DEFENDING THE WRITER

UNDER THE NEW PORNOGRAPHY LAW

- D R A F T -

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INTRODUCTION

Much has been written about the excesses of the government's proposed pornography legislation, Bill C-54. [1] Since most criminal prosecutions in recent memory have been of visual materials, it is easy to forget that both the existing obscenity law and the proposed pornography amendment also apply to written text. Indeed the amendments before Parliament put the prosecution of the written word on a different footing than that of the visual. Canadian authors of every stripe should be aware of the complex new rules and legal uncertainty they will face especially when dealing with certain controversial sexual subjects.

Of special interest to writers is the proposed Section 138(b). It makes pornographic any "matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any of subparagraphs (a)(i) to (v)". [2] These subsections are children and sex, sexual mutilation, sexual violence, sexual degradation, bestiality and incest. It excludes subparagraph (vi), "masturbation, ejaculation ... vaginal, anal or oral intercourse", but it is well to remember that the children and sex definition is extraordinarily broad covering all sex or sexual nudity if children are participating or even present. The definition has been severely criticized by civil libertarians of all stripes, and almost all progressive sex educators.

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[1] I wish to acknowledge the helpful comments of Ellen Murray and Peter Bartlett.

[2] The most important sections of the proposed legislation are included in Appendix I.

Section 138(b) covers not just sex toys and solicitations for sex, but also fiction and journalistic essays, serious or erotic, which touch on the forbidden topics. This means, for example, that society will jail not only those who sell pictures of incest, but also those who merely write about it and are taken to incite or advocate it.

For those who had hoped the proposed amendments would focus exclusively on visual material and leave writers free of any threat of criminal sanction, Section 138(b) is a real shock. There are numerous and obvious problems with these words and they amount to a profound threat to the free expression of ideas about these sexual topics.

The following is intended as a brief summary of the problems facing writers under the new legislation, particularly Sections 138(b) and 159.1(1), the defense of "artistic merit". It considers the problems and issues that will be raised in defending charges under the proposed legislation both from the point of view of interpreting the words in the Criminal Code and also as the Charter of Rights may require they be interpreted. It goes on to discuss the pivotal significance of the word "degrading". There are a number of things it does not do. Enough has been said elsewhere about the principle that censorship of any sort is unjustifiable, if not unconstitutional. Nor does it deal with the grossly restrictive definition in Section 138(a)(i) on children and sex.

The statutory history of obscenity legislation and its judicial interpretation are of some assistance in anticipating the meaning likely to be given to this proposed legislation. So are the comparable Criminal Code provisions on "hate propaganda" and the history of American litigation on obscenity and the Bill of Rights. But nothing really provides any certainty, except the certainty there will be a great deal of litigation. When dealing with certain controversial sexual topics, writers with even the most serious intent will be plagued with legal problems. Not only is freedom of expression infringed for unjustifiable reasons; this is done in a manner guaranteed to cause maximum confusion. Confusion breeds caution, and caution hesitation. Our American cousins call this "the chilling effect".

A) THE EXISTING OBSCENITY DEFINITION

The existing definition of obscenity makes criminal the "undue exploitation of sex", usually interpreted to mean sex that violates the community's standard of decency. In making comparisons to the proposed new definition of pornography we should remember that the existing law applies indiscriminately to the whole range of sexual subjects, while under the new law defenses will vary depending on the category of pornography. The

problems interpreting "community standards" are notorious, but it is noteworthy that the author's purpose and artistic merit have been held to be relevant though not decisive element to whether or not the exploitation of sex was "undue". The primary test is community tolerance, and the judges' conceived notion of what that might be. The Crown is not even required to lead evidence of what the community might be. Indeed, one of the profound absurdities of modern jurisprudence is the so called expert evidence and judicial opinions pretending to divine the community's level of tolerance. Speaking on behalf of the tolerance of others is inevitably a thinly disguised assertion of personal moral standards.

