Court File No. 27376

IN THE SUPREME COURT OF CANADA

(on appeal from the Court of Appeal for British Columbia)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOHN ROBIN SHARPE

Respondent

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF MANITOBA

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INDEX

5

PART I

STATEMENT OF FACTS

10 1. The Attorney General of Manitoba relies upon the facts as set out in the Appellant's Factum.

PART II

POINTS IN ISSUE

2. The following constitutional questions were stated by the Court:

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*?

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 prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?

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*?

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

3. It is the position of this intervener that s. 163.1(4) of the *Criminal Code* contravenes s. 2(b) of the *Charter* but is justified under s. 1 thereof. It is the position of this intervener that s. 163.1(4) does not contravene s. 7 of the *Charter*.

PART III

ARGUMENT

4. The Attorney General of Manitoba supports the arguments advanced in the Appellant's Factum but wishes to add the following comments with respect to the issue of overbreadth.

INTRODUCTION

5. Both Appellant and Respondent have identified the real issue in this appeal as being that stated by Chief Justice McEachern in his dissenting reasons for judgment [Appellant's Factum, par. 24]:

> The underlying question on this appeal is whether the simple possession of child pornography (as defined) that may have been created without abusing children and which may never be published, distributed or sold creates a sufficient risk of harm to children that it should be an offence for any one to possess such material, for any purpose or for no purpose at all.

6. The Respondent modifies the issue somewhat by stating it as being whether the private possession of child pornography as described above should be criminalized [Respondent's Factum, par. 22]. The extent to which privacy impacts on the analysis in this case will be discussed below.

7. The Respondent concedes that it is legitimate to prohibit the simple possession of certain types of child pornography [Respondent's Factum, par. 24]. It is clear from the evidence that the Respondent was in possession of a large quantity of the very type of pornography that he acknowledges is legitimately proscribed [Appellant's Factum, par. 7].

8. The Respondent argues, however, that s. 163.1(4) is invalid because of its potential application to a series of hypothetical fact situations that are not before the Court. It is the intention of this intervener to address the issue of when it is appropriate to consider hypotheticals

in reviewing the constitutionality of legislation and what type of hypotheticals are relevant to the constitutional analysis. It is submitted that when the scope of s. 163.1(4) of the *Code* is viewed in the context of the facts of this case, the infringement of the Respondent's s. 2(b) rights is readily justifiable. It is submitted that the Court should not strike down a provision on the basis of fact situations that do not realistically illustrate the scope of the impugned provision.

9. The Respondent sets out two categories of fact situations that he alleges fall within the ambit of s. 163.1(4) [Respondent's Factum, par. 24]. He concedes that it is constitutionally valid to prohibit the possession of materials in "Category A" but not those in "Category B". It is submitted that the various classifications of materials in both categories could include material the possession of which it is legitimate to prohibit. In fact, some of the material that was found in the possession of the Respondent would fall into his Category A and some into his Category B. Yet a look through the samples of this material, reproduced in the Appellant's Record, reveals material that is obviously not of an "innocent" or innocuous nature. It is submitted that possession of all of the material found in the Respondent's possession is justifiably prohibited. With respect to hypothetical fact situations, it is submitted that the Court has not been presented with realistic situations that illustrate the true ambit of s. 163.1(4). For example, it is simply not realistic to assume that someone who draws a pair of breasts on a piece of paper would come to the attention of the police, much less be charged or convicted under the section [Reasons of Rowles J.A., Appellant's Record, Vol. XII, at 2178].

SECTION 7

10. The Respondent has raised both s. 7 and s. 2(b) of the *Charter*. It is submitted that the overbreadth analysis would be the same regardless of which provision is the foundation for the challenge. The concept of overbreadth as an element of fundamental justice under s. 7 is similar to the concept of overbreadth as a factor, under s. 1, in determining whether a provision minimally impairs a s. 2(b) freedom. In particular, it is submitted that the relevance of reasonable hypotheticals to the overbreadth analysis would be the same regardless of which provision of the *Charter* is in issue. It is submitted, therefore, that it should not be necessary to address the overbreadth analysis under both s. 1 and s. 7. The relevance of the following comments would be the same under either section.

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at 629

R. v. Heywood, [1994] 3 S.C.R. 761, at 790 - 794

REASONABLE HYPOTHETICALS

11. The difficulty with determining appropriate fact situations on which to base a constitutional assessment of legislation is a result of the tension between two principles of *Charter* analysis. The first principle allows an accused to challenge the validity of the legislation under which he is charged even though his *Charter* rights are not affected by the legislation. This principle was first articulated in R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, where the respondent corporation was allowed to argue that the federal *Lord's Day Act* contravened s. 2(a) of the *Charter*, even though as a corporation it could not enjoy religious freedom.

12. The second principle is that a court should not entertain a *Charter* challenge to legislation without a factual underpinning that illustrates how the legislation is applied. In MacKay v. Manitoba, [1989] 2 S.C.R. 357, Cory J. said (at 361):

> Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel. [emphasis added]

See also Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, per Sopinka J. at 1101:

> In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred. [emphasis added]

See also R. v. De Sousa, [1992] 2 S.C.R. 944, esp. at 954

13. The dilemma, therefore, is reconciling the principle that an unconstitutional law should not be allowed to stand, even if it is not unconstitutional in its effect upon the particular accused, with the need to be able to understand, on the basis of an evidentiary underpinning, the actual effect of the impugned legislation on others. The concern with the first principle has been addressed by allowing an accused to raise hypothetical fact situations to show the potential scope of the law. The obvious danger with the use of these fact situations is that, because they are hypothetical, they cannot give a realistic picture of the potential effects of the impugned law.

