R. v. *SHARPE* AND THE DEFENCE OF ARTISTIC MERIT

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The impact of judicial decisions is sometimes most significant and most controversial in relation to matters that were not at the forefront in the legal proceedings. The decision in *R.* v. *Sharpe*[1] may be such a case. In this decision, the Supreme Court of Canada upheld, with minor qualifications, the offence of private possession of child pornography under section 163.1 of the *Criminal Code*.[2] The case was argued and resolved largely as an issue of privacy — could the prohibition on child pornography extend to private possession, while remaining within constitutional limits?[3]

At the same time, the Court, in discussing the "artistic merit" defence to child pornography (and obscenity in general), not only expanded this defence by suggesting that it be given a more broad interpretation than in the past, but also altered the definition of the defence itself. These modifications have changed the law with respect to this defence not only in the context of section 163.1, but also under section 163's prohibition on obscenity. By rejecting the community standards test set out in *Langer*[4] and affirming the harm test set out in *Butler*,[5] the Court suggests a more objective determination of "artistic merit." This modification brings the test into accord with current *Charter* principles that value the freedom of nearly any expression so long as it does not pose a risk of significant harm to society. Looking at the path that the Court took provides us with some important insights about the relationship between freedom of expression, the harm principle and the idea of artistic merit.

CONSTITUTIONAL RIGHTS AND HARM

Charter rights and freedoms are interpreted consistent with their purposes.[6] Section 2(b) protects expression because of its value in the search for truth, in the promotion of participation in social and political decision-making, and in individual development and self-fulfillment.[7] Given the breadth of these purposes almost any expression may have some value, and therefore, the Court has held all content and almost any form of expression are entitled to *Charter* protection.[8]

Recognizing the importance of rights, the *Sharpe* decision adopts *Butler*'s notion that only a "reasoned

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1 [2001] S.C.J. No. 3, rev'g (1999), 175 D.L.R. (4th) 1 (B.C.C.A.), which had aff'd (1999), 169 D.L.R. (4th) 536 (B.C.S.C.) [hereinafter *Sharpe*]. Sharpe was remitted for trial on all charges.

2 R.S.C. 1985, c. C–46, as am. 1993, c. 46, s. 2. Relevant portions of the section are set out below:

163.1(1) In this section "child pornography" means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

(b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

(4) Every person who possesses any child pornography is guilty of

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

(b) an offence punishable on summary conviction.

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

3 Section 163.1 of the *Criminal Code*, unlike section 163 upheld in *R.* v. *Butler* (1992), 89 D.L.R. (4th) 449 (S.C.C.) [hereinafter *Butler*], prohibits simple possession of the material. This extension to private possession led the British Columbia courts to conclude that the interference with free expression was more egregious, and could not be justified under section 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. While it has been argued that free expression protects only communicative activities and not private possession, in *Sharpe,* the majority held that "freedom of thought, belief, opinion, and expression" extends to the possession of expressive materials, which "allows us to understand the thought of others or consolidate our own thought." *Supra* note 1 at para. 25.

4 *Infra* note 25.

5 *Supra* note 3.

6 *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

7 *Quebec (Attorney General)* v. *Irwin Toy Ltd.*, 58 D.L.R. (4th) 577 at 612 (S.C.C.) [hereinafter *Irwin Toy*].

8 *Ibid*.

apprehension of harm" could justify infringing the freedom of expression.[9] The majority of the Court[10] used both interpretive and remedial instruments to conform the child pornography legislation to the harm principle. First, it held that the child pornography offence could be kept substantially within constitutional limits by a narrow reading of various terms of the provision.[11] In the same vein, a liberal approach should be taken to the statutory defences.[12] As a result of this interpretive approach, the majority concluded that, subject to two "peripherally problematic" applications,[13] only expression that is reasonably associated with harm to children would result in criminal liability. The Court then narrowed the scope of the prohibition to avoid the problematic applications. Firstly, the legislation would not apply in the case of a person who created such materials solely for his or her personal use. Secondly, it would be inapplicable in the case of "a teenager … possessing, again exclusively for personal use, sexually explicit photographs or videotapes of him- or herself alone or engaged with a partner in lawful sexual activity."[14]

