applies in proposed subsection 162 (1). We fear that our naturist pictures may be classed as illegal because they are deemed surreptitious, and that this in turn may affect our ability to publish our magazines and pictures or even possess those pictures.

Of great concern to naturists is being secretly or deviously observed by a person or persons with prurient intent. Without specific intent, the word “surreptitiously” could lead to a wide and spurious interpretation. For example, an electrician working in a university life-drawing class while students are sketching a nude model could also be accused of surreptitiously observing.

We therefore suggest that the phrase “without his/her knowledge” be added to proposed subsection 162(1).

To say that exceptions can be made only for the public good is a two-edged sword. What precisely defines "public good" is not clear and therefore open to local interpretation. Thus, when it is left to local police or judges' interpretations of whether or not public good is being served, they're given a weapon that might well plunge the legal chill factor threatening artistic freedoms into the publishing realm. It could warrant expensive and difficult litigation to prove public good was being met, as defined by the Supreme Court of Canada thusly:

> necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature or art, or other objects of general interest.

Major national and international naturist publications—I can't hold them up, but they should be circulating to you already—such as FCN's *Going Natural* and Michel Vaïs' new magazine *Naturisme Québec* would, with various naturist travel guides, face penalties. The printing of photos that were possibly obtained surreptitiously combined with the excessively restrictive notion of public good could risk legal consequences driven by inconsistent and unpredictable local interpretations.

We therefore suggest that legitimate defences against prosecution must be spelled out to include otherwise non-criminal artistic, scientific, educational, journalistic, literary, or religious activities. Naturist defences are implicit in this application.

Our second concern regards preventing the criminalization of mere nudity. Exposure of body parts cannot be a sufficient condition for a crime under this bill. Consideration of naturism as a moral attitude and ethical lifestyle shows why. Executive director of BEACHES, Shirley Mason, says that naturism stands in strong contrast and opposition to pornography and so-called adult entertainment because naturism is a non-sexual, non-exploitive, and communal social practice, rather than a prurient, demeaning, and voyeuristic activity.

I personally have been a card-carrying naturist for 39 years and taught secondary special-needs and severe-behaviour problem students for 40 years.

● (0910)

I've often lectured to educators on the merits of naturism for children's development. An 18-year definitive study at UCLA under the supervision of Dr. Paul Abramson and Dr. Paul Okami explored the differences between children of naturists and children of non-naturist families. They and other researchers found that naturist children exposed to parental nudity developed a stronger acceptance of their bodies as a whole, had more respect for the opposite sex, were more tolerant and accepting of different body types and bodies of all ages, and were generally better adjusted than their clothed peers, and they were less likely to have sex as early or to have as many teenage pregnancies as those peers.

In the case of a magazine distributor known as Alessandra's Smile, the U.S. Third Circuit Court affirmed the political value and protected status of publications with photographs of nude adults, teens, and children, thereby reaffirming that nude is not lewd. The court further prevented the prohibition of our lifestyle and recreational choices because it ruled that photos showing nudist children engaged in activities typical of children around the world were not obscene and did not appeal to prurient interests.

Yet in Canada last year, the *Naturisme Québec* distributor refused to distribute issue five, depicting an innocent child at play on the cover, because he feared prosecution in Canada. It did not matter—and the French-speaking members here have a copy—that the play depicted was typical of children around the world.

As this standing committee struggles to protect our children, we urge you to specifically exclude mere nudity as practised by naturists throughout Canada and the world from your definitions of pornography. We therefore suggest, in order to protect legitimate photography of children's nude bodies by parents, educators, researchers, artists, and naturists, that a specific addition to the Criminal Code be added that states that mere nudity does not qualify as pornography. The current definition of child pornography requires sexual purpose. Unfortunately, many people regard all nudity as sexual, which leads them to see prurient purpose in any nude image.

Bill C-2 must be crafted so as to punish the criminal while not restricting the freedom of expression of the innocent. We therefore suggest that for the purposes of proposed section 163.1, mere nudity of a child shall not be considered child pornography. We suggest that one way of circumventing the prosecution of naturist publications for publishing non-pornographic naturist children's photos would be to adapt the 2003 proposed CBC definition of public news:

> Any definition of public news included in Bill C-2 should offer the relevant defenceto newspapers or journals or naturist publications which contain non-pornographicimages of naturists, including of children. The media, naturist or not, should include Internet newspapers, journals, and websites which do not publish pornography; andbroadcasters licensed by the CRTC, including their websites.

Mere nudity must not be sexualized and penalized as pornography or voyeurism where there is no intent to expose a person's private parts with the purpose of personal sexual arousal or to lure, entice, or coerce a minor into a sexual activity. Doug Stead will be talking about this later.

The following quote seems as apropos today as it was when it was written nearly two decades ago:

> Because God created it, the human body can remain nude and uncovered and preserve intact its splendorand its beauty. Sexual modesty cannot in any simple way be identified with the use of clothing, norshamelessness with the absence of clothing and total or partial nakedness. .... Nakedness, as such,is not to be equated with physical shamelessness. Immodesty is only present when nakedness playsa negative role with regard to the value of the person. ... The human body is not in itself shameful.... Shamelessness (just like shame and modesty) is a function of the interior of the person.

The author, ladies and gentleman, was Pope John Paul II.

In conclusion, let me say the ramifications of Bill C-2 as it is currently worded are far-reaching, even Machiavellian, in their implications for naturist freedoms. Therefore, in summary, we suggest that because of difficulties with the notion of "surreptitious", the following phrase should be added to proposed subsection 162(1): "without his/herknowledge in circumstances which give rise to that person's reasonable expectation ofprivacy".

● (0915)

Because in this bill the major defence of the public good is too narrow and open to capricious interpretation to preserve the charter's hard-won freedoms, legitimate defences against prosecution must be spelled out to include otherwise non-criminal artistic, scientific, educational, journalistic, literary, or religious activities.

The defence of naturism is implicit, as it is explicit elsewhere in this brief. Because of the common assumption that all nudity involves sexual action or intent, this wording should be added: "For the purposes of this section 163.1, mere nudity of a child shall not be considered child pornography."

Finally, because any definition of public news included in Bill C-2 should offer a relevant defence to newspapers or journals, it should also specifically include naturist publications which contain non-pornographic images of naturists, including images of children. The media, naturist or not, should include Internet newspapers, journals, and websites that do not publish pornography, and broadcasters licensed by the CRTC, including their websites.

Thank you.

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

[*Translation*]

We will now go to Mr. Montpetit, from the Union des écrivaines et des écrivains québécois, for a 10-minute presentation, approximately.

Mr. Charles Montpetit (Responsable of the Committee for the Freedom of Speech, Union des écrivaines et des écrivains québécois): First of all, I want to apologize to committee members who were present last year, as I will undoubtedly repeat myself. However, I will not repeat the content of the brief that I have submitted and that you have in your hands, nor I will cover the points that will be raised by the members of the Canadian Conference of the Arts who will speak right after me. I want to say from the outset that we agree 100 per cent with the points we are going to explain to you today.

As indicated in the brief, I am here not only to represent the Union des écrivaines et des écrivains québécois, but also 14 associations representing civil libertarians, illustrators, booksellers, translators, librarians, and artists in the fields of visual arts, radio, television, cinema, performing arts, and multimedia.

We are here to summarize a concept that seems very simple to me. When a crime is committed by a real person, there is no problem. The perpetrator can be thrown in prison. However, there is a difference when you are dealing with a work of fiction or a documentary. In other words, when a work of fiction simply discusses a crime, when the abuse that is described in the work of fiction is theoretical, imaginary, fictional, there is no crime.

Even if murder is the worst crime that can be committed against someone, Agatha Christie was never arrested because she wrote murder mysteries. It should therefore be exactly the same for stories about sexual abuse. If there are no real life victims, there is no crime.

Everyone here knows that this bill is a reaction to the John Robin Sharpe case. I would like to tell you about a different case, the case of Eli Langer. Eli Langer was arrested for having painted pictures that depicted scenes of sexuality involving young people. I will give you more details later on.

This case is much more pertinent, as regards Bill C-2, than the John Robin Sharpe case. In fact, Eli Langer painted a work of fiction, but he was arrested all the same. For a year and a half, his works were effectively banned from the market.

