Defences to the Offence of Possession of Child Pornography
(A submission to the House of Commons Justice Committee on Bill C-20, October 7, 2003 for Beyond Borders)
by David Matas

Bill C-20, the Government of Canada's new proposed child pornography legislation, goes in exactly the wrong direction. The defences of artistic merit and educational, scientific or medical purpose need narrowing. Instead the Bill proposes broadening the defences.

Right now the law states that where an accused is charged with a child pornography offence, the accused has the defence either that the representation or written material has artistic merit or an educational, scientific or medical purpose or that the representation serves the public good. The Bill proposes that the first part of this defence be repealed and the law be left only with the defence that the material alleged to constitute child pornography serves the public good.

Mr. Justice Shaw of the Supreme Court of British Columbia in February 2002 [R. v. Sharpe (2002) B.C.S.C. 423] found that the written works of Robin Sharpe had artistic merit and acquitted him of the charges possession and distribution of child pornography in relation to those written works. It is unlikely that this verdict would be any different under the proposed law.

The defence of public good provides no clear guidance to the courts and no obvious deterrent to potential violators. The Supreme Court of Canada majority in R. v. Sharpe [2001] 1 S.C.R. 45 observed that the defence of public good had received little interpretation and its precise definition was beyond the scope of the appeal [paragraph 70].

With the defence of artistic merit or an educational, scientific or medical purpose gone and only the defence of public good available, the courts are likely to be clogged with not guilty pleas invoking that defence until the courts clarify its meaning. Since the courts in different provinces are likely to approach the defence of serving the public good differently, we will have to wait for years, till the Supreme Court of Canada gives the defence a uniform interpretation.

The majority of the Supreme Court of Canada, in the case the Sharpe case decided on January 26, 2001, at paragraph 62.

"It seems clear the defence [of artistic merit] must be established objectively, since Parliament cannot have intended a bare assertion of artistic merit to provide a defence."

It accordingly follows that the defence of artistic merit is not available to an accused simply because he invokes it.

The Court further said at paragraph 64:

"The subjective intention of the creator will be relevant, although it is unlikely to be conclusive. The form and content of the work may provide evidence as to whether it is art. Its connections with artistic conventions, traditions or styles may also be a factor. The opinion of experts on the subject may be helpful. Other factors, like the mode of production, display and distribution, may shed light on whether the depiction or writing possesses artistic value. It may be, as the case law develops, that the factors to be considered will be refined."

These comments lead us to believe that it is possible to legislate at least three limitations to the defences of artistic merit and educational, scientific or medical purpose and still maintain the constitutionality of the law. First, we understand the Court's comments to mean that where the subjective intention of the creator is sexual portrayal, enticement or seduction, rather than an artistic, educational, scientific or medical purpose, then that intention speaks to the unavailability of the defences of artistic merit or educational, scientific or medical purpose. In determining the intention of the creator, the work in question must not be viewed in isolation. If the creator is engaged in sexual activity, seduction and abuse of which the work forms part, that overall activity speaks to the purpose of the work in question.

That is what Bill C-20 should say. Rather than drop the defences of artistic merit and educational, scientific or medical purpose altogether, they should be legislated as a subset of the defence of public good, but with provisos. The defences of artistic merit and educational, scientific or medical purpose should have the proviso that where the intent of the creator is sexual portrayal, enticement or seduction, rather than an artistic, educational, scientific or medical purpose, then the defence of artistic merit and educational, scientific or medical purpose do not apply. The law should add that in determining the intent of the creator, the work in question must be viewed in context. Where the creator is engaged in sexual activity, seduction and abuse of which the work forms part, that overall activity is relevant in determining the intent of the creator in creating the work.

The second possible proviso we draw from the decision of the Supreme Court of Canada in Sharpe is that, where the work is unconnected or has little connection with artistic, educational, scientific or medical conventions, traditions or styles, that absence of connection undercuts the defences of artistic merit or educational, scientific or medical purpose. Again, the law should say this, that in determining whether the defences of artistic merit or educational, scientific or medical purpose are available, regard should be had to the connection or absence of connection with artistic, educational, scientific or medical conventions, traditions or styles.