It was argued in *Sharpe* that child pornography may "change possessors' attitudes in ways that makes them more likely to sexually abuse children."[15] The evidence in support of this harm was "not strong," but it "support[ed] the existence of a connection."[16] It was also argued that child pornography may fuel fantasies of pedophiles and incite them to commit unlawful acts. As to the evidence of this harm, McLachlin C.J.C. commented:[17]

> The lack of unanimity in scientific opinion is not fatal. Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of. Some studies suggest that child pornography, like other forms of pornography, will fuel fantasies and may incite offences in the case of certain individuals. This reasoned apprehension of harm demonstrates a rational connection between the law and the reduction of harm to children through child pornography.

With regard to some forms of harm arising from some forms of child pornography the evidence is much stronger. Where children are employed in the production of child pornography, there is a direct link between the material and harm to children.[18] But this proven connection to harm cannot justify the full breadth of section 163.1's definition of child pornography, which extends to all forms of "visual representation" of persons "depicted" as children, and "any written material or visual representation that advocates or counsels" criminal sexual activity with children. For all aspects of the law to constitute justifiable limitations on free expression, as the

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9 *Butler, supra* note 3 at 504; *Sharpe, supra* note 1 at para. 85.

10 *Sharpe, supra* note 1, per McLachlin C.J.C., Iacobucci, Major, Binnie, Arbour and LeBel JJ. concurring. L'Heureux-Dubé J., Gonthier and Bastarache JJ. concurring, interpreted the provision more broadly and would have upheld it without exception.

11 *Ibid*. The potential scope of section 163.1 was confined by narrow interpretations of the terms "explicit sexual activity" (interpreted as "intimate sexual activity represented in a graphic and unambiguous fashion" (*ibid*. at para. 49)); "dominant characteristic" and "sexual purpose" (whether a "reasonable viewer, looking at the depiction objectively" would perceive the depiction as "intended to cause sexual stimulation to some viewers" (*ibid*. at para. 50)); and "advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act" (*ibid*. at para. 54) (not a "mere description," but material that "sends the message that sex with children can and should be pursued" (*ibid*. at para. 56)). These interpretations exclude more extreme examples of overreaching, such as pictures of children kissing, family photos of naked children, anthropological works and political advocacy to lower the age of consent.

12 The defences of "artistic merit," "educational, scientific or medical purpose," and "public good," should all be construed liberally (*ibid*. at para. 60, with details following at paras. 61–71).

13 *Ibid*. at para. 111.

14 *Ibid*. at para. 110. These were excluded from the scope of the law through the remedial approach of upholding the law in its general application, while reading in exceptions for the problematic situations (*ibid*. at para. 115). This involves an extension of the remedy of reading in, but essentially the approach adopted is one I have supported before, arguing that it follows from established principles in the jurisprudence, including the "reasoned apprehension of harm" test (*Sharpe, supra* note 1 at para. 85, citing *Butler, supra* note 3 at 504) and the requirement to interpret legislation, to the greatest extent possible, in conformity with the Constitution (*ibid*. at para. 33, citing *Slaight Communications Inc*. v. *Davidson*, [1989] 1 S.C.R. 1038 at 1078, among other authorities).

15 *Sharpe*, *supra* note 1 at para. 87.

16 *Ibid*. at para. 88.

17 *Ibid*. at para. 89.

18 In addition, the Court held that there was "clear and uncontradicted" evidence that child pornography may be used by paedophiles to show to children as a part of a "grooming" or "seduction" process (*ibid*. at para. 91). Thus, it seems that even material that was not created using children and consequently would not be directly harmful, could still pose a reasoned apprehension of harm.