14. It is of note that, in Big M Drug Mart, where the Court struck down the law because it infringed s. 2(a) of the *Charter* and was not justified under s. 1, the finding of invalidity was based on the law's unconstitutional purpose, not on its unconstitutional effect. The Court found that the purpose of the *Lord's Day Act* was to compel religious observance. Because of that finding, the Court did not have to consider the effects of the law on fact situations not before it.

15. R. v. Smith, [1987] 1 S.C.R. 1045 is often referred to as the seminal case on the use of the hypothetical to strike down a law because of its potential unconstitutional effect on someone other than the accused. In that case, the Court struck down the minimum 7 year penalty under the *Narcotic Control Act*, R.S.C. 1970, c. N-1, for importing a narcotic. The basis for the decision was that the 7 year penalty could give rise to cruel and unusual punishment contrary to s. 12 of the *Charter*. The Court was not concerned with the effect of the penalty on the particular accused, who had pleaded guilty to importing more than $100,000 worth of cocaine from Bolivia, but rather with its potential effect on others. In fact, Lamer J. (as he then was) noted (at 1082) that there was no suggestion that the 8 year sentence that had been imposed on Mr. Smith by the lower courts was cruel and unusual.

16. In striking down the minimum penalty in Smith, Lamer J. referred to the "young person who, while driving back into Canada from a winter break in the U.S.A., is caught with only one, indeed, let's postulate, his or her first 'joint of grass'" (at 1053). A sentence of 7 years would clearly be grossly disproportionate to the circumstances of such an offence. While Lamer J. used this hypothetical as an example of a potentially unconstitutional effect of the impugned provision, this example was not determinative of the section's fate. Rather, the provision was struck because of its overall overbreadth. The minimum sentence had no regard for the

circumstances of the offence or the offender. Because of the range of fact situations to which it applied, it was inevitable that it would lead to cruel and unusual punishment in some case. Lamer J. said (at 1078):

> As indicated above, the offence of importing enacted by s. 5(1) of the *Narcotic Control Act* covers numerous substances of varying degrees of dangerousness and totally disregards the quantity of the drug imported. The purpose of a given importation, such as whether it is for personal consumption or for trafficking, and the existence or nonexistence of previous convictions for offences of a similar nature or gravity are disregarded as irrelevant. Thus, the law is such that it is inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate.
>
> This is what offends s. 12, the certainty, not just the potential. [emphasis added]

17. It is also of note that, while the Court in Smith struck down the minimum penalty even though it did not offend the rights of the particular accused, the maximum penalty remained intact. Thus Mr. Smith remained liable to a maximum penalty of life imprisonment. Mr. Smith's sentence of 8 years was not directly affected by the decision.

18. In R. v. Goltz, [1991] 3 S.C.R. 485, this Court took another look at the use of the reasonable hypothetical. Gonthier J., writing for the majority, referred to the dilemma outlined above (at 504):

> [H]ow does the test in *Smith* reconcile a concern for the particular circumstances of the offence with a necessarily more general assessment of the challenged sentencing provision as a whole?
>
> The question is not greeted by an immediate or obvious answer. The jurisprudence to date exhibits significant confusion about the use of hypothetical examples which may readily demonstrate that in some imaginable circumstances a minimum penalty might result in a punishment whose effects are grossly or excessively disproportionate to the particular wrongdoing in a given case.

19. While the Court confirmed the appropriateness of looking at hypothetical fact situations in analyzing whether legislation contravenes s. 12 of the *Charter*, it emphasized the need to look at "reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases" (at 506, emphasis in original). Gonthier J. also commented (at 515-516):

> A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility. While the Court is unavoidably required to consider factual patterns other than that presented by the respondent's case, this is not a licence to invalidate statutes on the basis of remote or extreme examples. Laws typically aim to govern a particular field generally, so that they apply to a range of persons and circumstances. It is true that this Court has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the *Charter* (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099, and *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). Yet it has been noted above that s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance. The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life. [emphasis added]

20. This Court again discussed the use of reasonable hypotheticals in R. v. Heywood, [1994] 3 S.C.R. 761 in considering whether s. 179(1)(b) of the *Code* contravened s. 7 of the *Charter* as a result of overbreadth. That section prohibited anyone who had been convicted of certain sexual offences from loitering near playgrounds or parks. The accused, who had a record for sexual assault, had been charged after being observed near a children's playground taking pictures of young girls. The Court spoke of the application of s. 179(1)(b) to a hypothetical offender - someone who had sexually assaulted an adult while under the influence of alcohol, had never re-offended, was not a danger to children and yet for the rest of his life was prohibited from entering any public parks. However, as in Smith, reliance on this hypothetical did not result in the Court striking the provision. The provision was found to be overbroad because of its general ambit. Cory J. said (at 800-801):

> In summary, s. 179(1)(*b*) is overly broad to an extent that it violates the right to liberty proclaimed by s. 7 of the *Charter* for a number of reasons. First, it is overly broad in its geographical scope embracing as it does all public parks and beaches no matter how remote and devoid of children they may be. Secondly, it is overly broad in its temporal aspect with the prohibition applying for life without any process for review. Thirdly, it is

> too broad in the number of persons it encompasses. Fourth, the prohibitions are put in place and may be enforced without any notice to the accused.

