

The freedom to speak and to be heard

Submission of the Canadian Association of Elizabeth Fry Societies (CAEFS) to the Standing Senate Committee on Legal and Constitutional Affairs, in opposition to Bill C-220

On October 1, 1997, Bill C-220 received the unanimous support of the House of Commons without any analysis or debate. It was then referred to the Senate. In the debate by the Senators preceding the motion to refer the Bill to Committee, the Honourable Noel A. Kinsella suggested that the Bill may have advanced through the House of Commons with "indecent haste" and, in addition to several other Senators, urged the Committee give the Bill "very careful analysis."

CAEFS objects to Bill C-220 and urges this Committee to oppose the Bill on the following grounds:

"The property, benefit or advantage" achieved as a result of a convicted person's creative work (where such work was based substantially on the person's offence) would become legislated as the proceeds of crime, subject therefore to seizure and forfeiture. The legislation would also vest the copyright in such work in the Crown in perpetuity, thereby denying prisoners and other convicted persons of the ability ever to write about their experiences, regardless of whether the purpose is for the benefit of their own catharsis or the enlightenment of the public.

This is of grave concern to CAEFS considering our mandate and the population our Association serves. There are a number of examples in Canada of books, television programs, movies and works in other media which depict, describe or discuss offences that have resulted in the conviction of women. For example, the book *Life with Billy* was written in the mid-80's about the horrific abuse suffered by Jane Hurshman at the hands of her common-law husband, whom she eventually killed. Ms. Hurshman, who went on to be a courageous and impassioned advocate on behalf of battered women was sent to trial for first degree murder.

The case pre-dated the Supreme Court of Canada decision in *Lavallee* and the acceptance in Canadian courts of the Battered Woman's Defence. Although Ms. Hurshman was acquitted by a jury, on appeal a new trial was ordered. Rather than go through a second trial, Ms. Hurshman pleaded guilty to manslaughter and served a short jail term.

Life with Billy was a book written about Ms. Hurshman's experiences and serves as a powerful and profoundly disturbing discussion of the reality experienced by battered women. In CAEFS' submission, Bill C-220, had it been law, could have prevented the publication of *Life with Billy* and would have prohibited Ms. Hurshman from receiving any benefit with respect to its publication.

Furthermore, the Crown's control of the copyright of such works could result in material such as that describing the experiences of Ms. Hurshman not being made available to the public with the concomitant effect of the public being less well informed about important issues of criminal justice.

In the submission of CAEFS, Bill C-220 would also have the effect of limiting the ability of women convicted of criminal offences writing about or describing their experiences in other media. It is submitted that such writings have not been produced with either the purpose or effect of aggrandizing or sensationalizing women's actions. Additional examples of women who have written about their crimes without minimizing their involvement or inappropriately denying responsibility include: Bonnie Walford's book, *Lifers: The Stories of Eleven Women Serving Life Sentences for Murder* and Margaret MacDonald's book, *The Violent Years of Maggie MacDonald*.

Bill C-220 will take a sledgehammer to the issue of crime sensationalization. It is an unreasonable and excessive limitation on the rights of convicted individuals to express themselves in the democratic marketplace of ideas. In addition, it is our submission that there are serious constitutional issues implicated by the Bill, most notably the constitutional guarantee of freedom of expression, a guarantee extended under

the Charter to all Canadians, including those who have been convicted of criminal offences. Moreover, it flies in the face of Canada's commitment to uphold the Universal Declaration of Human Rights, passed by the General Assembly of the United Nations on December 10, 1948. It will be a very poor reflection on Canada if Bill C-220 becomes law in the year of the 50th anniversary of our commitment to uphold human rights, including the right to "freedom of expression and opinion".

Freedom of expression has a central value in our democracy and should be particularly sedulously protected on behalf of the marginalized and dispossessed. Convicted individuals share with other citizens an interest in being able to write, speak and contribute to public awareness and opinion. Denying individuals convicted of crimes the ability to engage in this search and access opportunities for doing so is not in the broader interests of our society.

We must also remember that many people write for other reasons, including therapeutic ones, not merely for financial gain. Prisoners and individuals living in the community who have records of criminal convictions experience significant limitations on their ability to support themselves, much less achieve self actualization or significant personal advancement. Writing and/or other forms of artistic expression provide some with opportunities for personal development, growth, insight and enlightenment.

In addition, throughout history, prison writings have contributed significantly to literature and our understanding of such issues as, the human condition, conditions in incarceration, discrimination on the basis of race, class and gender, as well as the etiology of and solutions to crime. Writing about their experiences in the criminal justice system is not only potentially cathartic for the individual concerned, it can also aid in a socially beneficial search for the truth. Recent popularized examples of this include, *In the Name of the Father* and *Dead Man Walking*. Canadian examples include "In Their Own Words", a chapter of Ellen Adelberg's and Claudia Currie's book *Too Few to Count*, Roger Caron's books, most notably, *Go Boy*, Tony McGilvary's *Square John: A True Story*, and Julius Melnitzer's *Maximum, Minimum, Medium*.

CAEFS also objects to Bill C-220 on the grounds that it will rob wrongly convicted persons of an important tool to address their wrongful convictions. In Canada, we have seen some very significant miscarriages of justice, particularly in the area of wrongful convictions. Indeed, the names of Guy Paul Morin, Donald Marshall Jr. and David Milgaard are particularly well-known examples of such realities. With respect to both David Milgaard and Guy Paul Morin, support for reviews of their cases was first gained after books were written about the circumstances of the crimes and trials in respect of which they were convicted. For both men, *When Justice Fails* and *Redrum the Innocent* respectively, assisted them in gaining the requisite support to pursue matters by casting serious doubts about the reliability and validity of their convictions, well before DNA evidence finally exonerated them.

When Justice Fails, *Redrum the Innocent* and *Justice Denied* are examples of publications which played an important role and were a significant part of the struggle to obtain justice for three men who were wrongfully convicted. In Donald Marshall Jr.'s case, *Justice Denied*, the book about his wrongful conviction was influential in pushing the Nova Scotia Government to establish a Royal Commission to examine the circumstances which led to the injustice in his case. The book was published after Mr. Marshall was acquitted by the Nova Scotia Court of Appeal in 1983. However, had Mr. Marshall not been acquitted, the book about his case would have been an extremely important part of a continued effort to have him cleared of a murder he did not commit.

We must remember that Mr. Marshall and Mr. Milgaard spent 11 and 23 years respectively in prison for murders they did not commit. They have been conclusively and thoroughly vindicated of the crimes for which they were originally convicted. The circumstances of wrongful conviction and imprisonment allow for very few avenues of redress. It has been apparent from our experiences in Canada that wrongful convictions are not easily or quickly undone. Prisoners in these circumstances, like Mr. Marshall and Mr. Milgaard, have very little or no resources and are exceedingly hard pressed to advance their causes.

Consequently, in addition to the other concerns outlined above, CAEFS is extremely troubled by the reality that Bill C-220 would take away a valuable and vital tool presently available to the wrongfully convicted. Moreover, we know that several women who are currently serving life sentences are the subject of alternative accounts of the events that led to their convictions. If Bill C-220 becomes law, these stories may not be published and it will also most certainly increase the likelihood that wrongful convictions will go undetected and unexamined. This, in the submission of CAEFS, is too high a price to pay and should, alone, be fatal to this Bill.

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