In the leading case of Brodie v. Her Majesty The Queen, [1962] S.C.R. 681, the Supreme Court of Canada interpreted the then new obscenity definition which was adopted in 1959, S.C., 41, Sec. 11. The case concerned the book Lady Chatterley's Lover, by D. H. Lawrence. The court ruled that the ancient test in R. v. Hicklin, (1868), L.R. 3 Queen's Bench 360, it was no longer the law. The "Hicklin Test" was the famous Victorian definition of obscenity, as that which "tended to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall". The "Hicklin test" held that the intentions of the authors and publishers were irrelevant. It required that the "tendency" was referable to the more vulnerable members of society.

In Brodie our Supreme Court admitted expert evidence on artist merit in order to help define with the exploitation of sex was an "undue characteristic" of the book. But it should be noted that proof of artistic purpose has never been a sufficient defense under the current obscenity law. [3] The Ontario Court of Appeal has ruled that items in a well known and established art gallery, accepted as "art" by all the "art world" as least, as well as many others, could nevertheless still violate the obscenity law. Note that under the current law, the "motives" of the accused baldly stated are not relevant according to the Code. Sec. 159(5). It is the author's intention as evidence of artistic merit that is admissible, not good intentions themselves.

Finally, we should note that to date the Supreme Court of Canada has not ruled on the constitutionality of the existing obscenity definition.

B) "INCITES, PROMOTES, ENCOURAGES OR ADVOCATES"

The meaning of the words "incite, promote, encourage and advocate" in the proposed legislation is inherently ambiguous on

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[3] See R. v. Cameron, [1968] 2 OR 777.

certain important issues. One has only to listen to a sexual conservative arguing that straight-forward birth control information "promotes" teenage sex to realize the meaning of the words are dangerously elusive. Does the new offence focus on the subjective intention of the author to incite or promote, or at the other extreme, do the words require proof that there has been actual incitement or encouragement as evidence by the deeds of the reader? If incitement evidenced by action is too stiff a test, is incitement of thoughts, or thoughts tending toward action, sufficient? And who is "the reader"? Is it the mythical "average" reader, or will any vulnerable or weak-minded citizen do?

To twist the question a little, let us ask whether a defence could be mounted where an author truly intends to advocate the particular activity, but in fact the work has the opposite impact on most of its audience. It is not difficult to imagine, for example, a book advocating unusual sex, such as "S & M", where in fact the book has the opposite effect on the vast majority of readers who are repulsed. Can there be "incitement" or "advocacy" when there is no actual incitement? Or is incitement of a few enough? If a straight factual study of incest is taken by a disturbed reader as promoting the activity, is the author guilty notwithstanding his actual intention that his book deter incest? Will it be necessary to insert explicit and brutal words of condemnation every time the forbidden subjects are mentioned?

The four words chosen - incite, promote, encourage or advocate- may differ in the amount of intent and effect they imply as constituent elements of the offence. But none of them tell us clearly whether it is the author's intention on the one hand, or the real effect of the words complained on the other, that is the gravamen of the offence. Their differences matter little in a defence under the Criminal Code since a charge can be framed in the alternative. However, they may assume much greater importance in arguments under the Charter of Rights. (See below).

i) Effect

Section 138(b) appears to be a fundamental reorientation of Criminal Law for writers. The existing definition of obscenity makes criminal "the undue exploitation of sex", and undue is defined as that which violates community standards of decency. Artistic merit is accepted as relevant to whether the exploitation as sex is "undue", on the unarticulated premise that the public may be more tolerant of sex in "art".

Generally speaking, this shift indicates a turn away from a focus on the public reaction to questionable material and towards an examination of the nature of the material itself. However, there are still important potential elements of the offence that may

require an examination of the impact on the public, as opposed to public tolerance.

A stranger shift in this direction might have been a timely one. A vast amount of literature has been generated in the last twenty years by social scientists interested in the effect on viewers of violent and sexually violent film and video. Our ability to define cause and effect in the area has been immensely refined by the vigorous, sometimes polemical contemporary debate on this subject. [4] Various studies claim to show how certain types of videos influence attitudes and actions for shorter or longer periods of time, or, on the other hand, have no noticeable impact at all. The debate has not produced any conclusive answers, but it is clearly a debate about the "right question".