If there is a scandal here, it is not because John Robin Sharpe was acquitted of the charge he faced, but simply because Eli Langer was arrested without just cause. If there are to be amendments to the bill, they should be designed to prevent other artists like Eli Langer from getting caught up in the justice system, and not to tighten up these nets even more. In other words, the act should be made less restrictive, not more so.

I am going to give you a very concrete example of the type of person who might well be arrested in the future. In this case, it is me. If you are wondering what a child pornographer looks like, this bill might well turn people like me into child pornographers.

I am an author. I write books for teenagers. I have won the Governor General's Award, and I have compiled, among other things, an anthology entitled *The First Time*. It is reproduced in the brief that we have submitted. I have it here, and I can show it to you. There are two books that include 16 authentic stories about having sex for the first time. These things actually occurred, here in Canada. The stories were written by authors who, like me, have won prizes, and who are accustomed to talking to young people.

We produced the books to give them information on sexuality. We felt we were contributing to society by doing our part in terms of sex education.

● (0920)

The year they were published, the two books were even chosen by the International Youth Library in Munich to be part of the 200 best books for young people in the world. After that, the English Canadian version, *The First Time*, was published with 16 new authors. We even did an Australian version, which is also called the *The First Time*, with authors from the other side of the world.

If I understand the bill correctly, it will make child pornographers of authors who have participated in anthologies like this in Canada. If you think that I am exaggerating when I say that I am afraid that I might be arrested, think again.

Like most artists—I do mean the vast majority of artists—I live below the poverty line. I earn a very modest living. I cannot afford to go to court to defend myself against charges that might be in the courts for a year and a half, as in the case of Eli Langer. The proceedings could even drag on for 10 years, should the case go to the Supreme Court of Canada. Moreover, I would want to continue devoting my time to writing.

That is one of the reasons why artists like me are afraid of this bill. No one would want to be dragged into a process that would take up so much time and tarnish your reputation for ten years, even if you are found to be innocent at the end of the day. The problem with the act is that it enables our works of art to be seized until the trial is over. In other words, that means that we are presumed to be guilty until proven innocent. To my mind, that runs contrary to the way the law should work in Canada.

I would also like to point out that just under ten years ago, a member of Parliament as educated as you attempted to have John Steinbeck's novel entitled *Of mice and men* banned, by stating —"it has no educational value". If those comments were made about a great man like John Steinbeck, when the act was supposed to protect artistic, educational or scientific works, imagine what will happen to an author like me who is not as well known, or to any other artist, once the act has been beefed up.

There have even been international incidents like the one surrounding Salman Rushdie's book in 1989. Canada was the only industrialized country in the world to ban his book entitled *The Satanic Verses*, because it had displeased certain members of the Muslim faith. If Canada was the only country to impose a ban like that, even though it was only for two days, and if that succeeded in causing an international scandal, imagine the extent to which this bill runs the risk of paving the way to new scandals like that.

I will conclude by saying that Salman Rushdie, who has, rightly so, addressed this issue, essentially said this: "If you do not defend something that you personally find to be in bad taste, you do not believe in freedom of expression. You only believe in the freedom of expression of those who agree with you. But everyone has a odd uncle, a mentally unstable aunt, a nymphomaniac daughter. The idea that we live in a clean world, where nothing makes waves, is an element of fiction. The world is not like that. Real life is a turbulent storm, full of aberrations, difficulties and problems. Everyone knows that. It is therefore remarkable for anyone to try and claim otherwise, and to blame artists who try to paint an accurate picture of the situation."

Thank you very much.

● (0925)

The Chair: Thank you, Mr. Montpetit. I now give the floor to Mr. Malavoy, National Director of the Canadian Conference of the Arts.

Mr. Jean Malavoy (National Director, Canadian Conference of the Arts): Thank you very much, Mr. DeVillers. I will ask Mr. Frank Addario to complete my presentation.

The Canadian Conference of the Arts is a national non-profit organization. It is the oldest organization defending the interests of the arts in Canada. We have members everywhere. We are the voice of some 250,000 artists and cultural workers in Canada.

Artistic endeavours relate directly to the core values that the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms is intended to protect, including the pursuit of truth and individual self-fulfillment. Art is indispensable to modern society as a form of expression which describes and comments on human, social and political conditions. It plays a critical role in enabling individuals to explore, understand and become more aware of themselves and the world in which they live. An artist is a visionary. He sees things that take time to understand. Think, for example, about the impressionists, or Picasso.

The Canadian Conference of the Arts opposes the replacement of the artistic merit defence with a new test that asks whether the artist had a legitimate purpose and whether his or her art poses an undue risk of harm to children. Our opposition is based on the following points: First of all, as noted above, there is no reason to think that the current defence will not work to weed out that which truly exploits children, depictions involving real chidden in sexual acts that are themselves a sexual offence under the existing provisions of the Criminal Code. Secondly, as noted above, there is no practical risk that pedophiles will escape conviction for possession of child pornography involving real children. I emphasize the word "real". If they happen to possess some material with artistic merit, both the child pornography law and the artistic defence will have served their purpose. We have the act, it is good, and it has proved its merit. Thirdly, a legitimate purpose test introduces an element of subjectivity that will put legitimate artists at risk of prosecution.

The current defence has the beneficial effect of discouraging marginal prosecutions based on the subjective evaluation of art by police officers. This is because the artistic defence has been authoritatively described by the Supreme Court to extend to any work with "objectively established artistic value, however small". In contrast, a legitimate purpose test will engage the police in judging the art from the subjective view of whether there is "too much" emphasis on sex or sexuality, or whether the emphasis on sex or sexuality appears to be gratuitous or superfluous. That puts the police officer or the person in a very difficult situation, where he will be required to judge if the purpose is legitimate or not. The clause on artistic value is much clearer.

The temptation to compare it with established or majority art will be to difficult to resist, and the result will be artists not doing what we expect them to do. The theory that "legitimate purpose" will be obvious to police and prosecutors ignores the experience of artists and promotes "consensus art" of the most timid variety. The self-limiting nature of the defence means that it will offer protection against censorship and criminal conviction only to those whose expression represents consensus values. This is inimical to the concept of free expression.

We must mention that the second branch of the new test, which requires proof that the art poses no "undue risk of harm" to children, would engage artists in expensive litigation in which the risk of losing entails being labelled a child pornographer.

In conclusion, eliminating the artistic merit defence will not eliminate the sexual violence minors in Canada face.

● (0930)

It will not prevent the production and distribution of child pornography. It will simply cause confusion among the general public and persecute legitimate artists whose work could be considered in breach of the proposed legislative measures.

Frank will complete my presentation.

[*English*]

Mr. Frank Addario (Lawyer, Sack Goldblatt Mitchell, Canadian Conference of the Arts): Thanks very much.

The brief we filed really summarizes our legal objections to the change that's proposed to the artistic merit defence. I just want to point out that the artistic defence has served artists as well as the community for over 50 years. The change that's proposed, which we suggest is a radical one, is unnecessary, and to the extent that it's based on the trial decision in Sharpe at his retrial, we say it's illogical to change an entrenched defence in the law to deal with a perceived problem arising out of his case.

I can say that I'm unaware of a single instance in Canada since Sharpe's case where a real pedophile in possession of material involving real children escaped prosecution because of the artistic defence. That's not, in fact, what happened in Sharpe's case. As you all know or ought to know, he was convicted of possession of child pornography in relation to the large amount of materials in his possession. The stuff for which he was acquitted was written material of which he was the author.

Unless you're going to say that no pedophile can ever legitimately possess material that has artistic merit that involves a subject matter of teenagers and sexuality, then to change the law simply because we're unhappy with the result in that one narrow part of his prosecution is, we say, illogical.

We're concerned that the test that has operated on an objective basis and therefore been easy for judges and police officers to understand for many years is now going to be turned into a test that invites subjective evaluations of art, and we think ultimately the people who will pay the penalty for it are legitimate artists, not pederasts in possession of material. As we pointed out in the brief, pederasts—and I'm sure the police will confirm this for you—almost invariably are in possession of material that would neatly fit into the definition of child pornography in section 163.1 of the Criminal Code and would not permit the defence of artistic merit.

So we see it as unnecessary and would ask you not to disturb the defence.

● (0935)

The Chair: Thank you.

Merci, Monsieur Malavoy.

