27376

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)

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PART I - STATEMENT OF FACTS

A. The Course of the Proceedings

1. Prior to the start of a Supreme Court of British Columbia trial on a four count indictment charging two counts of possession of child pornography for the purpose of distribution or sale and two counts of possession of child pornography contrary to s. 163.1(3) and (4) respectively, the trial judge conducted a *voir dire* to address the self represented respondent's constitutional challenge to certain provisions of s. 163.1. At its conclusion, the trial judge ruled that subs. (4) violated s. 2(b) of the *Charter* and was not saved by s. 1. As a result, on January 13, 1999, he dismissed those two charges. He dismissed the remainder of the respondent's application.

2. The Crown appealed to the British Columbia Court of Appeal pursuant to s. 676(1)(a) of the *Code*. On June 30, 1999, the Court released its 164 page judgment. By a majority of 2:1 (Southin and Rowles JJ.A.; McEachern C.J.B.C. dissenting on the s. 1 issue), the Court of Appeal upheld the ruling of the trial judge striking down s. 163.1(4) as unconstitutional.

3. Pursuant to s. 693(1)(a), by notice filed July 8, 1999, the Crown appeals to this Court from the decision of the Court of Appeal based on the dissent of the Honourable Chief Justice of British Columbia.

4. The trial of the respondent on the possession for the purpose counts was adjourned pending the decision of the Court of Appeal. An appearance before the trial judge is presently scheduled for October 18, 1999.

B. The Evidence Adduced on the *Voir Dire*

5. The evidence called by the Crown on the *voir dire* was directed specifically to a s.1 defence of the challenged provisions. It therefore discloses little about the prosecution's case against the respondent. What it does disclose is summarized below along with the other evidence led by the Crown.

6. Det. Waters, the chief investigator, testified that on April 10, 1995 Canada Customs officers seized a quantity of photographs and ten computer discs containing a series of stories from the respondent. On May 13, 1996, pursuant to a warrant to search the respondent's Vancouver residence, police officers seized "a large quantity" of photographs and "books, manuscripts and stories." [A.R., I, 48(16) to 53(44)]

7. Crown counsel entered into evidence what he described as a small representative sample of the overall material seized from the respondent. The photographs are of boys. Some are Caucasian; others are clearly Southeast Asian. With possibly one exception, all the boys appear to be under 18 years of age; some appear pre-pubescent (as young as six or seven according to Det. Waters, A.R., I, 52). With very few exceptions, the boys in the photos are naked or mostly naked. With even fewer exceptions, the boys pose in such a manner that their genitals, and in some instances their anuses too, are prominently displayed. A significant number of the photos show a boy with an erection. Some photos depict the boy apparently masturbating. In one, a drop of ejaculate appears at the tip of the boy's penis. There are a small number of photos where two or more naked boys appear. Of these, a few show two boys embracing or kissing. One photo shows two boys simultaneously performing fellatio on each other. There are no photos in which an adult appears. [A.R., I, 48(37) to 49(1); 51(35) to 53(44); VI, 918-922; VII, 1202-1229]

8. Also entered into evidence was a collection of 17 stories written by the respondent under the pen name of Sam Paloc entitled "Sam Paloc's Boy Abuse – Flogging & Fortitude." [A.R., I, 22(22-39); II, 308(45-47); stories reproduced at A.R., VI, 924 to VII, 1165.] Of these stories Det. Waters gave this "very general overview:"

> They're extremely violent stories, the majority of them, with sexual acts involving very young children, in most cases, under the age of ten engaged in sadomasochistic and violent sex acts with either adults and children, other children, both male and female.
>
> They're extremely disturbing with just the descriptions of the sexual acts with the children particularly relating to circumcision. And the theme is often that the child enjoys the beatings and the sexual violence and that they are wanting it and actually

seeking it out. [A.R. I, 49(45) to 50(8)]

9. Det. Waters testified as an expert in the investigation of child pornography. She outlined the many forms child pornography can take:

- visual depictions, in both photographic and video formats, of children engaged in sexual acts with either other children or adults;
- photographs of nude children with the child's genitalia prominently displayed;
- written materials including very graphic, sometimes violent stories of children engaged in sexual activities with either other children or adults;
- publications issued by the North American Man Boy Love Association ("NAMBLA") and other organizations which promote as beneficial sexual activity with children through informational articles, explicit stories and photographs;
- pseudo-scientific articles and journals justifying sexual activity with children;
- comic books (drawings and writing); and
- computer-generated visual images [A.R., I, 28(29) to 35(10)]

10. Det. Waters also testified about the worldwide distribution of child pornography via the Internet. A person so minded, with relative anonymity, can communicate with like minded individuals around the world to compile vast collections of child pornography, both pictorial and written. Det. Waters described this phenomenon as being "like a tidal wave." In response to these technological advances and the resultant globalization of the problem, police agencies both nationally and internationally are co-operatively investigating child pornography.[1] [A.R., I, 35(11) to 36(22); 38(1) to 40(11); 42(15-35); 107(17-37)]

11. Police investigations into the simple possession of child pornography have led to the discovery of offenders who have been making and distributing child pornography and who have been sexually offending against children as well. Det. Waters also testified that the inclusion of visual representations of children, most commonly photographs, concentrating on the child's genitals or anus and of certain written materials within the definition of child pornography has assisted her and other investigators. [A.R., I, 43(14) to 44(6); 44(47) to 45(12); 47(10-17); affidavit of Det. Insp. Matthews admitted as fresh evidence on the appeal, A.R., XI, 2001-2010]

12. The Crown called Dr. Peter Collins as "an expert in forensic psychiatry and particularly in sexual deviance and paedophilia." He explained the terms paedophilia (the sexual attraction to pre-pubescent children) and hebephelia (the sexual attraction to pubescent, early adolescent children). He indicated that behavioural scientists do not know how many paedophiles there are in society because the majority do not readily profess their status as such or voluntarily seek out treatment. Reference in this factum by the appellant to paedophiles should be understood to include hebephiles. [A.R., I, 62(28) to 63(43)]

13. Dr. Collins testified that the "driving force" behind all sexually deviant behaviour is fantasy. Paedophiles, as a group, are "the most notorious" collectors of pornography which helps "fuel their fantasies." Material collected for this purpose includes both commercial and homemade pictorial images of children and written works which have paedophilic themes. Pornography is "the most highly valued material in their collections" and the more sexually explicit it is, the more it is coveted. [A.R., I, 66(31-47); 184(4-12)]

14. Dr. Collins confirmed Det. Waters' evidence concerning the greater access to child pornography through the Internet. Communication between paedophiles is facilitated and collections are much easier to amass. Without speaking quantitatively, based on his own experience from his practice, a correlation between greater access and increased child sexual abuse does exist. [A.R., I, 83(7-16); 149(7-29); II, 211(27) to 214(6); see also the affidavit of Det. Insp. Matthews, A.R, XI, 2001-2010]

15. Dr. Collins testified that it is generally accepted amongst the "vast majority" of forensic psychiatrists, and borne out by his work with paedophiles over many years, that paedophiles use their collections of child pornography in ways that put children at risk. The first way is through its use in a process termed "grooming." Grooming involves the use of pornography to lower the child's inhibitions and to persuade the child that sexual contact is healthy and normal, something other kids do. The second way that possession of child pornography creates a risk of harm to children is the risk that it will contribute to the fueling

of paedophiles' fantasies and incite them to act on their fantasies. [A.R., I, 69(39) to 70(33); 76(44) to 79(45); 155(5-11); 167(29-44)]

16. The third way that possession of child pornography creates a risk of harm to children is through its reinforcement of some paedophiles' cognitive distortions. Cognitive distortions are the "rationalizations and justifications" that paedophiles have for their deviant behaviour. They are "offence facilitating beliefs." Dr. Collins explained that the "whole concept of cognitive distortions is crucial in terms of understanding the thinking of the paedophile and that relates as to the use of child pornography." He explained that possession of child pornography encourages the paedophile to have sex with children and to believe that children want to have sex with adults. It validates and endorses for the paedophile that such activity is legitimate. Child pornography, cognitive distortions and validation of the belief that sexual activity with children is acceptable are inextricably linked. [A.R., I, 80(25) to 81(45); 83(6-16); 86(7-10); 167(22-28); 171(8-47); II, 214(32) to 215(3)]

17. Crown counsel asked Dr. Collins to comment on the comparative risk of harm represented by pictorial versus written pornography. In the doctor's opinion both forms of pornography are important to paedophiles. Written pornography

> still fuels the sexual fantasies of the pedophile and in my professional opinion, can be part of the process to, in some cases, incite them to offend. But it's also connected to these cognitive distortions that they have because it reinforces their beliefs that its okay to do these things to children, when they see it in the written form. The problem is, is that some of these pedophilic authors don't just write for their own personal use but they will make an attempt to show others their writings. They will show others, meaning other pedophiles. They will attempt to have them published, hence it still fits in with this whole concept of the rationalizations and justifications that they have for offending. [A.R., I, 83(32) to 85(7)]

18. The respondent advanced his constitutional challenge on a markedly different basis than the case put forward by counsel acting on his behalf on appeal. On the *voir dire* neither Crown counsel nor the self represented respondent asked Dr. Collins to address specifically the risk of harm posed by: (1) visual depictions of apparently lawful sexual activity involving

one or more parties aged 14 to 17 years; (2) videos or photos of one's own apparently lawful sexual activity involving an adult and a person aged 14 to 17 years; (3) visual representations of sexual activity involving a youthful looking 18 year old; or (4) material generally that did not involve the use of an actual person aged 17 years or younger in its production. Nor did Dr. Collins express an opinion on how common or uncommon such material is in collections of child pornography.

C. The Legislative History

19. Section 163.1 of the *Code* became law on August 1, 1993. The legislative history preceding its enactment spans more than a decade. This history includes three major Commission studies, previous attempts at legislation and Parliamentary review in a variety of forms.[2] A review of the legislative history reveals that there has been a consistent approach recognizing: (1) the direct harm to children abused and exploited in the production of child pornography; (2) the risk of indirect harm as described by Dr. Collins; (3) the harmful effect attendant to the promotion of the idea that children's sexuality is a commodity to be exploited by adults; (4) the deterrent effect a possession charge would have on the production and exchange of child pornography; (5) the need to include within the definition of child pornography visual representations involving the lewd exhibition of a child's genitalia; (6) the augmenting effect of written child pornography upon cognitive distortions; (7) the need to proscribe written works which advocate or counsel the commission of a sexual offence against a child; (8) that a possession offence would facilitate law enforcement objectives; and, (9) that the appropriate age limit in the child pornography provision was 17 years of age and younger.

20. Both Staff Sgt. Matthews and Det. Wolfe [now Waters] included in their written presentations and materials submitted to the House of Commons Standing Committee samples of child pornography in the form of visual representations and written materials advocating sexual relations between adults and children. Specific reference was made by Det. Wolfe to a comic book entitled *Cherubino* as an example of material used to lower a child's

inhibitions to sexual activity with adults. [A.R., V, 885]

D. The Findings of the Court of Appeal

21. While disagreeing about whether the violation of s. 2(b) is saved by s. 1, Rowles J.A. and McEachern C.J.B.C. did agree on a number of important matters set out below (with references to their respective judgments in parentheses following):

(1) s.163.1 as a whole is directed at a pressing and substantial objective, the protection of children (Rowles J.A.: paras. 148 & 205) {C.J.B.C.: para. 271} [A.R., XII, 2151, 2182, 2214];

(2) s. 163.1(4) is rationally connected to the legislative objective (Rowles J.A.: para. 158) {C.J.B.C.: para. 275} [A.R., XII, 2156, 2215];

(3) child pornography causes direct and indirect harm to children and to society generally (Rowles J.A.: paras. 157 & 158) {C.J.B.C.: paras. 265, 267, 269, 279, 287 & 291} [A.R., XII, 2156, 2211-13, 2217, 2221, 2223];

(4) child pornography constitutes low value speech or expression (Rowles J.A.: para. 152) {C.J.B.C.: para. 290} [A.R., XII, 2153, 2222]; and

(5) it would be difficult if not impossible to draft the provision in order to distinguish between innocent and nefarious possessors of child pornography (Rowles J.A.: para. 196) {C.J.B.C.: paras. 285, 288 & 291} [A.R., XII, 2177, 2219-23].

22. Rowles J.A. also found that "a possession offence undoubtedly contributes in some measure to law enforcement efforts" in the area of child pornography (para. 214). McEachern C.J.B.C. alone commented on the market suppression or eradication objective behind s. 163.1 and the role subs. (4) specifically plays in serving this objective (paras. 260, 265 & 286). [A.R., XII, 2187, 2207-11, 2220]

PART II – THE POINTS IN ISSUE

23. The following constitutional questions were stated by Lamer C.J.C. on August 26, 1999:

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 - ARGUMENT

I. Introduction/Overview

24. This appeal calls into question the constitutionality of s.163.1(4) of the *Code*, R.S.C. 1985, c. C-46. The case requires the Court to address whether, and to what extent, Parliament may legitimately criminalize the possession of child pornography. In particular, the Court must decide whether s. 163.1(4) infringes the guarantee of freedom of expression found in s. 2(b) of the *Charter* in a manner that is not justified under s. 1. It raises for the first time the issue of freedom of expression in the context of the right to possess child pornography and the state's compelling interest in limiting that right in order to protect children in particular, and society in general, from the harms associated with child pornography. Chief Justice McEachern, in his dissenting reasons for judgment, framed the issue as follows:

> [232] 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. [A.R., XII, 2195-96]

25. Such a careful delineation of the category of material at issue is necessary given the respondent's concession in the Court of Appeal that Parliament has the right and the obligation to protect children from the harmful effects that flow from child pornography. Pursuant to that obligation Parliament can, the respondent conceded, legitimately prohibit the possession of a restricted category of visual material consisting of photographs or videos of actual children (under 14 years of age) or of youths (aged 14 to 17 years) engaged in activity that constituted either a sexual assault or the sexual exploitation (also restrictively defined) of that child or youth. In other words, the respondent agreed that it should be illegal to possess a visual record of the commission of a sexual offence against an actual individual aged 17 years or younger. The respondent argued that if the effect of s. 163.1(4) and s. 163.1(1) (which defines child pornography) together was so restricted, the limitation upon s. 2(b) would be reasonable and justifiable.