Fifty years of American "free speech" litigation has produced and refined what is known as the "clear and present danger" test.[5] At the risk of oversimplifying, we can define this rule as follows: speech which appears to advocate a breach of the peace is nevertheless protected by constitutional guarantees of freedom of speech until there is a "clear and present danger" that a breach of the peace will take place. The case law in this area typically involves political speeches and demonstrations. Under American jurisprudence, material found to be obscene is not protected by consitutional guarantees of free speech and this test does not apply.

But, I would argue, a test of this nature ought to be applied to alleged pornography. Once provision has been made to restrict distribution of material to children under 18 (not a difficult task), then society's legitimate concern is only the clear and present danger of violence, whether sexual or not, of one member against another. A "clear and present danger" test regarding these specific provisions of the Code dealing with sexual violence makes sense. We may ultimately reject this as censorship in any event, but the point is that it addresses the real and legitimate issue in our society. It would force the Court to ask the hard questions about the real effect of the allegedly pornographic material. Such an approach admittedly leaves no scope for morality as the basis of criminal sanction,

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[4] See, for example, Burstyn, Varda (ed.), Women Against Censorship, Douglas & McIntyre, Toronto, 1985; Copp, David and Wendell, Susan, (eds.), Pornography and Censorship, Prometheus Books, Buffalo, 1983; Report of the Attorney General's Commission on Pornography, Department of Justice, United States, 1986.

[5] There are many books on that subject. Among the standard reference sources are: Lockhart, William B., Constitutional Law - Cases - Comments - Questions, West Publishing.

but society's real concerns today are the prevention of violence, not private sexual practices.

There is little likelihood that the proposed new Criminal Code provision will be interpreted to introduce a "real effect" as a constituent element of the offence. While the word "incite" seems to imply the necessity of a real impact on the reader, the word "advocate" does not. (The equivalent expressions would be "attempt to incite" and "advocate"). However, since criminal charges can be laid in the alternative the opportunity to argue the higher burden of proof regarding "incitement" will not arise.

It is useful to recall the famous "Hicklin test" of obscenity. This was the pre-eminent definition of obscenity in the United Kingdom, Canada and the United States for the better part of the last century. It arose in the case of R. v. Hicklin (1868), L.R. 3QB 360, in which Lord Chief Justice Cockburn said:

> I think the test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and unto those whose hands a publication of this sort may fall.

Hicklin, by the way, was the magistrate whose decision went on appeal, not the accused. The case concerned the distribution by the Protestant Electoral Union, the accused, of an ancient tract entitled The Confessional Unmasked: Showing the Depravity of the Romanist Priesthood, the Inequity of the Confessional and the Question Put to Females in Confession. Cockburn found that it was "quite certain" that The Confessional Unmasked

> would suggest to the mind of the young of either sex or even to persons of more advanced years, thought of a most impure and libelous character....This work I am told is sold at the corners of streets and in all directions and of course falls into the hands of persons of all classes, young and old and the minds of those hitherto pure are exposed to the dangers of contamination and pollution from the impurity it contains. [6]

The point to made is that Lord Justice Cockburn did not embark on any inquires as to the real impact of the alleged material. He presumed sexual material would tend to deprave. He imagined the impact of offensive material on the vulnerable young mind and convicted on that basis. And this presumptuous approach governed

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[6] See Kendrick, Walter, The Secret Musemen: Pornography in Modern Culture, Viking, New York, 1987, Pages 121 to 123.

interpretation of obscenity up until the time the "Hicklin test" was abandoned in Canada by Criminal Code amendments in 1959.

The American case law on political free speech applying the "clear and present danger" test is also from beginning to end an exercise of judicial reconstruction and imagination. The case law does not focus on the real impact on the words or the actual behaviour of the crowd. The court constructs a presumed effect. It must be said, however, that there are enough references in the cases to police witnesses claiming that "the crowd was getting restless" that we can surmise that at least the court was sightly interested in evidence of real impact.

