IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

BETWEEN:

HER MAJESTY THE QUEEN,

APPELLANT
(Crown)

- and -

JOHN ROBIN SHARPE,

RESPONDENT
(Accused)

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF NOVA SCOTIA

Daniel A. MacRury
Public Prosecution Service (Appeals)
Maritime Centre
1505 Barrington Street, Suite 1225
Halifax, Nova Scotia B3J 3K5
Tel: (902) 424-5450
Fax: (902) 424-0653

Counsel for the Intervener the
Attorney General of Nova Scotia

John M. Gordon
Kate Ker
Ministry of Attorney General
Criminal Appeals and Special Prosecutions
602-865 Hornby Street
Vancouver, British Columbia V6Z 2G3
Tel: (604) 660-1126
Fax: (604) 660-1142

Counsel for the Appellant

Richard C.C. Peck, Q.C.
Gil McKinnon, Q.C.
Peck and Tammen
610-744 West Hastings Street
Vancouver, British Columbia V6C 1A5
Tel: (604) 669-0208
Fax: (604) 669-0616

Counsel for the Respondent

Stephen J. Grace
Beament Green
47 Clarence Street, Suite 204
Ottawa, Ontario
K1N 9K1
Tel: (613) 241-3400
Fax: (613) 241-8555

Ottawa Agent for the Intervener the
Attorney General of Nova Scotia

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Tel: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agents for the Appellant

Gowling, Strathy & Henderson
2600-160 Elgin Street
Ottawa, Ontario
K1P 8S3
Tel: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agents for the Respondent

Mary Elizabeth Beaton
Assistant Director of Public Prosecutions
- Family Law
Office of the Attorney General
Room 445, Centennial Bldg.
P. O. Box 6000
Fredericton, New Brunswick E3B 5H1

Tel: (506) 453-2784
Fax: (506) 453-5364

Counsel for the Intervener the
Attorney General of New Brunswick

Gowling, Strathy & Henderson
Suite 2600
160 Elgin Street
Ottawa, Ontario K2P 3C3

Tel: (613) 233-1781
Fax: (613) 563-9869

Ottawa Agents for the Intervener the
Attorney General of New Brunswick

INDEX

PART I

STATEMENT OF FACTS

1. The Attorney General of Nova Scotia accepts the facts as set out in the factum of the Appellant.

2. By Order dated December 13, 1999 pursuant to Rule 5 the Attorney General of Nova Scotia was granted an extension of time to deliver its Notice of Intervention in response to the Constitutional Question in this proceeding to the 9th day of December, 1999.

PART II

POINTS IN ISSUE

3. By Order of the Chief Justice of Canada dated August 26, 1999, the following constitutional questions were stated:

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*?

PART III
BRIEF OF ARGUMENT

INTRODUCTION

4. The Intervener the Attorney General of Nova Scotia (hereinafter called Nova Scotia) submits that s.163.1(4) of the **Criminal Code** embodies a valid legislative objective of protecting children from the harmful effects that flow from child pornography.

5. The need to protect children from all forms of sexual exploitation and child abuse is reinforced by the terms of the **United Nations Convention on the Rights of the Child** (1989) 28 ("UNCRC) Article 34 states:

> (1) States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
>
> (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
>
> (b) the exploitative use of children in prostitution or other unlawful sexual practises;
>
> (c) the exploitative use of children in pornographic performances and materials.

6. Like Canada many free and democratic societies have responded to their international obligations by passing legislation which specifically prohibits possession of child pornography. These countries include the United States, Cuba, Grenada, Estonia, Latvia, Austria, Belgium, Denmark,

Germany, Greece, Ireland, Netherlands, Norway, Portugal, Sweden, United Kingdom, United Republic of Cameroon, The Gambia, Guinea, Mali, Mauritius, Mozambique, Swaziland, Zimbabwe, Republic of Korea, Philippines, Sri Lanka, Australia, New Zealand, Nauru, Papua New Guinea (A.R.) (IX, 1575 1659, X, 1695-1792: XI, 1862-1919).

7. As L'Heureux-Dubé said in **Baker v. Canada (Minister of Citizenship and Immigration)** (1999), 174 D.L.R. (4th) 193 at 230 ... children's rights and attention to their interests are central to humanitarian and compassionate values in Canadian society.

8. Nova Scotia submits that Parliament recognized the importance of protecting children from the harms of child pornography when it enacted s.163.1(4). Parliament had a reasonable basis for criminalizing not only the creation and dissemination of child pornography but its possession as well.