This is in contrast to the American approach. Under the *Child Pornography Prevention Act of 1996*, (Pub. L. No. 104–208, & 101(a), 110 stat. 3009–26) 1982, child pornography is more narrowly defined than under s. 163.1, as it is limited to pornography that involves actual children in its production or, since 1996, that appears to involve actual children (computer-"morphed" or "virtual" child pornography). However, no defence is provided for works of artistic merit. The law as it stood before 1996 withstood a First Amendment challenge in *New York* v. *Ferber*, 458 U.S. 747 (1982) at 766–74. See also *Osborne* v. *Ohio*, 495 U.S. 103 (1990) upholding the prohibition of simple possession of this type of child pornography. The fate of the provisions regarding virtual child pornography has not been determined. They were upheld in *U.S*. v. *Hilton*, 167 F. 3d 61 (1st Circ. 1999) and *U.S*. v. *Acheson*, 195 F. 3d 645 (11th Circ. 1999), but struck down in *Free Speech Coalition* v. *Reno*, 198 F. 3d 1083 (9th Circ. 1999); cert. granted 121 S.Ct. 876.

Court held that they do,[19] attitudinal harm and the attendant reasoned apprehension of harm test must be brought into the equation.

The reasoned apprehension of harm test does provide a degree of protection for free expression. But, alone, it is insufficient. Consider the application of the test to political expression. Were we to permit the censorship of political expression that is "unpopular, distasteful or contrary to the mainstream"[20] on the basis that such expression might change attitudes and lead to conduct perceived by the mainstream to be harmful, a central purpose of section 2(b) would be frustrated. Under both the obscenity and child pornography offences, a defence for works of artistic or literary merit is crucial in ensuring that only expression "far from the core" of section 2(b) is affected.[21] This defence, which guarantees that expression that "rests at the heart of freedom of expression values"[22] is shielded from liability, is the subject matter of the next part of the paper.

ARTISTIC MERIT, OBSCENITY, AND THE COMMUNITY STANDARD OF TOLERANCE

In both *Butler* and *Sharpe*, artistic or literary merit was not directly raised, but the defence was nonetheless discussed in the course of comprehensive reviews of the challenged statutory provisions. In *Sharpe*, the majority, adverting to free expression concerns, adopted a very broad interpretation of the artistic merit defence to child pornography. It held that while artistic merit must be "objectively established,"[23] this does not require the demonstration of any particular level of meritorious performance, as it should not be only good or experienced or conventional artists who are shielded from criminal conviction. Rather, what is required is artistic quality or character:[24]

> [A]ny expression that may reasonably be viewed as art. Any objectively established artistic value, however small, suffices to support the defence. Simply put, artists, so long as they are producing art, should not fear prosecution ...

McLachlin C.J.C. went on to reject McCombs J.'s holding in *Ontario (A.G.)* v. *Langer*[25] "that material, to have artistic merit, must comport with community standards in the sense of not posing a risk of harm to children."[26] This, McLachlin C.J.C. argued, would add a qualification to the defence not stated by Parliament, and would "run counter to the logic of the defence, namely that artistic merit outweighs any harm that might result from the sexual representation of children in the work."[27]

The nature of artistic merit, and the relative significance of artistic merit and the harm to children that may be caused by child pornography, lay at the heart of the *Langer* case. Langer had displayed several oil paintings and pencil sketches of children engaged in sexual acts both with and without adults. An art critic reviewed his works in the *Globe and Mail* under the title, "Show Breaks Sex Taboo."[28] The review prompted a call to police, leading to an investigation and the seizure of the works.[29] A forfeiture hearing under section 164 of the *Criminal Code* followed,[30] during which extensive evidence and argument was presented on the issue of artistic merit.

McCombs J. held that although section 163.1 provides that "artistic merit" is an absolute defence, the term does not merely possess the meaning that would be assigned to it by the artistic community and must conform to a "notion of artistic merit [that] emerges from, and is bound up with, considerations of contemporary standards of community tolerance, based on the risk of

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19 Unless they fall within the private creation and possession exceptions described, *supra* notes 10 and 11 and accompanying text.

20 *Irwin Toy, supra* note 7 at 606, commenting on the scope of the free expression guarantee.

21 *Butler, supra* note 3 at 488. See also at 482.

22 *Ibid.* at 471, cited in *Sharpe, supra* note 1 at para. 61.