21. There does not appear to be any decision of this Court striking down a law that, although constitutional in its effect on the specific offender before it, would be unconstitutional in a single hypothetical fact scenario not before the Court.

THE AMERICAN POSITION

22. The use of hypothetical fact situations by American courts to assess the constitutionality of laws is instructive. While in most constitutional challenges, litigants can only rely on the impugned law's application to them, in free speech cases challengers are allowed to raise the rights of third parties. According to Gunther [Constitutional Law (12th ed.), at 1194], the frequent use of the overbreadth doctrine by the Warren Court in the 1960's was subject to extensive criticism. In the 1970's, the Supreme Court began to retreat from its aggressive use of the technique.

23. In Broadrick v. Oklahama, 93 S.Ct. 2908 (1973), the appellants challenged a law that prohibited state employees from actively participating in partisan political activity. The appellants conceded that it was legitimate for the state to impose restrictions on their particular actions - actively soliciting funds from co-workers for the benefit of their superior. However, they argued that the impugned law was broad enough to prohibit wearing political buttons or displaying bumper stickers. The Court upheld the law on the basis that a law should not be struck down unless it suffered from substantial overbreadth. White J. said (at 2917):

> Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect - at best a prediction - cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe [reference omitted]. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

24. In New York v. Ferber, 102 S.Ct. 3348 (1982), the Court upheld a law that prohibited distribution of material depicting children performing sexual acts or lewdly exhibiting their genitals. The respondent argued that the law was overbroad because there was no exemption for serious literary, scientific or educational material. It was argued that the law would catch, for example, clinical pictures of adolescent sexuality in medical texts or children photographed in cultural rituals in National Geographic. The Court declined to consider these hypothetical fact situations in assessing the law. White J., writing the opinion for the Court, said (at 3360):

> By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face "flesh-and-blood" legal problems with data "relevant and adequate to an informed judgment."

And at 3363:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . . [W]e seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

25. In a concurring opinion, Stevens J. wrote (at 3367):

> My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitive. When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication. [emphasis added]

HYPOTHETICALS RELIED UPON IN THIS CASE

26. The dangers of relying on hypotheticals are very apparent in this case. The Respondent argues that it is only legitimate to prohibit possession of pornographic pictures of actual children. If the Court finds that the only legitimate objective of s. 163.1(4) is to protect children from direct harm when they are used in the production of pornography, then the Respondent may be correct. However, the Appellant has argued [Appellant's Factum, pars. 60-63], correctly it is

submitted, that there are multiple objectives for the provision. And in fact, the majority of the Court of Appeal accepted these broader objectives.

27. If one accepts that the objectives of s. 163.1(4) include combatting the use of pornography to "groom" children and fuel sexual fantasies of paedophiles, and curtailing the harm caused to society by imagery that sexualizes children, then one must also accept that prohibiting only possession of pictures of actual children will not fulfil those objectives. While Rowles J.A. accepted the broader objectives, she found that including drawings within the scope of s. 163.1(4) rendered the provision unconstitutionally overbroad because of the example of a drawing on which she focused. Rather than considering the section's application to drawings by examining the drawings found in the possession of the Respondent (such as the clearly provocative drawing of a young boy with an erection - Appellant's Record, Vol.VII, at 1207), she opined that the section could apply to a crude drawing of the breasts of someone under 18 [Reasons of Rowles J.A., Appellant's Record, Vol.XII, at 2178]. But without having such a drawing before her, how could she conclude that its possession could ever result in a conviction? How could she conclude, for example, that the Crown could prove that such a drawing was intended to depict a 17 year old and not an 18 year old?

28. Similarly, in finding that s. 163.1(4) is overbroad in its application to written materials that advocate sexual activity with children, Rowles J.A. spoke of its potential application to a diary entry that is never shown to anyone [Appellant's Record, Vol. XII, at 2179]. But how can one know whether such a writing would ever result in a conviction without knowing the content of the writing or the circumstances in which it was found? It is submitted that in assessing this aspect of s. 163.1(4), this Court should be concentrating on the fact situation before it. The Respondent here is charged with possession of stories that describe in detail the sexual torture of children, not innocent musings on some sexual fantasies [see e.g. Appellant's Record, Vol. VII, at 1191-1192].

29. All offences in the *Criminal Code* are written with some generality. This is necessarily so because of the need for flexibility to cover a broad range of fact situations. One could point to many provisions in the *Code* and imagine fact situations where prosecution would create draconian, and probably unintended, applications of the criminal law. Can a person be charged

with assault for pushing someone out of the way at a crowded bus stop in a last ditch effort to catch the bus? Can a person be charged with theft for walking out of a bank holding the teller's pen and not returning it once she realizes it is in her hand?

