File No.: S.C.C. 27376

**IN THE SUPREME COURT OF CANADA**

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF BRITISH COLUMBIA)

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**APPELLANT**

**AND:**

**JOHN ROBIN SHARPE**

**RESPONDENT**

# FACTUM OF THE INTERVENOR
## BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION


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## PART I STATEMENT OF FACTS

1. The British Columbia Civil Liberties Association (the "BCCLA") adopts the Statement of Facts of the Respondent.

## PART II ISSUES ON APPEAL

2. The issues on appeal are:

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

3. The issue on this appeal is not whether Parliament was constitutionally entitled to enact legislation to protect children or youth from harms occurring in, or caused by, the producing, printing, publishing, distributing, or circulating of child pornography. Nor is Parliament's ability to prohibit the possession of child pornography for the purposes of publication or distribution at issue. The issue is whether the constitution permits Parliament to impose criminal sanctions for the simple possession of written or visual representations of the sexuality of children or youth, in circumstances where the Crown cannot prove that the accused had the intent to publish, distribute or otherwise circulate the material at issue, and where no children or youth may have been harmed in its production.

## PART III - ARGUMENT

### A. Introduction

4. The BCCLA submits that the *Charter* poses no constitutional obstacle to the criminalization of the possession of photographs, films, videos or other pictures that involve the sexual exploitation of children or youth in their production. The making of such pictures involves the commission of a criminal offence, and their possession and distribution represents a continuing, serious violation of the dignity of the children or youth employed in their production. The prevention of the sexual violation or exploitation of children and youth is a state objective of pressing and substantial importance. A possession offence limited to pictures involving harm in their production would constitute a minimal and proportional impairment of s.2(b) freedoms and privacy rights. If Parliament had limited the application of s. 163.1(4) of the *Criminal Code* to pictures produced through the actual exploitation of real children or youth, then its constitutional validity, in our submission, would not be in doubt.

5. The definition of "child pornography" in s. 163.1(1) extends well beyond pictures produced through the actual exploitation of children or youth. This overbreadth is particularly problematic in the context of a simple possession offence. The Crown seeks to justify the proscription of the possession of all sexual representations (written and visual) of persons who are or appear to be under 18, including those that involved no harm, criminal conduct, or even the use of a real child or youth in their production, and in the absence of evidence that the possessors of the images intend to share them with others. The Crown asserts that the possession of visual representations of any sexual activity of persons under 18, including legal consensual sexual activity of youth aged 14 to 17, may induce criminally exploitative behaviour in pedophiles. Against this line of argument, we respectfully submit it is a basic tenet of our political and legal traditions that an offence of simple possession of expressive material cannot be justified only on the basis of apprehended future harm.

6. An offence of simple possession of expressive materials necessarily entails a profound violation of personal privacy and of the section 2(b) freedoms of thought, belief, opinion and

expression. State efforts to coerce individuals into holding or abandoning thoughts, beliefs, or opinions -- no matter how evil or repugnant they may be if acted upon -- are the hallmarks of a totalitarian society and antithetical to a free and democratic society. For this reason, simple possession offences of expressive material should only be upheld in extraordinary circumstances where the law in question is restricted to preventing *direct* harm in the production of the material that cannot be effectively combatted through other means.

7. Parliament's use of the stigmatizing label "child pornography" to describe all of the expression captured by s. 163.1(1) is unfortunate and potentially misleading. Much of what is captured by s. 163.1(1) is not "child pornography" as that term is commonly understood. As Madam Justice Rowles observed, "the use of the evocative and clearly emotive phrase *child pornography* in the definition section must not be allowed to displace or pre-empt a careful inquiry into what materials would be captured by it." (para. 178)

**B. Overview of the BCCLA's Position**

8. Other than s. 163.1(4) and the 1914 Order-in-Council identified in Southin J.A.'s judgment (at para.89), the BCCLA is not aware of another Canadian criminal law, either current or historical, that provides for a sentence of incarceration for the mere possession of expressive material. To our knowledge, this is the first opportunity for Canadian courts to consider the constitutionality of an offence of simple possession of written or visual representations.

