

## **Bills Committee on the Prevention of Child Pornography Bill**

### **Defence of Artistic Merit**

The Administration was requested to consider whether it was appropriate for the courts to determine whether an article which was alleged to constitute child pornography had artistic merit, and therefore, a statutory defence might be invoked.

#### **Administration response**

2. Clause 4(1)(a) of the Prevention of Child Pornography Bill stipulates that it is a defence to a charge under section 3 for the defendant to establish that the depiction that is alleged to constitute child pornography has artistic merit. This defence of artistic merit is provided as it is recognized that the Bill could unduly impinge a value protected by the guarantee of free expression, viz. artistic creativity. In other words, we have to cater for a scenario where a pornographic depiction may have genuine artistic value and the related right to freedom of expression should not be unduly curtailed.

3. Before the defence of artistic merit may be invoked, the defendant will have to adduce evidence to satisfy the court that the impugned depiction has artistic merit. Despite the fact that different people may have different views on artistic merit, it is up to the court to come to a decision having regard to a variety of factors and evidence, including any expert opinions and documentation available.

4. The defence in the interests of **art** is also found in section 28 of COIAO which stipulates that it shall be a defence to a charge [under this Part] in respect of the publication of an article or the public display of matter if that publication or display is found by a Tribunal to have been intended for the public good on the ground that such publication or display was in the interests of science, literature, **art** or learning, or any other object of general concern.

5. As a reference, section 163.1 of the Criminal Code of Canada also provides a defence for a representation or written material that constitutes child pornography if it has “artistic merit”. In the judgment by the Supreme Court of Canada on the appeal case R. v. Sharpe delivered on 26 January 2001, the following analysis was given –

*“Although it is generally accepted that “art” includes the production,*

*according to aesthetic principles, of works of the imagination, imitation or design (New Shorter Oxford English Dictionary on Historical Principles, vol. 1 p. 120), the question of whether a particular drawing, film or text is art must be left to the trial judge to determine on the basis of a variety of factors. 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.”*

6. The above analysis gives a broad framework of how artistic merit may be interpreted. The court is in the best position to make a judgment, having regard to all evidence and circumstances. This defence is provided for impugned depictions that, viewed reasonably and objectively, carry genuinely artistic value. We consider that the defence of artistic merit in the Bill is necessary and appropriate in order to ensure that the Bill’s interference with an individual’s right to freedom of expression does not go beyond what is rational and proportionate to achieve child protection.

Security Bureau  
May 2002

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