Supreme Court of Canada No. 27376

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of British Columbia)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and –

JOHN ROBIN SHARPE

Respondent

FACTUM OF THE INTERVENER FOR THE ATTORNEY GENERAL OF ALBERTA

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PART I – STATEMENT OF FACTS

Introduction

1. Two Royal Commission Reports recommended restrictions on the possession of child pornography. This Court ruled in ***R. v. Butler*** that a restriction on the distribution of pornography involving children is constitutionally sound. In response Parliament enacted a legislative regime that restricted the creation, possession and distribution of child pornography. This appeal questions the response of Parliament to those recommendations and that ruling.

2. The Intervener (Alberta) accepts the facts as set out by the Appellant except as qualified or expanded in the argument which follows.

PART II – POINTS IN ISSUE

3. On August 26, 1999, the following constitutional questions were stated by Lamer C.J.C. (as he then was):

(a) Does s. 163.1(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, violate s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

Section 163.1(4) does not violate s. 2(b) of the *Canadian Charter of Rights and Freedoms* with respect to a form of expression proscribed by ss. 163.1(1)(a)(i) and (ii).

(b) If s. 163.1(4) of the *Criminal Code* infringes s. 2(b) of the *Canadian Charter of Rights and Freedoms*, is s. 163.1(4) a reasonable limit proscribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?

Section 163.1(4) is a reasonable limit justified in a free and democratic society in accordance with s. 1 of the *Charter of Rights and Freedoms*.

(c) Does s. 163.1(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, violate s. 7 of the *Canadian Charter of Rights and Freedoms*?

The Intervener (Alberta) adopts the position of the Appellant regarding this issue.

(d) If s. 163.1(4) of the *Criminal Code*, R.S.C., 1985,c. C-46, infringes s. 7 of the *Canadian Charter of Rights and Freedoms*, is s. 163.1(4) a reasonable limit proscribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?

The Intervener (Alberta) adopts the position of the Appellant regarding this issue.

4. The Attorney General of Alberta filed and served a Notice of Intervention in this appeal.

PART III - ARGUMENT

Point in Issue No. 1

Does s. 163.1(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, violate s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

5. The Intervener (Alberta) submits that s. 163.1(4) of the *Criminal Code* does not breach s. 2(b) of the *Charter of Rights and Freedoms* in relation to a subset of forms of expression proscribed by ss. 163.1(1)(a)(i) and (ii). An understanding of the objectives and approach of the legislation is essential to this argument.

The Objectives and Approach of the Legislation

6. Alberta adopts the position contained in paragraph 60 of the Appellant's factum regarding the objectives of the impugned legislation. For ease of reference, those objectives are summarised as follows:

(a) the prevention of direct harm to children used in the production of child pornography;

(b) the prevention of harm to the privacy, dignity and reputation of the child caused by the existence of a permanent record of the sexual activity or depiction of the genital or anal region of a child for a sexual purpose;

(c) the prevention of the risk of harm posed to all children through the use to which child pornography is put by some individuals to rationalise that sex with children is acceptable;

(d) the prevention of the risk of harm caused by the use of child pornography in fuelling paedophilic fantasies, and the attendant risk that those fantasies may be acted upon;

(e) the prevention of the risk of harm caused by the use of child pornography to persuade children to engage in sexual activity;

(f) the prevention of harm to society caused by imagery which sexualises children;

(g) to eradicate the clandestine child pornography market.

7. It is submitted that a significant feature of the approach taken in the impugned legislation is the focus on forms of expression. This was noted by McEachern C.J.B.C., in his dissenting reasons in the court below. He summarised a fundamental feature of the legislation as the distinction between "private thoughts and thoughts recorded". (Appellant's Record [hereinafter referred to as A.R.] XII 2221:10-20)

8. In a different context Southin J.A. also noted this focus on forms of expression. She correctly observed that the effect of s. 163.1(1)(b) was to restrict only the written form of material in question. The verbal communication of the same content is not prohibited. She concluded that this omission undermined the rational connection of the legislation. (A.R. XII 2133:30-2134:20)

9. However, if one of the aims of the legislation is to restrict the creation, collection and distribution of certain forms of expression, the section is rationally connected to this objective.

10. In that regard it is submitted that the language of s. 163.1 may be instructively compared to other sections of the *Criminal Code* which have as their chief object the prohibition of the content of certain expressions.

298.(1) ***Definition*** *-- A "defamatory libel" is a matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by*

exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

298.(2) ***Mode of Expression*** *– A defamatory libel may be expressed directly or by insinuation or irony*

(a) in words marked legibly on any substance, or

(b) by any object signifying a defamatory libel otherwise than by words.

318.(1) ***Advocating Genocide*** *– Everyone who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.*

319.(1) ***Wilful Promotion of Hatred*** *– Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of....*

Application of Section 2(b) of the *Charter*

11. This Court has taken a broad approach in extending the protection of s. 2(b) of the *Canadian Charter of Rights and Freedoms*. Any attempt to restrict expressive activity based on the content of the expression in question has been found to infringe on freedom of expression. That position is well summarised in the following passage from the decision of this Court in ***R. v. Lucas***:

The respondent very properly conceded that ss. 298, 299 and 300 of the Code contravene the guarantee of freedom of expression provided by s. 2(b) of the Charter since the very purpose of these sections is to prohibit a particular type of expression. Counsel for the Attorney General of Ontario argued forcefully that defamatory libel is not worthy of constitutional protection. This submission cannot be accepted. It runs contrary to the long line of decisions, beginning with ***Irwin Toy***, supra, *which have held that freedom of expression should be given a broad and purposive interpretation. This Court has consistently held that all expression is protected, regardless of its content, unless the form in which the expression is manifested is such that it excludes protection (as, for example, a violent act). As Dickson C.J. wrote in* ***R. v. Keegstra***, *at p. 729:*

Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of

> *the guarantee" (p. 969). In other words, the term "expression" as used in s. 2(b) of the Charter embraces all content of expression irrespective of the particular meaning or message sought to be conveyed.* (citations omitted)
>
> ***R. v. Lucas*** [1998] 1 S.C.R. 439 at 455 [TAB 11]

12. The qualification that certain forms of expression will not be afforded constitutional protection is equally well established. The development of this exception is reviewed in the following passage:

> *On the other hand, some forms of harmful expression are not constitutionally protected. Violence or threats of violence are not protected: see RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, Keegstra, supra, at p. 733. Nor is expression which takes the form of "direct attacks by violent means on the physical liberty and integrity of another person" protected: Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra, at p. 1186. The fact that conduct has been criminalized by Parliament is an indication, although not a conclusive one, that expressive conduct falls in the latter category: Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra, at p. 1185.*
>
> ***Young v. Young*** [1993] 4 S.C.R. 3 at 122-123 [TAB 15]

13. The form and content expression can be closely intertwined. For example, language is an integral part of content. Restrictions on such traditional forms of communication such as the written or spoken word or art may constitute violations of s. 2(b).