9. The BCCLA submits that the constitutional infirmities of s. 163.1 lie in the breadth of the definition of "child pornography" when coupled with the extraordinary nature of a simple possession offence. It is respectfully submitted that the definition of "child pornography" in s. 163.1(1) constitutes an overly broad limitation on constitutionally protected rights and freedoms in the context of s. 163.1(4) in at least three respects.

10. First, s. 163.1(1) is overly broad by capturing the possession of visual or written representations of the sexuality of children or young persons that are purely the products of their creators' imaginations and involve no children or youth in their production. This includes stories, diary entries, paintings, drawings, sketches, sculptures and other

representations which may be self-authored and which are never disseminated.

11. Second, s. 163.1(1)(a) overreaches by including all pictures that record explicit sexual acts (including one's own) involving youth or young adults who are or appear to be aged 14 to 17. Many sexual acts engaged in by persons who are or appear to be aged 14 to 17 are perfectly legal and are not exploitative, as defined by the *Criminal Code* or otherwise.

12. Third, s. 163.1(4) is overly broad in not exempting from prosecution children and youth involved in the production of sexual images (including the creation of representations of themselves). It is not proportional to the goal of protecting children and youth from sexual exploitation to criminalize those who may be victims of exploitation and assault.

13. The problems of definitional overbreadth are acute when they form the basis of a charge of simple possession. When, for example, a person can be charged with an offence simply for possessing the products of his or her imagination, or a record of his or her legal sexual activity, the state is attempting to control thoughts or behaviour in a manner fundamentally inconsistent with an individual's dignity, privacy and section 2(b) freedoms.

## C. The Unprecedented Nature of the Violation of Section 2(b) Freedoms by a Simple Possession Offence

14. The Crown correctly concedes that s.163.1(4) violates s.2(b) of the *Charter*. Nevertheless, it is submitted that neither the legislation nor the submissions of the Crown take into account the extraordinary nature of a criminal offence of simple possession of expressive material.

15. The *Criminal Code* contains a number of provisions that target expressive activity, yet apart from s. 163.1(4), none of them contains a simple possession offence. The absence of simple possession offences in our criminal law is a reflection of the weight accorded to the values of privacy and freedom of thought in the political and legal traditions of free and democratic societies. As stated by Dickson C.J. in *Big M Drug Mart*, "an emphasis on individual conscience and individual judgment lies at the heart of our democratic political tradition." Further, in *R. v. Mills* this Court recently stated, "...privacy concerns are at their strongest

where aspects of one's individual identity are at stake, such as in the context of information 'about one's lifestyle, intimate relations or political or religious opinions': *Thompson Newspapers"* [cite omitted].

*R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 346 per Dickson C.J.
*R.* v. *Mills*, [1999] S.C.J. No. 68 at p.29 per McLachlin and Iacobucci JJ.

16. Criminalizing the simple possession of expressive material that may have caused no harm in its production and may never be published, distributed or otherwise circulated to anyone, constitutes "an extreme invasion of the values of liberty, autonomy and privacy protected by the rights and freedoms enshrined in the *Charter*." (per Rowles J.A. at para.171)

17. In the context of offence provisions which restrict expression, the extraordinary nature of s.163.1(4) is readily apparent. For example, as Southin J.A. observed (para. 94), unpublished writings cannot constitute the crime of treason. Rather, treasonous ideas must manifest themselves in "overt acts" before they constitute an offence (s.46(1)(d) *Criminal Code*). Similarly, the recording of seditious thoughts is not a crime. The offence of sedition requires public expression (s.59, s.61 *Criminal Code*). Even then, nothing short of an intention to incite the public to violence, public disorder, or unlawful conduct against the government will support a conviction, because "[f]reedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life." (See *Boucher* v. *The King*, [1951] S.C.R. 265 at 288 per Rand J.)