Now we go to the Entrepreneurs Against Pedophiles. Mr. Stead.

Mr. Harold Stead (Director, Entrepreneurs Against Pedophiles): Good morning, ladies and gentlemen, honoured members of Parliament, and staffers.

I appreciate your allowing me to come to present you with my views on some of the trying issues you're having to deal with in today's hyper-sexualized world we live in. Earlier, I distributed to each member directly the basis for what I am about to talk to you about, which is rather a large brief.

Section two is pretty much an outline of a new crime that's come about since the evolution of technology, which is the distance-remote exploitation of children, which is actually the only new crime that technology has brought forward to us, because sexual abuse has been with us for a very long time.

Section three is a work of foundation regarding morality and development or maldevelopment of moral ethical values for children exposed to such material, and why you as parliamentarians have a right and an obligation to look past the actual acts of sexual abuse, in your areas of consideration, when thinking strictly in terms of age of consent. This is what I had planned to basically run my presentation to you today on, because it's a very large bill and I would like to talk to you on child pornography and custodial sentencing.

If you are interested, if you would like to look at 28 days of global perspective of media reports of known child sexual abuse going on in the world from a global view, all you have to do is flip through sections four and five, which offer a compendium from a global perspective of what's going on in the English-language media throughout the world on various forms and methods of child sexual exploitation.

Now that I've thoroughly trashed going through what I was going to do for a presentation, if you'll just bear with me a second....

I think you have an opportunity here as parliamentarians to perhaps make this bill a crowning achievement in your personal lives and service to Canadians in general, and to children specifically. Of course you have just as much opportunity to make this bill ineffective or miss a good opportunity for leadership in setting the age of consent a little higher in this country and bringing us into line with what is going on in much of the free world.

I passed out, and I don't know if you have it, a graphic of the bigger banner that I have here, themed behind which is "How old is old enough?", looking at the legal jurisdictions around the world. Since 1984, when a seminal thesis that is world-renowned and recognized appeared, called the Badgley report—which is really entitled *Sexual Offences Against Children*, volumes 1 and 2—we have had a pretty much steady stream of requests to the House that the age of consent be reviewed and changed. In fact, this report, in recommendation number seven, given in 1984 by the blue-ribbon panel of the best minds of that period, recommended that 16 be the age at which adults who think and act with children in a sexual manner and as viable sexual partners should face severe prison time. They were recommending ten years as an indictable offence time at that point.

Since that time we've had numerous private members' bills brought up by various people of all stripes of political persuasion that have gone nowhere. We've also had numerous conferences of provincial attorneys and solicitors general with the federal counterparts where the provinces have requested, on more than one occasion, that the age of consent be re-evaluated and perhaps raised, some people think as high as 18, which would put Canada well into the top of the list of legal jurisdictions around the world.

The consensus of most of the people I've talked to around the world is that the age of 16 is probably an appropriate age for the legislation to take effect and start to offer at least a deterrent to adults who are considering children as viable sexual partners.

● (0940)

Sixteen is probably an appropriate age for the legislation to take effect and start to offer at least a deterrent to adults who are considering children as viable sexual partners, but also to the children themselves to set a boundary and an expectation for what is acceptable behaviour from children who are going through very difficult times in what is essentially a world for which we have no precedents in mankind to look back to for instruction.

It is the world where we have developed and deployed a communication technology revolution known as the Internet, where the age of exposure of children to adult pornography has dropped from that of my generation. It was somewhere around 14 to 15 years old, typically falling across their father's stash of *Playboy* magazines, to six and a half years, according to Health Canada, where children are being exposed to penetrating adult sex via videos that are bought from the stores, by magazines that are bought off the shelves, and more and more so by running around on the Internet in a world they have the technical skills to go anywhere with. Perhaps the generation that is rearing these children is somewhat lacking in the knowledge, and therefore the ability, to intercede with proper parental guidance and instruction to the child about what this material means at a much earlier age.

So we go back to how old is old enough. As members of the committee, I would like you to look at that question in the context of your own sons or daughters, or grandsons or granddaughters, at ages 14, 15, and just below 16. In that context, I would like you to think whether you believe that the child who you can picture in your mind has reached that requisite development of maturity and physical, emotional, intellectual, and cognitive ability to make these once-in-a-lifetime types of decisions in the context of informed consent.

By consent, I mean legally, as in terms of voluntarily given by a fully informed individual possessing full and clear appreciation of all the various characteristics and facts concerning sexual activity, together with the ability to foresee and understand all the consequences of these activities. I am talking about teen pregnancy. I am talking about HIV as a precursor to almost certain death, which my generation and yours didn't really have to worry about, as we were probably perhaps mostly afraid of picking up a treatable sexually transmitted disease, such as gonorrhea or syphilis.

These children who we are talking are not the generation we grew up with, where Meat Loaf, the musician, wrote the song, “Paradise by the Dashboard Lights”. We do not allow children to get drivers' licences until the age of 16 because we don't believe they have the cognitive ability to make the decisions necessary for the potential ramifications of behaviour that isn't to the norm of what society expects.

There is an age of consent in almost all the jurisdictions around the world, with the exception of a couple of notables like Pakistan, which have no legal jurisdiction. Legislators around the world acknowledge that at some age it is in appropriate for children to engage in these adult activities because they can be both physically and psychologically damaging to the child.

It is a fact that Canadian children have far less protection from adult sex offenders than children in the vast majority of western jurisdictions. In fact, a child in Canada is not as well protected, on paper at least, as are children in most third world jurisdictions, if you will direct yourself to the chart.

We could go back historically and look at the age of consent foundation in our system as coming out of the United Kingdom. It were first legally written down in 1275, when it was set at 12 years of age. Then it was set to 13 in 1875. Subsequently, in 1885 the United Kingdom set it to 16, where it stands today.

Children in most other countries benefit from a higher age of legal consent protections, specifically from adult-child sexploitation, to say nothing of the higher age of consent laws providing an expectation, if not behavioural boundaries, for the children considering sexual activities with their peers.

● (0945)

A number of results might materialize if you were to raise the age of consent to, say, 16. Children might take a little longer to reach the point where they are able to experience full human sexuality. It would allow youth longer to mature and become independent before having their own children. It would allow youth a greater opportunity to learn from less life-altering decisions. It would allow them more time to view their experience in light of their growing capacity for rational thought. Moreover, to my knowledge, no child has ever died from abstinence from sex.

Legislators in most other countries have set the bar higher, not only for the protection of children, but also to prevent harm to the society stemming from moral disintegration. Our society has become a hyper-sexualized, and hence dangerous, world for children. These dangers are heightened by the trends toward instant-gratification and the younger-is-better mentality. Morality for the purpose of age of consent should be based on what every right-minded person is presumed to consider moral within the society. I suggest that 14 is not what the general population of this country considers a moral age of consent.

For whatever reason, the drafters of Bill C-2 presupposed that the vast majority of Canadian children have achieved equilibrium of development and experienced mental, emotional and physical maturity by their fourteenth birthday. They have also assumed that, having arrived at 14 years, they have enough life experience behind them to give informed consent and to engage in full human sexual activities on a level playing field with each other, as well as with a large and growing group of adults, who see children as viable sexual partners.

The Chair: Mr. Stead, I'm going to ask you to wind up now so we can get to the questions.

Mr. Harold Stead: I would submit to you that even among adults, the sexual playing field is not level. Does a subordinate really have the ability to say no to a boss? If that's not the case in the adult world, how can we expect it to be so in the world of the child?

I would beseech you to try to convince your colleagues to give as much consideration to this crime, which devastates the person, as you give to crimes of property.

Thank you.

The Chair: Thank you, Mr. Stead.

We'll now go to questions from the members.

For the Conservative Party, Mr. Toews, for five minutes.

Mr. Vic Toews (Provencher, CPC): Mr. Stead, I'm interested in your comments in respect of the legal age of consent. You know that the government has put forward a bill that talks about exploitive relationships. John Robin Sharpe has certainly praised this provision and says that this is going to help the public to understand man-boy relationships. From a former prosecutor's point of view, I can see this provision being difficult, complex, and cumbersome. It's almost designed to provide pedophiles with an opportunity to escape responsibility for the exploitation of children.