Proceedings of Standing Committee on Legal and Constitutional Affairs Senate of Canada A.R. Volume XI, 1961-66

9. In **Re The Queen v. Langer**, 97 C.C.C. (3d) 290 McComb J. at page 321 described the legislative objectives of s.163.1(4) as follows:

1. Protecting children from sexual abuse that takes place when some type of child pornography is produced.

2. Protecting children who have been sexually abused in making child pornography from being further exploited by circulation of the film or photographic record of the sexual abuse.

3. Protecting all children from harmful effects caused by child pornography.

10. As stated in **Langer**, supra, the first two objectives ensure Parliament is able to protect children from being abused by child pornographers, from having photographic records of their abuse circulated. The third objective sees to protect children who are not involved in making child pornography from the alleged harmful effects caused by dissemination and possession of child pornography.

11. The purpose of child pornography provisions are to protect children from harm. This harm must be measured with reference to community standards. The central purpose of obscenity legislation was said in **R. v. Butler**, [1992] 1 S.C.R. 452 to be the protection of society from harm. Nova Scotia contends the purpose of the new child pornography legislation is the same: to protect children, society's most vulnerable members from harm caused by the evil child pornography.

12. In **Butler**, supra, Sopinka J. held that deciding whether a particular alleged obscene depiction causes societal harm should not be left to the individual tastes of Judges, but should be determined by reference to community standards of tolerance. The greater risk of harm the lesser the likelihood of tolerance.

13. The harm-based community standard of tolerance approach has been used to give meaning to the following phrases:

> "indecent act" from s.173 of the **Criminal Code**;
> **R. v. Jacob** (1996), 112 C.C.C. (3d) 1 at 4 (Ont.C.A.)
>
> "immoral, indecent or obscene performances" in s. 167 of the **Criminal Code**;
> **R. v. Mara and East**, [1997] 2 S.C.R. 630

"acts of indecency" used in the definition of a common bawdy house in s.197(1) of the **Criminal Code**; **R. v. Tremblay**, [1993] 2 S.C.R. 932.

14. In **Tremblay**, supra, Cory J. stated at page 960:

> In consideration of indecency of an act, the circumstances which surround the performance of the act must be taken into account. Acts do not take place in a vacuum. The community standard of tolerance is that of the whole community. However, just what the community will tolerate will vary with the place in which the acts take place and the composition of the audience. For example entertainment which may be tolerated by the community is appropriate for patrons of a bar may well be completely inappropriate for an audience of high school students. What is acceptable in a staged production for adults may be completely unacceptable if performed for elementary school pupils in a school auditorium.

15. In view of the community standard of tolerance Nova Scotia respectfully submits that Parliament has a right to legislate on the basis of some fundamental conception of morality for the purposes of safe guarding the children of our society. In **R. v. Butler**, supra, Sopinka J. aptly drew the distinction between morality in the broad sense and morality for criminal law purposes at pages 492-94:

> To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is amicable to the exercise and enjoyment of the individual freedoms which form the basis of our social contract ... On the other hand I cannot agree with the suggestion of the appellant that parliament does not have a right to legislate on the basis of some fundamental conceptions of morality for the purposes of safeguarding the values which are intrical to a free and democratic society ... As the respondent and many of the interveners have pointed out, much of criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded and morality does not automatically render it illegitimate. First the notion of moral corruption and harm to society are not distinct as the appellant suggests but inextricably linked. It is a moral corruption of a certain kind that leads to the detrimental affect of society ...

16. These passages indicate that the concept of morality for criminal law purposes must be restricted to those core values which are intrical to the existence of a free and democratic society. **R. v. B.E.** (Ont.C.A.) (O.J. No.3869) as Doherty J. stated at page 8:

> In my view conduct that endangers the morals of a child is that which poses a real risk that the child will not develop those values which are essential to the operation of a free and democratic society. Many of those values are reflected in the **Charter**.

17. It is respectfully submitted that possession of child pornography is conduct that endangers the morals of children. Nova Scotia contends that without protection of s.163.(4) child pornography poses both a direct and indirect risk to the children of our society.

Does s.163.1(4) of the Criminal Code violate s.7 of the Canadian Charter of Rights and Freedoms?

18. Nova Scotia contends that s.163.1(4) does not violate s.7 of the **Canadian Charter of Rights and Freedoms**. The Respondent contends that s.163.1(4) violates s.7 because the legislation is overbroad. Nova Scotia respectfully disagrees with this analysis.