18. Likewise, defamatory libel requires publication to a person other than the person defamed (s.298 *Criminal Code*; *R.* v. *Lucas*, [1998] 1 S.C.R. 439). The offence of wilful promotion of hatred requires the public communication of statements. The possession of racist or hateful ideas is not a crime, nor is expressing them in private conversation (s.319 *Criminal Code*; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697). Possessing materials advocating genocide is not an offence (s.318 *Criminal Code*). The offence of spreading false news, declared unconstitutional in *R.* v. *Zundel*, [1992] 2 S.C.R. 731, was restricted to the wilful publication of statements likely to cause injury or mischief (s.181 *Criminal Code*). Finally, the simple possession of obscene

material is not a crime (s.163 *Criminal Code*; *R.* v. *Butler*, [1992] 1 S.C.R. 452).

19. Likewise, the law of attempt requires more than mere preparation (s.24 *Criminal Code*).

See *R. v. Deutsch,* [1986] 2 S.C.R. 2 at 19-26

20. The planning and preparation of criminal acts gives rise to apprehended future harm. The possession of treasonous, seditious, libelous, hateful or violent sexual expression may likewise give rise to an apprehension that future harmful acts will be committed. The risk of harm arises from the possibility that the expressive material may be circulated in the future, may be lost, stolen or otherwise inadvertently distributed, or that the possessors' beliefs or attitudes may be influenced, so becoming more likely to commit criminal acts. None of the above provisions sanction simple possession; the risk of harm is indirect.

21. To our knowledge, apart from the 1914 Order-in-Council and the law at issue, Parliament has never considered the risk of such "indirect harms" (as opposed to direct harm caused to persons in the production of the material) from the simple possession of expressive materials to provide an adequate rationale for overriding the fundamental rights of privacy and freedoms of thought and expression. This is because the inevitable and serious violations of privacy rights and fundamental freedoms authorized by a possession offence outweigh the speculative risks of future harm. To deprive persons of their physical liberty for recording their "bad thoughts" on the grounds that their recorded thoughts may pose a risk of future harm to others bears, in Southin J.A.'s words, "the hallmark of tyranny" (para. 95). It is precisely this line of reasoning that was used to justify the Spanish Inquisition in the 15th and 16th centuries, witch hunts in early modern Europe, and the imprisonment this century of intellectuals and "counter-revolutionaries" during, for example, the Stalinist purges in the Soviet Union or the "Great Leap Forward" in China. This reasoning ignores the distinction in Western political thought between self-regarding and other-regarding actions. In Mill's famous formulation, the "appropriate region of human liberty" is the sphere in which an individual's thoughts or actions affect no other person "directly, and in the first instance". In the absence of direct harm to others, law and morality demand "liberty of conscience in the

most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects..."

J.S. Mill, *On Liberty* at p.16. See also pages 62, and 83-84
Ronald Dworkin, *Taking Rights Seriously* at p.263-264

22. It is respectfully submitted that prohibiting the simple possession of expressive materials on the grounds that they pose a risk of future "indirect harm" can never be acceptable in a free and democratic society. To do so would be to threaten the limits that have been imposed for centuries on the criminal law of attempt, sedition, treason, and libel, and more recently, on the criminal law of obscenity and hate propaganda. On the other hand, it is respectfully submitted, where "direct harm" has been caused to children and youth in the production of sexual imagery, and the traditional offences of production, distribution and sale have proven ineffective in combatting the harm in production, then Parliament has an extraordinary rationale that can justify a possession offence. It is respectfully submitted that a basic flaw in the design of s.163.1 is that it fails to heed the legitimacy of the "direct harm" rationale, and fails to recognize that the "indirect harm" rationale is not sufficient to justify an offence of simple possession of expressive materials in a free and democratic society.

23. In constitutional terms, the radical legal significance of a simple possession offence lies in its impact not only on the freedom of expression, but on the freedoms of thought, opinion and belief. Section 2(b) protects these freedoms whether or not one's thoughts and opinions are communicated to others. The forming of an opinion generally occurs prior to its expression, and the recording of one's thoughts is distinct from communicating them to others.