We heard some very powerful evidence from a Dr. Bala, who disapproved of this “vague exploitive relationship" provision by the Liberals. He said we need to draw a very clear line. He suggested that age 16—at least 16—would be an appropriate time to draw that line, for some of the reasons that you've mentioned.

Have you considered this exploitive-relationship provision? What are your comments?

● (0950)

Mr. Harold Stead: All people, including our parliamentarians, are having a great deal of difficulty dealing with what's going on in our hyper-sexualized world, with regard to adults accessing and exploiting children. I'm unsure, from a legal perspective, what value this proposed legislation has, in terms of relationships between children and pedophiles.

Pedophilia is a mental illness, and is listed in the DSM-IV as a known illness. People who have sexual desires for children are mentally ill. Unfortunately, there is no treatment for these people and they are highly motivated to continue their behaviour. I don't believe that the bill that you are talking about is going to address the problem. It muddies the line as to what is appropriate behaviour between adults and children.

Mr. Vic Toews: Have you taken a look at some of the other reforms countries have looked at? I know Great Britain was looking at the age-of-consent issue. Have you studied any of that literature, or proposals by Great Britain?

Mr. Harold Stead: Great Britain has pretty much set it at 16. There had been some talk of changing it, but it hasn't taken place. It is 16 there. New Zealand just increased their age to 16, and at the same time introduced new custodial sentencing laws for possession of child pornography to increase their maximum to five years of imprisonment.

Other than that, the age-of-consent laws are confusing, and not consistent from jurisdiction to jurisdiction. That includes even here in Canada.

I understand Quebec has separate child protection legislation that actually extends protection to age 16. That was reported by, and used by, the New South Wales government report that raised their age to 16—that Quebec was listed as a jurisdiction protecting them at 16, whereas the English of Canada had it at 14.

Mr. Vic Toews: In fact, in Canada, if a pedophile thinks somebody is 14, but the person is as young as 12, it is a legal defence under our Criminal Code. So you can be acquitted, if you're an adult, of having sex with a 12-year-old under our present system. I simply, for the life of me, can't understand what the government is trying to do with this exploitative relationship definition. It certainly doesn't draw the clear line Dr. Bala and others have been talking about, and I'm just wondering if you can fathom the understanding of the government to basically make each case an exploration into a sexual relationship between a child and an adult. It seems to me to be counterproductive. It doesn't send that clear message out to society that having sex with a child that young is wrong.

Thank you.

[*Translation*]

The Chair: Mr. Montpetit, do you want to comment on that question?

[*English*]

Mr. Charles Montpetit: Yes. I'd like to point out to the respectable representative who just spoke that the age of 12 is only legal for sex in Canada if the partner is no more than 14, so you cannot be an adult who has sex with a 12-year-old and still be legal.

● (0955)

Mr. Vic Toews: In fact, that's wrong. If you're 12 years old, but the pedophile thinks the person is 14, that's a legal defence under the Criminal Code. We can refer you to any number of decisions discussing it.

The Chair: Thank you, Mr. Toews.

[*Translation*]

Thank you, Mr. Montpetit.

Mr. Marceau, you have five minutes.

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

I would like to thank the witnesses for giving us their testimony today. I have the impression that I have already heard what some of them had to say.

Mr. Montpetit, when you came before the committee last year, you sold me the books that you mentioned, which I read with a great deal of interest. They are worthy of being on the list of the 200 best children's books in the Munich Library, I believe. I wanted to congratulate you on that.

In your presentation, you said that you had written these books to inform young people about sexuality, as a tool for sexual education. Under the legislation before us, if something is written for educational purposes, it is by definition not child pornography. So contrary to what you have said, you are not a pedophile or a child pornographer by having written these books.

I would like your comments on that.

Mr. Charles Montpetit: The legislation states that the material must have a legitimate artistic, educational or scientific purpose. The new version of the bill is much less clear than the old one, which covered all artistic, educational and scientific material. The question of the legitimate purpose becomes subjective and not everyone will interpret it the same way. So that means that if someone lays a complaint against me because of my book, stating that in his or her opinion the book has no legitimate purpose, then the complaint can go ahead. I strongly hope that I will be able to defend myself in court, but it might take me 10 years. I would really like the government not to open the door to that kind of thing.

Mr. Richard Marceau: To begin with, it seems to me that, according to the definition in the legislation, the dominant characteristic has to be a description for sexual purposes. So the bar is already quite high. Second, educational and artistic purposes constitute a legitimate defence.

You mentioned the Langer case. He was not convicted, right? Can we at least agree that the dilemma for us as legislators is the following? We need to find a balance between the possibility that certain artists could—I'm using the conditional here—be accused of creating child pornography but not convicted, and the need to protect even one child. On the one hand, people talk about unpleasant and lengthy legal proceedings that can cost a lot of money. On the other, we need to protect children. I have met with other people who have been convicted of child pornography. The list is not very long. Can we at least agree on this?

● (1000)

Mr. Charles Montpetit: There is a principle in law that protecting the innocent is much more important than arresting the guilty. When there is a choice between wrongly arresting an innocent person and rightly arresting a guilty person, it is preferable to come down on the side of protecting the innocent.

Mr. Richard Marceau: Mr. Montpetit, we are talking about the right of a person not to be convicted, rather than the right not to be charged. Those are two very different things, since the rights of the accused are protected. I am playing devil's advocate to a certain extent, because this is a very important point. There is a difference between someone who might be accused of something and someone who might be found guilty of something. That distinction, in my opinion, is missing from the presentation that you gave us.

I would also like to hear from Mr. Malavoy on this point, because I know that he has a number of things to say and is eager to jump in. So my point is this distinction between the possibility of being charged, which is real but less serious than conviction, and what you said. There is a difference between being convicted and being charged.

Mr. Charles Montpetit: The problem is that it is not necessary to subject works of fiction to the Pornography Act in order to protect real children. I have the impression that you may be having difficulty making the distinction that I have tried to pinpoint: the aim of the legislation should be to protect real children against real abuse. That aim is not better achieved by making authors of fictional works liable to prosecution. In other words, the legislation is working very well right now and will not be any better if novels and other works of fiction can lead to the same charges by including them here. Similarly, banning detective novels will not help us arrest more murderers.

You said that the legislation would ban only publications whose dominant characteristic was that they were written for a sexual purpose. I would like to correct you on that point as well, since this is only one of the elements that would be prohibited. The law also prohibits, in paragraph (a), representations that show a person who is or is depicted as being under the age of 18 years. Works in which the sexual organs of a person under the age of 18 years are depicted are also prohibited. In other words, the book that I mentioned to you and many other books on sexual education would be illegal. It is not just paragraph (c) that is important here; paragraphs (a) and (b) prohibit a lot more works of fiction than paragraph (c) does alone.

The Chair: Thank you, Mr. Montpetit.

Mr. Richard Marceau: I would like to hear what Mr. Malavoy has to say about this.

The Chair: Fine, and Mr. Deschênes also wanted to make a comment.

Mr. Malavoy, followed by Mr. Deschênes.

Mr. Jean Malavoy: Thank you very much, Mr. Marceau.

There is indeed a difference between being charged and being convicted. We feel that, in its current form, the use of artistic value as a defence is working.

Mr. Chairman, I would like to briefly cite a very significant ruling made by the Supreme Court of Canada in 1992 in the Butler case. It reads as follows:

> Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression. [...] As discussed above, the court must be generous in its application of the "artistic defence".

Even though we can say here today, April 7th, that being charged is not the same thing as being found guilty, a police officer in a village somewhere in Canada may be in a situation where his or her objectivity would be challenged because the legitimate purpose was unclear or there were no legal precedents. That kind of situation gives rise to much more complex consequences for creators, who need complete freedom of expression to do their work. As you know, that has nothing to do with child pornography.

Creators are responsible people who are respected by society. However, they constantly worry that people of good faith may judge their works by applying a much more restrictive definition of legitimate purpose than the idea of artistic expression. Our opinion is that we already have a law. Frank talked about the Sharpe case. Why do we need to change a law that has been working for 50 years, as shown by the fact that an individual has been convicted for the acts that he committed? What Charles was saying—he is a creator and it is useful to have a creator give his views—dealt with an element of subjectivity that represents a risk for creators, and some of them will refuse to create.

We need to keep in mind that creators are people like us, who have families. I have five children myself. The term “child pornography” is so terrible that there will be an impact on the environment and in the village where these people live. They will come to the conclusion that they would prefer not to create anything.