> ***Ford v. Quebec (Attorney General)*** [1988] 2 S.C.R. 712 at 748 [TAB2]
>
> ***Reference Re ss. 193 and 195 of the Criminal Code (Man.)*** [1990] 1 S.C.R. 1123 at 1181-1182 [TAB 14]

14. The catalogue of prohibited forms of expression is not closed.

> ***Irwin Toy Ltd. v. Quebec (Attorney General)*** [1989] 1 S.C.R. 927 at 970 [TAB 5]

15. It is submitted that some of the forms of expression precluded by s. 163.1(a)(i) and (ii) are analogous to violent forms of expression and are intrinsically harmful. No *Charter* protection should extend to such forms.

16. The question of harm in this context is to be determined by reference to the form itself, and not to the content of the expression or any harm consequential to that content. This method of analysis is clearly set out in the following passage from the judgement of this Court in ***Irwin Toy***:

> *If the government is to assert successfully that its purpose was to control a harmful consequence of the particular conduct in question, it must not have aimed to avoid, in Thomas Scanlon's words ("A Theory of Freedom of Expression", in Dworkin, ed., The Philosophy of Law (1977), at p. 161):*
>
> *a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.*
>
> *In each of Scanlon's two categories, the government's purpose is to regulate thoughts, opinions, beliefs or particular meanings. That is the mischief in view. On the other hand, where the harm caused by the expression in issue is direct, without the intervening element of thought, opinion, belief, or a particular meaning, the regulation does aim at a harmful physical consequence, not the content or form of expression.*
>
> ***Irwin Toy Ltd. v. Quebec (Attorney General)***, *supra*, at 975 [TAB 5]

17. The act of photographing a child engaged in sexual activity or the genital or anal region of a child for a sexual purpose (absent the statutory defences in ss. 163.1 (5), (6) and 163(3)) is *per se* harmful. The photographs that result are themselves a form of sexual objectification and exploitation of children. The photographs seized in the case at bar and reproduced at A.R. VII 1199-1230 are compelling examples of such objectification.

18. The harm occasioned by the objectification of children in the production of such images is self-evident. The images produced are either a record of sexual violence directed at children or a product of their exploitation. These forms of expression are antithetical to, and subversive of, the core values of the *Charter*. To extend *Charter* protection to forms of expression which are the product of violence and exploitation of children demeans the *Charter* and degrades the fundamental values it was enshrined to protect.

19. By necessary implication *Charter* protection should also not inure to computer generated or modified images of children in circumstances precluded by ss. 163.1(1)(a)(i) and (ii). Such images are virtually indistinguishable from photographic depictions of actual children. If the prohibition on the photographic objectification and exploitation of children is to be effective in curbing this insidious practice, it must extend to such computer generated or altered images.

20. It is submitted that the context in which this form of expression is considered is significantly different than that considered by the Ontario Court of Appeal in ***French***. In that case the court was considering materials that were exhibits within the custody of the court and subject to judicial control by way of s. 486 of the Criminal Code. It is submitted that the context contemplated by the impugned legislation is fundamentally and essentially different.

> ***French Estate v. Ontario (Attorney General)*** (1998) 122 C.C.C. (3d) 449 (Ont. C.A.) at 462-470; leave to appeal refused (April 22, 1999) 132 C.C.C. (3d) vi [TAB 3]

21. It is conceded that other forms of visual or written material within the scope of s. 163.1(1) would not fall within this exception. Restrictions on these materials require justification under s. 1 of the *Charter.*

Point in Issue No. 2

If s. 163.1(4) of the *Criminal Code* infringes s. 2(b) of the *Canadian Charter of Rights and Freedoms*, is s. 163.1(4) a reasonable limit proscribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?

22. The Intervenor (Alberta) adopts the s. 1 analysis and arguments advanced by the Appellant. In addition, it is submitted that both the trial judge and the majority of the Court of Appeal erred in characterising and assessing the harm in relation to child pornography. The majority of the Court of Appeal also erred in assessing the nature and magnitude of the *Charter* infringement. Both of these errors undermine the proportionality analysis undertaken by Rowles J.A. These errors result in both an understatement of the harm caused by the material in question, and an overstatement of the nature and magnitude of the *Charter* infringement caused

by the impugned legislation. This error also affects the overbreadth analysis undertaken by Rowles J.A. In addition, the majority of the Court of Appeal failed to recognise the integral role of s. 163.1(4) in the legislative scheme designed to combat child pornography, and in failing to show appropriate deference to the choices made by Parliament in their attempt to protect children.

The Harm Principle

23. It is submitted that both the trial judge and the majority of the Court of Appeal erred in the characterisation and assessment of the harm arising from the materials in question. The concept of attitudinal harm was not adequately considered by the courts below. In addition, the fact that the impugned materials themselves were direct evidence of that harm, was not adequately considered. Both of these errors had a significant impact on the analysis undertaken in the case at bar.

24. The definition of the type of harm sufficient to warrant a restriction on freedom of expression was provided by this Court in ***R. v. Butler***. Writing for the majority of the Court, Sopinka J. stated:

> *The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn from the material itself or from the material and other evidence.*
>
> ***R. v. Butler*** [1992] 1 S.C.R. 452 at 485 [TAB 8]

25. In explaining the principle of harm, Sopinka J. quoted the following passage from the MacGuigan Report with approval:

> *The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.*
>
> ***R. v. Butler***, *supra*, at 493 [TAB 33 of Respondent's Authorities]

26. From these passages it is evident that there is a significant attitudinal component to the harm principle. This harm may be manifest in the material itself. This approach was also used in the decisions of this Court in ***R. v. Jorginson*** and ***R. v. Mara***.

R. v. Jorgensen [1995] 4 S.C.R. 55 at 105-107 [TAB 9]

R. v. Mara [1997] 2 S.C.R. 630 at 644-652 [TAB 12]

27. It is submitted that the trial judge focused primarily on the risk of harmful conduct that might flow from the impugned materials. While consideration of the secondary or consequential harms that may flow from these materials is appropriate, the failure to adequately consider the attitudinal harm flowing from these materials is a significant error.