26. This concession has at its roots a further concession. The simple or private possession of child pornography of the type described above is harmful to children. It is harmful in a direct sense. Children are abused or exploited in its creation. The circulation and possession of the photo or video subsequent to production perpetuates the depicted child's abuse or exploitation and is a profound violation of his or her personal dignity, privacy, reputation and autonomy.

27. Acknowledgement by the respondent on appeal of indirect harm (the harmful uses to which child pornography may be put) was less clear. However, the trial judge and two judges of the Court of Appeal held that children are placed at risk through the use of this category of material by paedophiles. A consideration of the harm to society wrought by a desensitization of attitudes towards the sexual objectification of children through imagery was absent from the positions advanced by the respondent and the British Columbia Civil Liberties Association (the "BCCLA") on appeal. In respect of the category of material under discussion, a majority of the Court of Appeal found that the Crown did demonstrate a reasoned apprehension of this harm.

28. The appellant agrees with the foregoing but would add to it. As McEachern C.J.B.C. found, it is the possessors of child pornography who create the market for the material and fuel the demand for its production. Production is increased to meet demand. More children are directly harmed as a result and others and society as a whole are placed at risk indirectly by more material being in the hands of more people. Also, the importance of police investigating possession offences and potentially uncovering producers and distributors of this material cannot be overlooked. Neither can the possible identification of actual sexual offenders.

29. For all these reasons, it is indisputable that child pornography of this kind is pernicious. It must be proscribed at all levels, including private possession within the home. Where the parties and the respective interveners disagree and where Rowles J.A. and

McEachern C.J.B.C. part company is with respect to material further along the continuum. Specifically:

(a) visual material which does not use actual children in its production:

(i) non-photographic representations (works of the imagination) described by Rowles J.A. at para. 179 to include "all sketches, drawings, sculptures, and computer-generated images of persons under the age of 18 which depict the sexual content described in subsections (i) and (ii)" (to which the appellant would add paintings and cartoons);

(ii) photos or videos (with the defined sexual content) of individuals aged 18 years and older portraying persons under 18 years of age; and

(b) photos or videos of children aged 14 to 17 years which depict sexual activity (including one's own) or a pose (including of one's self) described in the definition section where that activity or pose does not offend against ss. 153, 212(4) or 271; and

(c) written material that is self-authored and represents the product of the author's imagination, the material never being disseminated or communicated to anyone.

30. The appellant submits that even material of this kind represents a sufficient risk of harm to children and society to warrant interference with an individual's right to possess it, even in the privacy of his own home. The respondent says it does not. This disagreement puts in issue the scope of the definition of child pornography and lies at the heart of the respondent's overbreadth complaint.

31. In her reasons for judgment Southin J.A. at para. 6-9 is careful to distinguish between children (persons under the age of 14 years) and adolescents (persons aged 14 to 17 years inclusive). [A.R., XII, 2066-68] Section 163.1 makes no such distinction referring only to persons under 18 years of age. For the purposes of this factum the appellant's use of "child" and "children" should be understood to refer to persons under 18 years of age.

II. Section 7 of the Charter

32. The respondent argued for the first time in the Court of Appeal that his right to liberty, as protected by s. 7 of the *Charter*, is violated contrary to the principles of fundamental justice because he is exposed to potential imprisonment by s. 163.1(4). While his liberty interest may be engaged by virtue of the possibility of imprisonment, the respondent must establish that it is violated in a manner contrary to the principles of fundamental justice. However, the appellant notes that the risk of imprisonment and the serious consequences of criminality are factors that are considered under the minimal impairment stage of the s. 1 proportionality analysis: ***R. v. Keegstra***, [1990] 3 S.C.R. 697 at 771*e* to 772*c*; ***R. v. Zundel***, [1992] 2 S.C.R. 731 at 774*a*-775*f*.

33. In ***Keegstra*** at 771*e-g*, Dickson C.J.C., writing for the majority, commenced the minimal impairment analysis with the following observation:

> The criminal nature of the impugned provision, involving the associated risks of prejudice through prosecution, conviction and the imposition of up to two years' imprisonment, indicates that the means embodied in the hate propaganda legislation should be carefully tailored so as to minimize impairment of the freedom of expression. It therefore must be shown that s. 319(2) is a measured and appropriate response to the phenomenon of hate propaganda, and that it does not overly circumscribe the s. 2(b) guarantee.

34. The respondent relied exclusively upon the alleged overbreadth of subs. (4) in an effort to establish: (1) a violation of his liberty interest contrary to the principles of fundamental justice; and (2) an unjustified violation of his freedom of expression. It must be noted however that test for overbreadth is the same whether examined under s. 7 or s. 1: "does the impugned legislation capture more activity than is necessary to achieve its objective – ***Zundel*** at 768; ***R. v. Heywood***, [1994] 3 S.C.R. 761 at 792*i* to 793*a*; 794*a-c*.

35. The issue the respondent seeks to raise under s. 7 forms part of the consideration of the balancing test under s. 1. The respondent has not shown any basis for this Court to depart from the approach indicated by the weight of the jurisprudence dealing with freedom of

expression violations. In all of these cases, allegations of overbreadth are dealt with under the minimal impairment stage of the s. 1 test. The overbreadth analysis, in the context of this case, is more appropriately conducted there.

> ***Ref. Re ss. 193 and 195.1(1)(c) of the Criminal Code***, [1990] 1 S.C.R. 1123 (the "***Prostitution Reference***"); ***Keegstra; Canada (Human Rights Commission) v. Taylor***, [1990] 3 S.C.R. 892; ***Committee for Commonwealth of Canada v. Canada*** [1991] 1 S.C.R. 139; ***Osborne v. Canada (Treasury Board)***, [1991] 2 S.C.R. 69; ***R. v. Butler***, [1992] 1 S.C.R. 452; ***Zundel***; ***Ontario (Attorney General) v. Langer*** (1995), 97 C.C.C. (3d) 290, lv to app. to S.C.C. dismissed (1995), 42 C.R. (4th) 410n,; ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***, [1996] 3 S.C.R. 480 at para. 55-58; ***RJR-MacDonald Ltd v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 ***Thomson Newspapers Co. v. Canada (Director, R.T.P.C.)***, [1998] 1 S.C.R. 877 at para. 118-122; ***R. v. Lucas and Lucas***, [1998] 1 S.C.R. 439; ***U.F.C.W., 1518 v. KMart Canada Ltd.***, [1999] S.C.J. No. 44 (QL).

36. There is a second reason why it is unnecessary to resort to s. 7 in this case. Neither Southin J.A. nor Rowles J.A. addressed the respondent's s. 7 argument in their respective judgments. At para. 245 [A.R., VII, 2201] McEachern C.J.B.C. took a different view of the liberty interest invoked (freedom to possess expressive materials as an element of personal autonomy), and found that such a right would be guaranteed by the more specific language of s. 2(b). Accordingly, he held that it was not necessary to resort to s. 7. This approach is in accord with the jurisprudence from this Court and other appellate courts which suggests that where a specific Charter right has been violated it is not necessary to resort to the more general or residual rights encompassed in s. 7 of the *Charter*.

> ***R. v. Ladouceur*** (1987), 35 C.C.C. (3d) 240 at 249 (Ont. C.A.) where s. 9 was resorted to not s. 7; ***R. v. Genereux***, [1992] 1 S.C.R. 259 where s. 11(d) was resorted to not s. 7; ***R. v. Pearson***, [1992] 3 S.C.R. 665 where s. 11(e) was resorted to not s. 7; and ***Pacificador v. Phillipines (Republic of)*** (1993), 83 C.C.C. (3d) 210 (Ont C.A.) at 227 {leave to appeal to S.C.C. dismissed April 28, 1994}, where s. 15 was resorted to not s. 7.

III. Section 2(b) of the Charter – Freedom of Expression

37. Courts have traditionally given a liberal and generous interpretation to freedom of expression. Consistent with this interpretation, in this case the Crown has conceded throughout that s. 163.1(4) violate s. 2(b). While freedom of expression is a fundamental freedom in Canadian society, it is not an absolute right. The issue on this appeal, given the conceded s. 2(b) violation, is whether the appellant can satisfy this court that s. 163.1(4) is a reasonable limit upon freedom of expression, contextualized by McEachern C.J.B.C. in his

judgment at para. 239 as ". . . the right, particularly in one's own home, to express one's "essential" self by reading, writing and possessing books, diaries, pictures, clothes and other personal things that are intertwined with one's private beliefs, opinions, thoughts, curiosities and conscience," that can be demonstrably justified in a free and democratic society. [A.R., XII, 2198]

38. The task of delineating the scope of freedom of expression and its limitations has been described as being extremely difficult and delicate: ***Prostitution Reference*** at 1185*h*. The determination of whether or not the Crown meets its burden under s. 1 requires the court to be sensitive to the importance of interpreting the rights guaranteed to individuals by the *Charter* broadly and generously so as to ensure that our citizens receive the full benefit of the *Charter* protections. At the same time, however, the court must be mindful of the concerns of the community as a whole as expressed by our legislators. In other words, as per McLachlin J. in ***Keegstra*** at 807*a*, "the question is always one of balance."

IV. Section 1 Reasonable Limit Analysis

39. The onus is upon the Crown to establish that the infringement of s. 2(b) is justified under s. 1. The general approach to the balancing test of a s. 1 analysis has been summarized in recent decisions of this Court in this way:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

This approach has most recently been endorsed by this Court in its decision in ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, (May 20, 1999) S.C.C. File No. 25708

at para. 21 & para. 97.

40. The specific s. 1 task for the Crown in this case is to establish that the category of materials described in para. 29 above represents a sufficient risk of harm to children and society to justify its inclusion within the definition of child pornography and the proscription of its possession. At the outset, some discussion of the numerous considerations influencing this task is appropriate.

A. The Contextual Approach

i) A Flexible and Contextual Approach

41. Section 1 determinations are not to be made in a contextual vacuum nor are they to focus exclusively on the right or freedom infringed. They must be undertaken with close attention to context. Furthermore, the contextual approach and the factors considered therein inform every stage of the s. 1 analysis. As noted by Bastarache J. for the majority in ***Thomson Newspapers*** at para. 87:

> context is the indispensable handmaiden to the proper characterization of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are closely related to the valid objective so as to justify an infringement of a *Charter* right.

42. It is respectfully submitted that a proper contextual approach to the various stages of the s. 1 inquiry and to the determination regarding the degree of deference to Parliament appropriate in the circumstances of this case stands in marked contrast to the approach taken by Rowles J.A. Her approach is one in which contextual factors were applied too narrowly. Specifically, she gave too little weight to the laudable government objective, the vulnerability of the group sought to be protected and to the impact of the nature of the expression in issue. Furthermore, she paid too little deference to Parliament particularly at the minimal impairment stage. Her approach is one which considered the liberty, autonomy, privacy and reputation interests of the possessor to the virtual exclusion of the parallel interests of children. At the proportionality of effects stage she started from the premise that subs. (4)

advances the legislative objectives not much at all. Finally, she took into account only a small class of hypothesized material bearing little relation to the reality of the child pornography that is being produced and finding its way into people's homes.

43. The relevant contextual factors engaged in this s. 1 analysis include the following:

(a) the vulnerability of the group which the legislator seeks to protect: ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927 at 987-999; ***Keegstra; Butler; Ross v. New Brunswick School District No. 15***, [1996] 1 S.C.R. 825 at para. 88;

(b) the nature of the expression in issue and whether or not it lies close to the core values of the guarantee of freedom of expression: ***Keegstra*** at 759-766; ***Butler***; ***Lucas*** at para. 33-34; ***Thomson Newspapers*** at para. 91;

(c) the importance of the objective of the legislation: ***Keegstra***; ***Butler***; ***Lucas***;

(d) the international community's commitment to the eradication of the sexual abuse and exploitation of children through child pornography as evidenced by the near-universal ratification of the *United Nations Convention on the Rights of the Child* (the "*UNCRC*") and article 34 therein: ***Keegstra*** at 749*h*-750*c*; ***Taylor*** at 919*i*-920*j*; ***Butler***; ***Lucas***; ***Baker v. Canada (Minister of Citizenship and Immigration***, [1999] S.C.J. No. 39 (QL) at para. 69-71;

(e) Canada's international obligations as a signatory to the *UNCRC*: ***Keegstra***; ***Butler***; ***Lucas*** at para. 50; ***Baker*** at para. 69-71;

(f) the steps taken by other free and democratic societies to combat the problem of child pornography and prohibit its possession: ***Butler*** at 497*d-f*; ***Lucas*** at para. 57;

(g) the interests of others considered in the balancing process: see ***R. v. O'Connor***, [1995] 4 S.C.R. 411; ***C.B.C. v. New Brunswick*** at para. 39; ***R. v. Godoy***, [1999] 1 S.C.R. 311;

(h) the underlying values and principles essential to a free and democratic society which include respect for the inherent dignity of the human person and commitment to social justice and equality: ***Prostitution Reference***; ***R. v. Oakes***, [1986] 1 S.C.R. 103 at 136; ***Keegstra***; ***Taylor*** at 916;

(i) other *Charter* provisions which impact on the issue, *i.e.* s. 15 equality rights and s. 7 right to security of the person for children: ***Keegstra*** at 775-756, 758; ***Taylor***

at 916, 920;

(j) the high degree of deference accorded to Parliament in the area of social policy legislation: ***Butler***; ***RJR-MacDonald*** at para. 68-70; ***Thomson Newspaper*** at para. 92-95;

(k) the inability to measure scientifically a particular harm in question or the effectiveness of the chosen remedy: ***Butler*** at 502-504, ***Thomson Newspapers*** at para. 90.

ii) Values Underlying a Free and Democratic Society - Factors (g), (h) & (i)

44. Crucial to our free and democratic society are the values of the inherent dignity and personal autonomy of the individual and a strong commitment to social justice and equality: ***Keegstra*** at 735*j* to 738*d*. Our society recognizes that children are equally deserving of privacy, of respect, and of the right to the equal protection and equal benefit of the law without discrimination based on age. They also deserve the right to bodily integrity and the opportunity to develop their own sexuality without being prematurely subjected to corrupting or distorted views of human sexual relations, either as an observer or participant. Most particularly, due to their vulnerability, children are deserving of society's protection from influences and messages antithetical to their rights. Child pornography is manipulative of children and plays on their vulnerability. It undermines their dignity and their position as equal members of society. Children are therefore deserving of protection from the direct and indirect physical and psychological harms[3] associated with the production, distribution **and possession** of child pornography.[4]

45. Protection from harm to identifiable individuals or groups and to society in general can justify limitations on freedom of expression. As Sopinka J. noted in ***Butler,*** at 496*i-j:*

> This court has thus recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression.