That said, Mr. Marceau, you are right in saying that there is a difference between being convicted and being charged. I support that.

● (1005)

The Chair: Mr. Deschênes.

Mr. Stéphane Deschênes (President, Federation of Canadian Naturists): I simply wanted to add that the fear of being charged is not the only problem. Judges and police officers are not the only ones who take these kinds of decisions. For example, last summer, the magazine *Naturisme Québec* was rejected by a distributor whose legal counsel was afraid that the company would be prosecuted for distributing child pornography.

Decisions are made and things are interpreted on the basis of subjective laws by everyone, not just police officers and judges. Especially in the case of publications that do not bring in a lot of money for distributors, these kinds of situations can truly reduce freedom of expression for everyone in society.

[*English*]

The Chair: Mr. Comartin, for five minutes, more or less.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): I like the “more” part better, Mr. Chair. Thank you.

Thank you all for coming.

Mr. Addario, we had the Canadian Bar Association here on Tuesday. Following up on the points you made around Sharpe—and I think I'm characterizing them accurately—regarding the provisions in the proposed bill around the definition of child pornography, they said that the defence that's available has a better than even chance, though I think their wording was even stronger than that, and that this would ultimately be struck down by the courts, because the court has basically carved out what they felt was the appropriate regime to govern artistic expression.

Have you or the conference commissioned any study by constitutional or charter experts for an opinion on that point?

Mr. Frank Addario: We agree with it. We're aware of their position, and in fact our position is a congruent analysis.

The way we read Sharpe is that the court was faced with a choice of striking down the law because it was overly broad and was going to violate paragraph 2(b) of the charter or reading into it provisions that would make it constitutional.

The majority did it by creating those two exceptions, of which you're aware. One is for works of the imagination for private possession, and the other involved consensual material where no offences occur between persons under the age of 18. The example given to the court was that two people who are 17 can legally get married, and if they decide to take photographs of themselves on their honeymoon engaging in sexual activity, it shouldn't be a criminal offence. The court said yes, that's fine for private possession.

The other branch of the court's decision was that the reason we don't need to strike it down is because there is this objective artistic merit defence. It doesn't depend on the success of the work or on the artist's motives. It depends exclusively on whether or not evidence can establish objectively that it has artistic merit. Otherwise, we'd be creating an unfair regime where good artists would be acquitted and bad artists would be convicted.

The court said, “We're not going to create that kind of regime. It would be unfair and extreme. What we'll do is just create this objective test as a threshold, and persons who can climb over that can access the defence, notwithstanding that the material they have fits within the definition of child pornography.”

We saw both branches of that to be essential to the court's decision in upholding the legislation in Sharpe. Apart from the absence of any proof that this is necessary in order to catch more pedophiles, the other principal problem is that it introduces a subjective element, which creates a risk of prosecution for legitimate artists.

If I could link that to something Mr. Marceau asked about, it's not only the risk of prosecution you should be concerned about, it's also the chilling effect on other artists, artists who just decide not to tackle a subject because the risk is too high. The danger of being charged and/or labelled a child pornographer is not worth the candle once you're contemplating an artistic endeavour.

You as parliamentarians, in my view, should not be encouraging that type of chilling effect. You should, on the contrary, be enacting legislation or engaging in public policy that encourages artists and artistic endeavours to flourish.

● (1010)

Mr. Joe Comartin: That was going to be my next question, around the whole issue of the chill, so let me pursue that further. We've heard that just being labelled a child pornographer is enough to place that chill. But there's the additional one, and that's the one I want to explore.That's the question of the legal costs of taking on and defending a charge.

[*Translation*]

Mr. Montpetit, perhaps you would like to respond to that as well.

[*English*]

Mr. Addario, what I'm looking for is an estimate of what it would cost to defend a charge like this all the way through the trial level, the appeal court level, and the Supreme Court of Canada level.

Mr. Frank Addario: Well, an honest lawyer wouldn't charge that much.

Mr. Comartin, I—

● (1015)

The Chair: His lawyer is busy today.

Mr. Frank Addario: That's right, testifying.

I had the privilege of defending Mr. Langer when he was charged. If I could maybe give the members of the committee a little overview of that case, he was a young artist and it was his first show. He painted museum-sized paintings. They were exhibited at an artist-run gallery, so the work was juried before it was put up.

An hon. member: What is museum-sized?

Mr. Frank Addario: Museum-sized? Really large, like the friezes, very large.

He used great materials. All of the experts who testified thought that there was no question that he was an adroit, talented, young artist.

That case seized his imagination and occupied his artistic imagination for almost two years. So the psychic cost of that case was incalculable for a young artist, and ultimately—I have some sympathy for the police, because no one knew what the test of artistic merit was then—the judge concluded that the work was condemnatory of the sexual abuse of children and he acquitted the paintings, if you will, and they were returned to Mr. Langer.

Now that we have an objective test, in my view, as his counsel, he could not be charged again. On the other hand, under the legitimate purpose test, he'd have to go through that same exercise again and satisfy a court or a jury that he in fact was intending to explore a serious subject in a serious way, or that he was intending to condemn the subject of sexual abuse of children in a serious way. I'd say it's just too much to put legitimate artists through.

There is no evidence that this type of amendment to the defence is necessary in order to catch guys like Sharpe.

[*Translation*]

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

[*English*]

Mr. Charles Montpetit: Since you've asked for my comments in regard to your question....

First, you mentioned a chill. I would just like to say that it is not a minor thing. As far as somebody who is actually accused, the chill will destroy an artist's life.

As a writer for teenagers, I will not be invited into schools, which is my main source of revenue—doing conferences—and my books will not be sold. They will be seized during the entire proceedings. That means I will lose all revenues, and even if I am declared innocent, the bad reputation that all this will have given me will probably keep me from ever exercising that profession again, because who wants an accused child abuser in schools. So that chill is enormous.

Second, you've asked about the cost. There has not been an actual case so far of an artist fighting it all the way to the Supreme Court, but we have a reasonable facsimile in the case of Little Sister's v. Customs, which was fighting a similar law. Customs was forbidding certain works of art at the border. They did fight it to the Supreme Court and it cost them more than $1 million over 10 years, the first time around. Currently, they have to do it all over again. So we are at about $2 million.

Finally, it is not only the chill or the cost, but what I find the most bizarre in the way the law is phrased right now is the issue of reverse onus. It is up to the artist to prove that his work is not exploitive of children, instead of having the accuser prove that it is. To me that is simply unconstitutional.

[*Translation*]

The Chair: Thank you, Mr. Montpetit.

Mr. Comartin, would you like to say something? No.

Mr. Macklin, you have the floor.

[*English*]

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

Thank you, witnesses, for being with us today. It is very important that we get your perspective. Today we have had a broad range of perspectives that certainly has made us sit back and listen to you with great care.

In particular, I would like to go to a couple of issues. I would like to follow up on Mr. Marceau's line of questioning, but first I want to deal with this concept of virtual. Right now within our existing definition, we do include and catch virtual child pornography that depicts sexual abuse of a real child, as well as, for example, a child who is what we will call computer-generated or computer-made as a composite.

With today's technology where you cannot differentiate—or at least we are getting to that point where you will not be able to differentiate—between a computer-generated photograph and a real child photograph, why do you think that we should differentiate between the two if we cannot distinguish—can't tell the difference—between the two?

Mr. Charles Montpetit: Okay, it's quite simple.

[*Translation*]

Excuse me. I will change to French.

There should be a difference. In order to arrest someone for a crime, you need to prove that the crime took place. There needs to be actual harm caused to an actual person. If it cannot be proven that the crime took place, no charges should be laid against an individual. The question is not whether the image is similar in the two cases. The question is whether the crime took place or not.

So the important thing is not to look at the product but to determine whether a real child was abused. That is what makes the difference. Even if the product is identical, there should not be an arrest unless it can be clearly determined that abuse took place, that a child was actually and physically abused. It is as simple as that.

[*English*]

Hon. Paul Harold Macklin: Are there any other comments from other witnesses?

Mr. Frank Addario: I'll just point out that even if you altered the definition to make it explicit to judges that virtual depictions of children were included and you left the artistic merit defence as it was, it would still operate to protect legitimate artists. On the other hand, where there's no minimal objective artistic value to the work, it would permit the prosecution of pederasts.