28. The potential range of attitudinal harm arising from the materials is broad. A common feature, however, is the portrayal of children as appropriate sexual objects. That is conduct which society has recognised as incompatible with its fundamental values and proper functioning. This harm is evident in the material itself and occurs regardless of the other consequential harms that may or may not follow in its wake.

29. The emphasis of the trial judge on consequential harm is evident in several passages in his judgement. (A.R. XII 2033:20-40, 2033:40-2034:30) It is most evident in the following passage:

> *There was no evidence led of any study demonstrating that "cognitive distortions" [attitudinal harm] cause any significant increase in the danger that paedophiles pose to children.... In my view, without reasonable*

supporting evidence, I should give only minimal weight to the "cognitive distortions" point. (A.R. XII 2033:10-20)

30. This emphasis on consequential harm also had a significant impact on the assessment of the benefits of the impugned legislation. That impact is evident in the following passage:

There are factors which go to the weight to be attached to the effectiveness of the prohibition in combating the forgoing practices and phenomena. There is no evidence which demonstrates any significant increase of danger to children related to the confirmation or augmentation of cognitive distortions caused by pornography. (A.R. XII 2039:35-45)

31. This error also has a significant impact on the proportionality and overbreadth analysis of Rowles J.A. in the Court of Appeal. Initially, attitudinal harm is listed in her reasons as one of the factors to be considered. (A.R. XII 2148:30-40) However, when she articulates the nature of the harm which the legislation is designed to prevent, her focus is considerably narrower. It is this narrow focus which provides the foundation for her overbreadth analysis:

The fact that 163.1(4) is directed only to the private possession of expressive material, as opposed to some form of dissemination to others, reduces substantially the likelihood that any potential harm to children will be prevented through the imposition of criminal sanctions. While the impugned provision is unlikely to alter appreciably the harm caused to children, the extent to which it trenches upon the values of liberty, autonomy and privacy that lie at the heart of a free and democratic society is increased dramatically. It is against this background that the impugned legislation must be subject to minimal impairment scrutiny. (A.R. XII 2166:10-30)

32. This analysis does not take into account the significant risk of attitudinal harm posed by the materials in question. That attitudinal harm is that children are depicted as appropriate subjects for sexual objectification. That harm occurs whether the material in question is distributed or not. That harm would also be present in the hypothetical examples of overbreadth cited by Rowles J.A.

33. As indicated in the previous authorities, this harm may be evident from the material itself. The written material seized in the case at bar exemplifies this harm. A small excerpt from the seized material follows:

> *Several youngsters began begging Ali and me to whip them. They showed off their smooth bellies and bums and with eager faces invited us to reach into their loincloths to feel their hardons* [sic]. *I chose a still hairless pup, obviously a recent pledge, and had him stand with his hands over his head while I worked twelve long thin stripes into his back, belly and buttocks, but drew no blood. The lad seemed cheerful throughout, joking with his friends, and was happy with his reward.* (A.R. VI 991)

34. In addition, Rowles J.A. erred in her assessment of the evidence in relation to the indirect harm that may be caused by the possession of written child pornography. She concluded that Dr. Collins evidence refers predominantly to the use of visual depictions of actual children. (A.R. XII 2170:10-20) Later she concluded that there was an absence of social science evidence regarding the effect of works of the imagination. (A.R. XII 2171:10-30)

35. With respect, that characterisation is inaccurate. While it is acknowledged that significant portions of the evidence of Dr. Collins dealt with visual depictions, he also testified that written works (including "products of the imagination") can also be significant elements in a paedophiles collection. In fact, he testified that some of the written material that he had seen had been among the most disturbing. (A.R. I 66:43-47, 67:33-68:6, 81:40-47, 83:1-47, 84:1-39) The tenor of this evidence is reflected in the following passage:

> *... written pornography still fuels the sexual fantasies of the paedophiles and in my professional opinion, can be part of the process to, in some cases, incite them to offend. But it's also connected to these cognitive distortions that they have because it reinforces their beliefs that it's okay to do these things to children, when they see it in the written form.* (A.R. I 84:40-47)

36. Written materiel represents a significant amount of the child pornography available on the internet:

> *Highly explicit pornographic stories were maintained at several sites. One gay and bisexual library contained a vast array of stories involving children. Another set of "erotic stories" provided child pornography under the classification "pedo". These libraries remained stable over the period of observation and they appeared to contain items collected over a number of years.... New additions to the libraries were received regularly (by anonymous e-mail). Subjects ranged from stories of love and infatuation to extreme child abuse and murder.* ("Paedophile Internet Activity" reproduced at A.R. X 1855 at1856)

37. It is submitted that the majority of the Court of Appeal erred in failing to appreciate the significance and proliferation of written forms of child pornography.

Minimal Impairment

38. The analysis of the extent of the *Charter* violation in the Court of Appeal was undertaken in the context of s. 2(b). The Intervener (Alberta) contends that the underlying values in s. 2(b) are only marginally affected by the impugned legislation. The claims of significant infringement found in the judgement of Rowles J.A. pertain to values subsumed in an expansive view of liberty. The Intervener (Alberta) contends that the analysis of Rowles J.A. is in reality a *sub silentio* argument based on an expanded view of liberty and privacy dependent on s. 7 of the *Charter*. Alberta contends that a prohibition on materials which sexually objectify children does not infringe even this expanded notion of liberty.

39. It is submitted that the essence of the *Charter* infringement articulated in relation to the impugned legislation is found in the following passage of the reasons of Rowles J.A.:

> *Making it an offence to possess expressive material when that material may have been created without abusing children and may never be published, distributed or sold, **constitutes an extreme invasion of the values of liberty, autonomy and privacy protected by the rights enshrined in the Charter.*** (A.R. XII 2164:20-40, emphasis added)

40. These same values are listed again as those imperilled by s. 163.1(4), and it is in the context of those values that Rowles J.A. conducts her minimal impairment analysis. (A.R. XII 2166:10-30)

41. While the impugned section is characterised as a "profound violation of freedom of expression" (A.R. XII 2166:1-10) the values purportedly imperilled by the section are not those traditionally associated with freedom of expression. Rather, they are consonant with an expanded view of liberty, privacy and autonomy associated with s. 7 of the *Charter*. This is not surprising given the nature of the impugned section. Section 163.1(4) proscribes the possession of child pornography. The constitutional analysis of this section in the context of freedom of expression is incongruous.