Provisions violating s. 2(b) have thus been found to be reasonable limitations in cases involving commercial advertising aimed at children (***Irwin Toy***), hate literature (***Keegstra***),

obscene materials (***Butler***), and defamatory libel (***Lucas***).

46. The respondent placed great emphasis on the right to privacy as a value underlying a free and democratic society. While important, it, too, is not absolute. In the context of child pornography, the limitation enacted by s. 163.1(4) is "justified by a countervailing state interest of the most compelling nature" (***Keegstra***, per McLachlin J. at 864), the protection of children. As the appellant will demonstrate, the importance of this state interest is not diminished by the fact that s. 163.1(4) has the effect of prohibiting child pornography intended for private possession.

47. Southin J.A. asserted that a prohibition of the possession of expressive material could never be justified in a free and democratic society. The appellant respectfully disagrees. The words of Anderson J.A. in ***R. v. Red Hot Video Ltd.*** (1985), 45 C.R. (3d) 36 at 59-60, (B.C.C.A.) albeit in the context of adult pornography, are apposite:

> Apart from such harmful and offensive material involving the subject of sex, we are not justified in restricting free expression in this area in any way. It must be remembered that freedom of expression includes the freedom to receive all material which is not harmful to others. It follows that in the privacy of his home every citizen is entitled to read, see or hear all material involving the subject of sex which is not harmful to others.

iii) *International Obligations and Comparable Legislation - Factors (d), (e) & (f)*

48. In ***Taylor*** Dickson C.J.C. noted at 919-920 that "[t]he stance taken by the international community in protecting human rights is relevant in reviewing legislation under s. 1, and especially in assessing the significance of a government objective." So pervasive is exploitation of children throughout the world that the international community adopted the *Convention on the Rights of the Child* (entered into force on September 2, 1990), to which Canada became a signatory on May 28, 1990 and ratified on December 13, 1991. The *UNCRC* is an expression of international consensus on the norms, standards of behaviour and obligations of societies towards their children. Of particular significance in the present context is Article 34 which reads:

> (1) State parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State 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 any other unlawful sexual practices;
>
> c) the exploitative use of children in pornographic performances and materials.
>
> [A.R., IX, p. 1660-1666]

49. A value enjoying status as an international human right is generally to be ascribed a high degree of importance under s. 1. That the international community has collectively acted to condemn child pornography and to oblige state parties to protect children and prevent recognizable harms attributable to sexual exploitation serves to emphasize the importance of the objectives behind s. 163.1(4) and to endorse the legislative judgment made by Parliament in this respect.[5]

50. Canada does not stand alone in criminalizing possession of child pornography. The Appellant's Record contains examples of comparable enactments from other jurisdictions [see also Appendix "A" for a summary of the enactments]. All are indicative of those legislatures' respective judgment that the possession of child pornography poses a risk of harm to children. One example is the *Child Pornography Protection Act* (the "*CPPA*") in the U.S. The identified harms the Act sought to address are essentially the same as those described by Dr. Collins. [A.R., IX, 1576-77] Congress found that child pornography is a form of sexual abuse of children which entails physical and psychological harm to the children involved; that child pornography is an invasion of a child's privacy and reputational interests; that child pornography plays "a critical role in the vicious cycle of child sexual abuse and exploitation" [A.R., IX, 1586]; and that due to the harmful effects child pornography can have **whether children are used in its creation or not**, its possession ought to be criminalized.

iv) *Nature of Expression in Issue and Meritorious Objectives - Factors (b) & (c)*

51. The core values that underlie s. 2(b) relate to the search for truth, political and social participation, and individual self-fulfilment. Rowles J.A. found that "child pornography cannot be said to lie close to the core of protected expression" [A.R., XII, 2153, para. 152]. This statement, in and of itself, is inarguable. Not only does child pornography "systematically and consistently undermine the position of some members of society" (***Thomson Newspapers*** at para. 93), its only relation to s. 2(b) core values is with individual self-fulfillment at a base and prurient level. It is not enough to simply say that child pornography bears little relation to the core values underlying s. 2(b) and is therefore low value speech. It is positively antithetical to those values.

Thomson Newspapers at paras. 91 & 92; ***Irwin Toy***; ***Keegstra***; ***Butler***.

52. The jurisprudence of this Court is sometimes divided on the question of exactly what effect the meritorious objective and the low value of the expression in question have on the justification standard required by s. 1. One approach recognizes that the two factors, and particularly the nature of the expression in issue, provide not only context for the s. 1 analysis, but also fall to be considered at various specific stages of the ***Oakes*** test. This approach speaks of the standard of justification being attenuated in appropriate cases. It recognizes that low value speech does not require the most solicitous degree of constitutional protection. Such speech will be subjected to a less searching degree of scrutiny and limitations upon it will be easier to justify.

Keegstra at 767; ***Lucas*** at para. 34, 57, 90 & 94; ***RJR-MacDonald*** per LaForest at para. 71

53. The contrasting approach views the value of the speech in issue as an appropriate contextual factor and one having application to the proportionality of effects test. The Crown remains obliged to demonstrate a pressing and substantial objective, rational connection and minimal impairment and must do so independently of any consideration of the low or minimal value of the speech. A limitation may be more readily justified in a particular case not because of a lowered standard but rather because it is easier to demonstrate that the beneficial

effects outweigh any negative effects.

> ***Lucas*** per McLachlin J. dissenting at para. 115-116 & 119; ***RJR-MacDonald*** per McLachlin J. at para. 169-171

54. The matter is not without difficulty. Several unanimous judgments of this Court reflect either an express or implicit acknowledgement of a variable standard of justification under s. 1 more attuned to the first described approach.

> ***C.B.C. v. New Brunswick (Attorney General)*** at para. 63; ***Ross v. New Brunswick School District No. 15***, [1996] 1 S.C.R. 825 at para 89, 91 & 94; ***Libman v. Quebec (Attorney General)***, [1997] 3 S.C.R. 569 at para. 60; ***U.F.C.W., Local 1518*** at para. 66

55. The latest majority pronouncement by this Court in a criminal case is ***Lucas*** where the nature of the expression in issue, defamatory libel, was considered as context, at the minimal impairment stage and at the proportionality of effects stage. The judgment also speaks of the combination of the lowered degree of protection accorded speech distant from s. 2(b) core values with the meritorious objective of the impugned legislative measure "facilitating the justification of the infringement of s. 2(b) of the *Charter*." And in ***Thomson Newspapers***, a non-criminal case, at para. 91, the majority gave express recognition to a variable degree of constitutional protection based upon the value accorded the expression in issue. Low value expression may be more easily outweighed by the legislative objectives.

v) *Deference to Parliament – Factor (j)*

56. ***Thomson Newspapers*** also assists in determining the appropriate degree of deference to be paid to Parliament's assessment of the breadth of the definition of child pornography required to achieve its objectives. At para. 111-117, Bastarache J. identified four contextual factors which would favour a more deferential approach at one or more stages in the s. 1 inquiry. All the factors are present in this case. They are: (1) the role of the legislature in striking a balance between the interests of competing groups; (2) the vulnerability of the group the legislature seeks to protect; (3) the inability to measure scientifically a particular harm in question or the effectiveness of a chosen remedy; and (4) the low social value of the activity suppressed by the legislation.

B. A Limit Prescribed by Law

57. During submissions at trial the respondent conceded that ". . . none of the language in the child pornography provisions is so lacking in precision as to make clear legal debate impossible." [A.R., II, 344(22-25)]. At the hearing of the appeal, the respondent abandoned his vagueness argument. It is the appellant's position that s. 163.1(4) of the *Code* clearly satisfies the requirement that it be a limit prescribed by law.

C. A Pressing and Substantial Objective

58. The majority and the dissenting reasons for judgment acknowledged that there is a pressing and substantial objective to the legislation. However, as Rowles J.A. pointed out at para. 141-144, not everyone can agree on how to characterize the objective [A.R., XII, 2148-50]. The proper characterization is critical to the remaining s. 1 analysis as it impacts upon and has significant repercussions for the rational connection and the minimal impairment stages.

59. In ***Vriend v. Alberta***, [1998] 1 S.C.R. 493 Iacobucci J. discussed the approach to be used in determining the objective of impugned legislation:

> 111. However, in my opinion, the objective of the omission cannot be fully understood in isolation. It seems to me that some consideration must also be given to both the purposes of the Act as a whole and the specific impugned provisions so as to give the objective of the omission the context that is necessary for a more complete understanding of its operation in the broader scheme of the legislation.

60. The overall purpose of the legislative scheme encompassed within s. 163.1 is the protection of children from the many evils of child pornography. Subsection (4) is one of the means by which this objective is achieved. Specifically, subs. (4) serves the following objectives: the prevention of the direct harm to children used in the production process; the prevention of the harm to the privacy, dignity and reputation of the child depicted caused by the existence of a permanent record of the sexual activity or graphic pose; the prevention of the 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 potentially act

upon their paedophilic fantasies and to show to children to facilitate their attempts to engage them in sexual activity; the prevention of harm to society caused by imagery which sexualizes children; the dampening or, to whatever extent possible, the eradication of the clandestine child pornography market; and the facilitation of police enforcement efforts in the area of child pornography.

61. Any characterization of the objectives which regards the sexual abuse and exploitation of children inherent in the production of some forms of child pornography as the **sole basis** for legislative action in this area is too narrow. The prevention of the direct harm to children used in the production process is **a basis** for the legislation, but it is far from the sole basis.

62. Rowles J. A. accepted the appellant's broader characterization of the objectives of the legislation and noted at para. 148 that:

> Parliament had a valid objective in enacting the legislative scheme in s. 163.1. Section 163.1 as a whole is directed at preventing harm to children, specifically in the form of sexual abuse caused, both directly and indirectly, by the production and existence of child pornography. I agree with the appellant that it is important to recognize that the valid objectives of the legislation do extend beyond the prevention of the direct harm to children which results from their involvement in the production of child pornography. [see also para. 158 & 216; A.R., XII, 2151, 2156, 2188]

63. Acceptance of the multifaceted objectives of the legislation, in addition to the prevention of the direct harm occasioned by the use of actual children in the making of child pornography, is evidenced by the findings of the Badgley and Fraser Commissions [A.R., VIII, 1348 to IX, 1574], this Court's judgment in ***Butler***, the decisions of appellate courts in ***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.) and ***Little Sisters Art and Book Emporium v. Canada*** (1998), 125 C.C.C. (3d) 484 (B.C.C.A.), lv. to app. to S.C.C. granted February 18, 1999, the legislative judgments of not only Parliament but of the American Congress and other nations around the world, and the trial court decisions in ***Langer*** (in relation to s. 163.1 generally) and *R. v. K. L. V.* (March 30, 1999), Alta. Q.B., Judicial District of Red Deer, No.

891000136C30101-4 (in relation to subs. (4) specifically).

D. Proportionality Analysis

i) Rational Connection

64. The Crown must demonstrate a rational connection between the infringing measure and the legislative objectives. This demonstration need not be at a scientific or empirical level. It is sufficient to show that Parliament had a reasoned apprehension of harm in relation to child pornography in its various forms. This may be done on the basis of reason or logic and the application of common sense to what is known. The inference of the risk of harm may be drawn from the material itself or from the material and the evidence: ***Keegstra, Butler, RJR-MacDonald, Thomson Newspapers***. With these principles in mind, the appellant acknowledges that it bears the burden of proving, to the civil standard, that the proscription of possession of child pornography in all its forms: (1) prevents a risk of harm to children and to society; (2) suppresses a market for the material; and (3) facilitates the entire enforcement scheme contained within s. 163.1.

65. A majority of the Court of Appeal found the requisite rational connection to have been established. For her part, Rowles J.A. concluded:

> [158] To use the words of *Butler, supra* at 504, what the Crown has succeeded in showing is a "reasoned apprehension of harm" to children resulting both from the potential use of child pornography by paedophiles and from the desensitization of society to the use of children as sexual objects. Having shown a reasoned apprehension of harm based on the available social science evidence, Parliament is not constitutionally obligated to await exact proof on these issues before taking legislative action to protect children from these risks.
>
> [159] The legislative scheme enacted in s. 163.1 of the *Criminal Code* attacks the child pornography industry at every stage: production, importation, distribution, and possession. Subsection (4) of s. 163.1, which prohibits possession of child pornography as defined in subsection (1), cannot be said to fail for want of a rational connection when the Crown has shown that children are put at risk by the creation and existence of that form of expression. The problem with subsection (4), if there is one, must lie in its potential overreach.