The "hate literature" provisions in the Criminal Code provide a further example of the court's strong disinclination to look at the real effect. These Criminal Code provisions are attached in Appendix II and are discussed in more detail below. Suffice to say here that no proof that hatred has actually been generated is required for conviction, only that the author or spokesman intended it to be so, or ought to have known it to be the normal consequence of the words in question.

Charter Challenge

Notwithstanding the unlikelihood of getting to "real effect" in the course of interpreting the wording of the legislation itself, there is a reasonable prospect that the application of the Charter of Rights may require this.

The Canadian Charter differs in its structure from its American cousin. Our Charter proclaims certain freedoms, and, in this particular case, "freedom of expression" will be relied upon. The Charter goes on to say in Section 1 that the guaranteed freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Litigation regarding constitutional rights is often referred to as a "judicial balancing act". The interests of society have to be balanced against those of the individual. No constitutional wording can be sufficiently specific to tell us precisely how this will be done in all cases. The approach our courts will take to these problems is only beginning to unfold. The strong tendency at present is to make a determination whether or not a particular piece of legislation violates the fundamental freedoms and if so cast the burden on the government to justify the

legislation under Section 1. The extent to which that justification requires real evidence is not yet clear. [7] In some decisions, the Supreme Court has urged counsel to present more fulsome briefs on the point. The type of evidence preferred is generally expert evidence about the nature of the "problem" being addressed in the particular legislation impugned. However, there are many decisions by courts at all levels which treat "demonstrable justification" as something that can be inferred from obvious and known social principles without evidentiary proof. [8]

Defense lawyers will challenge the constitutionality of the offenses of "encouraging and promoting" sexual activity on the basis that there must be real, demonstrable evidence that this is necessary legislation. "Incitement" of prohibited sexual activity may survive a Charter challenge precisely because it does imply the necessity of real evidence proving actual effect. They will argue that to criminalize speech that has no significant effect on its readers causing harm to another person is an unreasonable limit on free speech and not "demonstrably justified". Posed in this fashion, the Charter challenge will

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[7] See Re Southam (No.1) (1983), 3 CCC (3d) SIS, 41 OR (2d) 113 (OCA), which states evidence must be presented as to reasonableness. Cf. Re Reich (1984), 8 DLR (4th) 696, 31 ALR (2d) 205 (QB), which makes use of judicial notice instead of the presentation of evidence to make a finding under s.1 of the Charter. The former position is arguably more consistent with R. v. Oakes, [1986], SCR 103, 24 CCC (3d) 321, 26 DLR (4th) 200.

[8] By comparison, decisions interpreting the American Bill of Rights do not refer to any general "saving" section like our Section 1; there is none. The "balancing" function of American constitutional litigation is done by interpretation of the breadth of the words of the constitution such as "freedom of speech". Interestingly, obscenity in the United States has been found to be unprotected speech. Thus, the standard balancing function regarding free speech expressed in the phrase "clear and present danger" does not take place regarding allegedly obscene language. But there is a long line of cases attempting to interpret what is "obscene" and thus unprotected, a "balancing" act by another name. The significance of all of this is that the American constitutional litigation regarding the meaning of obscenity is probably not very helpful to the law as it ought to develop in Canada.

compel an evaluation of the difficult and voluminous evidence referred to above regarding the alleged impact of violent pornography. [9] On the list of difficult litigation which this essay attempts to catalogue, this issue will no doubt be the longest, most passionate, most difficult and certainly the most expehsive.

ii) Author's Intention

The words "promote, encourage and advocate", if not "incite", seem to indicate a requirement that the crown prove some degree of intention. This, however, should not be read as equivalent to the author's intention, which would be safe haven for an accused writer. Section 138(b) refers to "communication that...promotes, encourages..." The author's intention per se may not be the issue. A defense based on sincere, bona fide, or serious intention is in difficulty.

Further reason to be pessimistic can be found in the limited caselaw interpreting the "hate literature" provisions of the Criminal Code, Section 281. Some offenses in Section 281 are for "wilful promotion" and others for simple unmodified "advocacy" or "incitement. In R. v. Buzzanga and Durocher, 25 O.R.(2d) 705 the Ontario Court of Appeal ruled that in the context of Sec.281 "wilfully" indicated an element of the offence to be proved is a "conscious purpose" to promote hatred, or that the accused was "certain or morally certain" that the promotion of hatred would result.