> ***"R. v. Sharpe - Case Comment"*** 10 National Journal of Constitutional Law, 251 at 255-256 [Appendix "A"]

42. It is submitted that the essence of freedom of expression under s. 2(b) of the *Charter* concerns communication or conveyance of meaning. That is evident from the following passage from Wilson J., speaking for the majority, on this point:

> *Section 193 deals with keeping or being associated with a common bawdy-house and places* ***no constraints on communicative activity*** *in relation to a common bawdy-house.* (emphasis added)
>
> ***Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code****, supra*, at 1206 [TAB 14]

43. This proposition is also supported by the following passage from the judgement of Dickson C.J.C. in ***Irwin Toy***:

> ***Activity is expressive if it attempts to convey meaning.*** *That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure 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 is, in the words of both the Canadian and Quebec Charters, "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.* (emphasis added)

Irwin Toy Ltd. v. Quebec (Attorney General), *supra*, at 968 [TAB 5]
R. v. Keegstra [1990] 3 S.C.R. 697 at 727-729 [TAB 49 of Respondent's Authorities]

44. ***Irwin Toy*** also delineates the core values underlying freedom of expression. These may be summarised as:

> *(1) seeking and attaining truth ...;*
>
> *(2) participation in social and political decision-making is to be fostered and encouraged; and*
>
> *(3) diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.*
>
> ***Irwin Toy***, *supra*, at 976 [TAB 5]

45. It is submitted that the advancement of these values is premised on communication. While the right in question is an individual one, the values embodied in it are advanced in a social context. That context requires the dissemination or communication of ideas, opinions and information.

46. Of necessity, any expressive material encompassed in s. 163.1(4) must remain unexpressed. Any distribution or creation for that purpose would attract sanction under either s. 163.1(2) or (3). Those sections have not been challenged in this appeal and in light of the implications of the ruling of this Court in ***R. v. Butler***, such challenge would likely fail. As a result, it is submitted that the impugned provisions involve the core values of freedom of expression only marginally.

> ***Butler***, *supra*, at 485 [TAB 8]

47. It is submitted that the only core value of freedom of expression which is affected by s. 163.1(4) is that of individual self-fulfilment, and that only in its most base aspect. This Court has indicated that where the claim to individual self-fulfilment is founded in activity which infringes on the rights and liberties of others, it will be given a very low value. That is clearly the case with the material in question.

> ***R. v. Keegstra***, *supra*, at 763 [TAB 10]

48. It is also submitted that the other freedoms delineated in s. 2 are not significantly affected by the impugned legislation. The freedoms of thought, belief and opinion are minimally affected by the provision. As outlined in paragraphs 6-8, this legislation restricts certain forms of expression. It is as McEachern C.J.B.C. noted concerned not with thoughts but with "thoughts recorded".

49. As a result, it is submitted that the majority of the Court of Appeal erred in concluding that the impugned section constituted a significant breach of s. 2(b) of the *Charter*.

50. The description and demarcation of the extent of the "liberty" interest protected under s. 7 of the *Charter* is a complex and difficult undertaking. Various descriptions of the extent of the "liberty" interest are reflected in recent decisions of this Court.

> ***New Brunswick (Minister of Health and Community Services) v. (G.)J.*** [1999] S.C.J. No. 47 (Q.L.) at paragraphs 116-118 [TAB 6]
> ***Godbout v. Longueil*** [1997] 3 S.C.R. 844 [TAB 4]
> ***B.(R.) v. Children's Aid Society of Metropolitan Toronto*** [1995] 1 S.C.R. 315 at 368-369 [TAB 1]

51. Even the expansive descriptions of liberty set forth in these cases recognise the need for constraints on this sphere of liberty:

> *On the one hand, liberty does not mean unconstrained freedom; see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 (*per *Wilson J., at p. 524); R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 (*per *Dickson C.J., at pp. 785-86). Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract* Charter *scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In R. v. Morgentaler, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being.*
>
> ***B.(R.) v. Children's Aid Society of Metropolitan Toronto***, *supra*, at 368 [TAB 1]

52. It is submitted that even the most expansive definition of liberty and autonomy reflected in these cases would not give constitutional protection to the right to possess materials which sexually objectify children in the circumstances proscribed in s. 163.1. Such a conception of liberty goes well beyond the "narrow sphere of personal autonomy" within which an individual is "free to live his or her own life and to make decisions that are of fundamental personal importance". Otherwise the significance of individual self-fulfilment would be afforded greater and arguably inconsistent scope under s. 7 than contemplated under s. 2(b). Such inconsistent approaches should be avoided.

Legislative Context and Deference to Parliament

53. It is also submitted that the majority of the Court of Appeal erred in failing to consider the impugned provisions in the context of the entire legislative scheme. It is also submitted that the majority of the Court of Appeal failed to accord appropriate deference to the decision of Parliament in relation to this issue.

54. It is submitted that the majority of the Court of Appeal erred in failing to consider the impugned provision in context. It is submitted that s. 163.1(4) is an integral and essential component in the legislative scheme designed to curb the invidious practice of child pornography. A prohibition on possession furthers the overall legislative objective in at least two ways. First, it serves to suppress the demand for the creation and distribution of child pornography. Second, it enables the prohibition against distribution to be enforced more effectively.

55. The relationship between possession and a market for distribution has been the subject of comment from a variety of sources. The Report of the Special Committee on Pornography and Prostitution (The Fraser Report) summarised the relationship as follows:

> *There is yet another reason for proposing a possession offence. We agree with the Williams Committee that a nation should not be isolationist, protecting children who are its own nationals from use in pornography.... We believe that if the creation of the possession offence could reduce, even a*

little, the international child pornography traffic, it would be well worth while. (A.R. IX 1501)

56. The Ontario Court of Appeal also commented on the relationship between production and distribution in ***R. v. Stroempl*** in the following terms:

The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense possessors such as the appellant instigate the production and distribution of child pornography - and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

R. v. Stroempl (1991) 105 C.C.C. 187 (Ont. C.A.) at 191 [TAB 65 of Respondent's Authorities]

57. The United States Supreme Court noted the same relationship in ***Osborne v. Ohio***. Writing for the majority of that court, White J. stated:

... It is also surely reasonable for the state to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.

Osborne v. Ohio [1990] SCT No. 2035 (Q.L.) 1 (U.S.S.C.) at p. 4 [TAB 7]

58. It is submitted that the majority of the Court of Appeal was in error in dismissing or attaching little significance to this factor.

59. The prohibition against simple possession also plays a significant role in facilitating the enforcement of the ban on distribution of child pornography. Support for this contention is found in the affidavit evidence of Detective Inspector Matthews:

What is most telling about Bill C-128 is that prior to its passage (and codification in section 163.1 of the Criminal Code), our unit had only one or two obscenity investigations and or prosecutions involving the distribution of

child pornography per year. After the passage of Bill C-128, this number sky-rocketed. In 1998 alone, Project "P" handled as many as 134 investigations and prosecutions in the Province of Ontario.