Chief Justice McEachern came to a similar conclusion at para. 275 of the judgment. [A.R., XII, 2156-57; 2215]

66. Yet, as becomes apparent in her minimal impairment analysis, Rowles J.A. restricted this rational connection to the category of material acknowledged by the respondent to be harmful. It is the appellant's position that Rowles J.A. is mistaken in so finding. The acknowledged need to protect children from the risk of harm in its many forms does not depend upon either the illegality of the activity depicted or the use of actual persons. Material which does not portray criminal sexual activity or use actual children cannot be considered harmless.

a. Societal Harm

67. In concluding that the Crown had failed to demonstrate a sufficient reasoned apprehension of harm in respect of the material described in para. 29 above, Rowles J.A. failed to give any consideration to societal harm. Society is harmed by desensitized and legitimized attitudes concerning the sexual objectification of children. In ***Butler***, Sopinka J. found this to be a harm not susceptible to exact proof. He also found that it was "reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs." Gonthier J. expressed the view that adult pornography presented "a distorted image of human sexuality which in turn can induce behavioural changes." This concern applies equally to child pornography. Sopinka J. included material that "employs children in its production" within the categories of impermissibly degrading, and therefore harmful, representations of sexuality. He added in ***R. v. Mara and East,*** [1997] 2 S.C.R. 630 at para. 44 that "where the activities or the material in question involve the degradation and objectification of women, or perhaps children and men, the law infers the harm simply from that degradation and objectification." The harm in this context is found in the message conveyed by the portrayal, a message that encourages the sexual exploitation of children, and is not limited to the harm attendant to the use of actual children in activity that constitutes a criminal offence.

68. In enacting the *CPPA*, the U.S. Congress found that:

> 11(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and
>
> 11(B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children. [A.R., IX, 1576]

69. The noted Canadian anthropologist, Wilson Duff, in the introduction to his book, *Images: Stone: B.C. (Thirty Centuries of Northwest Coast Indian Sculpture)* wrote that "Images seem to speak to the eye, but they are really addressed to the mind. They are ways of thinking in the guise of ways of seeing." Imagery portraying children as objects to be used to satisfy the sexual urges of adults conveys a dangerous message, one that is not in any way lessened or diluted where the materials represent works of the imagination. This message is no different when the depicted child is drawn rather than photographed (e.g. ***R. v. Pointon*** (October 23, 1997), Unreported Judgment, Manitoba Provincial Court). It is not at all unreasonable, nor should it be unconstitutional, for Parliament to conclude that it is no less harmful when what addresses the mind are words describing a fictional event in place of a visual representation.

b. Child Pornography in Written Form

70. In addition to societal harm, the hypothetical examples considered by Rowles J.A. pose a risk of harm in other ways. Looking first at child pornography in written form, it is the opinion of F.B.I. Special Agent Ken Lanning that it is not always easy to tell whether the stories available by the thousands on the Internet describing what are in law sexual assaults committed upon children "are fictional stories, sexual fantasies, diaries of past activity, plans for future activities or future threats." [A.R. X, 1815] The stories written by the respondent are no less evocative than any picture of explicit sexual activity. As Southin J.A. notes at para. 66 what we read often represents some of our most powerful life experiences. [A.R., XII, 2050]

Recognizing the power of the written word, Dr. Collins testified that child pornography in written form is also used by paedophiles to reinforce their cognitive distortions and to fuel their fantasies. It poses, therefore, the same risk of indirect harm as visual depictions.

71. Child pornography in written form poses a risk of harm because of the element of persuasion inherent in the definition (see discussion below covering the definitional limits under the minimal impairment analysis). The persuasive "value" of such works led the respondent, during submissions on the *voir dire*, to admit that the NAMBLA bulletins, the article "Men Loving Boys Loving Men" and possibly the book *Dares to Speak*, if widely available:

> would predispose more men to seek contacts with -- sexual contacts with minors. But these books and NAMBLA provide boy love with a cultural, literary and historical context, making it seem more normal and acceptable. And to the extent that boys themselves were aware of this material, they would be more interested and willing to have sexual contacts with adult men. [A.R., II, 337(15-35)]

c. Computer-Generated Images

72. Special note should be made of computer-generated pictures. Rowles J.A., with respect, is simply mistaken when she states at para. 187-189 that the federal legislation in the U.S.A. "is directed solely at visual images of actual children, including depictions that have been manipulated or 'morphed' by a computer." At para. 191 she makes the same mistake with respect to the English use of the term, "pseudo-photographs." Neither the American nor the English legislation is restricted to computer altered images of real children. In this respect, s. 163.1(1) and its inclusion of non-photographic visual representations is not out of proportion with measures taken by other free and democratic societies as Rowles J.A. suggests. [A.R., XII, 2172-75]

73. In 1994 the English *Protection of Children Act 1978* was amended to introduce the term pseudo-photograph. It is a summary conviction offence in England to possess any indecent photograph or pseudo-photograph of a child. Pseudo-photograph is defined as "an

image, whether made by computer-graphics or otherwise howsoever, which appears to be a child." In ***R. v. Fellows***, [1996] E.W.J. No. 2589, the Criminal Court of Appeal held that the term "seems to us to be concerned with images created by computer processes rather than the storage and transmission by computers of images created originally by photography."

74. In 1996 the U.S. Congress found that:

> (5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct [A.R., IX, 1576]

and passed the *CPPA* which amended the definition of child pornography to include a "visual depiction [which] is, or appears to be, of a minor engaging in sexually explicit conduct." The Senate Report accompanying the statute's enactment devotes an entire section to computer-generated child pornography. [A.R., IX 1589-1594] The concerns expressed therein are mirrored by the findings of the U.S. Court of Appeals, First Circuit, in ***U.S. v. Hilton*** 167 F. 3d 61 (1999). These concerns are not unique to the American experience.

75. In ***Hilton***, the appellate court's task was to assess the constitutionality of Congress' attempt "to modernize federal law by enhancing its ability to combat child pornography in the cyberspace era."

> Lawmakers wished to improve law enforcement tools to keep pace with technological improvements that have made it possible for child pornographers to use computers to "morph" or alter innocent images of actual children to create a composite image showing them in sexually explicit poses. Through readily available desktop computer programs, **one can even create a realistic picture of an imaginary child engaged in sexual activity and pass off that creation as an image of a real child.** (emphasis added) [at 65]

Bownes J. described the objectives motivating the *CPPA* as:

(1) "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" (fuelling fantasies);

(2) to ban computer-generated images that are virtually indistinguishable from those of real children, but are made without live children. These images can be created with very little expense, and are often bought, sold, or traded in the same manner as images created through the use of real children (supply and demand repercussions); and,

(3) "to deprive child abusers of a criminal tool frequently used to facilitate the sexual abuse of children . . . Congress specifically found that virtual pornography created without the involvement of real minors (often via computer technology alone) is increasingly used by pedophiles and child molesters to seduce or entice children into participating in sexual activity by breaking down their natural inhibitions." [at 66-67]

As the Senate Report stated, computer-generated child pornographic images "can result in many of the same types of harm to children and society." Any assertion that the absence of any use of actual children in the production of such images "does not harm or threaten our children . . . ignores the reality of child sexual abuse and exploitation, and the critical role child pornography plays in such criminal conduct." [A.R., IX, 1589-1591] In addition, as it becomes increasingly difficult to distinguish computer-generated from photographic depictions, a provision restricted to imagery using actual children will be rendered unenforceable: ***Hilton*** at 73. [A.R., IX, 1594]

d. Computer Animation and Cartoon Imagery

76. Computer animation and cartoon imagery do not involve the use of actual children. Denying any risk or harm emanating from such material ignores the use to which it may be put by some individuals. In ***Langer***, McCombs J. spoke of the sexually explicit comic strip in the "Lolita Chick" publication giving rise "to a realistic risk of consequent harm to children.". There is every reason to believe that young children in particular are susceptible to messages conveyed by cartoon imagery. The whole premise underlying ***Irwin Toy*** suggests that this is so. As noted in paragraph 20 above, there was evidence before Parliament of the grooming value of comic books with sexual themes.

e. Paintings, Drawings, Sketches and Sculptures

77. Finally, there are visual works of the imagination not employing actual children such as paintings, drawings, sketches and sculptures. As Rowles J.A. pointed out in para. 183, Dr. Collins made only a single reference to drawings. During the course of cross-examination this exchange occurred:

> Q In other words, the abuse occurs whether the child is identifiable or not?
>
> A If it - - it still to me is a nude depiction of a child. Now, I've been involved in cases where the pornography has been drawings of children and very good drawings. But it still comes down to being pornography. [A.R., I, 186(22-27)]

The balance of his testimony regarding pictorial forms of child pornography and the harmful uses to which they may be put, with two exceptions [at A.R., I, 83 (35-37) and 168-9], is not restricted to visual depictions of actual children.

78. What Dr. Collins said about stories in written form has application, by analogy, to these types of imaginative visual representations. Reason, common sense and logic are tools available to demonstrate this reasoned apprehension of harm. Consideration of their efficacy in this regard should only be made after: (1) looking at drawings such as the one found at A.R., VII, 1207 which shows a young boy, likely under 14 years old, with an erect penis; (2) considering the type of drawings described in the sentencing proceedings in ***Pointon***; (3) having regard to the fact that drawings and sketches formed part of the collection of child pornography found in the possession of the accused in ***Stroempl***; and (4) having regard to the findings of McCombs J. in ***Langer***, a case dealing with paintings and drawings. Some material in this category will have grooming value. Some will reinforce cognitive distortions and fuel fantasies. Some of it will be shared and traded. All of it sends the same unfortunate message.

f. Visual Recordings of Lawful Sexual Activity

79. The respondent argued that since children aged 14, 15, 16 and 17 years are, in law, capable of consenting to sex with others their own age or with adults, with certain specified

exceptions, it ought to be lawful to possess a photograph or videotape recording their sexual activity. Material in this category might consist of two 17 year olds videotaping their own sexual activity. A married couple, with one or both spouses being under 18 years of age, might do the same. Finally, an adult might make a video or take a photograph of his having sex with a person 14 to 17 years old. Rowles J.A. agreed that since no one was harmed in the production of this material, possession of the videotape or photograph poses no risk of harm.

80. The first thing that should be pointed out is that while the recorded activity may **appear** to be lawful, there can be no assurance that it was indeed lawful. That a child aged 14 to 17 may consent is no guarantee that he or she **did** consent. No viewer removed from the production process can discern merely by looking at a photograph or watching a videotape whether the apparent consent was given free of any element of coercion or threat. Even when the second party to the activity is an age appropriate partner, there is no way of knowing whether the photographer or video camera operator is one of the parties to the sexual activity or a producer as in ***Jewell and Gramlick***. And where the second party is an adult, there are many reasons why the apparent consent of the child may not be genuine. The entire relationship may be exploitive. The particular sex act captured on film may have only come about because of the dominant position of the adult party in terms of age, status and power. Any element of mutuality, essential for the act to be truly non-exploitive in a broad sense, may be illusory.

81. An episode of consensual sexual activity is a transitory or fleeting event usually carried out in private. A permanent record of that activity is something entirely different. It would be unwise to assume that a 14 year old child possesses the maturity and life experience to appreciate this distinction or to understand that the prevention of future dissemination can never be guaranteed. While there may be no harm in the sexual act itself in the examples posited by the respondent, the potential for harm lies in the existence of the permanent record in the form of a photograph or video tape and the use to which it may be put. Even with the hypothetical teenage couple or married couple, one or both being 14 to 17 years old, who fully

intend to keep the image for their own private enjoyment, there can be no guarantees that the photos will not be disseminated publicly shattering the privacy, dignity and reputation of the depicted child. The photo or video tape might be stolen in a break in. It might be surreptitiously "borrowed" by a less principled friend. In the event of the couple splitting up, the rejected partner might, out of spite or bitterness, think differently about posting the image to the Internet. Once it is in the public domain, not only is the depicted child harmed, society is harmed, demand for the material is increased encouraging production and other children are at risk of indirect harm.

82. Specifically in relation to the risk of indirect harm, the appearance of consent can result in the image having greater value to an individual inclined to use it to seduce further child partners, to fuel his fantasies or to reinforce his beliefs that children do indeed desire and enjoy having sex with adults. While, as Southin J.A. points out, it cannot be said that a belief that teenagers are sexually active in our society is a cognitive distortion, it is an example of distorted thinking to believe that 14 to 17 year olds desire and enjoy sex with adults who are significantly older than themselves. More specifically in relation to grooming, one need look no further than the circumstances in ***Jewell and Gramlick*** to see that these kinds of videos are utilized in this way to the lasting detriment of additional children.

83. In its written submission before the Court of Appeal, the BCCLA asserted that the Crown had failed to demonstrate that a visual record of lawful sexual activity incites some men to commit unlawful sexual acts. This takes far too narrow a view of sexual arousal. The arousal in the examples under consideration comes about not because the sex portrayed is lawful. The video arouses because the sex portrayed is explicit and involves a child.

84. The appellant will discuss the question of the age limit Parliament has set in s. 163.1 under the minimal impairment analysis. A related issue arises at this point. It concerns the discrepancy between Parliament's decision to set the age of consent at 14 and the decision to criminalize the possession of visual records of what may be consensual sexual activity

involving a person aged 14 to 17.

85. Analogous situations have arisen in other cases. For example, in the ***Prostitution Reference***, this Court upheld the validity of a law aimed at the social nuisance of street solicitation when prostitution itself as an activity is not illegal. Reasoning in a manner having application to the present case, Dickson C.J.C. wrote at 1142*e-f*:

> The fact that the sale of sex for money is not a criminal act under Canadian law does not mean that Parliament must refrain from using the criminal law to express society's disapprobation of street solicitation.

This Court upheld the constitutionality of the prohibition against assisted suicide despite the fact that suicide itself is not a crime (***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519) and found that a prohibition against tobacco advertising was a valid use of the criminal law power despite the fact that the consumption of tobacco is entirely legal (***RJR-MacDonald***).

86. In enacting s. 163.1, Parliament's aim was not to eradicate sexual activity amongst teenagers. Such an objective would be impractical, to say the least. Rather, Parliament sought, through this provision and others, to prevent the commission of exploitive and abusive acts against children. The production, distribution and possession of child pornography contribute directly and indirectly to the commission of such acts. Sexual autonomy notwithstanding, the children of Canadian society are deserving of protection from these acts.