There is a great danger that the Court will draw the negative inference that the absence of the word wilfully from Sec. 138(b) implies that it is irrelevant whether the author intended or knew that their words would have the effect alleged. Thus the prosecuting Crown Attorney will not have to prove a specific intent.

We are likely to hear language something like this - the author is presumed to intend the natural and ordinary meaning of his words, notwithstanding a contrary self proclaimed private meanings. Which is to say the author's purpose - if an unacceptable purpose in the eyes of the judge is not, in law, the author's purpose.

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[9] We should note that the U.S. Supreme Court has explicitly rejected the necessity of hard proof. See Paris Adult Theatre v. Slaton, 413 US 49, cited Lockhart, 1980, p. 893.

C) DEFENCE OF ARTISTIC MERIT OR EDUCATIONAL PURPOSE

Under the proposed legislation, "artistic merit or an educational, scientific or medical purpose", Section 159.1(1), will be a defense with respect to Section 138(a) (iii) to (v), but not (i) and (ii). "Incitement" in writing of (vi) (garden variety intercourse) is not an offence and thus it will not be a crime to advocate sexual intercourse. It will be a crime without defense to advocate sex or sexual nudity by or in the presence of those under eighteen, and similarly sexual mutilation. And for those seeking to defend the discussion of sexual violence, degradation, bestiality, necrophilia and incest, the burden of proving the defense of artistic merit or educational purpose will fall on the writer or publisher. For example, Bear, by Marian Engel, may be prosecuted for promoting bestiality or a factual book, or novel about incest, may be accused. The author or publisher will have to prove "artistic merit or educational purpose".

It has already been the subject of much comment that the burden of proving this defence lies on the accused. It is entirely predictable that one of the first Charter challenges to the proposed legislation will focus on this issue. The caselaw under the Charter gives us some reason to be optimistic that this "reverse onus" will be overturned by the Court. [10] The legal issues here are complex. The defence will argue that "freedom of expression" requires that works of "artistic merit or educational purpose" be protected. To put the burden of proof of this essential element of the offence on the writer or publisher is a total reversal of our long cherished presumption of innocence. The issue will surely not be resolved by anything less than a decision of the Supreme Court of Canada.

We should note in passing that there will no doubt be a parallel Charter case on the complete denial of the defense to works adolescents and sex, Section 138(a)(i). When Romeo and Juliet or Show Me are prosecuted, there will be no defense of artistic merit or educational purpose unless required as a result of a Charter challenge.

i) Artistic Merit

Under the proposed new legislation, we should not expect that an author's artistic purpose will be treated as equivalent to "artistic merit". The phrase implies an evaluation of quality, rather than of intent. Evidence from authors about their purpose or intention will be admissible as relevant to, but certainly not decisive of, the question of "merit". Given the difference in wording between the arts and education defenses the Court will

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[10] See R. v. Oakes [1986], 1 SCR 103.

obviously be highly skeptical of self-proclaimed "artistic merit", and, indeed of all claims to merit based on anything but the opinions of well-qualified critics. A new generation of expert witnesses on "artistic merit" will no doubt swarm like a flock of expensively dressed vultures from the imagination and cocktail connections of defense counsel to replace the aging avatars of "community standards". The "avant garde" is in jeopardy in dealing with these controversial subjects. Success will depend on the status and panache of their champions in the witness box. And those artist totally out of step with, or at odds with, the temper of the times will, to be frank, probably be convicted.

This does not address the profound question - what <u>is</u> "artistic merit" anyhow? As I read the popular cultural and artistic press nobody ever bothers anymore to debate "what is art?" - except tongue in cheek. In an age of deconstruction who knows the real meaning of anything? Perhaps I should put the point more directly in lawyers' language - the question of "artistic merit" is a dog's breakfast. It is not worth the ink to catalogue the various and serious claims advanced in the modern era to the moniker "Art". The debate will be endless, forensic philosophy at its finest, and funniest.