I verily believe that the principal reason for this dramatic change was the inclusion of possession of child pornography as a criminal offence.

Virtually all of the child pornography being created and distributed today is communicated by computer through the Internet. Unlike adult pornography, however, there is not a significant commercial market for child pornography. It is largely traded privately between paedophiles for the sole purpose of increasing their private collections. This material is rarely exchanged for money, however, when it is, the value of this material can be expensive (i.e. $200.00 to 300.00 for a small collection of photographs). The personal hand to hand distribution of child pornography is virtually non-existent as a direct result of the Internet. Because child pornography is now distributed by way of the Internet and traded privately (and because of its illegality), the creation and distribution of such pornography are largely shrouded in secrecy and not easily detected. (A.R. XI 2004:40-2005:30)

60. White J. commented on a similar correlation in ***Osborne*** as follows:

Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the State, since the time of our decision in Ferber, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, 19 States have found it necessary to proscribe the possession of this material.

Osborne, *supra*, at p. 4 [TAB 7]

61. In this context, it is submitted that s. 163.1(4) plays an integral part in controlling the distribution of child pornography. That is particularly true in the age of the Internet where the difference between private possession and world-wide anonymous publication is literally a few keystrokes.

62. The Intervener (Alberta) also submits that the majority of the Court of Appeal failed to give adequate weight and consideration to the attempt by Parliament to solve a pressing social problem and protect a very vulnerable group. The legislative action undertaken occurred after

consideration of the recommendations of two separate royal commissions and the decision of this Court in ***R. v. Butler***.

63. It is submitted that the recent comments by this Court in ***R. v. Mills*** are equally applicable in the case at bar:

> *Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups. This is especially important to recognize in the context of sexual violence. The history of the treatment of sexual assault complainants by our society and our legal system is an unfortunate one. Important change has occurred through legislation aimed at both recognizing the rights and interests of complainants in criminal proceedings, and debunking the stereotypes that have been so damaging to women and children, but the treatment of sexual assault complainants remains an ongoing problem. If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to such voices.*
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> ***R. v. Mills*** [1999] S.C.J. No. 68 (Q.L.) at para. 58 [TAB 13]

64. For all of these reasons, it is submitted that s. 163.1(4) constitutes a reasonable limit that has been demonstrably justified in a free and democratic society.

Point in Issue No. 3

Does s. 163.1(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, violate s. 7 of the *Canadian Charter of Rights and Freedoms*?

65. The Intervener (Alberta) adopts the position of the Appellant regarding this issue.

Point in Issue No. 4

If s. 163.1(4) of the *Criminal Code*, R.S.C., 1985,c. C-46, infringes s. 7 of the *Canadian Charter of Rights and Freedoms*, is s. 163.1(4) a reasonable limit proscribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?

66. The Intervener (Alberta) adopts the position of the Appellant regarding this issue.

PART IV – NATURE OF ORDER REQUESTED

67. The appeal should be allowed and the decision of the British Columbia Court of Appeal overturned.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

JOSHUA B. HAWKES
APPELLATE COUNSEL

JH/clk

PART V - TABLE OF AUTHORITIES

APPENDIX "A"

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CASE COMMENT

R. v. Sharpe

Jack Watson

Some segments of the public strongly condemn judicial rulings. This is particularly so if the ruling takes judicial notice that is (to them) so entirely unwarranted and unfair as to seem an expression of arrogance and bias.[1] On the other hand, some may strongly condemn rulings that refuse to take judicial notice. Such rulings (to them) may affront common sense. Either way, they may see rulings as expressions of wilfulness and stupidity.

Such calumny—even when emanating from the fringes of society—is probably part of the burden of the judiciary. This may be particularly so in the judiciary's execution of its role as guardian of Constitutional values in a democracy, such as discussed in *Beauregard*[2] and *Campbell*.[3] Fortunately, we have in Canada reached consensus on

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1 For an interesting discussion of the conceptual interaction between judicial notice and bias, see David Paciocco's thoughtful commentary, "The Promise of R.D.S.: Integrating the Law of Judicial Notice and Apprehension of Bias" (1998) 3.3 Canadian Criminal Law Review 319.

2 *R. v. Beauregard*, (*sub nom. Beauregard v. Canada*), [1986] 2 S.C.R. 56, 30 D.L.R. (4th) 481, 26 C.R.R. 59, 70 N.R. 1 (S.C.C.).

3 *R. v. Campbell*, (*sub nom. Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*) [1997] 3 S.C.R. 3, 118 C.C.C. (3d) 193, [1997] 10 W.W.R. 417, (*sub nom. Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*) 206 A.R. 1, (*sub nom. Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*) 158 W.A.C. 1, (*sub nom. Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*) 121 Man. R. (2d) 1, (*sub nom. Reference re Public Sector Pay Reduction Act (P.E.I.), s. 10*) 150 D.L.R. (4th) 577 (S.C.C.) from *R. v. Campbell*, [1995] 8 W.W.R. 747, (*sub nom. R. v. Wickman*) 100 C.C.C. (3d) 167, 169 A.R. 178, 97 W.A.C. 178 (Alta. C.A.). Stay reasons explained, (*sub*

the importance of judicial independence. By this means, judges would not be "fragile flowers" in the face of public criticism, to paraphrase comments of Cory J.A., as he then was, in *Kopyto*.[4]

To threaten a judge who exercises, wrongly or rightly, the role of guardian of the Constitution, as was media-reported to have happened in this case, is, however, plainly wrong and criminal. It is an affront to the administration of justice which cannot be accepted if the Rule of Law and Constitutionalism are to have any reality in Canada. One should not forget the eloquent expression of the four main pillars of Canada's legal order as expressed in the *Secession Reference*,[5] as follows:

> ...Finally, as was said in the Patriation Reference, supra, at p. 874, the Constitution of Canada includes
>
> > the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state
>
> These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.

Constitutionalism and the Rule of Law is an interlocking element of the legal order of Canada, serving to preserve federalism, democracy, and the rights and freedoms of all, including minorities, the weak

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nom. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)) [1998] 1 S.C.R. 3, 121 C.C.C. (3d) 474, 212 A.R. 161, 168 W.A.C. 161, (*sub nom. Reference re Public Sector Pay Reduction Act (P.E.I.), s. 10*) 155 D.L.R. (4th) 1 (S.C.C.).

4 *R. v. Kopyto* (1987), 61 C.R. (3d) 209, 24 O.A.C. 81, 62 O.R. (2d) 449, 39 C.C.C. (3d) 1, 47 D.L.R. (4th) 213 (Ont. C.A.).