87. An example not considered by Rowles J.A. or the respondent can serve to demonstrate further the fallacy of premising a reasoned apprehension of harm entirely upon the illegality of the sexual activity depicted. The appellant questions whether anyone would countenance the possession of a photo or video of a 12 year old girl having consensual sexual intercourse with a 13 year old boy. Yet, due to the provisions of s. 150.1(2), such activity is not unlawful.

g. Photographic Depictions Under s. 163.1(1)(a)(ii)

88. The photographic depictions under subs. (1)(a)(ii) deserve special mention. Strict adherence to the respondent's interpretation of exploitation as activity offending against ss. 151 to 153 and s. 212(4) of the *Code* is not possible. Taking first the case of a child under 14 years of age, photos meeting the definition may or may not have involved the child touching him or herself sexually at the invitation of the photographer either prior to or as the photo is taken. If it does, an offence under s. 152 is made out. If it does not, there is no crime. Yet no one would argue that a child in these circumstances is not exploited. Exploitation in such circumstances must refer to the occurrence of "harm" in a more broadly understood sense.

89. The situation should be no different for 14 to 17 year olds. A 14 year old girl may spread her legs to expose her vagina for the photographer and no crime under s. 153(1)(b) is committed unless she also touches herself at the invitation of the photographer who does so for a sexual purpose and who also happens to stand in one of the prohibited relationships with the girl. Similarly for a 14 year old boy who gets himself in a state of physical arousal for the purposes of the photograph. Absent both the proscribed relationship between the boy and the photographer together with counseling or invitation by the latter resulting in the state of arousal, no offence is committed. There is nothing illegal about the taking of these photos. Yet it cannot be said that the girl and boy in these circumstances have not been "exploited." As a society we should not assume the depicted child possessed the emotional and intellectual maturity, sophistication and life experience so as to preclude any possibility of exploitation, manipulation or coercion, all elements undetectable from the mere appearance of the photograph.

h. Summary

90. The inclusion within the definition of child pornography of works of the imagination, both visual or written, whether or not the depicted activity is apparently lawful, is carefully designed to achieve the objective of protecting children and society. As the respondent conceded, no one should be permitted to possess, even in the confines of his own home, a

photo or video of a child engaged in explicit sexual activity that is an offence under the *Code*. Replace the photograph with a drawing, or a cartoon, or a painting, or a computer-generated picture showing the very same activity between people the exact same ages, and it is correct that no actual child was abused or exploited in its creation. It follows that no child will suffer the perpetuation of the original abuse or exploitation through the distribution of the image. It does not follow, however, for the reasons discussed above, that the non-photographic image poses no risk of harm and should be lawful to possess. To the extent that Rowles J.A. found otherwise represents a significant flaw in her analysis.

ii) Minimal Impairment

a. General

91. The minimal impairment stage of the s. 1 proportionality analysis requires that the means employed by Parliament impair as little as reasonably possible the right or freedom in question in order to achieve the legislative objective: ***U.F.C.W., 1518*** at para. 34 &71; ***Thomson Newspapers*** at para. 118; ***RJR-MacDonald*** at para. 160. It also requires that the impugned provision be appropriately tailored in the context of the infringed right. In determining whether the means adopted by Parliament to achieve its legislative objectives are overbroad, it should be borne in mind that Parliament need not choose the least restrictive means at its disposal. Neither must Parliament be held to a standard of perfection. Indeed, as previously noted, in this case this Court should accord a high degree of deference to the means Parliament has chosen.

92. Parliament has, through its legislative function, an important role to play in shaping the kind of community in which we live and, most particularly, the values we share. The criminal law is, in itself, an expression of collectively shared values. In giving these values legislative life, Parliament must be given some reasonable latitude to respond to the acknowledged existence of serious social and individual harm flowing from the activity in question. This is especially so where Parliament attempts to intervene in a balanced way, in the face of competing rights, in order to protect the vulnerable among us: ***Keegstra*** at 764-

765.

93. The respondent has argued that s. 163.1(4), while pursuing a valid objective, when read in conjunction with the definition of child pornography contained in s. 163.1(1), captures more expressive material than is necessary to achieve Parliament's objective. The proper characterization of the legislative objective is critical to the analysis under this stage. The objectives should be accurately and precisely defined so as to provide a clear framework to assess the precision with which the means have been crafted to fulfil that objective: ***U.F.C.W., Local 1518*** at para. 59. While the jurisprudence cautions against stating the legislative objectives too broadly, the appellant submits that the s. 1 analysis is equally compromised by stating these objectives too narrowly. In his written brief before the Court of Appeal, the respondent stated the objective very narrowly indeed. It is significant to note that in the Court of Appeal at least, the respondent's overbreadth argument was contingent upon acceptance of his restrictive characterization of the legislative objective of s. 163.1(4):

> If, as submitted earlier, the legislative object of s. 163.1(4), which prohibits possession, is to prevent the sexual abuse and/or exploitation of children that mere possession of child pornography causes, **then** the definition seriously overreaches, by criminalizing many forms of material that do not harm children. [emphasis added]

Clearly a majority of the Court rejected the respondent's narrow characterization and accepted the appellant's broader characterization of the legislative objectives. Broader objectives necessarily require broader means, that is, the more encompassing definition of child pornography as contained in s. 163.1(1).

94. In finding the provisions to be fatally overbroad Rowles J.A. effectively held Parliament to a standard of perfection not required by the ***Oakes*** test. She also failed to appreciate that the provisions, through their partial rather than complete prohibition, as McEachern C.J.B.C. found at para. 285, do "provide an exemption from criminal liability for almost all conceivable kinds of innocent possession." [A.R., XII, 2219-20]

b. Hypothetical Material Not Harmless

95. In the preceding section, the appellant has demonstrated that the risk of harm in its many forms is not dependent either upon the illegality of the activity portrayed or upon the use of actual children. This can be further established by an examination of the hypothetical examples relied on by Rowles J.A.

96. The appellant does not take issue with the use of reasonable hypotheticals as an analytical tool at the minimal impairment stage. It bears remembering, however, that the determination of the degree of impairment is not a purely theoretical exercise. This determination and the hypotheticals must have some grounding in reality: ***Prostitution Reference; R. v. Goltz***, [1991] 3 S.C.R. 485 at 515.

97. It is the position of the appellant that it is simply incorrect to equate materials, as Rowles J.A. has done, which do not involve any harm to children in their production, either because the depicted child is imaginary, or because a young looking adult is used, or because the activity being depicted is lawful, with materials which cannot be said to pose any danger to children. It is vital to understand what preconditions and assumptions, stated and unstated, underlie this equation. They are: (1) self authorship (*i.e.* no dissemination of the image of writing from another to the possessor); (2) that what appears to be lawful activity is in fact lawful activity; (3) that there was no exploitation in the less formal sense previously discussed; (4) that possession is purely private (*i.e.* no dissemination of any sort intended by the creator/possessor); and, (5) the possession is innocent (*i.e.* the possessor is not aroused by the material or, if aroused by it, will not act upon it or use it to harm others).

98. At para. 197 Rowles J.A. outlines five hypotheticals which she says demonstrate the overbreadth of the impugned provision. [A.R., XII, 2178-79] The appellant proposes to examine each hypothetical in turn to expose what it submits constitutes the flaw or unreality in the applicable assumptions and preconditions. By doing so any foundation for concluding that the material poses no risk of harm to children, or to society, vanishes, if this could ever truly

be said of these materials in the first place.

Hypothetical #1 – a drawing or cartoon which depicts a person under 18 years of age engaged in explicit sexual activity drawn by the possessor and never shown to anyone.

99. The underlying preconditions are, first, the fact that the possessor is also the creator of the visual representation. Such a scenario seeks to render inapplicable the market fueling role a possessor occupies when the material in question is created by someone else. If the picture is received from someone else, distribution has taken place. This is more germane when a photographic visual representation (such as in hypotheticals 3 and 4) is changing hands since even this single act of distribution perpetuates the violation of the depicted individual's privacy, dignity, autonomy and reputation.

100. Second, the possession is entirely private, *i.e.* the picture will never be shown to, or shared with anyone, let alone distributed, published or sold, the terms actually used in s.163.1 (unlike "disseminated"). The appellant does not contend that such an individual could never exist but points to the evidence of Dr. Collins and Det. Insp. Matthews concerning the collecting, trading and sharing traits exhibited by most paedophiles, the kind of men most likely to create and possess such a picture in the first place (e.g., see ***R. v. Pointon***).

101. Third, the possession is innocent, *i.e.* the possessor is not a sexual deviant. For if he were, the evidence provides a sufficient basis from which it can be inferred that he might use it in a way that is harmful to children.

Hypothetical #2 – a crude drawing of the sexual organ or anal region of a person under 18 years of age

102. The appellant points out that a drawing such as this will only be captured by the definition under subs. (1)(a)(ii) if it was drawn for a sexual purpose (see the discussion of definitional limits below). Assuming that it was and assuming its "crude" nature limits its value as a grooming tool, the same assumptions regarding the absence of any dissemination

are made. So, too, is the assumption that the creator will not be aroused by it. Given that the drawing had to be created for a sexual purpose and given that it is retained despite its crudeness, it is likely to be in the hands of someone who is aroused by it.

Hypothetical #3 – the recording of a couple's lawful sexual activity, one or both persons being aged 14 to 17 years, remaining in their private possession

103. Most of the risks associated with this example were discussed in para. 80 to 83 above. The risk of later dissemination, unintended and uncontemplated at the time of production, by one of the parties or a third party into whose possession the record may fall through a variety of means, is every bit as reasonable as the scenario posited. An item of pornography of this description, on the evidence of Dr. Collins, would be highly prized and highly sought after. In other words, the demand for it would be great. One act of uploading the video or the photograph to the Internet and its distribution is instantaneously worldwide.

Hypothetical #4 – an "erotic nude" photo taken of himself by a narcissistic 17 year old and kept in his private possession

104. The appellant will assume that the description "erotic nude photograph" is meant to convey that both the content and purpose requirements of subs.(1)(a)(ii) are met. They might well not be and the photograph could still be considered erotic, a very subjective appraisal. Assuming that the content and purpose requirements are met, the unstated assumption of non-deviant possession is questionable. Considering what these requirements are, one might well wonder how realistic it is to assert that the possessor is not likely to be aroused by it and/or use the photograph to groom others.

105. Once again, it is assumed that there has been no prior distribution of the photograph in question. Add this element to the scenario and circumstances comparable to those in ***Osborne v. Ohio***, 495 U.S. 103, 109 L.Ed. 2d 98 (1990) arise where the United States Supreme Court upheld the proscription of private possession of similar photographs of a teenage boy for market suppression and child protection purposes.

Hypothetical #5 – a self-authored written statement recording the author's private thoughts, perhaps a diary entry, advocating the commission of a sexual offence against a person under 18 years of age, which is never disseminated or shown to anyone

106. The appellant discusses this example in the definitional limits section below. For present purposes, it should be pointed out that Dr. Collins testified not only with respect to the indirect harm applicable to child pornography in written form, he offered the opinion that paedophiles do not just write it for their own personal use. Written works are exchanged, as the volume of this sort of material available on the Internet would attest. The hypothesis suggesting that such works may be written and not shared is, on the evidence of Dr. Collins, an unlikely one. [See also article by Forde and Patterson, "Paedophile Internet Activity" A.R., X, 1855-1860]

107. The evidence establishes that in our society there are individuals who use child pornography in ways that are harmful to children. By adding the preconditions of private and innocent possession to the hypotheticals she relied upon, Rowles J.A. fell prey to the same error made by the trial judge. This error has as its foundation a distinction between an innocent and a nefarious possessor. As both Rowles J.A. (at para. 196) and McEachern C.J.B.C. (at para. 291) pointed out, the legislation cannot be drafted in such a way so as to permit the possession of certain varieties of child pornography by some and prohibit the same material in the hands of others. [A.R., XII, 2177, 2223] One can readily imagine how many individuals facing prosecution under subs. (4) would hold themselves forth as innocent possessors. It would be equally frustrating to the effective enforcement of subs. (4) to have the legislation reward the production of child pornography such as would be the case if the definition were to exempt those who create or otherwise produce their own child pornography in whatever form.

108. The appellant takes issue with the suggestion that the category of materials said to demonstrate the overbreadth of subs. (4) poses no risk of harm to children and society. This is not to say that all forms of child pornography are equally harmful. While not attempting to rank the broad spectrum of material from the most to the least harmful, it is appropriate to

acknowledge that there is variability in the degree of harm the material may pose. Dr. Collins testified that in his opinion, the "more graphic form of visual depictions . . . where children as young as three" are shown engaging in explicit sexual acts posed the greatest risk of harm to children. [A.R. II, 215(4-9)] It is unclear whether he was speaking of direct harm which, in such a case, would be self-evident. Any ranking of material would by necessity have to take into account the nature of the harm in mind – direct, indirect or societal.

109. The reasoning in ***Irwin Toy*** is instructive with respect to the breadth of the definition and the variable degree of harm. In defining child pornography, Parliament was not obliged to confine itself solely to protecting against the most harmful material. Parliament was only required to exercise a reasonable judgment in specifying what material it deemed to be harmful to children and to society. The courts are not called upon to substitute judicial opinion for legislative ones as to where to draw the precise line.

110. The concentration in the overbreadth argument on the lawfulness of the sexual activity depicted puts in issue Parliament's decision to "draw the line" in the child pornography provision at 18 rather than at 14, the age at which an individual is capable of consenting. This disparity clearly troubled both Southin and Rowles JJ.A. but not McEachern C.J.B.C. He correctly noted that setting the age "below which children are to be protected from exploitation by means of child pornography" was a policy decision for Parliament just as setting the age of consent was and, as such, it ought to be respected by the courts. [A.R., XII, 2216-17]

111. Extending the protections created by the provision to 14 to 17 year olds is consistent with the recommendations of both the Badgely and Fraser Commissions. It is also in conformity with Canada's international obligations under the *UNCRC* which defines children as those persons being under 18 years of age.

112. This issue is not unlike that raised in ***Irwin Toy*** where evidence at trial established that younger children (up to age 7) were more susceptible to manipulative advertising than an older group (up to age 13) although both groups were susceptible to varying degrees. The legislature set the upper age limit at 13. This Court held that the legislature was not obliged to confine itself to protecting the most clearly vulnerable group. It was only required to exercise reasonable judgment in specifying the vulnerable group.