23 *Sharpe, supra* note 1 at para. 63. At paragraph 64, the Court noted that factors to be considered in the determination of artistic character include the intention of the creator, the form and content of the work including its "connections with artistic conventions, traditions or styles," the opinion of experts, and the mode of production, display and distribution.

24 *Ibid.*

25 (1995), 123 D.L.R. (4th) 289 (Ont. Ct. (Gen. Div.)); leave to appeal to S.C.C. denied 100 C.C.C. (3d) vi [hereinafter *Langer*].

26 *Sharpe, supra* note 1 at para. 65.

27 McCombs J. relied on *Butler, supra* note 3 in associating a community standard of tolerance with the artistic merit defence, and L'Heureux-Dubé J. indicated support for a common approach. McLachlin C.J.C. gave less weight to this concern, noting that the statutory defence under section 163.1 was conceptually different from the judicially-created defence under section 163, so that different approaches could be justified.

28 K. Taylor, "Show Breaks Sex Taboo" *Globe and Mail* (14 December 1993) C5, online <http://collections.ic.gc.ca/mercer/348.html> Taylor stated: "Eli Langer's show of eight paintings and various small pencil drawings ... breaks one of the last taboos: the sexuality of children. The paintings, gorgeously rendered in a duo-toned chiaroscuro of red and black, show children and adults in various forms of sexual play ... Langer's attitude toward these activities is ambivalent — they are depicted with both horror and fascination — but what is definitive about the paintings is that the children are not portrayed as victims but rather as willing participants."

29 *Langer, supra* note 25 at 296.

30 The nature of the forfeiture provisions and the hearing is discussed, *ibid.* at 297 and 327–29.

harm to society."[31] This interpretation was defended as consistent with the interpretative approach employed with regard to obscenity and because it would advance the statutory purpose of protecting children from harm.[32] To conclude otherwise, McCombs J. warned, would lead to the result that even "a scintilla of artistic merit" would justify "even the most harmful depictions."[33]

Notwithstanding the qualification placed on the artistic merit defence, McCombs J. concluded that Langer's "deeply disturbing"[34] paintings and drawings were not proscribed by section 163.1. The works had accepted artistic merit in the view of expert witnesses,[35] but this was not determinative. It was also necessary to consider the risk of harm to children. This would be clear if children were involved in the production of the material (they were not), and could also be proved if the material were of the type used by paedophiles to fuel fantasies. There were differing expert opinions on the latter point, with the defence expert testifying the drawings and paintings had a "frightening quality" and were unlikely to be so used. Relying on this evidence, McCombs J. held that a "realistic risk of harm" had not been proven.[36] Thus, harm, rather than artistic value, appeared to be the overriding consideration. This was indicated by McCombs J.'s comment that in the "rare circumstance where a depiction has merit in the view of artistic community, but nevertheless creates a strong risk of harm to children," the artistic merit defence would fail.[37]

McCombs J. justified the incorporation of community standards into the artistic merit defence, as consistent with the law relating to obscenity. The artistic merit defence to obscenity is largely a judicial creation, flowing from interpretation of the statutory requirements that "a dominant characteristic" of the subject material be "the undue exploitation of sex."[38] If the sexual aspect of a work is incidental to the exploration of an artistic or literary theme, this supports the conclusion that the dominant characteristic of the work is not the exploitation of sex. Alternatively stated, if the sexual aspect forms part of the "internal necessities" of a work that pursues an artistic or literary purpose, any exploitation is not undue. This interpretation was introduced in the 1962 *Brodie*[39] decision in which the Supreme Court of Canada considered the 1959 *Criminal Code* obscenity provision in the context of a prosecution of D.H. Lawrence's *Lady Chatterly's Lover*.[40] Justice Judson concluded that the book was not obscene because of its literary merit, and linked this holding to both of the statutory requirements of dominant characteristic and undue exploitation. The protection of artistic and literary freedom of expression was the underlying policy for this interpretation.[41] Recognizing the importance of expert witnesses in this context, Judson J. stated: "I can read and understand but at the same time I recognize that my training and experience have been, not in literature, but in law."[42] Justice Judson also linked the statutory requirement of "undueness" to the concept of community standards.[43] This, however, was described as a test that might be either additional or alternative to the internal necessities test, and not as a qualifier of artistic or literary merit.[44]