5 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385, 228

and those in need of protection. We should not allow these values to be eroded by inaction or inadequate cultivation.

Nonetheless, judges can be wrong. In some instances, rather flagrantly so. It falls to Courts of Appeal to repair the error, and, if not, to the Supreme Court of Canada, and, if not, to Parliament. The Supreme Court of Canada has even recognized a "Constitutional track" by which Parliament may seek to remedy rulings that undermine legislation, even if the Constitutional ruling was, in a sense, merely collateral damage to a decision that otherwise or technically favoured the Crown: *Campbell*,[6] *Laba* and *Dagenais*.[7] When a judge is wrong about the law, there are legal means of remedy. No other means are necessary.

The need to remedy legal error is all that is involved in the decision in *Sharpe*.[8] While the decision seems to have touched a raw nerve in some segments of society, one should pause a moment to remember that the ruling distinguished between "simple possession" of child pornography and "possession for a purpose" of the same. The same ruling found no Constitutional impediment to Parliament's enactment of the offence of possession "for the purpose of distribution or sale any child pornography" as against challenges under section 2(a), 2(b), 2(d) and 15 of the *Charter*, albeit that it focused on section 1 of the *Charter*. As for the controversial part of it, where it held that the prohibition against "simple possession" of child pornography, as it were, offended the *Charter* and could not be saved by section 1, the judgment is just wrong and can be expected to be corrected on appeal.

The ruling of Shaw B.C.S.C.J. included the following findings said to be based on the evidence before the court:

1. Sexually explicit pornography involving children poses a danger to children because of its use by pedophiles in the seduction process.

2. Children are abused in the production of filmed or videotaped pornography.

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6 *Supra*, note 3.

7 *R. v. Laba*, [1994] 3 S.C.R. 965, 34 C.R. (4th) 360, 94 C.C.C. (3d) 385, 25 C.R.R. (2d) 92, 120 D.L.R. (4th) 175, (*sub nom. R. v. Johnson*) 174 N.R. 321, (*sub nom. R. v. Johnson*) 76 O.A.C. 241 (S.C.C.) [hereinafter *Laba*]; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 120 D.L.R. (4th) 12, 175 N.R. 1, 76 O.A.C. 81 (S.C.C.) from (1992), (*sub nom. Canadian Broadcasting Corp. v. Dagenais*) 59 O.A.C. 310 (Ont. C.A.).

8 *R. v. Sharpe*, (1999), 169 D.L.R. (4th) 536 (B.C. S.C.) [hereinafter *Sharpe*].

3. "Highly erotic" pornography incites some pedophiles to commit offences.

4. "Highly erotic" pornography helps some pedophiles relieve pent-up sexual tension.

5. It is not possible to say which of the two foregoing effects is the greater.

6. "Mildly erotic" pornography appears to inhibit aggression.

7. Pornography involving children can be a factor in augmenting or reinforcing a pedophile's cognitive distortions.

8. There is no evidence which demonstrates an increase in harm to children as a result of pornography augmenting or reinforcing a pedophile's cognitive distortions.

9. The dissemination of written material which counsels or advocates sexual offences against children poses some risk of harm to children.

Based on what the trial judge's summary of the evidence before him contains, findings number 4 and 6, and particularly finding number 6 would appear to be inconsistent with the effect of that evidence. For instance, the judgment refers to the opinion of a Massachusetts study to the effect that resort to pornography can relieve sexual desire, but the study went on to opine that:

> This finding should not be construed to suggest that pornography functions to inhibit sexual acting out. The use of pornography to relieve an impulse does not preclude its role in intensifying an already active, and in many cases rich, fantasy life. Such intensification is supported by the greater use of pornography prior to offences by child molesters. Thus if an individual is prone to act on his fantasies, it is likely that he will do so irrespective of the availability of or exposure to pornography.[9]

When one considers the evidence before the court as summarized in the judgment, and when one adds common logic, there seems to be no basis for finding number 8 either. If a pedophile's cognitive distortions are augmented or reinforced, they are not thereby cured or changed. Moreover, any habilitative effect of deterrence or controls must be thereby undermined. If pedophiles with uncontrolled, uncured or undeterred cognitive distortions represent a risk to children, that risk remains if they are augmented or reinforced as opposed to being deterred, controlled or cured. It follows that reinforcement or augmentation of cognitive distortions involves a risk. Quantification of that

9 *Ibid.*

risk is probably beyond current capacities unless we convert our state apparatus in a way far more intrusive than this present prohibition.

Beyond these findings, a moment's reflection brings to mind an important additional fact, the finding or noting of which is lacking from the judgment. An analogy explains this. The Criminal Laws of most civilized nations prohibit the "simple possession" of what is known to be stolen property. The expression is "if there are no receivers, there are fewer thieves." The logic is that if people are not willing to buy or possess stolen property, then the incentive to stealing is necessarily diminished.

In Canada, we do not proscribe knowing possession of stolen property merely to capture people as thieves by operation of the so-called doctrine of recent possession. We also do not prohibit such possession merely because it continues the deprivation of the property from the owner. In sum, we do not prosecute possessors because they are themselves thieves. We prohibit the knowing possession of stolen property because to fail to do so would create sanctuaries, in effect, for such goods, and necessarily enhance the occurrence of theft and trafficking in stolen goods.

If there were no market for child pornography, then the creation and trafficking in such baleful items would necessarily be discouraged at least to some degree. From the other perspective, a safety zone of possession of such materials could, at least for the marketplace of those disposed to possess it if legal, necessarily improve the profit of its creation and sale.

If one considered the reality that buyers encourage sellers, then the objective served by Parliament's prohibition is more accurately understood. Moreover, the means chosen by Parliament to achieve that purpose are better recognized. If one is still stuck within the framework of reasoning under section 1 of the *Charter*, the objective and rationality, and proportionality of Parliament's enactment are not unappreciated like they have been by this judge.

Before returning to the section 1 discussion herein, it seems apt to explain the reference above made to being "stuck within" section 1. The judgment suggests that the Crown conceded infringement of freedom of "expression" under section 2(b) of the *Charter* by the prohibition against "simple possession" of child pornography. The trial judge agreed. This concession is hard to understand. The theory seems to include "possession" within "expression," thus torturing the language

and concept and history of freedom of "expression." If "possession" is included within the scope of "expression," then one is put in mind of the old riddle about whether a tree falling in a forest makes any noise if no one is around to hear. Private conduct that is not intended to be, or even capable of being, shared or communicated with anyone would, by such a theory, have to be considered to be expressive. The idea is an oxymoron. Moreover, such reasoning would drown separate freedoms such as freedom of conscience, religion and belief, since "self-fulfilment" would hardly have to be conscientious, religious or reasonable.