30. In the Canadian justice system, the case law that interprets the scope of an offence, the requirement for *mens rea*, the heavy onus on the Crown to prove all elements of the offence beyond a reasonable doubt, the discretion of the police in laying charges and the discretion of the Crown in deciding whether to proceed with prosecutions, and the range of penalties to suit a range of fact situations and offenders are all factors that set limits on the application of the criminal law.

31. The fact situations described in paragraph 29 may technically be subject to prosecution, but it is unlikely that these scenarios would ever proceed to court. While this Court has said that we cannot rely on prosecutorial discretion alone to salvage an unconstitutional provision [R. v. Smith, *supra*, at 1078], it is submitted that prosecutorial discretion cannot be ignored in assessing fact situations that may reasonably fall within a provision's application.

32. In R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, this Court upheld provisions in the *Identification of Criminals Act* and *Criminal Code* that allowed police to fingerprint persons charged with indictable offences. The Saskatchewan Court of Appeal had held that the provision violated s. 7 of the *Charter* because it could be applied in an arbitrary manner. In overturning this decision, La Forest J., writing the decision for the Court, said (at 410-411):

> Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.
>
> The *Criminal Code* provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.

33. All justice departments in Canada have policy manuals that set out the following twofold test to determine whether to proceed with or institute a prosecution: 1) whether or not there is a reasonable likelihood of conviction and 2) whether it is in the public interest to proceed. The public interest consideration in the exercise of prosecutorial discretion was described by Hartley Shawcross, Q.C. (now Lord Shawcross) when he was Attorney General of England (and has been quoted in a number of the Canadian crown policy manuals):

> It has never been the rule in this country - I hope never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should . . . prosecute, amongst other cases: "wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest." That is still the dominant consideration.
>
> United Kingdom, House of Commons Debates, Vol. 483, col. 681 (Jan. 29, 1951)

34. The Public Prosecutions Manual for the Manitoba Department of Justice sets out a number of factors to guide prosecutors in determining whether it is in the public interest to pursue a prosecution. Among these factors are "the triviality of the alleged offence or that it is of a 'technical' nature only" and "whether the consequences of any resulting conviction would be unduly harsh or oppressive." The same or similar guidelines are listed in prosecutors' manuals across Canada. Even if a photograph taken by a 17 year old of himself or his 16 year old girlfriend fell within s. 163.1(1), these guidelines make it highly unlikely that possession of such a photograph (in the event it came to the attention of the police) would result in prosecution.

> Manitoba Department of Justice, Public Prosecutions Policy Manual, Guideline No. 2:INI:1.2
>
> [See also manuals from other provinces in Book of Authorities of the Attorney General of Manitoba, tab 15]

35. It is submitted that, in assessing the validity of s. 163.1(4), the Court should concentrate on real fact situations that have been prosecuted under the section rather than hypothetical fact situations that may never materialize. As stated by the United States Supreme Court in

Broadrick v. Oklahama, *supra*, at 2915, the "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."

36. In assessing the validity of s. 163.1(4), the Court does not have before it the fact situations where the police or Crown have decided not to pursue charges. What the Court is able to examine to evaluate the scope of the provision are the reported cases where prosecutions have been pursued.

37. A summary of the facts of all reported decisions (that this intervener has been able to locate) involving charges under s. 163.1(4) appears in Appendix 1. Those decisions do not show that individuals are being prosecuted in the type of scenarios that would give rise to the broad sweep to the section suggested by the Respondent. What those decisions do show is that the checks and balances listed in paragraph 30 are working to limit the application of s. 163.1(4) to cases that genuinely give effect to the objectives of the provision. Those cases also illustrate and support the arguments advanced by the Appellant [Appellant's Factum, pars. 95-118] in response to the suggestion that the Respondent's "Category B" materials are harmless.

CHILDREN BETWEEN 14 AND 17

38. The Respondent argues that it is not legitimate to prohibit the possession of photographs of the sexual organs of children between the ages of 14 and 17 or photographs of children between 14 and 17 engaged in sexual activity since this activity is not in itself criminal. Rowles J.A. agreed with this argument citing, as an example of the application of this aspect of s. 163.1(4), the potential for prosecuting a couple for recording their own sexual activity if one or both of them were between the ages of 14 and 17. But the type of fact situations described in the reported cases do not involve consensual activity between teenagers but exploitive actions against vulnerable youths. For example, in R. v. Geisel, Man. Prov. Ct., April 22, 1999 (unreported), the accused was found in possession of photographs that he had taken of partially dressed girls between the ages of 13 and 17. The girls had all been offered liquor by the accused before the photographs were taken and some had consumed liquor to the point of intoxication. It is true that the girls (two of whom lived in group homes) had gone to the accused's home

voluntarily, in fact one had returned to the accused's home on a number of occasions. However, it is also quite clear that the photographs were not taken in the context of a mutual relationship between parties in equal positions of power.

39. Similarly, in R. v. Lee, [1998] N.W.T.J. No. 113 (S.C.), the accused was charged with possession of videotapes depicting himself engaging in sexual activity with teenage girls. The sexual activity was consensual. However, the girls engaged in this activity for money which they used to feed their drug and alcohol habits. As the Appellant in this case has argued [Apellant's Factum, pars. 108-118], it is legitimate for Parliament to protect teenage girls from this type of exploitive sexual activity. As the trial judge in Lee pointed out (at par. 13):

> I realize that young people are particularly vulnerable to the sexual predations (sic) of older men with money to spend.