19. In determining whether there has been a violation of s.7 of the **Canadian Charter of Rights and Freedoms** the Courts must determine whether Parliament has struck a proper balance between the accused's interests and the interests of society. As McLachlin J. stated for this court in **Cunningham v. Canada**, [1993] 2 S.C.R. 143 at page 152:

> "The ... question is whether, from a substantive point of view the change in the law strikes the right balance between the accused's interest and the interest of society."

20. This Court's recent decision in **R. v. Mills**, [1999] S.C.J. No. 68 discussed the difference between the balancing exercise under s.1 and s.7 of the **Charter**. At page 26 the court stated:

> However, there are several important differences between the balancing exercises under ss.1 and 7. The most important difference is that the issue under s.7 is the delineation of the boundaries of the rights in question whereas under s.1 the question is whether the violation of these boundaries may be justified. The different role played by ss.1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s.7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s.7. If interests are balanced under s.1 then it is the state that bears the burden of justifying the infringement of the Charter rights.
>
> Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in Re B.C. Motor Vehicle Act, supra, at p.503: "the principles of fundamental justice are to be found in the basic tenets of the legal system." In contrast, s.1 is concerned with the values underlying a free and democratic society, which are broader in nature.

21. The protection afforded s.7 rights is not absolute; the state may limit them as long as it is done in accordance with the principles of fundamental justice: **B.(R.) v. Childrens' Aid Society of Toronto**, [1995] 1 S.C.R. 315 at page 339 per Lamer C.J.C..

22. In determining whether legislation is overbroad requires determination on whether the impugned legislation reaches areas which are not reasonable given the objectives of parliament, the nature of the right infringed and the context of the infringement.

23. In **R. v. Nova Scotia Pharmaceutical Society**, [1992] 2 S.C.R. 606 at page 630 Gonthier J. stated that the court should "(compare) the ambit of the provision touching upon protected right with

such context as objectives of the state, the principles of fundamental justice, proportionality of the punishment ... to name a few."

10

24. This Court in **R. v. Heywood**, [1994] 3 S.C.R. 761 examined the principal of overbreadth analysis in relation to s.7 of the **Canadian Charter of Rights and Freedoms**. As Cory J. stated at page 792:

> Overbreadth analysis looks at the means choosen by the state in relation to its
> 20 purpose. In considering whether the legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that some applications the law is arbitrary or disproportionate.

30

25. As stated in **Heywood**, supra, reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. This type of balancing was approved by this Court in **Rodriquez v. British Columbia (Attorney General)**, [1993] 3 S.C.R. 519 per Sopinka J. at pages 592-95.

40

26. In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure the legislation conforms with the **Charter**, legislatures must have the power to make policy choices. A
50 court should not interfere with the legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been a legislator.

27. However, before it can be found that an enactment is so broad that it infringes on s.7 of the **Charter**, it must be clear that the legislation infringes life, liberty and security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

28. Nova Scotia submits that s.163.1(4) is not overbroad and is in accordance with the principles of fundamental justice. When one balances the rights to protect children from child pornography against the rights of someone who possesses child pornography, it is clear after balancing that right and analyzing s.163.1(4) one concludes that this section is not overbroad.

29. In determining whether legislation is overbroad the court should look at the legislative objective of the legislation. Nova Scotia agrees with the Appellant that s.163.1(4) serves the following objectives:

1. Prevention of direct harm to children used in the production process.
2. Prevention of harm to the privacy, dignity and reputation of the child depicted cause by the existence of a permanent record of sexual activity or graphic pose;
3. The prevention of risk of harm posed to all children through the use to which child pornography is put by some individuals to rationalize that sex with children is acceptable. To fuel and eventually act upon their paedophilic fantasies and to show children to facilitate their attempts to engage them in sexual activity;
4. The prevention of harm to society caused by imagery which sexualizes children;
5. The eradication of the clandestine child pornography market;
6. The facilitation of police enforcement efforts in the area of child pornography.

30. By enacting s.163.1(4) Parliament has recognized that in order to eradicate the problem of child pornography a multi-layered approach to enforcement is required. This approach was approved in the case of **Osborne v. Ohio**, 495 U.S. 103 the Supreme Court of United States at page 110:

> Given the importance of the State's interest in protecting 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.