● (1020)

Hon. Paul Harold Macklin: Do you wish to add something?

Mr. Harold Stead: I would like to respectfully take the opposite position from the other witnesses on virtual versus real children in the image. Consider that child pornography, whether it be virtual or real, when used by the pederast or the pedophile becomes an artificial stimulant to one of the strongest emotions within the human body, the orgasm. As with all artificial stimulants, such as drugs or alcohol, the body tends to get used to a certain level, and requires stronger stimulants to achieve the same effect.

I think there is a danger in not differentiating, or in making an exception for what would be termed virtual—if we could in future actually distinguish virtual from real in identifying a child and bring that real child to court to admit that she is or he is that individual. The damage to the society fabric, in general, by people who are sucked into the younger and younger mentality and instant gratification through masturbation is a serious mental problem that is going to overwhelm our social systems in dealing with it.

When you think about the number of young children who are being exposed to this type of material, and the very lack of social services and mental health professionals capable of dealing with children who are caught up in the particular type of addiction, that justifies in itself that we do not make allowances for virtual child pornography.

Hon. Paul Harold Macklin: Mr. Deschênes.

Mr. Stéphane Deschênes: If I could add to that, we have to keep in mind that the problem is not the product; the problem is the pornographer who is abusing the victim, the children. It is also a known fact that stimulus for those people can come from fully clothed children. They will stand outside schools and be turned on just by watching the kids in the playground—the innocent children. Unless we're going to make all imagery of children illegal, we will not remove that stimulus. We are going after the criminal, not the product.

Hon. Paul Harold Macklin: Let me switch to one other area, because I know we don't get much opportunity to ask various questions. One of the issues I'd like to come back to is what Mr. Marceau was talking about. Although you spent a certain amount of time in your briefs dealing with the fact that you want to deal with the offences that are available for child pornography, I think it really does come back to the question of whether, in the first instance, you are satisfied the protections are really there for artists generally, in terms of the definition of child pornography.

Let's just look at one other example. Within that definition, Mr. Marceau pointed out certain areas that talk about explicit sexual activity, and the dominant characteristic is a sexual organ or the anal region, and it is done for a sexual purpose. But let's go on to the next section—and these are cumulative, not individual and separate—where it talks about the written material or visual representation that advocates or counsels unlawful sexual activity with a child.

Are you suggesting to us that artists want to be able to advocate or counsel unlawful sexual activity with a child?

Mr. Charles Montpetit: Of course not, but I'd like to correct you. It's not cumulative; it's an either/or category. It's either the works that depict children—that is, people under 18 or who look like they're under 18—engaging in sexual activity; or books that depict nudity for the purpose of sexual stimulation, including genitalia or the anus; or written material that matches what you've just described. So a work does not have to fulfil all three criteria—just one—in order to be prosecuted, and that will be enough to make that work subject to an accusation.

On what you just said earlier, to me it's quite simple. Whether the work is virtually identical to a real act, if it was a virtual murder that was identical to a real murder it would not warrant the arrest of the person who created it on the Internet, so why should we treat sex differently from any other virtual work?

Basically those are the two answers I have for you. You should not arrest people for depicting something in which no crime has been committed. That is not a matter of personal interpretation. When you say "in order to provide sexual gratification", that is subjective. That will change with just about every person; therefore a lot of people will interpret the issue of sexual goal as something you might not think is a sexual goal.

To have the law rest on such a subjective issue is extremely dangerous, because it means the opinion of the accuser is more important than whether a real crime has been committed.

● (1025)

The Chair: Thank you, Mr. Macklin.

Mr. Warawa is next, for five minutes.

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

I'd like to thank the witnesses for being here this morning and providing their perspectives.

I have a comment and then a question.

My comment is regarding a comment made by Monsieur Malavoy. You asked, why change something that is working? I'd suggest that Canadians support amendments. They support in general the legislation that is being proposed, Bill C-2, because they don't see the present legislation as working and providing protection for children.

In my riding of Langley we have a young adult who was convicted of sexual offences against two young children and was given a conditional sentence to be served out in his home. The victims reside on each side of him, leaving the parents and those young victims in a continual state of fear. In that case, I, along with the victims and residents, don't believe that the system is working.

There are numerous examples of adults in an authoritative position who have abused a trust and have had sexual relations with children of age 14 or 15, and the bill would tighten that up. Some have been charged. But I want to focus on non-authoritative positions where you would have, for example, a 28-year-old or a 30-year-old talking to and building a relationship with a 14-year-old or 15-year-old, and progressing to a state where there is a sexual relationship that happens between somebody who is non-authoritative but who has a relationship with a child and takes advantage of a person of a young age. Those are my leading comments.

My question relates to the presentation made by Mr. Stead, dealing with the age of sexual consent. Before being elected as a member of Parliament for my riding, I spent 14 years in local government. Local governments in Canada are represented by a body called the Federation of Canadian Municipalities. It represents almost every local government in Canada. For a number of years it has been asking—and even recently it passed a resolution, almost unanimously—that the age of consent be raised to 16 years of age from the present 14 years of age.

Canada is clearly in a minority when we have the age of consent as 14. The vast majority of Canadians abhor victimizing children, and I'm sure everyone here today supports protecting our children. Why is there resistance? This is my question for each of the panellists. Why do you believe there is a resistance by a few in our country who are in a position of decision-making and influence to raise the age to 16 when the vast majority of well-educated, hard-working Canadians, even in government, are saying please increase the age to 16 because a 14-year-old does not have the cognitive skills to be able to make those decisions, to give informed consent to have a relationship with a 28-year-old, a 30-year-old, or a 32-year-old?

So that you understand my question, why is there resistance to increase that age? Let's start with Mr. Stead, please.

● (1030)

Mr. Harold Stead: You're the parliamentarians; I would like to ask you why it hasn't happened in 28 years. My suspicion is that in our charge to liberalize personal freedoms and accommodate everybody's desire for the liberalist interpretation of behaviour, we have granted adults, and disenfranchised children from, the rational boundaries that are common sense and almost a no-brainer in the rest of the world.

Some of the arguments I've heard made by parliamentarians as a justification for not raising the age of consent are that no child would want to be victimized by being a victim. Well, nobody wants to be victimized by being a victim of any crime, least of all a sexual crime, especially children. We've heard the defence that children will be criminalized—if they're having sex with each other and are under 16, they may fall into this net and somehow be criminalized. There's a simple solution to that—put an age differential in between. When you get right down to it, why are we not putting limits on the behaviour of children that at least put an expectation that they should wait?

We put limits on them not to smoke, because it's bad for their health. I suggest to you here that any reasonably competent individual would not want their child or grandchild to be having sex at 14 or 15 with another 14- or 15-year-old, because of the lack of understanding of HIV, and a host of other problems that can come about from it.

The Chair: Thank you, Mr. Stead.

We'll move along.

[*Translation*]

Mr. Malavoy, do you have an answer you would like to give?

Mr. Jean Malavoy: I will ask Frank to answer that question.

[*English*]

Mr. Frank Addario: Mr. Warawa, we very much appreciate the question and the comments you made.

The CCA does not have a position on this issue. We came here to make the single point made in our brief, if I could give that answer.

In relation to your comments about the system not working, and your reference to the fellow who got the conditional sentence living next to the victims—that, of course, doesn't have anything to do with the artistic merit defence. You referred to the apparent plague of breach of trust and exploitation situations involving children, and that of course doesn't have anything to do with the artistic merit defence. Our simple position was that the defence itself is working, and Parliament ought to maintain it.

The Chair: Thank you, Mr. Addario.

Monsieur Montpetit.

[*Translation*]

Mr. Charles Montpetit: I support Mr. Addario's comments. I was going to say the same thing. If there is ever legislation to change the age of consent, I would suggest that you hold hearings on the subject, and competent experts in that area will give testimony before the committee.

We are here to comment on this bill. A decision was made that these hearings would deal with this legislation. There are no proposals in the legislation to change the age of consent.

● (1035)

[*English*]

The Chair: Ms. Williams or Monsieur Deschênes.

Mr. Vic Toews: On a point of order, I don't know if the witnesses know it's Bill C-2 we're dealing with, which does include the age of consent. Witnesses may be confused about that. It is broader than simply the issue of artistic merit.