<u>ii) Educational Purpose</u>

And what is the substantive meaning of "educational, scientific or medical purpose"? If "artistic purpose" is the black hole of cultural philosophy, then "educational purpose" is an outer galaxy of social theory the distant edges of which ever recede before our eyes. If the pursuit of knowledge is an end in itself what are the limits of "educational purpose"? Who will be the expert witnesses? Professors? Politicians? Parents? Poets? What if the author proclaims a educational purpose the judge deems untenable?

We should ask: whose purpose? Will particular volumes from a collection of books on incest held in (a special adults only section of) a library be found to have an "educational purpose", while the same books for sale in a bookstore do not have this redeeming purpose? This ought not to be the result. The wording of the defense in Sec. 159.1(1) provides that if the "matter or communication in question has artistic merit or an educational, scientific or medical purpose" then the defense has been made out. It is not the possession of pornographic material that is criminal, but rather publishing and "dealing" in pornographic material. And we are not referred to the purposes of the dealer, but, again, to the purposes of the material. No doubt there will be many cases defended on the basis that whatever the allegedly sleazy purposes of the dealer, or the ultimate reader of the book may be, the book itself in other hands has legitimate "educational or scientific purposes", and is therefore saved.

Note the conundrum here for the academic establishment. They may wish to possess in libraries and research institutions a variety of materials that would be deemed to be pornographic if considered individually. Their possession would be obviously for "educational or scientific" purposes. However, the purpose of the possession does not provide a defense. Can the collection of material as a whole have a redeeming purpose? If so, what about the private pornography collection? What if the collection is bound in one volume? How fast can you dance?

I believe "educational purpose" will disappoint its draftsmen. They no doubt intended it to have objective meaning, and that the judiciary should defer to establishment educational authorities to determine a "proper" educational purpose. However, the reality is that the modern "educational" establishment has an entirely catholic dominion. Respectable experts can no doubt be found to lay claim to the legitimate study of just about anything. There are important opportunities for the defense in these troubled waters.

iii) Charter Challenge

We have mentioned the Charter challenge pending on the limited scope of 159.1(1), defenses and the reverse onus. A more difficult question is what degree of artistic freedom and educational purpose the court may require as an inherent aspect of any constitutionally justifiable infringement of "freedom of expression". More specifically will the Charter require greater freedom than the wording of the defense in the proposed legislation.

The American case law on the nature of obscenity gives some sense of the boundary between the pornographic and acceptable artistic or educational material as viewed by the judiciary. "Obscenity" in the United States is beyond the protection of constitutional "free speech". In Miller v. California, 413 US 15 the American Supreme Court laid down this test:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of Memoirs; that concept has never commanded the adherence of more than three Justices at one time.

We could fill many pages with an analysis of these words, but will not. The bad news is that the court incorporates a community standards test into the definition. The good news is that "patently offensive" suggests a higher degree of respect for free speech than "community standards of decency". The basic point is that there are good arguments that the very nature of freedom of expression requires at the least the widest berth for "artistic merit and educational purpose". Here is yet another substantial constitutional test case.

D) DEGRADING

The proposed law does not criminalize written material that "advocates" mere intercourse [see Section 138(a)(vi], but written material that advocates or incites a degrading act [see Section 138(a)(iv)] will be a crime. Section 138(a)(iv) declares pornographic the following:

> (a)(iv) a degrading act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or the anus of that person or any other person or defecates, urinates or ejaculates onto another person, whether or not the person appears to be consenting to any such act, or lactation or menstruation in a sexual context.

The language covers everything from treating another as an "animal or object" in a "sexual context" to defecation and urination.

Given the difficulties of establishing a defense if the supposed advocacy involves one of the prohibited subject matters, and exemption from prosecution if the subject matter is ordinary intercourse, the boundary line between the two domains is obviously of critical importance.

When do we slip beyond intercourse (anal, oral or vaginal) which as it appears are per se not degrading to related sexual acts when treating another as "an object .... in a sexual context" is found to be degrading? Many common sexual preliminaries would be regarded as degrading by someone. Posing? Body rub? The government has no place in the bedrooms of the nation, but mind what you do on the way down the hall!