In the subsequent Supreme Court of Canada decisions that elaborated upon the community standards test, the relationship of the community standards test and the artistic defence was not resolved. Rather, another test of undueness, the "degrading or dehumanizing" test, was introduced and artistic merit was not argued.[45] However, the Manitoba Court of Appeal in *R.* v. *Odeon Morton Theatres Ltd.*,[46] holding that the film *Last Tango in Paris* was not obscene, relied on the film's artistic quality and its conformity with community standards of tolerance, without clearly distinguishing these two factors.[47]

In *Butler*, Sopinka J. reconciled the community standard of tolerance test with the more recently developed degradation or dehumanization test, holding that there is undue exploitation only in works whose dominant characteristic is the depiction of explicit sex combined with violent, degrading or dehumanizing treatment of persons. The depiction of explicit sex unaccompanied by such features is not undue, unless

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31 *Ibid.* at 308.
32 *Ibid.* at 311.
33 *Ibid.* at 313.
34 *Ibid.* at 298.
35 *Ibid.* at 306.
36 *Ibid.* at 304.
37 *Ibid.* at 314–15.
38 *Criminal Code, supra* note 2, s.161(1)(8).
39 *R.* v. *Brodie* (1962), 32 D.L.R. (2d) 507 at 527–28 (S.C.C.) [hereinafter *Brodie*].
40 *Brodie, ibid.* note 39 at 524. Justice Judson wrote for only four of the five majority justices, but his decision has been authoritatively adopted in subsequent Supreme Court of Canada decisions, including *Butler, supra* note 3 at 463.
41 *Supra* note 39 at 528.
42 *Ibid.*
43 *Ibid.* at 528–29, adopting the approach in *R.* v. *Close*, [1948] V.L.R. 445.
44 *Ibid.* at 529: "whether the question of 'undue exploitation' is to be measured by the internal necessities of the novel itself or by offence against community standards, my opinion is firm that this novel does not offend."
45 *R.* v. *Dominion News & Gifts (1962) Ltd.*, [1964] 3 C.C.C. 1 (S.C.C.), adopting the dissenting reasons of Freedman J.A. in [1963] 2 C.C.C. 103 (Man. C.A.); and *Towne Cinema Theatres Ltd.* v. *The Queen* (1985), 18 D.L.R. (4th) 1 at 10 (S.C.C.) [hereinafter *Towne Cinemas*].
46 (1974), 45 D.L.R. (3d) 224 (Man. C.A.) [hereinafter *Odeon Theatres*]. This case was referred to with approval by the Supreme Court of Canada in *Butler*.
47 *Ibid.* at 233, 235.

children are employed in the production of the material.[48] The rationale for bringing these tests together was that contemporary Canadian society would tolerate exposure to sexually explicit material except that which causes harm in the sense that it "predisposes persons to act in an antisocial manner as, for example, the physical or mental mistreatment of women by men or, what is perhaps debatable, the reverse."[49]

Justice Sopinka went on to deal with the relationship of the artistic defence to these other tests:[50]

> How does the "internal necessities" test fit into this scheme? The need to apply this test only arises if a work contains sexually explicit material that by itself would constitute the undue exploitation of sex. … The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole.

This is a clear statement that the artistic merit defence should in some way be qualified by the community standard of tolerance. How this is to occur requires closer examination. First of all, the artistic merit defence is not reached until the community standard of tolerance has been, at least on a *prima facie* basis, exceeded. Under *Butler* this means that the material is of a type that is believed by the national community to be likely to cause harm by predisposing persons to engage in antisocial conduct — in other words that the material combines depictions of explicit sex with violent, degrading or dehumanizing treatment. It seems unlikely that the community would come to a different conclusion about the potential harmfulness of such material on the basis that it has artistic or literary merit,[51] but the Court does not indicate that the initial assessment as to harmfulness must be reversed for the artistic defence to succeed. Rather, the Court assumes that *the community is prepared to tolerate a risk of harm regarding art and literature* that it would not tolerate regarding other material. This assumption has not been empirically established or even tested. However, it is consistent with the *Brodie* interpretation of Parliament's intention underlying the definition of obscenity: "[t]he section recognizes that the serious-minded author must have freedom in the production of a work of genuine artistic and literary merit."[52] It is also consistent, as I have shown, with the Court's interpretation of the purposes underlying section 2(b) of the *Charter*.