24. The section 2(b) jurisprudence has thus far been restricted to protecting freedom of public expression and freedom of the press because Canadian governments ordinarily restrict expression through laws or policies that seek to reduce the perceived harmful effects of public communicative activity. In the context of the criminal law, this is ordinarily accomplished through offences proscribing the publication, distribution, sale, or possession *for the purposes of distribution*, of the targeted expression. A *simple* possession offence,

however, enables the state to target the allegedly harmful effects of thoughts, opinions and private recording of thoughts and opinions, in the absence of any evidence of an intention to distribute or sell.

25. Professor Thomas Emerson, in his leading text on freedom of expression, summarized the American constitutional position as follows:

> "It seems fully accepted that the government cannot subject any person to direct criminal punishment because of his beliefs.... In a democratic society the government should not attempt to reach back into the realm of belief for the purposes of controlling future action. When it tries to do so the First Amendment should afford complete protection."
>
> T. I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970) at 32 and 41

26. This Court has confirmed that a central purpose of the *Charter*'s fundamental freedoms is to protect the individual from coercive state attempts to interfere with individual beliefs and opinions. As Chief Justice Dickson wrote in the *Big M* case,

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.
>
> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 346

27. In this formulation, and in all of the jurisprudence upholding limitations on the exercise of expressive freedoms, Canadian courts have suggested that the state can justify limitations on fundamental freedoms when acts or the public exercise of freedoms (their "manifestation") pose a demonstrable risk of harm to others. The jurisprudence reflects a basic trend away from status offences in our criminal law towards offences based on the harmful effects of conduct. It is not a crime in free and democratic societies to be a particular kind of person, be it a revolutionary, a pauper, or, for that matter, a pedophile. It is respectfully submitted that the Constitution provides all persons with absolute protection from punishment for the mere

possession of thoughts or opinions which the state alleges pose a risk of future harm to others. Punishing persons for possessing a private record of their own "bad thoughts" is never acceptable in a free and democratic society.

28. A simple possession offence further violates individual privacy, dignity and conscience by compelling the disclosure in a public trial of intimate thoughts, beliefs and opinions that the accused may or may not have recorded but chosen not to disclose to anybody. In Emerson's words, "[a]ny official demand that an individual disclose his beliefs constitutes an unwarranted invasion of personal integrity and creates an atmosphere incompatible with freedom of thought."

Emerson, op cit., at 31

29. In summary, s.163.1(4) violates s.2(b) in an extraordinary manner that has yet to be directly considered in this Court's *Charter* jurisprudence. Section 163.1(4) confronts Canadian courts for the first time with the task of determining the constitutionality of a law that criminalizes not only expressive activities aimed at an audience, but also activities which privately record peoples' own thoughts, beliefs and opinions, and which are not communicated to anyone nor intended to be communicated to anyone. This unprecedented foray into "thought control" represents a profound violation of privacy rights and s.2(b) freedoms.

**D. Section 163.1(1)'s Impact on Section 2(b) Freedoms**

30. The Appellant argues in its factum that it is "inarguable" that child pornography "bears little relation", indeed is "positively antithetical", to the core values that underlie s.2(b) (para.51). This is one of the reasons, in the Appellant's view, that this Court "should accord a high degree of deference" to Parliament in reviewing a child pornography law (para.91). There would be merit in this submission if the definition of child pornography in s.163.1(1) was limited in its application to pictures that record the sexual exploitation of actual children, or if s.163.1 did not contain a simple possession offence. However, s.163.1(1) extends well beyond imagery of actual exploitation.

31. This Court has acknowledged the legitimacy of suppressing depictions of explicit sex that "employ children in their production" (*R. v. Butler*, [1992] 1 S.C.R. 452 at 485). Section 163.1 takes a significant step beyond *Butler* in suppressing the simple possession of written and visual representations which may include stories, diary entries, paintings, drawings, or sculptures that are purely the product of their creators' imaginations and thus do not employ children in their production. By definition, the production of imaginative texts and images is closely related to the value of individual self-realization that underlies s.2(b). This is true whether or not the creator is blessed with artistic or literary talent.