The third limitation the Supreme Court of Canada mentions, the mode of production, display and distribution, also deserves attention. Where the mode of display and

distribution is showing material to young children for purpose of sexual gratification enticement, seduction and abuse, that mode undercuts the defences of artistic merit and educational, scientific or medical purpose. Is the material distributed to libraries or published in books? Or is the material distributed to young children directly for the purpose of sexual corruption and to adults who share the purpose of the creator in the sexual corruption of children? The law should, thirdly, include this limitation. The law should state that the mode of production, display and distribution of the material is relevant to the availability of the defence.

The majority of the Supreme Court of Canada affirmed the constitutionality of the present law, albeit by reading into the law the exclusion of two applications. This affirmation of constitutionality was based on the existence and interpretation the Court gave to the defences of artistic merit and educational, scientific or medical purpose. So, one could change the law to legislate that interpretation without any fear of impinging on the constitutionality of the law.

Other changes to the law could also be made. The Court did not freeze the law. It did not say which potential amendments would or would not be constitutional. There is one amendment we would suggest about which the Court said nothing, an amendment we believe would strengthen the law and, in our view, would not weaken its constitutional status.

This proposed amendment is the inclusion of a fourth exception to the defences of artistic merit and educational, scientific or medical purpose based on effect. The defences should not be available to any material which reasonably could change the possessor's attitude in ways that makes the possessor more likely to abuse children sexually.

The Court recognized in Sharpe that the evidence supported the existence of a connection between possession of child pornography and incitement to abuse children sexually, reduction of inhibitions against sexual abuse of children and grooming or seducing of victims. The Court held that there was a rational connection between the existing legislation and goal of the legislation of preventing harm to children, in part, because of that evidence [paragraphs 88, 89 and 91].

The Supreme Court of Canada has already held that a limitation on expression legislated in terms of its likely effect is constitutional. The Canadian Human Rights Act prohibits telephone communication of

"any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination." [section 13(1)].

The case of John Ross Taylor v. Canadian Human Rights Commission [1990] 3 S.C.R. 892 found that legislation constitutional.

While the Canadian Human Rights Act legislation is civil and not criminal, that civil legislation prohibited certain expression without regard to intent and solely based on its likely effect. Here, the proposal to introduce the concept of likely effect is limited to an exception to a defence. The requirement of intent for the offence would remain. So the fact that the legislation here is criminal and not civil, which might seem to weaken the applicability of the Taylor case, is counterbalanced by the fact that intent is necessary for the commission of the offence.

What we are proposing would make the law more certain and more circumscribed. As well, the proposed changes are more likely to give the law an immediate deterrent effect.

Bill C-20, by making the defences to the child pornography offences as broad as all outdoors, makes convictions harder to obtain. Mr. Justice Shaw, in acquitting Sharpe of some the charges against him, gave a broad interpretation of the defense of artistic merit. This broad interpretation shows that there is a legal problem with the defence. Bill C-20 does nothing to address that problem. Because there are at least four possibilities of limiting the defences of artistic merit and educational, scientific or medical purpose, consistent with the majority decision of the Supreme Court of Canada in Sharpe, Bill C-20 needs to be amended to invoke those possibilities.
.....David Matas is a Winnipeg lawyer. He argued the Sharpe case in the Supreme Court of Canada for Beyond Borders.

Appendix - Proposed drafting changes

Amend section 7(2) of Bill C-20 to read

(2) Subsections 163.1(6) and (7) of the Act are replaced by the following:

(6) same as in Bill C-20.

(7) For greater certainty, material shall be deemed to serve the public good, if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

(8) Subsections (6) and (7) shall not apply where
(a) the intention of the creator is sexual portrayal, enticement or seduction;
(b) the work is unconnected or has little connection with artistic, educational, scientific or medical conventions, traditions or styles;
(c) the mode of display and distribution is showing material to young children for purpose of sexual gratification enticement, seduction and abuse; or
(d) the material reasonably could change the possessor's attitude in ways that makes the possessor more likely to abuse children sexually.

(9) If the creator of a work is engaged in sexual activity, seduction and abuse of which the work forms part, that activity is relevant in determining, for the purpose of subsection (8)(a), the intent of the creator in creating the work.

(10) same as subsection (7) in Bill C-20.