113. A modest amount of human experience teaches us that 14 to 17 year olds are a vulnerable group in need of the protection provided by s. 163.1(4). Adolescence is the bridge between childhood and adulthood. The desire to bridge the gap quickly is strong. Experimentation with one's physically maturing body is part of bridging that gap. Physical maturity most often outpaces its emotional and intellectual counterparts. This factor has significant repercussions (discussed previously at para. 81) concerning the "agreement" to having one's sexual activity videotaped. For present purposes it is enough to recognize that in many respects there is a sizeable power imbalance, leaving adolescents vulnerable to the abuse of adult authority.

114. The need to protect children from the physical and psychological harm related to premature sexualization is, to borrow a phrase from McLachlin J. in ***R. v. Hess; R. v. Nguyen***, [1990] 2 S.C.R. 906 at 948, "so obvious as not to require formal demonstration." Her Ladyship gave three reasons why children merited the protection provided by the offence of having sexual intercourse with a female under the age of 14 years. The first reason dealt with the risk of pregnancy.

> The second is the need to protect them from the grave physical and emotional harm which may result from sexual intercourse at such an early age. The third is the need to protect them from exploitation by those who might seek to use them for prostitution and related nefarious purposes.

These concerns should not be restricted to the offence then under consideration.

115. In 1983, the United States Congress raised the age limit applicable to its child pornography legislation from 16 to 18. Reports issued at that time point to a very practical reason behind the increase. Since prosecutions will most often proceed on the basis of the objectively verifiable apparent age of the depicted child, determination on this basis of whether a child is under 16 is far more difficult than determining that a child is clearly not an adult (18).

116. There are numerous provisions in the *Code* and other legislation where 18 years of age is set as the dividing line. These can be found at Appendix B to this factum. Reference has already been made to s. 212(4) which makes it an offence for a person to obtain or communicate for the purpose of obtaining the sexual services of a person who is under, or who an accused believes to be under, the age of 18 years. Another example from the *Code* is s. 715.1 which permits the evidence of a complainant or witness under 18 years of age as of the date the alleged offence was committed, in prosecutions of certain enumerated offences, to be given in part by videotape. Calling the provision a "response to the dominance and power which adults, by virtue of their age, have over children," Lamer C.J.C. ruled in ***R. v. L. (D.O.)***, [1993] 4 S.C.R. 419 at 428-29 that the age limit of 18 was not arbitrary. "[R]ather [the age limit] is consistent with laws which define the age of majority to be 18 years, and with the special vulnerability of young persons of sexual abuse."

117. L'Heureux-Dube J. for her part wrote about the particular vulnerability of young women "at the age when they commence to assert their sexuality." Having made reference to articles 19 and 34 of the *UNCRC*, the *Young Offenders Act* and the age of majority in all the provinces, she added:

> I find that the inclusion of all children up to the age of 18 under the protections afforded by s. 715.1 is required by the continued need for such protection and is in conformity with international and domestic instruments. As such, it is in no way arbitrary and, accordingly, it was perfectly legitimate for Parliament to draw the line where it did. [at 464-66]

118. As a society charged with the responsibility of protecting our young, we cannot assume that teenagers aged 14 to 17 years, notwithstanding the receipt of sex education, both formal and informal, sexually active or not, will never be susceptible to the "seductive" images of adult males having sex with post-pubescent children. Neither can we assume that they are immune to the abuse of adult authority. Material that promotes the message that children are the appropriate target of adults' sexual desires only serves to exploit that vulnerability. The importance of avoiding indifference to such sexual objectification cannot be overstated.

c. Section 163.1 Does Not Create a Total Ban

119. In his written brief before the Court of Appeal the respondent argued that "the breadth of the material criminalized by s. 163.1(4) amounts to a total ban." In fact ss. 163.1(1) and (4) together do not constitute a total ban on possession of expressive material dealing with sex and persons under 18 years of age. A distinction between a total ban and a partial ban "is relevant to the margin of appreciation which may be allowed the government under the minimal impairment step of the analysis:" ***R.J.R.-MacDonald***, per McLachlin J. at para. 163. The absence of a blanket prohibition is evidence of careful tailoring so that the right of freedom of expression is impaired no more than necessary and makes the legislation more amenable to justification under s. 1.

120. Section 163.1 contains definitional limits which act as safeguards to ensure that only material antithetical to Parliament's objectives in proscribing child pornography will be targeted. Perhaps the most significant safeguard is found in subs. (1)(b) which restricts "any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act." "Advocate", as a verb, is defined in the O.E.D. as "plead for, **defend, recommend publicly**" (emphasis added). "Counsel" in this context is defined by the O.E.D. as "advise, recommend." "Counsel" is also defined at s. 22(3) of the *Code* to include "procure, solicit or incite." Works which merely describe sexual acts involving a child will not necessarily advocate or counsel

others to engage in such activity or defend the validity of such conduct. This definition leaves ample room for lawful expression. For example, written social commentary on the evils of childhood sexual abuse hardly involves advocating such activity.

121. The appellant agrees with the position taken by the BCCLA in its written submissions to the Court of Appeal that "it is not possible to "advocate or counsel" the commission of a sexual offence involving children or youth without communicating that message to others." McEachern C.J.B.C. took a similar view when he held at para. 284, "that anything alleged to be child pornography under s. 163.1(1)(b) . . . must therefore require private or public publication of some kind." Hypothetical #5, the self-authored written statement which is never disseminated or shown to anyone, is "not communicated to others." Any reasonable doubt on the question of advocacy or counseling would be resolved in the favour of the accused. [A.R., XII, 2219]

122. Section 163.1(1)(a)(i) requires that the sexual activity depicted be explicit not implicit. It would be legal to possess the drawing or cartoon in hypothetical #1 if the sexual activity was not explicitly depicted. Concerns expressed before the House of Commons Standing Committee during the course of the hearings on Bill C-128 regarding the potential chilling effect of subs. (4) on legitimate film making activities have not been realized. Teenage coming of age movies and dramas such as the critically acclaimed *The Boys of St. Vincent* can still be made provided they contain, as the evidence before the Committee made clear, nothing in the way of "explicit sexual activity." [A.R., V, 799-800]

123. Section 163.1(1)(a)(ii) has a content requirement and a purpose requirement. The visual representation must have as its dominant characteristic a depiction of the sexual organ or anal region of a person under 18 years of age. This depiction must also be for a sexual purpose. Any reasonable doubt regarding either of these elements would be resolved in favour of an accused. The pictures described in hypotheticals 2 and 4, for example, may not constitute child pornography.

124. In addition to these definitional limits, s. 163.1 contains defences available to anyone charged under subs. (4). Section 163.1(6) provides for a defence based on the work having artistic merit or an educational, scientific or medical purpose. As well, s. 163.1(7) adopts the public good defence contained in s. 163(3).[6] The onus is upon the Crown to disprove a defence beyond a reasonable doubt where it is raised by an accused. Again, the principle of reasonable doubt significantly minimizes any impairment of legitimate social expression: *Keegstra* at 778-782.

125. Section 163.1(4) is a full *mens rea* offence. In addition to the elements referred to above, if a doubt existed as to whether an individual charged with possessing a piece of subs. (1)(a)(i) material knew that the individual shown was, or was depicted as being, under 18 years of age, he would be acquitted. So, too, would an individual charged with possessing an item of subs. (1)(a)(ii) material where there was doubt as to his knowledge that the individual shown was under 18 years of age. Accordingly, the emphasis placed by the respondent on the allegedly unnecessary capture of material depicting 16 or 17 years olds, or of material using a youthful looking adult in place of a person under 18 years of age, is misguided. The prosecution would have difficulty in such circumstances in proving guilty knowledge of the requisite actual or apparent age. More significantly, as the evidence reveals, a vast majority of the material of concern involves children much younger in age than 16 or 17.

126. A further indication that Parliament carefully tailored the definition of child pornography so as to not impair free expression unduly is the fact that in enacting section 163.1(1), Parliament did not go as far as recommended by the Badgley and Fraser reports. For example, the Badgley report did not provide for a defence of artistic merit and the Fraser report recommended prohibiting material of any type which condoned, encouraged, or normalized sexual activity between adults and persons under 18 years of age.

d. No Reasonable Alternatives

127. The affidavit of Det. Insp. Matthews speaks pointedly about the importance of subs. (4) to the enforcement mechanisms provided by s. 163.1. [A.R., XI, 2004-2009] It is the clear opinion of Matthews that s. 163 and ss. 163.1(2) and (3) are not even adequate measures to achieve the overall legislative objectives of protecting children in today's clandestine and anonymous Internet world, let alone "clearly superior measures" (***Libman*** at para. 62 quoting Wilson J. in an earlier case). A paedophile can use an item of child pornography in ways harmful to children without publishing, selling, importing, distributing or possessing it for any of these purposes and hence incur no liability under either subsection (2) or (3). At para. 286 of the judgment McEachern C.J.B.C. notes that merely showing a picture to a child without parting with possession of it, as the accused in ***K.L.V.*** did, does not constitute publication or distribution. [A.R., XII, 2220]

128. In the Court of Appeal, the respondent argued for a less inclusive definition of child pornography. He contended that Parliament made unconstitutional legislative determinations with respect to the age limit, the use of actual versus imaginary children and the significance of the apparent lawfulness of the activity depicted. It is the appellant's position that Parliament had a reasonable basis for concluding that the simple possession of child pornography as defined impaired free expression as little as reasonably possible given the government's pressing and substantial objectives. Bringing to the analysis an appropriately high degree of deference, there is no basis for this Court to decide that a less inclusive definition, particularly one which effectively restricts child pornography to crime scene photos, would be as effective as the present definition in serving Parliament's multifaceted objectives. The provision does not fail to distinguish between expression that is squarely within the focus of Parliament's valid objectives and that which does not invoke the need for criminal sanction (***Keegstra*** at 772). No measures "clearly superior to the measures currently in use" have been identified. Accordingly, there has been no failure on the part of the Crown to satisfy the minimal impairment test.

iii) The Proportionality of Effects

129. In the course of her section 1 analysis, at paragraph 213, Rowles J.A. found the deleterious effects of s. 163.1(4) to be: (1) it substantially impairs freedom of expression and personal privacy; (2) core values enshrined in the ***Charter*** of liberty, autonomy and privacy are "trenched" upon deeply; (3) a vast range of harmless material is captured by the breadth of the present definition; and (4) there is an unacceptable chilling effect on legitimate and non-harmful expression. [A.R., XII, 2186]

130. It is respectfully submitted that in narrowing her focus to only the class of materials said to demonstrate the overbreadth of the provision, with the exception noted below, Rowles J.A. entirely overlooked the section's salutary effects. While acknowledging that subs. (4) serves the objective of preventing the harm to children associated with child pornography, Rowles J.A. found its beneficial effect in this respect is limited. Any beneficial effect in preventing the risk of indirect harm to children is limited to the proscription of material involving actual children. Finally, subs. (4) "contributes in some measure to law enforcement efforts in this area." [A.R., XII, 2187]

131. While agreeing with the last finding, the appellant respectfully submits that there are numerous flaws in Rowles J.A.'s analysis which lead to the others. Firstly, with respect to the deleterious effects, the appellant re-iterates that Rowles J.A. paid insufficient attention to the nature of the expression in issue. Whether one adopts the view that this factor, combined with the tremendous importance of the legislative objectives, operates to facilitate the justification of the s. 2(b) infringement or whether one takes the other approach where it is easier to demonstrate that the beneficial effects outweigh the negative effects, a finding in favour of the Crown should result.

132. Secondly, Rowles J.A. gives more weight to the perceived negative effects than they warrant. The impact of s. 163.1(4) upon freedom of expression and personal privacy is neither needlessly nor unacceptably severe. In terms of any invasion of personal privacy, an

individual's right to privacy in his home is not absolute. Reliance on the exemption of private conversation in ***Keegstra*** and in ***Taylor***, and upon the lawfulness of the private possession of **adult** pornography in ***Butler***, does a disservice to the analysis. Section 163.1(4) does not prevent anyone from, as McEachern C.J.B.C. puts it, "imagin[ing] or mus[ing] about sex with children" or conversing privately about such thoughts. And given the evidence concerning the risk of indirect harm posed by the private possession of child pornography, it simply is not possible to conclude, as Dickson C.J.C. did in ***Taylor***, that the fact that the expressive activity in question is not intended to be public minimizes the risk of harm. The use of child pornography to entice a child into sexual activity usually involves a private communication. Any resultant sexual abuse of the enticed child usually takes place in private.

133. Further with respect to the severity of any invasion of privacy occasioned by a police investigation into an offence contrary to subs. (4), Rowles J.A. failed to consider that any such "invasion" would only take place after a judicial officer had made a prior determination that the law enforcement interests of the state were, in the particular situation, demonstrably superior to the affected individual's interest in being left alone, even when this individual interest is at is highest because it is in relation to a private residence. Finally, in placing as much emphasis as she did on one's right to expression of their individuality in a private setting, Rowles J.A. neglected to consider how disconsonant the exercise of those individual rights, in this context, is with other equally important values and principles in a free and democratic society. More specifically, she failed to properly factor into the analysis how inimical the possession of all child pornography is to the dignity, autonomy and privacy of the children directly abused and exploited in its creation and distribution and of all children put at risk through its use.

134. Rowles J.A. is mistaken when she concludes that the class of material posited in her hypothetical examples poses no risk of harm to children. Too many preconditions and/or assumptions, all of which may be unfounded or unwarranted in a given situation, make up her conception of private, innocent possession, a state of affairs no form of legislation can assure.