32. This Court's jurisprudence supports the view that the degree of protection accorded to public expression will be determined, in part, by reference to the value of the expression at issue. On the other hand, our political and legal traditions accord equal and absolute protection to all private thoughts, opinions and beliefs that have not been communicated to others, no matter how offensive or repulsive others may consider them to be. For this reason, it is respectfully submitted that cases where this Court has upheld laws that restrict public expression on the ground that the state was entitled to act to prevent a reasoned apprehension of future harm are distinguishable when assessing the constitutionality of a simple possession offence.

## E. The Section 1 Analysis

### (i) Pressing and Substantial Objective

33. The legislative history of s.163.1 indicates its objective is to prevent the sexual exploitation of children and young persons. Mr. Pierre Blais, the Minister of Justice responsible for the introduction of s.163.1 (Bill C-128), described the objective of s.163.1 as follows:

> ...the purpose of a law specifically addressing child pornography is to deal with the sexual abuse and exploitation of children. With the proposed legislation, we are conveying an important message, that children need to be protected from the harmful effects of child sexual abuse and exploitation, and that they are not appropriate sexual partners.
>
> *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 34th Parl., 22 June 1993, p.51:43
> See also: *House of Commons Debates*, June 3, 1993, p.20328

34. So long as Minister Blais' comment that "they are not appropriate sexual partners" is understood as describing persons under the age of 14, or youth aged 14 to 17 only when exploitation, commercial exchange or assault is involved, the objective he identifies meets the "pressing and substantial" requirement of the *Oakes* test.

**(ii) Introduction to the Proportionality Test**

35. If s.163.1(4) were limited in its application to pictures that involved the sexual exploitation of children or youth in their production, it is submitted the government would be able to meet its burden of establishing that the legislation passes the *Oakes* proportionality test.

36. The real issue, the BCCLA submits, is whether the suppression by s.163.1(4) of expression that did <u>not</u> involve the sexual exploitation of children and youth in its production is rationally related to the objective of preventing the sexual exploitation of children and youth, whether it constitutes the least restrictive means of pursuing that objective, and whether the beneficial effects of proscribing such material outweighs the severe impact on freedom of thought and privacy. It is at the proportionate effects stage where, it is respectfully submitted, a simple possession offence of expressive material will always fail the s. 1 test if the material proscribed is not limited to material which caused harm in its production.

**(iii) Principle of Overbreadth**

37. A law will fail the *Oakes* proportionality test if it goes beyond what is necessary to accomplish its objectives. For example, in *Heywood*, at issue was a provision of the *Code* that made it a crime for a person previously convicted of a sexual offence against children to loiter near schools or recreational areas. Cory J., for the majority, found the provision used means that were broader than necessary to accomplish the state's objective. Hypothetical applications of the law indicated its effects were arbitrary or disproportionate.

*R. v. Heywood*, [1994] 3 S.C.R. 761

38. The importance of a law's objective cannot compensate for its patent overbreadth. This Court has struck down legislation with the most pressing and substantial objectives when the means

adopted are not proportional to the objective. Such objectives have included the protection of children from sexual offenders (*R.* v. *Heywood*, above), the protection of female children (under 14) from the harm caused to them by premature intercourse (*R. v. Hess*, [1990] 2 S.C.R. 906) and the protection of persons from the health risks of tobacco use *(RJR-Macdonald Inc. v. Canada*, [1995] 3 S.C.R. 199).

**(iv) The Legislative History of Section 163.1: Evidence of Overbreadth**

39. A review of the legislative history is included under the proportionality test because it provides insight into the law's overbreadth. The legislative history reveals two important facts: 1) the focus of most Parliamentarians and Committees which studied the issue of "child pornography" was on visual depictions of sexual activity that use children in their production; and 2) Bill C-128 was rushed through Parliament in the dying days of the Mulroney government with last-minute amendments not subject to proper (or any) scrutiny.

40. The focus of the legislators' comments was the need to criminalize the simple possession of pictures that involved a record of the sexual exploitation of real children. The legislative and committee debates during the passage of Bill C-128 (which added s.163.1 to the *Criminal Code*) include little or no discussion of whether the possession of *creative representations of imaginary children* increases the risk of sexual exploitation of children, nor of the concern that the law should not capture children themselves, nor the concern that the law captures the private recording of legal sexual activity of 14 to 17 year olds.