[*Translation*]

The Chair: Mr. Deschênes...

Mr. Charles Montpetit: Excuse me, Mr. Chairman. I did not say that there was no mention of age in this bill. I said that the bill did not propose to change the age of consent. So we are not here to discuss changing the age of consent.

[*English*]

Ms. Judy Williams: I would like to agree with the previous two witnesses about this not being our purpose for being here. We were asked this question the last time we appeared before you, and I can tell you that after 40 years of teaching secondary students, the question you ask is a good one, which I would turn around to the parliamentarians. We all must answer that question, but I think the best way to answer it would be to give you this analogy: have you ever tried to tell a teenager that they are grounded or that they cannot watch television after a certain time? You know the resistance you get.

We have a growing problem in Burnaby, B.C., right now, and in Abbotsford. The problem in Burnaby is increased violence of teenagers—12-year-olds, pre-teens—pulling knives on lone women and mugging them right in the SkyTrain station, etc. The other one is in Abbotsford, B.C., the bible belt, as it were, of British Columbia, where young teenagers are gathering to have group sex in order to get drugs. Now it comes down to parental guidance, parents being ready and willing to impose boundaries, and to know where their children are. So it comes back to the family, and it comes back to us as adults being guides for young people.

But I don't want to deflect from our purpose for being here today. The chill factor that was mentioned earlier, by the way, is one that anyone who is a naturist, who has a public position such as teaching, which I had, knows is definitely there. I had a photograph printed of myself in *Vancouver* magazine, the first time frontal nudity had been put in a magazine like that, and it came out at Easter time—

Mr. Mark Warawa: Mr. Chair, I appreciate the reference, but it's not relevant to my question.

Ms. Judy Williams: Okay, there you go.

Boundaries—it comes down to boundaries.

[*Translation*]

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

Mr. Richard Marceau: Thank you, Mr. Chairman.

My question this time is for Mr. Addario. Of course, I know that hypothetical questions can take you anywhere. However, if Bill C-2 had been adopted and was enforced at the time of Sharpe, would the decision have been any different, do you think, and why?

[*English*]

Mr. Frank Addario: That's a tough question, because, as you know, in a constitutional challenge one of the things before a court is the section 1 evidence about whether or not the infringement is justified, and there was some section 1 evidence, although not as much as one would hope, before the court in Sharpe.

The key is that if you read Chief Justice McLachlin's judgment, you'll see that she thought in relation to the artistic merit defence that the objective aspect of it was critical to upholding the constitutionality of section 163.1.

Just as a point of clarification, the way the current legislation works, it only applies to material that is already by definition child pornography. It doesn't apply to material that's undefined out here. There's a definition of child pornography, and then there's a defence in subsection (6), which only applies.... So the objective test was what saves the person from a conviction. It doesn't save the material from the deemed definition in the earlier provision—I think it's section 1.

● (1040)

[*Translation*]

Mr. Richard Marceau: May I impose on you once again and ask for your opinion? You were Langer's lawyer; do you think Mr. Langer would have been convicted if Bill C-2 had been in force?

[*English*]

Mr. Frank Addario: That's a good question because of the second branch of the test. Despite the fact the judge found that it was condemnatory, it would still have been open to the prosecution to say, "Ah, but there was a risk of harm to children, because were they to get their hands on this material, they could use it to fuel sexual fantasies, for example, or they could use these paintings to groom...." It's why I am encouraging you to maintain the current defence, which doesn't expose an artist to that type of analysis.

There was evidence from research psychologists and forensic psychiatrists who treat pedophiles that some pedophiles would be aroused by the material that Langer was painting, but as was pointed out earlier by someone else, some pedophiles are also aroused by the Sears catalogue. We can't vaporize all images of children, notwithstanding that they might be used by someone who has a disease.

So we see the second branch of that defence, the undue risk of harm, to be problematic for that reason.

The Chair: Ms. Neville.

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you, Mr. Chairman.

I thank all of you for coming.

When I chair a meeting, I cringe when a member asks many questions, but our time is limited and I want to cover a few things here.

My first question is to Mr. Stead. I'm assuming that you prepared this document yourself. I certainly have some concerns about it in a number of ways. First of all, you chose to break out the states within the United States separately, which gives us a very distorted view, as you chose not to do that with any other countries that are federal jurisdictions. I'm wondering if you could comment on that.

Secondly, in your development of this and in looking at the minimum legal age of consent, I'm wondering if you in fact did an analysis of what the age of consent referred to, whether it was sexual interference or sexual penetration. What were the aspects of the age of consent as you developed them here?

My own view, for what it's worth at the moment, is that I believe the sexual exploitation aspect of this bill in fact goes further in raising the age of consent, as we have it here, providing more protection to more children and shifting the onus to the accused, rather than to the child. So I would appreciate your comments on that.

I'd also appreciate some comments on the chill, because the artistic chill concerns me a lot. I'm wondering if just the prospect of this legislation has in fact affected the artistic community, as you know it, Mr. Montpetit and Mr. Malavoy. Could you comment on the impact of the introduction of the bill?

I would ask the naturists group—who I thank, as I think your presentation was a very thoughtful one—if you or any of the other naturist organizations take any steps to ensure that members are not there for any illegal activities or any potential exploitation or luring of children. I understand what you're about, but the potential for exploitation would concern me.

So I've asked three questions, and I know it's not the right way to do it, but I'm doing it anyway.

● (1045)

The Chair: It's in the neighbourhood.

Could you make your answers as direct as possible?

Mr. Stead.

Mr. Harold Stead: I didn't do this to confuse you in terms of countries. This is actually a chart of legal jurisdictions around the world. To some degree, it isn't even representative of that because I didn't put down the 47 diets of Japan, which have varying ages from 16 to 18, mostly because I couldn't translate Japanese legislation for each of those provinces. In terms of jurisdiction, the basis of my analysis was what are the legal jurisdictions of other appropriate legislative bodies? What have they done? Canada's is at the federal level, with the minor exception of Quebec, I believe, with their provincial legislation protecting children. This is what I came up with. So I was not trying to mislead you.

In terms of what this type of sex involves, it gets highly complex if you start to go past heterosexual intercourse between a child and an adult, which is essentially what I was looking at. If you start to go into the nuances of the various legislation for homosexual sex, age differential, and things like that, it gets really complex.

Mexico has two laws. There's a federal law, which is at age 18, and then all of the different states have their own law, and pretty much all of them are at age 12. But that's not even a true depiction of what's going on, because for a 13-year-old to make a complaint to jurisdictional authorities, under most of the provinces in Mexico that girl has to prove she was a chaste virgin before the actual intercourse with an adult took place. Usually, the matter is dealt with between the family of the child and the perpetrator. If the man isn't married, in the case of heterosexual activity, the man would marry the daughter and pay a fine.

That's in terms of the types of sex. In terms of the chill factor—

Ms. Anita Neville: My question was really directed to Mr. Malavoy.

Mr. Harold Stead: I would like to say that the chill factor equates to deterrence in the minds of many people.

[*Translation*]

The Chair: Go ahead, Mr. Malavoy.

Mr. Jean Malavoy: The 250,000 artists who are members of the cultural sector that we represent here today are very concerned about this, because artists who explore the topic of sexuality are considered abnormal. It also creates a level of concern. At any time, an artist can be convicted because, as was already mentioned, the concept of legitimate purpose is big and someone around the artist may make a subjective judgment about the artist's work that will lead to his arrest.

So there is great concern in the artistic community. I would remind you as well that artists are the lowest paid group in Canada. The average earnings of a Canadian artist are $23,500. So this is a group at risk living in difficult financial circumstances. The bill will further increase the concerns of artists in dealing with their social environment.

I would also remind you that professional artists in all regions and all villages of Canada play an important role as teachers and as part of their communities. As a result, they are affected by the additional risk involved.

Adolescents are also an important concern. Any Canadian teenager who has reached the age of consent, which is currently 14 years of age, is liable to criminal charges if he or she decides to give expression to this personal experience. Our children are affected by this situation. I represent the Canadian Conference of the Arts, but as parents, we are affected by this, since our own children might be considered criminals because of the subjective way in which the legislation can be interpreted.

● (1050)

The Chair: Thank you.

Mr. Montpetit.