40. As stated above, one of the factors that limits the application of s. 163.1(4) is the fact that the Crown must prove all the elements of the offence beyond a reasonable doubt. The Appellant elaborates on this in his factum (at pars. 120-125). The Geisel and Lee cases illustrate the stringent proof requirements on the Crown which mean that only clear cases will result in conviction. In both cases, the trial judges commented that, without the evidence of the children who had been photographed, it would not have been clear that they were under 18 when the pictures were taken (Geisel, at 21; Lee, at par. 9). In other words, unless the subject of a photograph is pubescent or pre-pubescent, it would be difficult to prove that the subject is under 18 if the identity of the subject is not known.

41. Moreover, the Crown must prove that the accused knew that the subject of the picture in his possession is under 18. And if the accused had taken the picture, he or she would have a defence if attempts were made to determine whether the subject was over 18. In Lee, the accused was charged with several counts involving a girl who was 12 to 14 years old at the time of the sexual encounters. In acquitting him of these counts, Vertes J. said (par. 15-16):

> With all five counts, the accused may rely on his mistaken belief as to her age. All he has to do is raise a reasonable doubt. There must be evidence that the accused made an earnest inquiry as to age (and here there is

> evidence that he asked the complainant how old she was) but the necessary extensiveness of that inquiry depends on the circumstances.
>
> It was very obvious to me that the complainant tries to act and present herself as older than what she is. I may not have believed her if she told me she was 20 years old, but that is not the test. Based on all the evidence, I am not satisfied that the accused would not have believed her.

42. The reported decisions set out in Appendix 1 also illustrate that prosecutorial discretion is in practice limiting the application of s. 163.1(4). For example, in R. v. Rideout, [1998] A.J. No. 199 (Prov. Ct.), the accused was found in possession of a computer and disks with numerous images of child pornography. The Crown chose to proceed on charges only with respect to 22 of the pictures. Although there were numerous other pictures of nude children, it was not obvious that they had been made for a sexual purpose.

WORKS OF THE IMAGINATION

43. The Respondent also argues that s. 163.1(4) is overbroad because it applies to "works of the imagination" such as drawings or writings [Respondent's Factum, par. 24]. It would appear that by describing these materials as works of the imagination, the Respondent intends to suggest that any restriction on this type of expression is tantamount to controlling one's thoughts [Respondent's Factum, par. 88-89]. In fact, Rowles J.A. found that a prosecution grounded in a written record of an author's private thoughts is "only one step removed from criminalizing having objectionable thoughts" [Appellant's Record. Vol. XII, at 2179]. There are two points to be made in response to this suggestion. The first is that whether drawings or writings are "works of the imagination" is irrelevant to the issue in this case. The second is that materials that would realistically be caught in this category are not an individual's harmless personal musings or sketches of one's own body but graphic depictions or descriptions that would cause the harm intended to be addressed by s. 163.1.

44. As to the first point, it is submitted that describing material caught by s. 163.1 as works of the imagination does not bolster the Respondent's argument. Much, if not most, expression

may be described as works of the imagination in the sense that it flows from the personal creativity of the expresser. And the fact that a work is an original creation as opposed to a reproduction of another's work does not necessarily make it more revealing of the way one thinks. All expression is necessarily linked to thought. The fact that the state restricts one form of expression as opposed to another does not necessarily make the restriction more or less invasive of one's thoughts. Obviously, to control any form of expression, original or not, is significant. But if the expression is capable of causing harm, whether or not it is a creation of one's imagination, it can and should be subject to limitations. The damaging statements made about the complainant in R. v. Lucas, [1998] 1 S.C.R. 439 were works of the accused's imagination. As stated above, once one accepts that the harm addressed by s. 163.1(4) goes beyond protecting children from being used in the production of pornography, works of the imagination will necessarily be caught by the legitimate scope of the provision. (Of course, if the work of the imagination has artistic merit, the possessor would have a defence to a charge under s. 163.1(4).)

45. As to the second point, it is submitted that the hypothetical "works of the imagination" relied upon by the Respondent to illustrate the overbreadth of the section are not realistic examples of the section's application. Possession of a nude drawing of oneself or a sketch of a pair of breasts [Respondent's Factum, par. 76] would be unlikely to ever lead to a prosecution. A conviction could not result if it could not be proved beyond a reasonable doubt that the drawing was for a sexual purpose, that the drawing depicted someone under 18, and that the defence of artistic merit (if raised) did not apply.

46. Nor is it likely that the Respondent's example of the writings that are never shown to anyone [Respondent's Factum, par. 76] would ever lead to prosecution. As the Appellant argues [Appellant's Factum, par. 121], a writing does not "advocate or counsel" a sexual offence if it is not intended to be shown to anyone.