*House of Commons Debates*, June 3, 1993, pp.20328-36 (second reading); June 15, 1993, pp.20863-83 (third reading);
*Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, 34th Parl., 8 June 1993, 10 June 1993 and 15 June 1993
*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 34th Parl., 21-22 June 1993

41. Since the mid-1980s, debate over child pornography has been heavily influenced by two comprehensive reports on the subject. The *Report of the Committee on Sexual Offences Against Children and Youth* (the "*Badgley Report*") and the *Report of the Special Committee on Pornography and Prostitution* (the "*Fraser Report*"), were both referred to regularly in the

legislative and committee debates leading to the passage of Bill C-128.

*Report of the Committee on Sexual Offences Against Children and Youths* (*Badgley Report*) (1984), volume 1, pp.99-103; volume 2, pp.1079-1285
*Report of the Special Committee on Pornography and Prostitution* (*Fraser Report*) (1985), volume 2, pp.561-650

42. Both reports clearly stated that the objective of suppressing child pornography is to prevent the exploitation of real children in the production of sexually explicit images. Neither report identified creative sexual representations of imaginary children as a problem contributing to the sexual exploitation of children. The *Badgley Report* recommended the creation of a child pornography offence that would be limited to visual depictions that used children or youth in their production. Concerning the inadequacy of existing obscenity law to address child pornography, the Committee stressed:

> *In reference to child pornography, it is the circumstances of its production, namely, the sexual exploitation of young persons, which is a fundamental basis for proscription.* [emphasis in original]

*Badgley Report*, *supra*, volume 1 at p.101

43. Though the committee restricted its recommendation to materials involving the exploitation of children or youth in their production, committee members were sharply divided on whether the creation of a simple possession offence was in any event justifiable. See *Badgley Report*, *supra*, volume 1 at p.102

44. Like the *Badgley Report*, the Fraser committee's research revealed an "absence of a really effective and direct sanction against persons who involve children in pornography." Therefore, the committee found "it is necessary to provide direct criminal sanctions which would deter the use of children in the production of pornography." The committee recommended the creation of a number of sexual offences in order to "specifically address the use of young persons in the production of sexually explicit material." [emphasis added]

*Fraser Report*, *supra*, volume 2 at 584-5, 629

45. During committee debate over Bill C-128, the overbreadth problems posed by the inclusion of representations that do not use children in their production were raised by Mr. Alan Borovoy of the Canadian Civil Liberties Association and a number of other witnesses appearing before the *Standing Committee on Justice and the Solicitor General* on what turned out to be its last day of hearings on June 15, 1993. These witnesses received no response to their concerns. In fact, after considering the submissions of Mr. Borovoy and others for a mere half-hour, the committee introduced and passed a number of amendments that expanded the scope of Bill C-128. Within several hours, the committee's report was before the House of Commons. It contained a list of amendments without any supporting rationale or evidence. One of the amendments that day was the inclusion of paragraph 163.1(1)(b) concerning written materials. Later that evening, debate on third reading of the Bill commenced, and it passed unanimously several hours later on June 15, 1993.

*Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, 34th Parl., 15 June 1993, pp.106:5-48
*House of Commons Debates*, June 15, 1993, pp.20863-83 (third reading and passage)
B. Blugerman and L. May, "The New Child Pornography Law: Difficulties of Bill C-128", (1993) 4 Media & Comm. L. Rev. 17, 19-26
D. Lyon, "A Bad Law on Child Pornography", *Globe and Mail*, 22 June 1993, p.A23

46. During Third Reading debate, several Members of Parliament expressed their frustration with the lack of time to carefully consider the bill. They stated that they would vote in favour nonetheless, because a flawed bill dealing with "child pornography" was better than no bill.