And far from there being a "large range of expression" and a "vast range of conduct" captured, in the opinion of Rowles J.A. (at para. 203 and 205), unnecessarily, there is likely to be instead, as McEachern C.J.B.C. correctly described them (at para. 288 and 292), infrequently arising "anomalies" where "someone might offend against this section without any intention of harming children." Such an "extremely remote possibility" is an insufficient basis upon which to strike down the provision. [A.R., XII, 2181-82, 2221, 2223-24]

135. Significantly, in reaching the conclusions she did, Rowles J.A. gave no consideration to the prevention of the societal harm wrought by the possession of child pornography. She failed to appreciate the inadequacy of the protections provided by s. 163 and by s. 163.1(2) and (3). Finally, she did not consider the important market eradication objective behind subs. (4) in particular. The evidence establishes that child pornography is a widely available and highly sought after commodity. There is a demand for this material in its diverse forms and the demand is created by those who possess it. The importance of attacking each and every stage from production through distribution to private possession has long been recognized and cannot now be ignored. It was the view of the Fraser Committee that sanctions against possession of child pornography were important "because they attack the market for such materials and arguably reduce the incentive to produce it" and would "act as some deterrent" to its production and exchange. This view was shared by the U.S. Supreme Court in ***Osborne*** and by the Ontario Court of Appeal. In ***Stroempl*** at 191 the Court said:

> The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense possessors such as the appellant instigate the production and distribution of child pornography - and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observations that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place. [See also ***Hilton*** at 70; ***Jewell and Gramlick***]

136. As to the alleged "chilling effect" on expression in this area, no evidence has been lead to show that s. 163.1 has had this effect upon truly legitimate and valuable expression. What is "chilled" is more than merely unpopular or unconventional. The BCCLA argued in the Court of Appeal that there is value in film producers, photographers, artists and writers "challenging existing norms and promoting the evolution of attitudes towards sex." In fact, given its definitional limits and available defences, anyone can do exactly that without offending against the provision. When erotic self portraits, videos of one's own love making, writings of imagined sexual offences and drawings or paintings of sexual acts offend against s. 163.1(4), they do so because of their explicit content and their sexual or persuasive purpose and because they lack any artistic merit or legitimate purpose. Taken at its highest, the social value of such material is non-existent. Its value to the individual seeking to fulfill himself is confined to base and prurient interests. At worst, such material, like all forms of child pornography, is intrinsically harmful and demeaning to children, the most vulnerable members of our society.

137. The expression chilled by s. 163.1(4) stands in marked contrast to cases like ***Zundel*** where McLachlin J. expressed concern over the suppression of "a broad range of legitimate and valuable speech." The deterrence of the expression described in the hypotheticals does not deprive society of an important means of examining human sexuality. Sexual activity is obviously part of the human experience and the relations between the sexes are a legitimate matter for public discussion. The same cannot be said about the discussion of sexual relations between generations which, on the evidence, lies at the heart of paedophilia and hebephilia.

138. The seriousness of the breach of freedom of expression is further reduced by the very preconditions Rowles J.A. attaches to the hypothesized class of material. This material is intended to be closely kept by its creator/possessor. It is never to be disseminated in any way. Society is therefore not deprived of "any beneficial exchange of ideas." (***Keegstra*** per McLachlin J. dissenting at p. 850)

139. The appellant submits that the following are the true beneficial effects of s. 163.1(4) that ought to have been considered by Rowles J.A. at para. 214:

(1) the deterrence of the production and distribution of child pornography;
(2) the deterrence of the use of child pornography in the grooming and inciting processes;
(3) the fulfillment of Canada's international obligations to prevent the exploitive use of children, not only here in Canada but around the world;
(4) the prevention of societal harm;
(5) the deterrence of the reinforcement of offence facilitating beliefs in sexual deviants (cognitive distortions); and,
(6) it is an essential element in police enforcement capabilities.

140. The deleterious effect of subs. (4) is that it inhibits the freedom of a small number of individuals to direct and shape their own self-fulfillment by restricting their ability to give expression to their most intimate thoughts, imaginings and conduct in the form of a permanent record, either visual or written. If this can truly be regarded as detrimental, when one considers that the effect of this record is to sexualize and objectify children for the gratification of deviant sexual interests recognized to be harmful to children and to society, it should be given minimal weight.

141. It is the salutary effects of s. 163.1(4) that are substantial and profound and the deleterious effects that are limited. Even if the balance between them were to be evenly weighted, which the appellant submits it is not, then the balance must tip in favour of the protection of children. The appellant adopts the position taken by McEachern C.J.B.C. at para. 291:

> I stress that the balancing is not just between the admitted risk of harm to children by simple possession against a right of innocent enjoyment of child pornography. Rather, the balancing is between the risk of harm to both children and society as a whole by simple possession, against the right of every person, innocent or nefarious, to possess any kind of child pornography for innocent, predatory or commercial purposes. Possession for purely innocent purposes cannot be assured by any legislation and it is impossible to know how much harm will be done to children by allegedly innocent possession. Future harm to children cannot be predicted with any degree of accuracy. Any real risk of harm to children is enough to tip the scales in favour of the legislation in the context of this case. [A.R., XII, 2223]

V. Conclusion

142. One measure of a society is how it protects its most vulnerable members (per Iacobucci and Cory JJ., ***Zundel***, at 830). A declaration that s. 163.1(4) is of no force and effect will have the undesirable consequence of permitting the accumulation and maintenance of inventories of child pornography in all its forms, much of which involves direct harm to children through its production and distribution. Increased demand will result in increased production. It is inevitable that more material of every variety will end up in the hands of individuals who already believe that having sex with children is acceptable and who will use it to further that objective. Police enforcement capabilities will be eroded. Many of these same detrimental effects will result even if the basic proscription is upheld but limited to the narrow category of material advanced by the respondent and endorsed by the majority of the Court of Appeal.

143. Our society should resist the harmful attitudinal changes that will result from the sexual objectification of children. We should look upon children as individuals deserving of our respect, not as objects available for our sexual gratification. We must promote a shared understanding amongst Canadians that children need our protection from sexual abuse and exploitation, not our indifference towards it.

144. The social and individual costs of protecting children against the harm created by the possession of child pornography are few. The same cannot be said of dispensing with or restricting the protection offered by s. 163.1(4). The provision is a reasonable limitation prescribed by law that is demonstrably justifiable in a free and democratic society.

PART IV – NATURE OF ORDER REQUESTED

145. The appellant 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: It is not necessary to answer this question.

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.

146. It is respectfully requested that the appeal be allowed, the acquittals on the two counts of possession of child pornography be set aside, and that the trial of the Respondent be ordered to proceed on all four counts of the indictment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

John M. Gordon
Counsel for the Appellant

Kate Ker
Counsel for the Appellant

September 27, 1999
Vancouver, B.C.

NOTICE TO THE RESPONDENT

Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.

LIST OF AUTHORITIES

Page

LIST OF AUTHORITIES (CONT'D)

LIST OF AUTHORITIES (CONT'D)

Endnotes

[1] Since 1992 INTERPOL has had a Standing Working Party which includes law enforcement officials from 29 different countries actively collaborating in their efforts to prevent and investigate the sexual exploitation of children.

[2] (a) **Commission studies** {the Badgley Report (1984), the Fraser Report (1985), and the Rogers Report (1990)}; (b) **attempts at legislation** {since 1977 as noted in the Fraser Report at pp. 585-587; Bill C-114 (1986), Bill C-54 (1987) and two private members bills – C-396 (1993) and one other from 1993 - predating Bill C-128 (1993)}; and (c) **Parliamentary review** {the 12th Report of the House of Commons Standing Committee on Justice and the Solicitor General "Crime Prevention in Canada: Toward a National Strategy," February 1993 at pp. 31-32; the 17th Report of the House of Commons Standing Committee on Justice and the Solicitor General "Four Year Review of the Child Sexual Abuse Provisions of the *Criminal Code* and the *Canada Evidence Act* (Formerly Bill C-15)," June (1993) – Supp A.B., III, pp. 428-431; Proceedings of the House of Commons Standing Committee on Justice and the Solicitor General, June 8, 10 and 15, 1993, Supp. A.B. II p. 254 to III, p. 513; Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs June 21 and 22, 1993, excerpts contained in Supp Rec, II, Tab 2}. The Commission studies and the Parliamentary review considered a large amount of research and heard from a number of witnesses.

[3] In "Commercial Sexual Exploitation of Children: The Health and Psychosocial Dimensions," a background paper prepared by Dr. Mark Belsey of the World Health Organization, for the 1996 United Nations World Congress Against Commercial Sexual Exploitation of Children, the author notes the following:

> The health and behavourial science literature from developed countries notes that the sexual experience of children portrayed in pornography is accompanied by a sense of betrayal, guilt, feelings of worthlessness and rage. A number of studies indicate that sexually exploited children are at high risk of becoming sexual exploiters of children as adults. [footnote omitted] Children in "sex rings" show a variety of somatic and psychosocial symptoms during the exploitation, at the time of disclosure and in the posttraumatic stages. Somatic complaints include urinary infections, headaches and stomach aches. Behavioural problems at the time of exploitation include difficulty in school, acting-out behaviours and sudden changes in behaviour. At the time of disclosure children display signs of post-traumatic stress, including re-experiencing the traumatic events, diminished responsiveness to the environment. [A.R., X, 1844-45]

The international scale of the problem is evidenced by the existence of groups such as Cyberangels monitoring the Internet for child pornography; ECPAT ["End Child Prostitution, Pornography and the Trafficking of Children for Sexual Purposes" formerly "End Child Prostitution in Asian Tourism"]; Beyond Borders [Ensuring Global Justice for Children]; and MAPI [Movement Against Pedophilia on the Internet]. All point to the magnitude of the problem and the concern of the harmful effects of the sexual exploitation of children, including use in child pornography. The international community has also demonstrated its commitment and concern about this alarming problem by holding conferences and congresses such as the 1996 "World Congress Against Commercial Sexual Exploitation of Children" held in Stockholm, Sweden; the 1998 "Out from the Shadows: International Summit of Sexually

Exploited Youth" held in Victoria, B.C.; and, the UNESCO 1999 Expert Meeting "Sexual Abuse of Children, Pornography and Paedophilia on the Internet: An International Challenge" held in Paris, France on January 18-19, 1999.

4 The sexual abuse and exploitation of children in child pornography is as much a matter of equality as it is an offence against human dignity and a violation of human rights. Just as Cory J. wrote in ***R. v. Osolin***, [1993] 4 S.C.R. 595 at 669, that sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women," the same can be said in respect of children and their abuse and exploitation in and through child pornography. These human rights are protected by ss. 7 and 15 of the *Charter*.

5 As recently noted by L'Heureux-Dubé J. in ***R. v. Ewanchuk***, [1999] 1 S.C.R. 330, at para. 73: "Our Charter is the primary vehicle through which international human rights achieve a domestic effect (see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Keegstra*, [1990] 3 S.C.R. 697). In particular, s. 15 (the equality provision) and s.7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity." This Court recently reaffirmed the importance of Canada's international obligations informing the contextual approach and noted that international human rights law is of critical influence to the interpretation of the scope of rights included in the *Charter* in ***Baker v. Canada (Minister of Citizenship and Immigration)***, (July 9, 1999) S.C.C. # 25823 at para. 69-71.

6 The public good defence was defined by the Ontario Court of Appeal in ***R. v. American News Co. Ltd.*** (1957), 118 C.C.C. 152 at 161 as "necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature or art or other objects of general interest."

APPENDIX "A"

Comparable Legislation in Other Jurisdictions

1. At the international level the United Nations has taken considerable steps to combat the burgeoning problem of the exploitation of children. On November 20, 1989 the General Assembly of the United Nations adopted by resolution 44/252 the *Convention on the Rights of the Child* (the "*UNCRC*"). The guiding principle and underlying concept of the *UNCRC* is the "best interests of the child." The *UNCRC* seeks to address the special needs of children who, due to their physical, mental and emotional immaturity, need special protection and care as the most vulnerable members of society. Canada became a signatory to the *UNCRC* on May 28, 1990 and ratified the *UNCRC* on December 13, 1991. By signing and ratifying the *UNCRC* Canada signaled its deep commitment to the rights of children and accepted the challenge involved in realizing those rights. The *UNCRC* provides a baseline international legal standard for the protection of children from sexual exploitation.

2. In addition to the international obligations created by the *UNCRC*, a number of countries have implemented legislation that prohibits the possession of child pornography.

3. The following countries have legislation which specifically prohibits possession of child pornography: 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]

4. The following countries have legislation which specifically prohibit possession of child pornography in written form: Australia, New Zealand and Ireland. [A.R., X, 1695-1778; XI, 1990-2000]

5. The following countries have legislation which include computer generated images and/or computer graphics and games in the definition of child pornography: United States, United Kingdom, Australia, New Zealand and Ireland. [A.R., IX, 1575-1659; X, 1695-1792; XI, 1990-2000]

United States:

6. The United States has taken increasing measures since 1977 to combat the ever growing problem of child pornography.[1] Under U.S. federal law, Title 18, Part 1, Chap. 110 of the United

[1] For a general overview see Foreman, J. "Can We End the Shame? – Recent Multilateral Efforts to Address the World Child Pornography Market," (1990-91) 23 *Vanderbilt Journal of Transnational Law* 435 [A.R., X, 1793-1810].

States Code deals with the criminal offences relating to the "sexual exploitation and other abuse of children." Numerous amendments to the Code occurred in 1984, 1988, 1990, 1994, 1996, and 1998. Significant amendments to 18 U.S.C., Chap. 110, occurred in 1996 in the form of the *Child Pornography Protection Act 1996* (the "*CPPA*") and in 1998 in the form of the *Protection of Children from Sexual Predators Act 1998* (the "*PCSPA*"). The *CPPA* was passed in part to address the manipulation issue involved in computer generated depictions, or "morphing." It expanded the definition of child pornography, contained in s. 2256(8) of 18 U.S.C., to include images which are "or appear to be" of minors engaging in sexually explicit conduct, or are presented in a manner which conveys the impression that the material contains such a depiction. The United States Code does not include the written word in the materials that constitute child pornography.

7. The definition of "sexually explicit conduct," found in s. 2256(2) of 18 U.S.C., includes actual or simulated sexual acts as well as the "lascivious exhibition of the genitals or pubic area of any person." [18 U.S.C. s. 2256(2)(E)] The term "minor" is defined as any preson under the age of 18 years at s. 2256(1). The term "identifiable minor" is also included and defined at s. 2256(9).

