

**BRITISH COLUMBIA CIVIL LIBERTIES
ASSOCIATION**

Broadcasting Act

**Written Submissions to the House of Commons Standing
Committee on Canadian Heritage on Bill C-327: A Bill to
Regulate Violent Broadcasting**

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The B.C. Civil Liberties Association

The B.C. Civil Liberties Association (“BCCLA” or the “Association”) formed in 1963, is Canada’s most active advocate defending civil liberties and democratic freedoms. The objects of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. The BCCLA has demonstrated a long-standing, genuine, and continuing concern with the rights of the citizens in British Columbia and in Canada to liberty and freedom. In various settings, we speak out on the principles that promote individual rights and freedoms, including freedom of thought, belief, conscience, religion, opinion and expression, equality, and autonomy generally. The Association pursues its work in four areas of programming: law reform, litigation, public education and complaint assistance. In furtherance of our law reform objectives, the Association has a long history of providing input to government and the courts on matters of vital importance to civil liberties in Canada. For more information, please visit our website at: <http://www.bccla.org>.

Position

The BCCLA has consistently, since its inception, championed the cause of expressive freedom and argued for its centrality to the democratic process. Freedom of expression has long been held to be a fundamental freedom necessary for a flourishing democracy. The *Charter of Rights and Freedoms* (“Charter”), along with an illustrious line of case law has consistently found that freedom of expression is critical to the pursuit of truth, self-fulfillment, and the functioning of democracy. Section 2(b) of the *Charter* provides that:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Chief Justice McLachlin of the Supreme Court of Canada has written:

The values underlying the right to free expression include individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 765. While some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society. As stated in *Irwin Toy*, supra, at p. 968, the guarantee "ensure[s] that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection", the Court continued, "is ... 'fundamental' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual". As stated by Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319

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(1937), free expression is "the matrix, the indispensable condition, of nearly every other form of freedom" (p. 327).¹

Within the sphere of constitutionally protected freedoms is a free press. The substantive protection of expression is content neutral, and includes speech, art, images, and violent content. Depictions of violence can also serve as forms of political and artistic expression. The justification for such broad protection is grounded in the recognition that humans are autonomous individuals who are capable of making decisions for themselves.

Empowering an agent of the state, the Canadian Radio-television Telecommunications Commission ("CRTC" or the "Commission") to make regulations limiting content based upon their perception of whether it is inappropriately violent in nature raises concerns of censorship, prior restraint on expression and gives rise to potential violations of expressive freedom. The proposed regime in Bill C-327 would censor protected speech in Canada. Worse still, it would do so without offering any effective remedy for Canadians. Bill C-327 creates an architecture that allows for the limitation of expressive freedom. In the past, when such an architecture has been set up, unjustifiable censorship has followed. The BCCLA opposes the passing of Bill C-327 due to its inevitable violation of legally protected expression.

Also, while the focus of the proposed legislation is on regulating and filtering expression by the media, it is obvious that communication involves receiving expression as well as making it and that limiting the media's ability to communicate restricts the right of Canadians to access all ideas. The rights of people to receive, as they may freely choose, such expression is given short shrift by the proposed legislation.

General Concern of Vagueness

Section 10.1(1) of Bill C-327 delegates to the Commission the power to make regulations respecting the broadcasting of violent scenes, including those contained in programs intended for persons under the age of 12 years. The BCCLA has at least three specific concerns relating to vagueness of the proposed legislation.

First, the provision delegates a broad power to the Commission and thereby abdicates the responsibility of democratically elected legislators to fashion clear and understandable laws. If Parliament cannot draw lines as to what is to be permitted and what is not, what is the utility in passing on a vague delegation to an unelected and unaccountable tribunal to do so?

Second, the provision creates a structure that inevitably will infringe upon constitutionally protected expression. The Commission is mandated to do something and presumably would follow that vague mandate. That would clearly limit free expression.

¹ *R. v. Sharpe* 2001 SCC 2 at para. 23

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Third, the phrase “including those contained in programs intended for persons under the age of 12 years” suggests that the overall standard of adjudication in setting these regulations should be programming appropriate for children. The BCCLA submits that this threshold is inappropriate as it invites an overly restrictive interpretation and does not use the least restrictive means available to address whatever might be argued to be the “problem.” Bill C-327 is directed towards the public, not children. The highlighting of the interests of children within the provision creates an increased likelihood of violations of free expression of all.

Effects of s. 10.1(1)

The analysis of this proposed legislation must start with the observation that the expression that is sought to be regulated and barred from broadcast is not illegal expression. Limiting such content, however, is an infringement of the right to free expression. The effect of s. 10.1(1) is that the Commission would be granted broad powers to become a “Supernanny” of broadcast television for both children and adults alike. The cost of this kind of censorship would be high, both economically and socially. The Preamble purports to recognize “creative freedom” and “that censorship is not the solution.”² Despite this recognition, the objective of regulating violent content and the lack of any type of standard or guideline for application means that there will assuredly be some violation of free expression. As there is no confirmation process to vet the regulations created, the only remedy would be to litigate the Commission’s ruling. It is fair to say that this is a costly burden for broadcasting companies. It is also fair to say that many, if not most companies, are unwilling to engage in the arduous legal process of judicially reviewing a ruling and following-up with potential appeals. Moreover, the high cost would be even more prohibitive for private individuals to litigate. Instead, the most likely result is a chilling effect, whereby broadcasters will curtail their programming, with the aim of complying with the regulations. The social cost of this would be less intelligent and less thought-provoking programming, and overall, less diversity in social expression.