*House of Commons Debates*, June 15, 1993, pp.20881-82, 20871

47. It is noteworthy that no consideration of the fact that a simple possession offence departs from our political and legal traditions can be found in the committee hearings or Parliamentary debates. Members of Parliament made passing references to the possibility that Bill C-128 was inconsistent with the *Charter*. As one Member stated,

"...Do we not do something for fear of a charter challenge or do we do something and then see what takes place afterward?
...In the area of child pornography, I think we opt for the second alternative and do

what we think is right. If it does not pass the test then we will try to correct it later on."

*House of Commons Debates*, June 15, 1993, p.20881 (Mr. G.S. Rideout)

48. Rather than being "a notable example of the dialogue between the judicial and legislative branches" about the appropriate scope of *Charter* rights and freedoms in the context of a simple possession offence, Members of Parliament engaged in little or no debate, leaving the "dialogue" largely to the judiciary. In stark contrast to the legislative response at issue in this Court's recent decision in *Mills*, it is respectfully submitted that the nature and quality of the legislative process that led to the passage of Bill C-128 does not merit judicial deference. To defer to Parliament, after Parliament has deferred to the judiciary, is to foreclose dialogue about the unprecedented and profound violations of privacy rights and s.2(b) freedoms occasioned by a simple possession offence.

*R.* v. *Mills*, [1999] S.C.J. No.68 at 38, para.125 per McLachlin J. (see also paras.56-9)

**(v) The Principle of Harm in Production Can Justify a Possession Offence**

49. Given the extreme nature of the invasion of s.2(b) freedoms and privacy interests by any provision that makes it a crime to simply be in possession of expressive material, it could be argued, as Southin J.A. did (para.95), that such offences can never be accepted in a free and democratic society. Support for this view can also be found in the United States Supreme Court's 1969 ruling in *Stanley v. Georgia*. The Court found the simple possession of obscene representations to be constitutionally protected from state interference. The Court stated that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."

*Stanley v. Georgia*, (1969) 394 U.S. 557, 22 L Ed 2d 542 at 550

*Osborne v. Ohio*, 109 L Ed 2d 98 (1990), dissenting Judgment of Brennan J., concurred in by Stevens J. and Marshall J. at p.128-132

50. Further, as Justice Shaw indicated in his reasons (at para. 44 and 47), in upholding s.319

(hate propaganda) and s.163 (obscenity) of the *Criminal Code* as justifiable restrictions on freedom of expression, this Court placed significant reliance on the exclusion of private communications from the hate propaganda prohibition, and the exclusion of a simple possession offence from the obscenity prohibition.

*R. v. Keegstra*, [1990] 3 S.C.R. 697
*R. v. Butler*, [1992] 1 S.C.R. 452

51. Notwithstanding the compelling arguments against the criminalization of the mere possession of images or text, the BCCLA submits that an offence of simple possession of expressive material may be a demonstrably justifiable limitation on s.2(b) freedoms in extraordinary circumstances. It is respectfully submitted that a *simple possession* offence can survive constitutional scrutiny when two conditions are met.

- First, the more traditional and less invasive offences of importing, printing, producing, distributing, or possessing for any of these purposes must be incapable of accomplishing the objective of preventing the harm in production. The *Badgley* and *Fraser Reports* do provide evidence that these less invasive offences in the context of the obscenity provision of the *Criminal Code* had proven ineffective in stemming the production and exchange of pictures of children and youth engaged in explicit sexual activity.

- Second, the scope of the offence must be limited to objects or materials which must be criminalized in order that the pressing and substantial objective of eliminating harm in the production of the material can be pursued meaningfully.

**(vi) The Application of the Direct Harm Principle**

52. It is submitted that the sexual offence provisions of the *Criminal Code* should provide the starting point for drawing the lines between harmful and constitutionally protected kinds of sexual expression involving children or youth. The provisions of the *Criminal Code* can be taken to represent and define community standards on the questions of who is a child or youth, and what constitutes exploitation, in the context of sexual relations.

53. The *Criminal Code* deems sexual relations with a person under the age of 14 to be a form of assault or exploitation. Once a young person has reached the age of 14, the question of whether sexual activity is exploitative or not is determined by the presence or absence of consent, and in the case of youth aged 14 to 17 the presence or absence of a commercial exchange, or a relationship of trust, authority or dependence.