8. Simple possession of child pornography is an offence contained in s. 2252(a)(4)(B) of 18 U.S.C. Until October 1998 prohibited possession was defined as "knowingly possesses 3 or more books, magazines periodicals, films, video tapes, or other matters which contain any visual depiction. . ." On October 30, 1998 the *PCSPA* was passed which amended s. 2252(a)(4)(B) to amend prohibited possession of "3 or more" to "1 or more." The amendment was included to reflect the United States' "Zero Tolerance" for possession of child pornography.

9. Before the adoption of the *CPPA* the U.S. federal law was directed at the production, distribution and possession of visual depictions of sexually explicit conduct that portrayed actual children. Congress became concerned, however, that advances in technology allowed purveyors of child pornography to produce visual depictions that appear to be of children engaged in sexual conduct but without using children at all, thus placing such depictions outside the scope of the federal law. After holding hearings and considering the matter for a year, Congress passed the *CPPA* as part of the Omnibus *Consolidated Appropriations Act* signed by President Clinton on September 30, 1996. Congress explained, in detailed legislative findings contained within the statute, the rationale for including visual depictions of what appear to be children engaging in sexually explicit conduct [commonly referred to as "morphing"]. Virtual depictions were found to be as troubling as actual depictions because, as Congress found, "child pornography is often used as part of a method of seducing other children into sexual activity." [See *CPPA* s. 2(3) and (8) contained in United States Senate Report 104-358, August 27, 1996, and also the *Child Pornography Prevention Act,* Pub. L. No. 104-208, div. A, tit. I, S. 121. 110 Stat. 3009-26, subs. 1(3) and (8). [A.R., IX, 1576, 1582-83, 1589-91, 1628-31] Congress determined that "a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." *Ibid.*

England:

14. In England, the relevant legislation dealing with child pornography is found in the *Protection of Children Act 1978* and s. 160 of the *Criminal Justice Act 1988*, both as amended by ss. 84 and 86 of the *Criminal Justice and Public Order Act 1994*. Essentially, these provisions prohibit the production, distribution and possession of indecent photographs and pseudo-photographs. [A.R., X, 1779-1792] The term "indecent" is not defined in the legislation but has been by the jurisprudence. The term "child" is defined in s. 7(6) & (8) of the *Protection of Children Act 1978* to mean a person under, or who appears to be under the age of 16.

Sweden[2]*:*

15. In Sweden, new legislation on extended criminal liability for association with child pornography was to be proclaimed in force on January 1, 1999. Child pornography will be dealt with primarily under the *Penal Code*, Chapter 16, s. 10a. Almost all association with child pornography images will constitute an offence. This includes possession. The legislation applies to all kinds of media including the electronic environment. Sanctions for possession do not extend to artistic depictions rendered, so long as the picture is not available for public consumption.

16. "Child pornography" is defined as a depiction of a child in a pornographic picture. It extends to images beyond involvement in sexual activity of any kind to include pictures that, in any way, depict a child in a manner likely to appeal to the sexual urge. Thus, it is intended to include nudist films when close-ups of nude children are explicit.

17. A "child" is defined as a person who is not yet fully sexually matured or who, when it is apparent from the picture or the circumstances of the picture, is under 18 years of age.

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[2] The appellant was unable to obtain a copy of the Swedish legislation. However, included in this Appendix is a copy of a December 2, 1998 Memorandum issued by the Swedish Ministry of Justice announcing the "new Swedish Legislation on Child Pornography."

REGERINGSKANSLIET

Ministry of Justice
Stockholm, Sweden

Division for Criminal Law
Erica Hemtke
Direct phone no +46 8 405 46 52

Memorandum

2 December 1998

The new Swedish Legislation on Child Pornography

On January 1, 1999 new legislation on extended criminal liability for association with child pornography will enter in to force. From that date only ordinary statute law (mainly the Penal Code, Chapter 16, Section 10 a) will apply to child pornography. Virtually all association with child pornography images, including possession, will constitute a criminal offence. The legislation will apply to all kinds of media and therefor also to the electronic environment. In addition, import and export of child pornography will be prohibited.

The prohibition on depiction and possession does, however, not apply to a person who draws, paints or otherwise in a similar artisan way produces a picture, if the picture is not intended to be made available to others.

The definition of child pornography is a depiction of a child in a pornographic picture. There is no demand that the picture depicts a child involved in a sexual activity of any kind. Also a picture that, in any other way, depicts a child in a way likely to appeal to the sexual urge, is regarded as child pornography. This can, for example, be the case in nudist films when close-ups of nude children are explicit.

According to the new legislation on child pornography a child is defined as a person who is not yet fully sexually matured or who, when it is evident from the picture or the circumstances concerning the picture, is under 18 years of age.

A person committing a child pornography offence will be sentenced to imprisonment for at most two years or, if the crime is of a petty nature, to a fine or imprisonment for at most six months. A person committing an aggravated child pornography offence will be sentenced to imprisonment for not less than six months and at most four years. In

judging whether the offence is aggravated, special consideration shall be given to e.g. whether it has been conducted on a large scale, for profit reasons or whether the children in question have been subjected to particularly ruthless treatment.

Negligent acts of dissemination will also be punishable if they occur in the course of commercial operations or if they otherwise are committed for profit reasons.

However, punishment for child pornography offence shall not be imposed if the act, in view of the circumstances, is defensible. This exception basically applies to research and formation of public opinion purposes. It will therefore be possible for e.g. journalists and NGOs to posses child pornography for the sole purpose of formation of public opinion.

According to the new legislation punishment for attempt to commit a child pornography offence that is not of a petty nature or attempt to commit or preparation of an aggravated child pornography offence shall be imposed. Punishment shall also be imposed for instigation of or accessory (aiding and abetting) to any child pornography offence.

The National Criminal Investigation Department is responsible for police work in cases of sexual exploitation of children, including child pornography. The Special Objects Unit, which is responsible to the Criminal Intelligence Service, deals with such cases. This division informs Interpol when an investigation reveals data with international ramifications. The National Criminal Investigation Department has issued an action plan for international police work on child sex offences and child pornography. The Department's tasks, as outlined in the action plan, are:

- to document child sex abuse and the circulation of child pornography
- to collaborate with other organisations
- to establish cross-matching procedures for child pornography material
- to further develop these procedures
- to assist with searches and provide investigation resources
- to prevent child sex abuse with the help of liaison officers
- to assist with training.

According to a law on criminal liability for persons who maintain electronic bulletin boards, the supplier of such a service has an obligation to prevent further distribution of a message if it is obvious that the message contains child pornography. This law entered into force on May 1, 1998

10. Two critical legislative findings of Congress are contained in subs. 1(8) and (9). These findings recognize that the effects of virtual pornography (on both the child molester and the victimized child) are the same as where an actual child is used. [A.R., X, 1576, 1589-91, 1628-31]

Australia:

11. In Australia, at the federal level the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995* contains a National Classification Code which defines the category to which various materials are ascribed. The RC or Refused Classification category is, generally speaking, the "child pornography" category. The Schedule to the National Classification Code defines the RC category for publications, films and computer games to include materials that "describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like a child under 16 (whether the person is engaged in sexual activity or not)" - paragraph 1(b) of each of the Tables [s. 1 Supp. Rec., Tab 9]. The words used are broad enough to include images of children engaged in sexual activities as well as images of children in sexually provocative poses (whether naked or clothed). The words used are quite wide, and key matters are that the depiction is of a child under 16 (or a person who looks like such a child), and is likely to cause offence to a reasonable person. The definition of publication includes the written word.

12. All States and Territories of Australia have incorporated into their criminal offence provisions offences that either mirror the wording of the National Classification Code or paraphrase the provisions. All have made possession of such materials an offence. The Australian legislation is reproduced in the Appellant's Record at X, 1695-1753.

New Zealand:

13. In New Zealand, the *Films and Video Classification Act 1993* deals with the censorship of films, videos, books and other publications. "Publication" is defined in s. 2 of the Act and includes the written word. In s. 3(2)(a) of the Act a publication is deemed to be "objectionable material" if it "promotes or supports, or tends to promote or support, - the exploitation of children, or young persons, or both, for sexual purposes." Pursuant to s. 3(3)(b) a publication may be classified as objectionable if it "exploits the nudity of children, or young persons, or both." Subsection (4) outlines the factors to be considered where a publication under s. 3(3) is being reviewed for classification as possibly objectionable. Under s. 131 of the Act possession of objectionable material is an offence. The New Zealand legislation is reproduced in the Appellant's Record at X, 1754-1778.

APPENDIX "B"

- CONSOLIDATED STATUTES OF CANADA
9 - C
1 - Controlled Drugs and Substances Act
1 - PART I OFFENCES AND PUNISHMENT
- Sentencing
1 10(2) Factors to be considered
...public place usually frequented by persons under the age of eighteen years, or ...
...purpose of trafficking, to a person under the age of eighteen years; ...
...used the services of a person under the age of eighteen years to commit, or involved such ...
1 - Corrections and Conditional Release Act
1 - PART II CONDITIONAL RELEASE, DETENTION AND LONG-TERM SUPERVISION
- Detention during Period of Statutory Release
1 129(9) "sexual offence involving a child" « infraction d'ordre sexuel à l'égard d'un enfant »
...the Criminal Code involving a person under the age of eighteen years that was prosecuted by way ...
...(d) an offence involving a person under the age of eighteen years under any of the following ...
...(e) an offence involving a person under the age of eighteen years under any of the following ...
17 - Criminal Code
6 - PART V SEXUAL OFFENCES, PUBLIC MORALS AND DISORDERLY CONDUCT
- Sexual Offences
1 153(2) Definition of "young person"
...years of age or more but under the age of eighteen years. ...
- Offences Tending to Corrupt Morals
1 163.1(1) Definition of "child pornography"
...is or is depicted as being under the age of eighteen years and is engaged in or ...
...the anal region of a person under the age of eighteen years; or ...
...counsels sexual activity with a person under the age of eighteen years that would be an offence ...
1 163.1(5) Defence
...not depict that person as being under the age of eighteen years. ...
1 170 Parent or guardian procuring sexual activity
...parent or guardian of a person under the age of eighteen years who procures that person for ...
...years of age or more but under the age of eighteen years. ...
1 171 Householder permitting sexual activity
...premises who knowingly permits a person under the age of eighteen years to resort to or to ...
...years of age or more but under the age of eighteen years. ...
1 172(3) Definition of "child"
...who is or appears to be under the age of eighteen years. ...
4 - PART VII DISORDERLY HOUSES, GAMING AND BETTING
- Procuring
1 212(2) Idem
...prostitution of another person who is under the age of eighteen years is guilty of an indictable ...
1 212(2.1) Aggravated offence in relation to living on the avails of prostitution of a person under the age of ei
...avails of prostitution of another person under the age of eighteen years, and who ...
1 212(4) Offence in relation to prostitution of a person under the age of eighteen years
...services of a person who is under the age of eighteen years or who that person believes ...
...or who that person believes is under the age of eighteen years is guilty of an indictable ...
1 212(5) Presumption
...represented to the accused as being under the age of eighteen years is, in the absence of ...
...been committed, that the person was under the age of eighteen years. ...
1 - PART VIII OFFENCES AGAINST THE PERSON AND REPUTATION
- Assaults
1 273.3(1) Removal of child from Canada
...years of age or more but under the age of eighteen years, with the intention that an ...
...(c) under the age of eighteen years, with the intention that an ...
2 - PART XV SPECIAL PROCEDURE AND POWERS
- General Powers of Certain Officials
1 486(2.1) Testimony outside court room
...the trial or preliminary inquiry, is under the age of eighteen years or is able to communicate ...
1 486(4) Mandatory order on application
...first reasonable opportunity, inform any witness under the age of eighteen years and the complainant to
1 - PART XXI APPEALS—INDICTABLE OFFENCES
- Right of Appeal
1 675(2.1) Persons under eighteen
...*(2.1) A person who was under the age of eighteen at the time of the commission ...
1 - PART XXII PROCURING ATTENDANCE
- Videotaped Evidence

1 715.1 Evidence of complainant or witness
...the complainant or other witness was under the age of eighteen years at the time the offence ...
2 - PART XXIII SENTENCING
- Imprisonment for Life
1 745.1 Persons under eighteen
...pronounced against a person who was under the age of eighteen at the time of the commission ...
1 745.1(3) Young offenders
...or second degree murder who was under the age of eighteen at the time of the commission ...

1 - F
1 - Firearms Act
1 - TRANSITIONAL PROVISIONS
- Licences
1 121(1) Minors' permits
...Act to a person who was under the age of eighteen years; ...

1 - G
1 - Geneva Conventions Act
1 - SCHEDULE VI
1 PART II HUMANE TREATMENT
...be pronounced on persons who were under the age of eighteen years at the time of the ...

1 - I
1 - Immigration Act
1 - PART III EXCLUSION AND REMOVAL
- Conduct of Inquiries
1 29(4) Minors and incompetents
...held with respect to any person under the age of eighteen years or any person who, in ...

1 - M
1 - Merchant Seamen Compensation Act
1 - SCALE OF COMPENSATION
1 31(1) Amounts of compensation
...(i) for each child under the age of eighteen years, and ...
...(i) to each child under the age of eighteen years, and ...

1 - N
1 - National Defence Act
1 - PART II THE CANADIAN FORCES
- Enrolment
1 20(3) When consent of parent or guardian required
...(3) A person under the age of eighteen years shall not be enrolled without ...

1 - R
1 - Royal Canadian Mounted Police Act
1 - INTERPRETATION
1 2(1) "child" «enfant»
...to the contrary, appears to be under the age of eighteen years; ...

2 - W
2 - War Veterans Allowance Act
2 - INTERPRETATION
1 2(1) "dependent child" «enfant à charge»
...(a) under the age of eighteen years, ...
1 2(1) "orphan" «orphelin»
...(d) under the age of eighteen years, ...

1 - Y
1 - Young Offenders Act
1 - TRANSFER
1 16.1(1) Detention pending trial — young person under eighteen
...where a young person who is under the age of eighteen is to be proceeded against in ...