What a frail reed - degrading! A simple majoritarian approach to this meaning of this word - what do most people think is

degrading - would take us right back to "community standards" of decency. Enough has been said already about the difficulties of objective definitions and the privileged role of the judiciary making them that we do not need to belabour the total inadequacy of this word to mark the dangerous border.

E) HATE PROPAGANDA

A comparison with the "hate propaganda" provisions of the Criminal Code is instructive.[11] Here we find comparable offenses for "inciting and promoting". Bill C-54 proposes to add sex to the existing Criminal Code "hate propaganda" laws as one of the prohibited categories. To those who suggested the inclusion of pornography in the hate sections of the Code as opposed to special obscenity/pornography crimes, the government has responded by creating both crimes, not just one!

A close reading of Section 281 discloses the hierarchy of offense. To "advocate or promote genocide" is an indictable offense, punishable by 5 years. To "incite hatred in a public place" is an offense punishable by 2 years, and to "wilfully promote hatred" is an offense punishable by 2 years. There is a defense of truth, good faith and public interest to the latter two charges, but not the first.

Note that Section 138(b) goes even further than hate propaganda provision. It captures anything that incites, promotes, advocates or encourages not just hatred based on sex, but any of the sexual conduct regarded as pornographic in Sections 138(a)(i-v). It provides no defenses of truth, good faith or public interest. It is a crime whether or not the words are spoken "wilfully".

Thus writers will face the prospect of prosecution if their work is seen to "incite sex hatred in a public place" or "wilfully promote sex hatred" in private. Presumably books will be vulnerable under the latter. The degree of conscious intention as required by these words by R. v. Buzzanga was the subject of earlier comment. What is extremely worrisome is the open-ended nature of the meaning of "promoting hatred". Clearly this does not require any action by the reader as proof that hatred has in fact been generated. And what is "hatred"? Where do we start? Fortunately, we can report that there have been few prosecutions under Section 281 to date, so, unfortunately we have little by way of judicial guidance.

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[11] See Appendix II.

F) CONCLUSION

It is impossible to be precise in predicting the future interpretation of Bill C-54. But some more general observations can be made with certainty.

A purely subjective defense of artistic or education motives by the accused will continue to be largely inadmissible and irrelevant. It is unlikely our Court will strike out the legislation altogether on free speech grounds, but there are some promising lesser Charter arguments. The reverse onus placed on artists and educators will be challenged. The absence of an artistic defense regarding children in sex will be challenged and strong Charter arguments that some evidence of real impact or effect must be shown has a good chance of success, although it is unlikely the court will go too far down that road. Look for a careful judicial construction of what the average reader is likely to do. It is predictable that a fierce battle will be waged for years over the meaning of "degrading" with no clear

victor. Similarly "educational purpose" will provide grist for the defense mills until we are but dust. The new law is progress only in the sense that for writers the list of forbidden subjects has been defined and narrowed slightly from the wider scope of "obscenity". But the definition of the new offense and defense are full of legal uncertainties.

How do you "promote", for example, bestiality? Which defense would you like, the false objectivity of "artistic merit", or the borrowed subjectivity of "educational purpose".

Where does all this lead us? Into a legal bog as deep and dark as the one which now - in the name of obscenity - fetters our speech and chills our thoughts and clouds our imagination.

The lawyers will be very busy.