Mr. Charles Montpetit: I would like to say two things about the chilling effect. First of all, this is something that is very difficult to prove, because, by definition, when artists are affected by intimidation, the effect is not something that can be proven.

An artist may not be invited into a school. He may not be invited to give a talk. He may not choose to write a book. So there is actually an absence of evidence and not evidence that real harm has been caused to artists up to this point.

That is certainly true. In many cases, I have personally been refused by schools that had invited me once to speak about my book. At the last minute, just when I was supposed to go into the classroom, I was asked to speak about something else. I do not know whether that kind of situation is caused by the legislation, but the more this is in the news, the more it affects the general public. That would explain why I was first invited to speak about the book and then asked to change my talk. Nobody explained it to me in so many words. So that aspect is not provable.

However, the second aspect is provable: the artistic community has had to make a great deal of effort to prepare representations such as ours. The simple fact that we have submitted a brief supported by 14 Quebec organizations is something that has required a great deal of time. Obviously, artists are spending this time protecting themselves from Bill C-2 are not using that time to create.

For now, that is the main factor that can be demonstrated. There are surely a lot more serious consequences, but we will never know.

The Chair: Thank you.

Mr. Deschênes.

[*English*]

Mr. Stéphane Deschênes: Before I answer your questions specifically, I'd like to address a common misconception, which is that naturists might be more susceptible or more vulnerable somehow.

It's an unfortunate circumstance that if clothes prevented any kind of abuse or prevented pedophiles from acting, we probably wouldn't have a problem. And if naturism was the only reason, I would be the first probably to say that we shouldn't bother with naturism. But the reality is most of these cases do not happen in naturist environments; they happen in places where children have adults in positions of trust —be it hockey, be it scouting, be it teachers in some cases—and the vast majority of time they are dressed in those events and they are led to other things that lead them to that.

Having said that, we recognize that we need to take precautions just like any other group does. I think Ms. Williams can talk specifically to some events in her clubs.

Ms. Judy Williams: The Federation of Canadian Naturists has made suggestions. We don't have authority over our member clubs, but one of the strong suggestions is to have photo ID at various events involving naturists such as our swim clubs, and in our publications' photo releases, particularly when they involve children, to have not only the children's signatures but their parents' or those of the people who are officially responsible for them. That is very, very important, particularly when someone is in a position of trust, but it also applies to volunteers, because there are many volunteers in naturist venues, just as there are in clothed venues.

Our top priority is the protection of our children, just as it would be for clothed people. The same thing applies. As a teacher, I had police checks run on me, and if we have a position of trust where people are working in naturism with children, then it would behove them to have police checks done, or at least full disclosure, so they can say, “look, I have no prurient intent here”. So I think it's extremely important to realize that we have the same concerns as our textile counterparts.

The Chair: Thank you very much.

Thank you, Ms. Neville.

Now for the final intervention before we move on to our next session, Mr. Breitkreuz.

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): Thank you very much. I have two questions here. I'll try to pose them as quickly as possible.

Paul Bernardo, Karla Homolka, the film's going to come out soon. It's going to be regarded as art. Should this be allowed? Because it will motivate some to commit copycat crimes—that's my concern.

You may argue that we need to explore and see this in order to discuss these issues. How would you deal with this?

● (1055)

The Chair: Monsieur Montpetit.

[*Translation*]

Mr. Charles Montpetit: Even though one might assume that it could motivate someone to commit a copycat crime, no crime has been committed, at least not yet, in the case of a film that has not yet been released. If a crime does occur, the degree to which the accused can be considered guilty will not be based on any relationship between the film and what was done, but rather on the nature of the crime itself.

Moreover, if no child was abused in the making of a film, then the filmmakers have not committed a crime.

[*English*]

Mr. Garry Breitkreuz: Sir, are you arguing that we should not restrict child pornography on that basis and that if we as legislators are trying to control materials that will cause others to commit crimes, that's not our role? Are you arguing we should not do that?

I would disagree with you. I think we have an obligation to try to restrict materials that may cause others to commit crimes. That's the reason we want to get rid of child pornography in our society. I heard one statistic that said 40% of people who do this are motivated to copy it, so I just cannot agree with your analysis there.

Does anybody else have a comment on this?

Mr. Charles Montpetit: Since you're asking, I'd like to respond to that.

Yes, I think that unless there is a crime, we should not criminalize some material, because that would be the equivalent of criminalizing a movie or a TV program that deals with stories with murder in them, saying this might cause people to commit murders as copycats. We don't criminalize those programs, so we shouldn't do so in the case of material about sex.

The Chair: Does anybody else wish to respond?

Mr. Addario.

Mr. Frank Addario: I'd just say to the member that of course it's a legitimate aspiration of Parliament to prevent the risk of harm to children in every way you can. The problems we see are, first of all, that the social science evidence creating a link between the availability of the material and the action is extremely weak. Second, the line-drawing exercise you get involved in once you try to protect legitimate artists is so difficult that inevitably legitimate artists get swept up. Third, as we pointed out in our brief, it's almost invariable, if you ask the police, that when they go into a pedophile's home, they will seize real material to which the artistic merit defence would never apply.

Mr. Garry Breitkreuz: Well, I think I would have concerns with the argument that preserving art is more important than preventing the spread of child pornography to those who might be motivated to commit crimes. I think I would have problems with that, but I want to propose another question here, to Mr. Stead, before my time is up.

Our discussion seems to come down to this. The argument is often used that the norms in our society have changed, that youth in Canada are sexually active at a lower age, that our laws need to be designed in order not to criminalize normal activity of young people. How would you, when people make these kinds of arguments, defend the argument that the age needs to be raised to 16?

Mr. Harold Stead: I think there have been several proposals on providing an age differential for children that tries to level the playing field based on age, which isn't a particularly good method for determining when children mature. They all mature at different levels.

So I would suggest that in terms of child protection legislation and virtual child pornography versus non-virtual child pornography.... There is the term "copycat" for stuff such as children taking weapons to school and killing their classmates. That created the term. Because you're quite right, there's been very little science that linked pornography with sexual violence in the past.

However, there is a lot of research going on that links child pornography to child sexual abuse. You mentioned one case in Toronto as an example. I'd like to mention another case. That's the case of Michael Briere, who at 8 o'clock in the morning masturbated to child pornography on the Internet, and at 8:30 went out and abducted Holly Jones. He brought her back to his house half a block away, raped her, killed her, dismembered her, put her in a fridge, and then disposed of her body parts.

Whether that man, Michael Briere, was turned on by the Sears catalogue or virtual child pornography or real child pornography really isn't.... The underlying fact is there are people who take this, move through their fantasy cycle, and then do not achieve what they used to achieve by masturbation and do move on to the actual simultaneous or conjunctive abuse of children.

There are three studies in the world today.... They're not statistically significant as yet because the sample groups are very small, but there were two in the United States of people who purchased child pornography out of Operation Landslide. One study indicated that 23% of the people involved who purchased child pornography were simultaneously abusing children. The FBI released a paper that said it was as high as 80%. The people at COPINE, at the university in Cork, which is the centre for analysis of child pornography, did a study indicating that 48% of the people arrested in the United Kingdom were simultaneously involved in the sexual abuse of children.

It's not statistically significant enough to make a causal link yet, but certainly anecdotally it's going that way.

● (1100)

The Chair: We have to move on.

[*Translation*]

Mr. Malovoy, do you wish to say something before we wrap up?

Mr. Jean Malavoy: I have a comment to make on the importance of education and protecting children. As the father of children whose ages range from 2 to 25, I see society heading in a rather frightening direction, when it comes to our children.

A child must be aware of his environment, and his parents are responsible for protecting the children's environment. This emotional ecology is important and must be part of every parent's responsibilities. When it comes to this issue, I believe that is one of the key steps that society can take.

[*English*]

The Chair: Merci, Monsieur Malavoy.

Thank you to all the witnesses. We have to adjourn for a couple of minutes to go into our next session. Thank you for coming.

To members, it appears abundantly clear to me that we need to get some psychiatric witnesses before us. We have a lot of—

A voice: I'm glad you clarified that.

The Chair: It's not counselling. It's expert witnessing on the cause and effect relation of pornography and crime. I'd ask members, if they know someone to suggest, I think that's something that would complete our study.

Merci encore à tous les témoins.

We'll adjourn because we're going into a separate session. We need time for the television to set up.

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

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