THE APPROPRIATE ROLE FOR COMMUNITY STANDARDS

Even if it is accepted that a risk of harm does not outweigh artistic merit, under sections 163 and 163.1 and the *Charter*, this does not necessarily mean that community standards should play no role. It seems clear that there must be some objective quality to artistic merit. The subjective intention of the creator is a necessary component when determining artistic merit, but is not sufficient, as merely "calling oneself an artist" should not constitute a defence.[53] Arguably, a community standard of tolerance[54] may provide a workable approach to the ascertainment of artistic merit in an objective sense. However, close examination supports the view that the community standard test is not well suited to dealing with questions of artistic merit.[55] From a theoretical perspective, reference to a common or average standard is out of place in this context. The need to protect artistic or literary works must extend to works that are "unpopular, distasteful or contrary to the mainstream."[56] The reading or viewing tastes of the majority have not been relied upon to defend and likely would not have protected from criminal liability many literary or artistic works of great merit, even masterpieces. As stated by Frederick Schauer, commenting on the "literary-value test" in American obscenity law:[57]

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48 *Butler, supra* note 3 at 471.

49 *Ibid*. at 470. The "harm" requirement does not signal a return to *Hicklin*'s "tendency to deprave" test (*infra* note 51). As elaborated in *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at paras. 47, 56–57, 61–62) the new test is based on a reasonable apprehension of harm, not on a violation of moral standards.

50 *Ibid*. at 471.

51 The community might come to the same conclusion as courts applying the *Hicklin* test. Under that test, in which obscenity was that which had a "tendency ... to deprave and corrupt those whose minds are open to such immoral influences," the innocent or artistic purpose of the author was not relevant: see *R*. v. *Hicklin* (1868), L.R. 3 Q.B. 360 at 372–73, 377; *Brodie, supra* note 39 at 530.

52 *Supra* note 39.

53 *Sharpe, supra* note 1 at para. 232. See also paras. 63, 64.

54 *Towne Cinemas, supra* note 45 at 15.

55 This conclusion applies equally with regard to the *Criminal Code* obscenity provision as with regard to the child pornography offence, because it does not depend on the statutory formulation of the defence, but on issues relating to the theoretical basis for and functional operation of the community standard test which is an element of both offences.

56 *Irwin Toy, supra* note 7 at 606. Citing this concern, the United States Supreme Court, in *Pope* v. *Illinois*, 481 U.S. 497 (1987) at para. 11, rejected the application of a community standards test to the determination of merit, and found instead that "[t]he proper inquiry is not whether an ordinary member of a given community would find serious literary, artistic, political, or scientific value ... but whether a reasonable person would find such value in the material." The Court added that the "reasonable person" may find valuable a work believed to be such by only a minority of a population (*ibid*.).

57 F. Schauer, *The Law of Obscenity* (Washington, D.C.: Bureau of National Affairs, 1976) at 144.

> [T]he literary-value test embodies implicitly the concept that the purpose of the obscenity laws is not to "level" the available reading matter to the majority or lowest common denominator of the population ... It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population ... Yet this has not prevented the courts from finding literary merit in these and other works which clearly have an intellectual appeal to only a minority of the population.