APPENDIX I

Important Sections of Proposed Bill C-54

1. Section 138 of the Criminal Code is amended by adding thereto, in alphabetical order within the section, the following definitions:
"erotica" means any visual matter a dominant characteristic of which is the depiction, in a sexual context or for the purpose of the sexual stimulation of the viewer, of a human sexual organ, a female breast or the human anal region;
"pornography" means
(a) any visual matter that shows
(i) sexual conduct that is referred to in any of subparagraphs (ii) to (vi) and that involves or is conducted in the presence of a person who is, or is depicted as being or appears to be, under the age of eighteen years, or the exhibition, for a sexual purpose, of a human sexual organ, a female breast or the human anal region of, or in the presence of, a person who is, or is depicted as being or appears to be, under the age of eighteen years,
(ii) a person causing, attempting to cause or appearing to cause, in a sexual context, permanent or extended impairment of the body or bodily functions of that person or any other person,
(iii) sexually violent conduct, including sexual assault and any conduct in which physical pain is inflicted or apparently inflicted on a person by that person or any other person in a sexual context,
(iv) a degrading act in a sexual context, including an act by which one person treats that person or any other person as an animal or object, engages in an act of bondage, penetrates with an object the vagina or the anus of that person or any other person or defecates, urinates or ejaculates onto another person, whether or not the other person appears to be consenting to any such degrading act, or lactation or menstruation in a sexual context,
(v) bestiality, incest or necrophilia, or

(vi) masturbation or ejaculation not referred to in subparagraph (iv), or vaginal, anal or oral intercourse, or

(b) any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any of subparagraphs (a)(i) to (v).

159. (1) Every person who deals in pornography is guilty of an offence.

(2) For the purposes of this section, a person deals in pornography if the person imports, makes, prints, publishes, broadcasts, distributes, possesses for the purpose of distribution, sells, rents, offers to sell or rent, receives for sale or rental, possesses for the purpose of sale or rental or displays, in a way that is visible to a member of the public in a public place, the pornography.

(3) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in subparagraph (a)(i) or (ii) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in either of those subparagraphs, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years.

(4) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in any of subparagraphs (a)(iii) to (v) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in any of those subparagraphs, is guilty

(a) of an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) of an offence punishable on summary conviction.

(5) Every person who commits the offence referred to in subsection (1) with respect to any matter referred to in subparagraph (a)(vi) of the definition "pornography" is section 138 is guilty

(a) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(b) of an offence punishable on summary conviction.

159.1(1) Where an accused is charged with an offence under section 159, other than an offence that is in relation to conduct referred to in subparagraph (a)(i) or (ii) of the definition "pornography" in section 138 or any matter or communication referred to in paragraph (b) of that definition, if the matter or communication is in relation to conduct referred to in either of those subparagraphs, the court shall find the accused not guilty if the accused establishes, on a balance of probabilities, that the matter or communication in question has artistic merit or an educational, scientific or medical purpose.

(2) Where a court finds an accused not guilty by reason of the defence of artistic merit set out in subsection (1), the court shall declare that the matter or communication that formed the subject-matter of the alleged offence is not pornography.

159.7 Every person who displays any erotica in a way that is visible to a member of the public in a public place, unless the public must, in order to see the erotica, pass a prominent warning notice advising of the nature of the display therein or unless the erotica is hidden by a barrier or is covered by an opaque wrapper, is guilty of an offence punishable on summary conviction.

164. Every one who makes use of the mails for the purpose of transmitting or delivering any pornography or any hate propaganda referred to in sections 281.1 to 281.3 is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or of an offence punishable on summary conviction.

APPENDIX II

HATE PROPAGANDA PROVISIONS OF THE CRIMINAL CODE

281.1(1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.

(2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely:
(a) killing members of the group, or
(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin. R.S.C. 1970, c.11 (1st Supp.), s.1.

281.2(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of
(a) an indictable offence and is liable to imprisonment for two years; or
(b) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
(a) an indictable offence and is liable to imprisonment for two years; or
(b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)
(a) if he establishes that the statements communicated were true;
(b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

(4) Where a person is convicted of an offence under section 281.1 or subsection 91) or (2) of this section, anything by means of or in relation to which the offence was committed, upon such conviction, may, in addition to any other punishment imposed, be ordered by the presiding magistrate or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

(5) Subsections 181(6) and (7) apply mutatis mutandis to section 281.1 or subsection (1) or (2) of this section.

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

(7) In this section

"communicating" includes communicating by telephone, broadcasting or other audible or visible means;

"identifiable group" has the same meaning as it has in section 281.1;

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"statements" includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations. R.S.C. 1970, c.11 (1st Supp.), s.1.