47. The people who have been prosecuted under s. 163.1(4) since its enactment and those who will likely be in the future are those who have large volumes of offensive material in their possession, not one or two innocuous sketchings. Moreover, in the unlikely case that an individual was prosecuted for possessing an unsophisticated or crude drawing of a nude child, it

is submitted that a defence of *de minimis non curat lex* may be available. In R. v. Hinchey, [1996] 3 S.C.R. 1128, this Court considered the nature of the offence under s. 121(1)(c) of the *Criminal Code* [which prohibits government employees accepting personal benefits from a person dealing with the government]. Although the case did not involve a *Charter* challenge, the issue before the Court, in that case as in this, was the scope of the section. As L'Heureux-Dubé J. stated (writing for the majority, at 1135):

> Clearly, what the appellant takes issue with is not that s. 121(1)(c) lacks a fault requirement, but that the offence, as it was set out by the trial judge, has the potential to trap conduct which should not be considered criminal, and thus punish offenders undeserving of sanction.

48. After defining the *actus reus* of the offence, L'Heureux-Dubé J. said (at 1164-5):

> In fact, while this case deals with the potential application of the section, the appellant was unable to cite one reported case where the Crown actually pursued someone for the receipt of a "trivial" benefit. . . .
>
> In my view, this interpretation removes the possibility that the section will trap trivial and unintended violations. Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a Code section has been proposed by the Canadian Bar Assocation, in *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada* (1992), and others: see Professor Stuart, *Canadian Criminal Law: A Treatise* (3rd ed. 1995) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day. [emphasis added]

49. It is submitted that the sketch of a pair of breasts or the diary entry referred to by Rowles J.A. as examples of fact scenarios that fall within the definition of child pornography in s. 163.1(1)(a) are not realistic examples of the section's scope. "Works of the imagination" that do fall within the section include those found in the Respondent's possession in this case or those found in the possession of the accused in R. v. Pointon, Man. Prov. Ct., Oct. 23, 1997

(unreported). In the latter case, the accused pleaded guilty to possession of hundreds of drawings of child pornography including drawings depicting "a male's penis ejaculating into a young girl's mouth as she's crying" (at 7). The accused also pleaded guilty to possession of a number of notebooks in which he articulated his thoughts under the pen name "J.P. Wolfe". The last page of one of these notebooks, which included ink drawings of young girls in various stages of undress, described its intent as follows (at 10):

> This is the perverted world of the child molester. J.P. Wolfe opens up the doors to show the shocking reality and very graphic detailed art. This uncensored book shows the secrets kids keep in the straight boy gallery.

50. It is submitted that the above real examples properly reflect the ambit of s. 163.1(4) and illustrate the legitimacy of proscribing "works of the imagination".

PRIVACY

51. The Respondent raises the issue of privacy in two ways. First, he argues that the application of s. 163.1(4) to "private" possession of child pornography affects his liberty and security of the person interests under s. 7 [Respondent's Factum, par. 54 & 64]. However, the fact that the Respondent has been charged with a criminal offence having a potential penalty of incarceration means that s. 7 is triggered. Therefore, there should be no need to consider whether there are also any privacy issues that invoke the application of the provision. In Reference Re ss. 193 and 195.1(1)(c) of the *Criminal Code* (Man.), [1990] 1 S.C.R. 1123, it was argued that the *Criminal Code* prohibition on communicating for the purpose of prostitution affects prostitutes' liberty to practise their profession. Dickson C.J. declined to consider this argument, stating (at 1140):

> With respect to the first component of s. 7, the strongest argument that can be made regarding an infringement of liberty derives from the fact that the legislation contemplates the possibility of imprisonment. Because this is the case, I find it unnecessary to address the question of whether s. 7 liberty is violated in another, "economic", way.

52. If the Court finds it necessary in this case to consider the overbreadth argument as an aspect of fundamental justice, it is clear that there is a liberty interest at stake.

53. Secondly, the Respondent argues that the proscription on private possession of child pornography renders s. 163.1(4) overbroad because there is no risk of harm from private possession of these materials [Respondent's Factum, par. 103]. The Appellant addresses this argument in his factum [esp. at pars. 101, 107, 132 - 135]. For example, the Appellant points out the necessity of prohibiting private possession to eradicate the market for child pornography. The prohibition on possession is necessary to effect the objective of the legislation.

54. In R. v. B.E., Ont. C.A., Oct. 8, 1999 (unreported), the appellant challenged the constitutionality of s. 172 of the *Criminal Code,* which makes it an offence to endanger the morals of a child by engaging in sexual immorality in the home of the child. The appellant had been charged under the section on the basis of evidence that he and his wife had engaged in sexual intercourse in front of their children and kept videos, which had been seen by their children, of their sexual activity. In upholding the provision as a justifiable infringement of s. 2(b), Doherty J.A. said (at par. 72):

> In concluding that the objective outweighs the harm done to the right protected by s. 2(b), I have considered that s. 172 reaches inside the home. That reach is a significant aggravating feature when considering the harm done by the section to the right of freedom of expression. That same feature, however, is essential if the section is to serve its purpose. Unfortunately, it is in the home where children are most susceptible to the kinds of conduct at which s. 172 is aimed. The section could not prevent the harm at which it is directed unless it is aimed at conduct occurring in the homes of children.