This approach has also been supported by **R. v. Jewell and Gramlick** (1995), 100 C.C.C. (3d) 270 (Ont.C.A.); **R. v. Stroempl** (1995), 105 C.C.C. (3d) 182 (Ont.C.A.); **Little Sisters Art and Book Emporium v. Canada** (1998), 125 C.C.C. (3d) 484 (B.C.C.A.) and also in **Langer**, supra.

31. Nova Scotia concurs with analysis in the Appellant's factum paragraph 67 through to 90 dealing with the appropriate materials that should be covered by the legislation. Nova Scotia contends the materials covered by the legislation are not overbroad. The reason for their prohibition from possession is that these materials impose a realistic risk of harm to children by reinforcing cognitive distortions fuelling fantasies and have the potential of use in grooming the possible child victims. As well as by restricting possession of this material the protection of children is enhanced by the laudable legislative goal of attempting to eliminate the child pornography market. As Chief Justice McEachern of the Court of Appeal stated at paragraph 260:

> Without that market productions of some kinds of child pornography which the judges found by its nature involved abuse of children and the profits of distribution and sale will be greatly reduced. As well, in focussing on the use and effects of pornography by paedophiles the trial judge does not seem to have given sufficient consideration to the fact that the prohibition against possession

> educes the abuse of children involved in making child pornography and less directly its distribution sale into the market fuelled to some extent by those who choose to possess such material.

10 32. In **R. v. Langer**, supra, the court found that s.163.1 is not overbroad. McCombs J. at page 326 stated:

> The scope of s.163.1 is large, but a large scope is required to ensure that the objectives of the legislation are addressed. The child pornography legislation does not exceed the boundaries of its legitimate objectives, and is not overbroad.

20

33. Chief Justice McEachern of the Court of Appeal in British Columbia also found s.163.1(4) was not overbroad. At paragraph 286 he stated:

> If the prohibition against possession of child pornography should be deleted from the *Criminal Code* or be struck down because of overbreadth or otherwise, it would not only be lawful for those who wish to possess the recorded
30 product of their own imaginations, but it would also be lawful for them to show such material to children as I do not believe showing something without parting with its possession constitutes publication or distribution. The same would apply to other "possessed" material, howsoever obtained, including material produced through the abuse of live models, thus creating a market for such material and enhancing greater risk of harm to children. Moreover, without subsection (4), it would be lawful for anyone to maintain inventories of child pornography with impunity, and they could be prosecuted only if an offence against subsections (2)
40 or (3) could be established.
>
> While it is not for me to say whether or how s.163.1 might be amended it seems to me that there would in almost every possible scenario still be a risk of harm from works of imagination or other innocent private possession through cognitive distortions and fuelled fantasies. There is, in my view, a distinction between private thoughts and thoughts recorded, which Parliament has recognized.

50

> I doubt if it would be possible for Parliament, even with the assistance of Legislative Counsel, to re-draft this definition in such a way that such persons would be absolutely protected. However, the minimal impairment rule does not require scientific perfection. Thus, the fact that some anomalies may arise is not

> fatal. In this case they are very remote and likely to arise very infrequently. Considering the infinite varieties of child pornography, the many different ways it can be created and used, and the harm Parliament believes it causes to children, I do not believe the minimal impairment rule is offended by this definition.

34. In **U.S. v. Hilton**, the United States Court of Appeal, First Circuit, 167 F.3d 61 held that their legislative scheme was not overbroad in banning possession of child pornography. At page 66 the Court stated:

> Congress broadened the scope of federal anti-child pornography statutes to address a set of related concerns aimed at the ultimate goal of destroying the underground supply of child pornography in all of its manifestations. First, the legislature desired to reduce the sheer volume of computerized child pornography that could be used by child molesters and pedophiles to "stimulate or whet their own sexual appetites."

35. The British Columbia Court of Appeal focussed its overbreadth analysis on three areas: 1. the expressed material caught by definition of child pornography; 2. the ages depicted in the child pornography who will be caught by the provision and; 3. the range of persons who are potentially liable in criminal sanctions under this provision.

36. Nova Scotia adopts the submissions of the Intervener New Brunswick in relation to overbreadth analysis at paragraphs 10 to 36 of her factum.

37. Nova Scotia contends that Parliament was careful to ensure that the child pornography legislation was not overbroad. The examination of the difference between the obscenity and child

pornography legislation supports this contention. There are two basic differences between the legislative schemes:

Difference in definitional approach.

1. Parliament has defined "obscene material" broadly as material whose dominant characteristic is undue exploitation of sex. In contrast, child pornography "is specifically defined in the detail within the statute".

Difference in approach to artistic merit.