Case of Little Sisters

The Association would like to direct your attention to the litigation that culminated in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* 2000 SCC 69 (“*Little Sisters*”). Little Sisters is a business located in Vancouver that sells books and magazines, most of which are written by and for the gay and lesbian community. Most of the books and magazines sold by Little Sisters are published in the United States and imported into Canada by Little Sisters. The BCCLA was a co-plaintiff in this case.

² We note that preambles can have little effect on how a statute is interpreted. Section 13 of the *Interpretation Act* which says that: “The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.” But where the “plain meaning” of words in the body of the statute “admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble...”: *A.G. v. H.R. H. Prince Ernest Augustus of Hanover* [1957] A.C. 436, quoted in *Maxwell on The Interpretation of Statutes* (12th ed.) at p. 7.

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In *Little Sisters*, the Government, via the *Customs Tariff* and the *Customs Act*, delegated the power to regulate the import of “obscene materials,” as defined in s. 163(8) of the *Criminal Code* to customs agents. The delegation of this broad power, which lacked any standards for application, and the lack of training provided to officials empowered to make such determinations resulted in an overbroad application of the laws that censored protected speech. Beginning in approximately 1985 and from time to time until the trial in 1994, hundreds of books and magazines that Little Sisters purchased and sought to import into Canada were detained, prohibited and/or destroyed by customs officials because they were deemed to be “obscene.” Over the course of the trial and its subsequent appeals, it was revealed that customs officers made arbitrary decisions, procedures were haphazardly applied, and there was no proper training nor adequate time given to make such decisions. There was no formal procedure for placing evidence of artistic or literary merit before the classifying officers. Most importantly, many publications were prohibited entry into Canada that would not have been found to be obscene if full evidence was considered by officers properly trained to weigh and evaluate the materials. The result of these shortcomings was a disturbingly high amount of homosexual art and literature that was not obscene that was prohibited. The delegation of power to customs officers resulted in customs officers becoming the arbiters and guardians of a paternalistic scheme which denied access to protected expression.

As we saw in *Little Sisters*, the delegation of broad powers affecting free speech and communication creates a structure that while holding the appearance to some of being innocent and benign, inevitably leads to Charter infringement, only some of which may result in litigation. If the agency assigned to apply the law is not sufficiently cautious, fundamental freedoms can be encroached upon unnecessarily. For these reasons, the BCCLA opposes Bill C-327 as a dangerous delegation of censorship authority to the CRTC.

Practical considerations

As evidenced in the Preamble, the proposed Bill presupposes a relationship between violence on television and violence in society. Whether there is a clear causal link between violence on television and violence in society remains very much in dispute. The BCCLA does not believe that turning the Commission into a “Supernanny” is the solution to decreasing societal violence. At a practical level, there are everyday realities that we as a society must face – one being that we live in a society that unfortunately experiences violence. Thus, programs such as news broadcasts and documentaries, while possibly disturbing to watch, serve as important instruments for public safety, intelligent discourse, democratic accountability, dissemination of important information, and public decision making. Moreover, a functioning free press is a critical component of a free and democratic society. A potential effect of this Bill is the creation of regulations that will call for the sugar-coating of our daily news broadcasts that would obscure the current realities of society and the challenges we face.

At an operational level, the Association questions the effectiveness of the proposed Bill. With modern technologies such as satellite television, digital cable, and the Internet, individuals are

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able to access channels from across Canada, the United States and all over the world, the content of which can be more graphic than that found in Canadian programming. From the perspective of British Columbia, we note that this complicates the 9 p.m. threshold argument as it is not only possible, but increasingly common, for Vancouverites to be watching Eastern broadcasting which broadcasts at local times. Thus, while it may be 7 p.m. in Vancouver, they are watching 10 p.m. broadcasts being aired for a Toronto audience. As a result, regulations predicated on time zones and broadcast jurisdictions are increasingly losing their effectiveness. Moreover, more and more individuals are accessing their television programming from the Internet. If the aim of Bill C-327 is to enable the CRTC to protect Canadians from violent content, regulation through time and place will become increasingly difficult if not impossible, short of regulating the Internet.

Philosophical Pitfalls

The BCCLA has long argued for freedom of expression and the right of an individual to make his or her own choices. This is based, as mentioned above, on the belief that individuals are autonomous beings who have the faculty of reason. We are capable of making our own decisions, and indeed, the exercise of this faculty plays a significant role in a flourishing democratic society. Consequently, the limiting of choice and free expression not only hinders the self-fulfillment of an individual, but also the well-being of society.

The delegation of regulations poses two potential concerns: First, individuals are unable to access constitutionally protected expression and consequently unable to determine for themselves what they view. Second, parents or guardians are unable to determine what is appropriate for their children to view. This is one step too far into the private sphere for the state to be venturing into. If parents want to censor what their children have access to on television, then they can employ the use of V-chips or similar types of technology. As parents decide the appropriateness of books, music, and hobbies for their children, they should also determine what their children watch. Indeed, those households with satellite television or digital cable already do.

Conclusion

In conclusion, the BCCLA submits that the proposed bill creates a structure that will violate free expression. With costs, practical effects of Bill C-327, and philosophical underpinnings added to the consideration, the proposed structure is inadequate in providing safeguards against violations of free expression. Bill C-327 should not be passed into law.