One can object that this theoretical concern arises only if a community standard of taste, rather than tolerance, is applied. But here a functional problem regarding the community standard test arises. A review of case law demonstrates that there is a significant risk, in applying the community standard test to a question of artistic merit, that an adjudicator will end up applying a standard of taste. The community standard test effectively invites an adjudicator to reject expert evidence of artistic merit, and to substitute his or her view of the community standard of tolerance. There is unlikely to be any compelling evidence of the community standard of tolerance for artistic works. An adjudicator is thus left with little guidance from the evidence, and with little to substitute for expert opinion other than his or her subjective reaction.[58]

R. v. *Cameron*[59] provides an example. The case arose out of a showing of sixty drawings by twenty-two artists under the title "Eros 65." Expert witnesses agreed that the works possessed artistic merit.[60] Nonetheless, the majority judgment held that the drawings were obscene as they exceeded the community standard of tolerance.[61] The majority placed little or no weight on the expert evidence, complaining that the experts were too concerned with "form" and not sufficiently concerned with the sexual content of the drawings.[62] The majority concluded, by referring to "the drawings themselves," that they were "of base purpose and their obscenity [was] flagrant."[63]

Cameron included a lengthy dissenting judgment by Laskin J.A. (as he then was), which was highly critical of the majority, and which has since received favourable comment by the Supreme Court of Canada.[64] The dissent noted that a work should be considered as a whole, including its composition, method and manner of execution, as well as its subject matter,[65] and that the standard applied should be one of tolerance, not taste. The dissent also commented on the importance of expert evidence:[66]

> A standard must come from experience of art; it cannot rise from a vacuum if it is to be something more that a personal reflex ... [W]e are concerned with changing criteria, with movement in public taste that takes place under the push, initially at any rate, of artists themselves and their sponsors.

Therefore, a court *must* weigh expert evidence, and *must* be careful not to replace expert opinion with a personal assessment:[67]

> [E]ven the most knowledgeable adjudicator should hesitate to rely on his own taste, his subjective appreciation, to condemn art. He does not advance the situation by invoking his right to apply the law and satisfying it by a formulary advertence to the factors which must be canvassed in order to register a conviction.

The problem with the community standards test as applied to artistic merit is that it deflects attention from the expert evidence, which should be accorded significant weight,[68] and provides a vague substitute regarding which little or no relevant evidence is available. This creates a significant likelihood that adjudicators will be influenced by their lack of appreciation for a particular work[69] or for

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58 This can occur outside the context of artistic merit, as well. The Supreme Court of Canada has held that, while evidence as to the community standard of tolerance (such as rulings by censor or classification boards) is not conclusive, it should only be rejected for "good reason." Adjudicators must beware not to apply their own opinions about "tastelessness or impropriety" for their assessment of the community standard of tolerance: *Towne Cinemas, supra* note 45 at 19–20.

59 (1966), 58 D.L.R. (2d) 486 (Ont. C.A.) [hereinafter *Cameron*]. Another example, from the same year, is found in *R.* v. *Duthie Books Ltd.* (1966), 58 D.L.R. (2d) 274 (B.C.C.A.) [hereinafter *Duthie Books*] dealing with a critically-acclaimed book, *Last Exit to Brooklyn* by Hubert Selby (New York: Grove Press, 1964).

60 In *Cameron, ibid.* at 515–16, Laskin J.A. (as he then was), dissenting, noted that the expert evidence left "not the slightest doubt" that the drawings had artistic merit. The majority did not suggest that there was any conflict in the evidence on this point.

61 *Ibid.* at 497.

62 *Ibid.* at 496.

63 *Ibid.* at 497.

64 An appeal to the Supreme Court of Canada based on Laskin J.A.'s dissent was refused, the Court holding that the dissent did not raise a question of law "in a strict sense." An application for leave to appeal was also denied: (1967) 62 D.L.R. (2d) 328. Some 18 years later, in *Towne Cinemas, supra* note 45, Dickson C.J.C., while disagreeing that expert evidence as to obscenity or community standards is required, did agree with Laskin J.A.'s statement, presented in the text, *supra* note 60, that adjudicators should hesitate to substitute their own opinions of the value of a work for that of the expert witnesses.

65 *Cameron*, *supra* note 59 at 512.

66 *Ibid.* at 514.

67 *Ibid.* at 515.

68 *Supra* note 60 and accompanying text.