2. The obscenity provisions do not provide for a defence based on artistic merit. Instead the Courts have evolved a definition of obscenity which takes artistic merit into consideration. In contrast child pornography explicitly provide for an absolute defence where the material has artistic merit.

38. The present child pornography legislation provides a specific defence for artistic merit or an educational, scientific or medical purpose. Parliament has recognized that this defence is necessary to ensure that reach of legislation does not extend to a form of expression which serves a legitimate purpose. The accused does not have to prove that his work has artistic merit or of an educational, scientific or medical purpose. If the defences is raised; the onus is on the prosecution to prove beyond a reasonable doubt the representation does not possess artistic merit or have educational, scientific or medical purpose. It is respectfully submitted that proper balance has been achieved between the rights of children and the rights of freedom of expression. Unlike the American Congress the Canadian Parliament has gone further to recognize freedom of expression by including this defence.

39. Nova Scotia contends that the child pornography legislation does not exceed the boundaries of its legitimate objectives and is not overbroad and therefore the Respondent has failed to meet the burden to prove that there is a violation of s.7 of the **Canadian Charter or Rights and Freedoms.**

Does s.163.1(4) of the Criminal Code violate s.2(b) of the Canadian Charter of Rights and Freedoms?

40. Nova Scotia agrees with Appellant that s.163.1(4) of the **Criminal Code** violates s.2(b) of the **Canadian Charter of Rights and Freedoms.** This is in accordance with the well established principles annunciated by this Court in decisions such as **Irwin Toy, Keegstra** and **Butler.**

Is s.163.1(4) a reasonable limit prescribed by law as can be drawn demonstrably justified in a free and democratic society for the purposes of s.1 of the Charter?

41. If the Court should find s.163.1(4) of the **Criminal Code** infringes on the Respondent's s.2(b) rights, it is submitted that s.163.1(4) of the **Criminal Code** constitutes a reasonable limit.

42. The basic test for establishing whether an infringement measure may be justified is set out in **R. v. Oakes,** [1986] 1 S.C.R. 103 and involves the following consideration.

(a) Is the objection of the infringing measure pressing and substantial.
(b)(i) Is the measure rationally connected to the objective?
(ii) Does the measure minimally impair the right it is said to infringe?
(iii) Are the objectives in the salutary affects of the measure proportional to deleterious effects on the infringed right?

43. Where, however, the legislation at issue involves the balancing of competing interests and the matters of social policy the approach to justification under s.1 must be flexible. Parliament ought to be accorded a high degree of deference when the legislation under consideration is directed toward a laudable social goal and is designed to protect vulnerable groups.

Ross v. New Brunswick School District Number 15, [1996] 1 S.C.R. 825 at 871

R. v. Keegstra, [1990] 3 S.C.R. 697 at 736-738

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at 279 per LaForest, J.

44. Recently in **Thomson Newspapers v. Canada (Attorney General)** Bastarache, J. reviewed the analysis to be undertaken in a s.1 inquiry. He stated that the approach under s.1 must be contextual and the facts should be taken into account in assessing whether a limit is to be justified:

(a) vulnerability of the group which the legislature seeks to protect;
(b) vulnerability groups' subjective fears and apprehension of harm;
(c) the inability to measure scientifically a particular harm or efficaciousness of a remedy.

Each case will present a different justificatory context and this context will determine the degree of deference to be accorded to the limit at issue. **Thomson Newspaper v. Canada (Attorney General)**, [1998] 1 S.C.R. 877 at 942-943.

The Objective Of The Legislation Must Be Pressing And Substantial

45. Nova Scotia contends the protection of children from harmful conduct is a pressing and substantial concern. Clearly if children's rights and interests are central, protection of those same rights from harm is critically important. Section 163.1(1) and (4) protects children directly and indirectly from

sexual exploitation by prohibiting possession, production, distribution and the sale of child pornography. Nova Scotia contends that the legislative objective of s.163.(1) and (4) is pressing and substantial.

46. In the case on appeal it is submitted that children in our society are a vulnerable group and Parliament is clearly mindful of the two important societal interests: the freedom of expression crucial to a free democratic society enshrined in the **Canadian Charter of Rights and Freedoms** and society's legitimate concern for the protection of children, its most vulnerable group, from the lifelong harm caused by sexual abuse in enacting s.163.1(4) of the **Criminal Code**. The objectives of s.163.1(4) of the **Code** are clearly pressing and substantial. One need look no further than the parens patriae jurisdiction of the courts for proof that the protection of children from harmful conduct is a paramount concern of law. **Baker v. Canada (Minister of Citizenship and Immigration)**, supra.