55. What the B.E. case also illustrates is the mistaken assumption of the Respondent's privacy argument that private possession should be equated with innocent possession. The flaw in this assumption is shown as well by the cases in Appendix 1. The nature of the incriminating material in those cases illustrates that the material for which actual charges have been pursued are not crude drawings that would cause no harm if not distributed but graphic depictions which at the very least have intrinsic harm by depicting children as sexual objects/victims and reinforcing cognitive distortions. Mr. Pointon's private possession of numerous drawings, such as one showing a young girl in an act of fellatio with an adult male and captioned "What started as a simple weekend at the cabin with daddy became incest", can hardly be seen as harmless.

CONCLUSION

56. To restate the issue in this appeal as summarized by McEachern C.J.B.C.:

> The underlying question on this appeal is whether the simple possession of child pornography (as defined) that may have been created without abusing children and which may never be published, distributed or sold creates a sufficient risk of harm to children that it should be an offence for any one to possess such material, for any purpose or no purpose at all.

57. It is submitted that the clear answer to this question is YES! The factual underpinning in this case and other cases that have been prosecuted under s. 163.1(4) show that it is necessary to criminalize simple possession in order to accomplish the legitimate objectives of the provision.

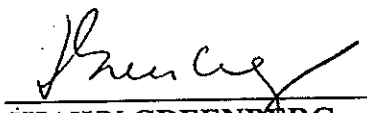
58. It is submitted that in assessing the scope of s. 163.1(4), this Court should follow the direction of Gonthier J. in Goltz, *supra*, and concentrate on reasonable hypothetical examples, not those that are "far-fetched or only marginally imaginable as a live possibility." It is respectfully submitted that the examples relied upon by Rowles J.A. to strike the section for overbreadth are not based in reality. Considering the elements of the offence, the possibility of obtaining a conviction for crude drawings of sexual organs or personal diary entries is negligible. The possibility of a young couple being found with pictures of themselves engaged in sexual activity is highly unlikely. And, considering prosecutorial discretion, which it is submitted cannot be ignored, the likelihood of the Crown proceeding with a charge in such a case is equally unlikely. If the Court were to strike down this provision on the basis of these type of hypotheticals, it would, in the words of White J., be voiding a law "whose legitimate reach dwarfs its arguably impermissible applications" [New York v. Ferber, *supra*, at 3363]. It is submitted that to do so on the basis of scenarios that are not before the Court, to allow proper analysis of the section's reach to them, is a dangerous route.

PART IV

RELIEF CLAIMED

59. This intervener submits that the first and second constitutional questions should be answered in the affirmative and that the third question should be answered in the negative. It is not necessary to answer question 4.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



SHAWN GREENBERG
Counsel for the Attorney General
of Manitoba

PART V

TABLE OF AUTHORITIES

Cases *Page No.*

Texts and Other Material

Appendix 1

Decisions Under *Criminal Code* S. 163.1(4)

This Intervener was able to identify eleven reported cases and three unreported cases in which the accused was charged with possession of child pornography. The material giving rise to charges in the decided cases may be described as follows:

- R. v. Caza (1996), 82 B.C.A.C. 251 - The material found to be child pornography was a photograph of the sexual organs of a nine-year-old boy.

- R. v. Geisel, Man. Prov. Ct., April 22, 1999 (unreported) - The material found to constitute child pornography consisted of twenty-two photographs of young females in various states of undress. Some of the photographs depicted the females engaged in various types of sexual activity.

- R. v. Henricks, [1999] B.C.J. No. 1246 (S.C.) - The numerous videotapes found in the possession of the accused depicted, among other things, lengthy scenes involving the female accused performing a number of sexual acts with an approximately three-year-old boy and performing sexual acts with an approximately nine or ten-year-old girl.

- R. v. Jewell and Gramlick (1995), 100 C.C.C. (3d) 270 (Ont. C.A.) [Appellant's Book of Authorities, Tab 32] - The material alleged to constitute child pornography included numerous videotapes and still pictures depicting scenes of explicit sex, including unprotected anal intercourse with boys under the age of eighteen years. The youngest of the boys pictured in the videotapes was 10 years of age.

- R. v. J.R.C., [1994] O.J. No. 3951 (Prov. Div.) - The accused was found in possession of several NAMBLA [North American Man Boy Love Association] publications as well as photographs that he had taken of the anal regions of his nephews.

- R. v. K.L.V., Alta. Q.B., March 30, 1999 (unreported) [Appellant's Book of Authorities, Tab 34] - The material found to constitute child pornography consisted of a photograph of a young girl, approximately five years of age. The girl had her dress pulled up over her head and her panties pulled down around her ankles exposing her genital area. The accused tried to show the photograph to two five-year-old girls playing in a sandbox in one of the girls' back yards.

- R. v. Lee (1998), 125 C.C.C. (3d) 363 (N.W.T.S.C.) - The accused had several videotapes in his possession depicting various girls under the age of 18 having sex with the accused.

- R. v. Logan, [1996] B.C.J. No. 352 (Prov. Ct.) - The material found in the possession of the accused consisted of magazines containing photographs of: physically mature teenaged boys performing sexual acts with each other; pubescent boys and girls involved in sexual activities together; and pubescent girls engaging in sexual activities together. The accused also had various NAMBLA publications in his possession.