69 There seems to be little other explanation for *Duthie Books, supra* note 59, in which there was uncontradicted expert evidence of literary merit and of the importance of the sexual aspects to the

art generally. For example, the majority in *Cameron* suggested that any artistic objectives relating to the depiction of lines or the interplay of shade and light could be achieved by drawing human figures engaged in other activities![70]

CONCLUSION

The question of artistic merit in relation to pornography has been reviewed by the Supreme Court in a number of cases over the years. The watershed decision in relation to the law of obscenity came in the *Butler* case. It limited obscenity to explicit depictions of sexual activity combined with violent, degrading or dehumanizing treatment of persons, and provided that even this narrowed category of material could be shielded from liability under section 163 through the artistic merit defence. In much the same way, *Sharpe* is a defining case. The Court's interpretation of child pornography and artistic merit narrows the potential scope of section 163.1.

There is much to commend in the *Sharpe* approach to artistic merit. Whether the decision is based on the view that the community is prepared to tolerate a risk of harm regarding art and literature that it would not tolerate regarding other material, or on the view that artistic merit carries more constitutional weight than does a risk of harm, the importance the Supreme Court of Canada assigned to artistic expression appropriately reflects *Charter* imperatives. Some types of expression are particularly valuable, from a constitutional perspective, including an "artist's attempt at individual fulfillment."[71] If expression of this degree of significance is to be restricted, it should not be because of a risk of harm only, but on the basis of proven harm. This would not make artistic expression, or other valuable forms of expression such as political expression, immune from all regulation, but it would make such expression immune from regulation based on only a reasoned apprehension of harm. Where proven harm exists, as when children are employed in the production of child pornography, even the significant *Charter* value of artistic expression could be outweighed. But with a broad definition of child pornography, and reliance on the reasoned apprehension of harm test, a defence for material of literary or artistic merit is a constitutional necessity.

But caution is still warranted. The Court was commenting without the benefit of a factual context,[72] and the precise boundaries of the defence still need elaboration. For example, in its effort to ensure that the defence is available to all sincere artists and not only to those who are successful or conventional, the majority described the defence as extending to "any objectively established artistic value, however small."[73] This definition contains competing messages, and is open to misinterpretation. Artistic merit must have objective substance; subjective intention is necessary but not sufficient. But the defence must not be confined to only those works that appeal to majoritarian tastes. The required level of artistic value must be set "low" enough to provide room for artistic exploration, so that public tastes may move and minority tastes may be allowed expression. The danger is that, if the bar is set too low, the concept of an objective quality may be lost, with only an idiosyncratic or subjective standard remaining. After all, it is likely that "there is someone, and perhaps even some 'expert,' who will see literary merit in anything."[74]

It all comes back to balance. Although the child pornography law is a reasonable and justifiable limit on free expression in most of its applications, it must accommodate individual privacy interests.[75] There must also be freedom for "the serious-minded" artist or author "in the production of a work of genuine artistic and literary merit."[76] The application of the law to the targeted "hard core, low value" material is constitutional and pursues important aims, seeking to protect vulnerable children from serious abuse. These aims are worth pursuing, though we must also remain sensitive to countervailing concerns, and though the pursuit will inevitably require hard decisions.❑

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novel's theme. Nonetheless, the Court held, without reference to evidence or further explanation, that "any literary or artistic merit ... and any sincere and valid purpose ... are clearly submerged by the undue and decided over-emphasis of the objectionable characteristics" (*ibid*. at 282).

70 *Supra* note 59 at 499–500.

71 *Butler*, *supra* note 3 at 485.

72 Noting that the defence had not been raised in the courts below and was not addressed in the evidence, L'Heureux-Dubé J. suggested that its "boundaries" should not be determined (*Sharpe*, *supra* note 1 at para. 232).

73 *Ibid*. at para. 63.

74 Schauer, *supra* note 57 at 144. The difficulty involved in arriving at an appropriate description of the requisite level of artistic merit is apparent in American jurisprudence. See *ibid*.

75 J. Ross, "*R*. v. *Sharpe* and Private Possession of Child Pornography" (2000) 11:2 Constitutional Forum 50.

76 *Brodie*, *supra* note 39 at 528.