It is not merely well established by cases like *Keegstra*[10] and *RJR-MacDonald*[11] that freedom of expression under section 2(b) refers to communication. It is the logical way of understanding the concept. Freedom of expression is understood in the context of the other freedoms and rights in the *Charter*, and in the historical and social context of Canada and other civilized nations. If the Trial Judge felt that purely private and undisseminated possession of child pornography was unconstitutionally affronted by this *Criminal Code* prohibition, where's the 'expression'? The fact that depriving a possessor of such goods might incidentally affect a trafficker's 'expression' does not mean expression of the possessor is involved. To reason so would mean that section 2(b) protects *any* form of possession of contraband if a transaction in it previously occurred. In addition, the fact that individual self-fulfillment and personal autonomy might be an *objective* of Freedom of Expression does not mean that those things are expressive by themselves. The fact that individual self-fulfillment and personal autonomy might be an objective of freedom of expression does not mean that those things are expressive by themselves.

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10 *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1 C.R. (4th) 129, 77 Alta. L.R. (2d) 193, [1991] 2 W.W.R. 1, 61 C.C.C. (3d) 1, 117 N.R. 1, 114 A.R. 81, 3 C.R.R. (2d) 193 (S.C.C.).

11 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 100 C.C.C. (3d) 449, 127 D.L.R. (4th) 1 (S.C.C.) allowing appeal from, 102 D.L.R. (4th) 289, (*sub nom. Canada (Procureur général) c. RJR-MacDonald Inc.*) [1993] R.J.Q. 375, (*sub nom. RJR-MacDonald Inc. c. Canada (Procureur général)*) 53 Q.A.C. 79, 48 C.P.R. (3d) 417 (Que. C.A.), allowing appeal from, 82 D.L.R. (4th) 449, (*sub nom. Imperial Tobacco Ltd. c. Canada (Procureur général)*) [1991] R.J.Q. 2260, 37 C.P.R. (3d) 193 (Que. S.C.) which granted a motion for a declaratory judgment.

One can understand why the Crown refused before the trial judge to concede infringements of "association" [with whom?], or religion conscience, or equality, or the like. However, the trial judge seems patently off-track in thinking that "possession" is part of "expression." Reference to decisions such as *Langer*[12] and *Butler*[13] adds no support to the conversion of "possession" into "expression," because those were cases involving exposure or publicity. Moreover, one does not need to possess child pornography to express opinions or ideas about it.

If Parliament chooses to define some thing as an illegal substance or contraband, that is a moral decision within the exercise of its Criminal Law power. Absent issues like vagueness or other Constitutional-procedural concerns, and absent the prohibition of something that is "not really wrong" within the meaning of the test in *B.C. Reference*,[14] there is no Constitutional right to possess such contraband. When there has never been recognized a Constitutional right to possess such contraband, one has to wonder how the possession got elevated to Constitutional stature.

Morality is still within the reach of the Criminal Law of Canada: see, e.g., *Nguyen*.[15] Indeed, and one should hope that Canadian law policy remains so since a Criminal Law disconnected from morality would devolve quickly into oppression. We are, as a society, a long way from considering child pornography to be "not really wrong." Canadians did not choose to have the right to have child pornography written into our Constitution—even in the recently elasticized pream-

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12 *R. v. Langer* (1995), (*sub nom. Ontario (Attorney General) v. Langer*) 123 D.L.R. (4th) 289, (*sub nom. Ontario (Attorney General) v. Langer*) 97 C.C.C. (3d) 290 (Ont. Gen. Div.), leave to appeal refused (1995), 42 C.R. (4th) 410 note (S.C.C.).

13 *R. v. Butler*, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, [1992] 2 W.W.R. 577, 70 C.C.C. (3d) 129, 134 N.R. 81, 8 C.R.R. (2d) 1, 89 D.L.R. (4th) 449, 78 Man. R. (2d) 1, 16 W.A.C. 1 (S.C.C.) from (1990), 60 C.C.C. (3d) 219, [1991] 1 W.W.R. 97, 1 C.R. (4th) 309 (Man. C.A.). Application for re-hearing refused, [1993] 2 W.W.R. lxi (S.C.C.).

14 *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266 (S.C.C.).

15 *R. v. Hess (Victor John) and Nguyen (Van Hung)*, [1990] 2 S.C.R. 906, 79 C.R. (3d) 332, [1990] 6 W.W.R. 289, 50 C.R.R. 71, 119 N.R. 353, 46 O.A.C. 13, 73 Man. R. (2d) 1, 3 W.A.C. 1, 59 C.C.C. (3d) 161 (S.C.C.), affirming (1988), 25 O.A.C. 43, 40 C.C.C. (3d) 1993 (Ont. C.A.), and allowing appeal from [1989] 3 W.W.R. 646, 57 Man. R. (2d) 267 (Man. C.A.), and ordering a new trial.

ble. Probably one of the reasons that some people recoiled from this decision in *Sharpe* was that it seemed oblivious to the consensus power of a democracy to prohibit things that society considers intrinsically wrong to exist.

The listed rights and freedoms are, it will be recalled, fundamentally guaranteed within and by society because of their interactive nature, not because of their selfish nature. For example, we do not really need a law—yet at least—to protect our ideas within our heads. We may need a law to protect our ideas when disseminated and to protect us from being told what to think. On the other hand, the same society is allowed—indeed expected—in a democracy to deny possession of at least some physical things to all people absent special permission—firearms, explosives, some drugs and poisons and so on—because of the dangers they involve by their very nature and availability.

In the author's view, the Court of Appeal should have no problem repudiating the claim of infringement of freedom of expression by "simple possession" at the initial stage before one reaches section 1. However, if driven into section 1, the issues, properly understood as indicated above, should cause no difficulty to upholding this prohibition.

First, the objective is the protection of children from their use and abuse by creators or users of child pornography as well as the affirmation of the duty of adults to provide a safe and suitable environment for children to learn and mature properly and with increasing autonomy in society. Second, the rational relationship between the means used and that objective is obvious. The law seems clear that Parliament is not bound to search in vain for the legal mechanism that ensures only the lowest conceivable intrusion on rights or freedoms in Parliament's line-drawing efforts see, e.g.: *Videoflicks*,[16] *Downey*,[17] and *Canadian Broadcasting Corp. v. New Brunswick*.[18] One might also consider *Little*

16 *R. v. Videoflicks Ltd.*, (*sub nom. R. v. Edwards Books and Art Ltd.*) [1986] 2 S.C.R. 713, 55 C.R. (3d) 193, 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, 28 C.R.R. 1, 19 O.A.C. 239, 71 N.R. 161 (S.C.C.).