- R. v. Pointon, Man. Prov. Ct., June 25, 1998 (unreported) [Appellant's Book of Authorities, Tab 43] - The accused was found in possession of hundreds of pieces of hand drawn child pornography and written text. With the exception of Ontario v. Langer, where the defence of artistic merit was successful, this is the only case where the accused was charged with possession of drawings and writings that he authored, that is, where the pornographic materials were "works of the imagination". Detective Sargent Harrison, called by the Crown at the sentencing hearing, described a sample of the drawings seized as follows (at 6 -7):

> *The first one is of a young female. These all -- are all young females, by my estimation under the age of 10 years. Is -- she has her tongue out and she's licking at an erect penis.*
>
> *The second one is entitled "The Family Secret". It depicts two young girls, one of them in the act of fellatio with an adult male or with a male. And it's captioned, "What started as a simple weekend at the cabin with daddy became incest."*
>
> *The other one is a -- is called "Funny Girls - Naughty Cartoons of Little Girls". What it is it's -- I guess it's an attempt at humour involving child pornography and it involves a scene with a, with a minister receiving fellatio from a young girl, with a school teacher receiving fellatio from a young girl and with Santa Claus with his mitt in the anal area of a young girl....*
>
> *The -- there's a further picture of a, of a young girl with a vibrator inserted in her vagina. There's actually two images that depict that.*
>
> *There's another scene of a, a young girl with her tongue out by the vaginal area of another young girl.*
>
> *There's another drawing of a young girl with what appears to be semen on her face and two penises by her mouth, one in her mouth and one beside her mouth. On the back side of that picture is a -- another young girl licking a male's penis. The -- there's a -- another one that's -- depicts a young female with obviously a male ejaculating on her tongue. And on the back side of that picture is a male with an erection standing overtop of a young female. And the last picture is a, a male or a male's penis ejaculating into a young girl's mouth as she's crying.*

At pages 8 and 9 of the transcript, Detective Sargent Harrison read the following passage from a notebook entitled "The Straight Boy Gallery - The Complete Works of J.P. Wolfe's Naughty Little Girl Collection", authored by the accused:

> *A child's nude body may not look like much to the ordinary person but to a child molester or child pornographer it is the most beautiful thing in the world. Even at ages under 10 the little girl has a defined form. The chest may be flat but her nipples are still responsive to the touch and get erect. There's a softness to her body that women do not have, as well as a smell and taste. These qualities are the lures of molesters.*
>
> *A child's body is the ultimate symbol of purity and innocence. The underdeveloped features are like the buds of a flower waiting to bloom. The molester sees the innocence of a child as a prize, a trophy.*
>
> *Slim, average-built bodies and cute faces are the -- are usual targets for pornography. Yet to a molester types may vary depending on the offender. When an offender selects a target, looks are only the first factor in choosing the right girl. To a pornographer, though, looks are everything. The works in part, in part one reflects the beauty of a young, little girl's body and show how a pornographer uses that beauty to stimulate a molester's mind and body.*

- R. v. Rideout, [1998] A.J. No. 199 (Prov. Ct.) - The accused was found in possession of computer disks that contained 22 images of child pornography. In addition to the 22 images identified by the Crown as child pornography, the computer disks also contained numerous images of nude underage females and males. The Crown did not allege that these nudes were child pornography because they were not, in the Crown's submission, made for a sexual purpose.

- R. v. Stroempl (1995), 105 C.C.C. (3d) 185 (Ont. C.A.) [Appellant's Book of Authorities, Tab 45] - The accused was found in possession of a vast collection of child pornography that included over 300 photographs, 16 drawings and videotapes. One pamphlet showed a girl apparently under the age of six in sexual poses with a dachshund. The drawings all involved children and various types of penetration.

- R. v. Weir, [1998] 8 W.W.R. 228 (Alta. Q.B.) [Respondent's Book of Authorities of the Respondent, Tab 69] - The accused was found in possession of approximately 190 computer files that he had received via e-mail. The Crown and counsel for the accused agreed that the images, which are not described in the case report, constituted child pornography.

- Ontario (Attorney General) v. Langer (1995), 97 C.C.C. (3d) 290 (Ont. Gen. Div.) [Appellant's Book of Authorities, Tab 10] - This case proceeded under the forfeiture provisions of the *Criminal Code*. It did not proceed as a charge either for making child pornography against Eli Langer, the artist, or as a charge of possession either against Mr. Langer or the art gallery that displayed the works. The material alleged to be child pornography consisted of five large oil paintings and the sketches that were created prior to the paintings. The Court described the paintings as follows (at 300):

> *The oil paintings are also disturbing. Exhibit 50 shows a naked child with her head near the genital area of a naked elderly man. Exhibit 51 depicts a naked young girl defecating. Exhibit 52 depicts a young person and an adult under the covers of a bed. It is apparent that the adult is engaged in some sort of sexual activity with the child, who has a look of anguish on his/her face. Exhibit 53 depicts a naked young girl standing over an elderly man lying in bed. A drop of liquid is drooling from her mouth and she has a look of sorrow on her face. Exhibit 54 depicts a naked man, apparently with an erection, lying on his back on a bed. Straddling his chest is a young girl, whose labia are clearly visible just inches from his face, which is turned to the side. A barely visible masked figure is entering through the window.*

In this case, the defence of artistic merit was made out.