The Rational Connection Test

47. First the Crown must show a rational connection between the objective of the legislation and the protection of children from harm, a crime created by s.163.1(1) and (4). This Honourable Court should have no difficulty finding a connection. This section specifically targets activity (child pornography) which causes harm to children both directly and indirectly.

48. Nova Scotia contends that the connection between the object, the protection of children from harm and the means to criminalization of the activity which causes harm is direct and self-evident.

Minimum Impairment Test

49. The second part of the proportionality branch of s.1 analysis addresses whether or not s.163.1(4) impairs the right to freedom of expression as little as reasonably possible. Parliament is not required to choose the least ambitious means to protect vulnerable groups. In **Irwin Toys Ltd. v. Quebec (A.-G.)**, [1989] 1 S.C.R. 927 at 999 the Court stated:

> While evidence exits that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.

50. With respect to the minimum impairment test of s.1 analysis the measure at issue must infringe the accused's rights as little as possible. It is submitted, however, that the context which s.163.1(4) was enacted is such that significant deference must be accorded to the legislative scheme. This is not only as a result of the nature and context and the vulnerability of the group. It is not the case that the legislative scheme must herein be accorded a large degree of deference in order to satisfy the minimum impairment test, but is entitled to the deference nevertheless. When viewed within the proper context the legislative scheme is amply cognizant and respectful of the rights it allegedly infringes. **Thomson Newspaper**, supra, 962 per Bastarache, J., **RJR-MacDonald**, supra, 342 per MacLaughlan,J.

51. Nova Scotia contends that the child pornography provisions impair freedom of expression as little as possible in order to protect those objectives. As indicated earlier in s.7 analysis, Nova Scotia contends that s.163.1 is not overbroad and does not fall outside the objectives of the legislation.

52. With respect to the third step in a proportionality test Lamer C.J.C. in **Dajenais v. C.B.C.**, [1994] 3 S.C.R. 835 stated at 889:

> There must be a proportionality between deterious effects of the measures which are responsible for limiting the rights and freedoms in question and the objective and there must be a proportionality between the deterious and the salutary effects of the measures.

53. Professor Hogg, Constitutional Law of Canada, 4th Edition at page 883 describes the final stages asking:

> **Whether the Charter infringement is too high a price to pay for the benefit of the law.**

54. Cost benefit analysis in the final stages of proportionality inquiry requires one to measure the value inherit in the object (protection of child from harm) against the harm in the limitation on the freedom of expression, and the actual benefit to society accruing from the operation of this section against the actual harm caused to individual's rights to freedom of expression.

55. As stated in the case of **New York v. Ferber**, 458 U.S. 747 at 762 the value of permitting child pornography has been characterized as "exceedingly modest, if not deminimus". Nova Scotia contends that when one weighs the low value of this type of expression (child pornography) against the important need to protect our children against the harm of sexual exploitation the scales of s.1 jurisprudence can easily be tipped in favour of protecting our children.

56. The child pornography provisions, designed to protect children, due indeed limit the fundamental freedom of expression. However, in the contextual approach that is required it is important to bear in mind the type of expression that has been limited. As Dickson C.J.C. observed in **Keegstra**, supra, at page 760:

> While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s.2(b).

57. Nova Scotia respectfully submits that the expression inherent in the production of child pornography is not essential to the principles which lie at the core of freedom of expression. Section 163.1(4) is far from having a chilling effect on the exercise of the right of freedom of expression, in fact it barely produces a faint shiver.

PART IV
NATURE OF ORDER REQUESTED

58. Nova Scotia submits that the constitutional questions ought to be answered in the following manner:

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*?

   Answer: Yes.

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*?

   Answer: Yes.

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*?

   Answer: No.

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*?

   Answer: It is not necessary to answer this question.

59. All of which is respectfully submitted this 4th day of January, 2000.

Daniel A. MacRury
Counsel for the Attorney General of Nova Scotia

APPENDIX "A"

List of Authorities

Cases — **Pages**

Publications

Legislation

SERVICE OF A TRUE COPY HEREOF
SIGNIFICATION DE COPIE CONFORME

Admitted the 6th day
Acceptée le jour

of January 2000
de

Linda Gauthier
for
pour Morris Rosenberg
Deputy Attorney General of Canada
Sous-procureur général du Canada

1:33 p.m.