17 *R. v. Downey*, [1992] 2 S.C.R. 10, 13 C.R. (4th) 129, 2 Alta. L.R. (3d) 193, 72 C.C.C. (3d) 1, 136 N.R. 266, 9 C.R.R. (2d) 1, 125 A.R. 342, 14 W.A.C. 342, 90 D.L.R. (4th) 449 (S.C.C.).

18 *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, 110 C.C.C. (3d) 193, 2 C.R. (5th) 1, 139 D.L.R. (4th) 385, 203 N.R. 169, 182 N.B.R. (2d) 81, 39 C.R.R. (2d) 189 (S.C.C.), dismissing an appeal from (1994), 32 C.R. (4th) 334, 116 D.L.R. (4th) 506, 91 C.C.C. (3d) 560 (N.B. C.A.),

Sisters[19] and *S. (M.)*,[20] the latter of which figures in the judgment in *Sharpe*.

One comes, then, to the issue of proportionality. The reality that there will be in this analysis a balancing between the deleterious and the salubrious effects of legislation has been recognized by the Supreme Court of Canada in *Laba*[21] and in other cases. As pointed out in *Laba*, the section 1 analysis comes down at the last proportionality stage to whether the law has deleterious effects, which are proportional to both their salubrious effects, and the importance of the objective, which has been identified as being of "sufficient importance." For child pornography possession, this, surely, is a "no-brainer."

If to possess prohibited child pornography is to encourage someone else to create it and supply it, then the possession is offensive in great measure. Against this, what necessities of life, safety, or the human spirit or soul are injured by not being allowed to possess it? Is the autonomy of a Canadian person so exclusive of the needs, communitarianism and benefits of society that people could not be prohibited from secretly keeping shrunken heads in their refrigerators? What other intrinsically noxious things that are currently prohibited should people have a Constitutional right to have?

Even assuming the possession of the prohibited sort of child pornography is a cognizable feature of a civilized Canadian adult's life—and history does not favour that assumption—it must surely be out there at the very edge of the sphere of liberties. Surely its removal would hardly do extensive damage. As with the prohibition against yelling death threats, the prohibition against possession of child pornography has such obvious benefit and involves such minute trespass on the liberties of civilized life as to be obviously sustainable as a reasonable limit—without any need of deep reflection.

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dismissing an appeal from a judgment of the N.B. Queen's Bench dated June 30, 1993, itself refusing to quash an order of a Provincial Court Judge excluding the public from a sentencing court room pursuant to s. 486(1) of the *Criminal Code* dated October 2, 1992.

19 *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* (1998), 160 D.L.R. (4th) 385, 125 C.C.C. (3d) 484, 109 B.C.A.C. 49, 177 W.A.C. 49 (B.C. C.A.), leave to appeal allowed (1999), 59 C.R.R. (2d) 188 (note) (S.C.C.) from (1996), 131 D.L.R. (4th) 486, 18 B.C.L.R. (3d) 241 (B.C. S.C.).

20 *R. v. S. (M.)* (1996), 84 B.C.A.C. 104, 137 W.A.C. 104 (B.C. C.A.), leave to appeal refused (1997), 87 B.C.A.C. 80 (note), 143 W.A.C. 80 (note) (S.C.C.).

21 *R. v. Laba*, *supra*, note 7.

In the result, what the decision in *Sharpe* involves is merely an exercise in judicial reasoning in the *Charter* era that is eminently reversible. There is no reason for the public to start lighting torches. Indeed, the outcome of this case seems bound to burnish the image of our Constitutionalized legal system once the B.C. Court of Appeal gets through reversing this decision. Reversal of the decision ought not to be difficult for that Court.

APPENDIX "B"

Sections 163.1, 163(3) to (5) and 164 of the *Criminal Code*

Offences Tending to Corrupt Morals

163. (1) **Corrupting morals** — Every one commits an offence who

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

(2) **Idem** — Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(b) publicly exhibits a disgusting object or an indecent show;

(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) **Defence of public good** — No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

(4) **Question of law and question of fact** — For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) **Motives irrelevant** — For the purposes of this section, the motives of an accused are irrelevant.

(6) [Repealed 1993, c. 46, s. 1.]

(7) **"crime comic"** — In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) **Obscene publication** — For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

163.1 (1) **Definition of "child pornography"** — 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.

(2) **Making child pornography** — Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

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

(b) an offence punishable on summary conviction.

(3) **Distribution or sale of child pornography** — Every person who imports, distributes, sells or possesses for the purpose of distribution or sale any child pornography is guilty of

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

(b) an offence punishable on summary conviction.

(4) **Possession of child pornography** — 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.

(5) **Defences** — It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

(6) **Defences** — 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.

(7) **Other provisions to apply** — Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3) or (4).

164. (1) **Warrant of seizure** — A judge who is satisfied by information on oath that there are reasonable grounds for believing that

(a) any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, within the meaning of section 163, or

(b) any representation or written material, copies of which are kept in premises within the jurisdiction of the court, is child pornography within the meaning of section 163.1

may issue a warrant authorizing seizure of the copies.

(2) **Summons to occupier** — Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) **Owner and maker may appear** — The owner and the maker of the matter seized under subsection (1), and alleged to be obscene, a crime comic or child pornography, may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

(4) **Order of forfeiture** — If the court is satisfied that the publication, representation or written material referred to in subsection (1) is obscene, a crime comic or child pornography, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) **Disposal of matter** — If the court is not satisfied that the publication, representation or written material referred to in subsection (1) is obscene, a crime comic or child pornography, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal was expired.

(6) **Appeal** — An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI and sections 673 to 696 apply with such modifications as the circumstances require.

(7) **Consent** — Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, representation or written material, no proceedings shall be instituted or continued in that province under section 163 or 163.1 with respect to those or other copies of the same publication, representation or written material without the consent of the Attorney General.

(8) **Definitions** — In this section

"court" means

(a) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec;

(a.1) in the Province of Ontario, the Ontario Court (General Division),

(b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench;

(c) in the Provinces of Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court;

(d) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory and the Northwest Territories, the Supreme Court;

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(d) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory, the Northwest Territories and Nunavut, the Supreme Court;

1993, c. 28, s. 78 (Schedule III, item 28). Not in force at date of publication.

"crime comic" has the same meaning as in section 163;

"judge" means a judge of a court.

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de

Linda Gauthier
for
pour Morris Rosenberg
Deputy Attorney General of Canada
Sous-procureur général du Canada 2:25 p.m.