54. Therefore, a constitutionally valid possession offence could prohibit the possession of pictures that used persons under the age of 14 in their production and recorded those children in sexual poses or engaged in explicit sexual activity. It could also prohibit the possession of pictures that used youth aged 14 to 17 in their production, recorded those youth in sexual poses or engaged in explicit sexual activity, and involved coercion, exploitation of a relation of trust, authority or dependence, or a commercial exchange (i.e. criminal activity). Pictures that record the sexual victimization of actual children or youth involve harm in their production, and their very existence represents an ongoing affront to the dignity of the children or youth depicted. Moreover, the legislative history of s.163.1, including the findings of the *Badgley Report* and *Fraser Report*, provides evidence that the offences in the obscenity provision of the *Criminal Code* had proven ineffective in targetting the production and distribution of these images. In these circumstances, the necessity of employing a possession offence to achieve the important objective of preventing the sexual exploitation of children and youth in the production of sexual imagery justifies the serious invasion of privacy rights and s.2(b) freedoms.

55. On the other hand, it is submitted that the simple possession offence in s.163.1(4), by extending to the possession of material that caused no harm in its production, does not constitute a minimal impairment of privacy rights or expressive freedoms. The definitions of child pornography in s.163.1(1) extend to products of the imagination such as written texts, drawings, paintings or sculptures, and to images of 14 to 17 year old youth engaged in lawful sexual activity (that is, non-commercial, non-exploitative, consensual sexual activity). These materials cannot be presumed to have caused harm to anyone in their production. To meet the minimal impairment test, therefore, the Crown must demonstrate that their proscription is

demonstrably justified by the need to prevent the speculative risks of future, indirect harm that cannot be effectively combatted through other less intrusive means. As Rowles J.A. noted (at paras.182-6), the evidence introduced at trial, and relied upon by Parliament in passing Bill C-128, fails to establish that the possession of materials causing no harm in their production adds significantly to the risk of future harm. Nor does the evidence demonstrate that other less invasive measures have proven inadequate in addressing these risks.

56. In any event, even if the minimal impairment test is satisfied with respect to materials causing no harm in their production, it is respectfully submitted that the extreme and certain negative effects on personal privacy and the freedoms of thought, opinion, belief and expression caused by a possession offence always outweigh the speculative risks of future harm arising from the possession of material that caused no harm in its production. In other words, it is respectfully submitted that the proportionate effects stage of the section 1 analysis cannot be satisfied by an offence of simple possession of expressive material that caused no harm in its production. The salutary effects of such an offence lie in its uncertain, speculative impact in reducing future harm. In the absence of a possession offence, a range of less invasive measures are available to target activity once the risk of future harm goes beyond speculative possibility. These include the offence of possession for the purposes of distribution, the law of attempt if an accused has taken steps beyond mere preparation of sexual exploitation of a child or youth, and the offence of invitation to sexual touching if an accused has actually embarked on the "grooming process".

57. On the other hand, the negative effects of an offence of simple possession of expressive material include the certain and serious violation of privacy rights and s.2(b) freedoms discussed above. The violation of these rights and freedoms is equally serious whether or not the creator of the representation has artistic talent. The defence of "artistic merit" in s.163.1(6) does nothing to alleviate the serious violation of the section 2(b) freedoms of those lacking the skill (or who are not trying) to produce work with artistic merit.

58. The case law from the United States Supreme Court is consistent with the BCCLA's position that s.163.1(4) is overly broad in extending to visual and written representations that did not

cause harm (or do not appear to have caused harm) to children or youth in their production. The Court has twice upheld child pornography laws limited to sexual pictures that used children or youth in their production. In *Ferber*, the Supreme Court upheld a provision concerning material depicting children engaged in a "sexual performance". In *Osborne* the majority upheld a possession offence restricted to materials involving actual children.

> *New York v. Ferber*, 458 U.S. 747 (1982)
> *Osborne v. Ohio, supra*

59. While the U.S. Supreme Court has yet to rule on the issue, the American jurisprudence also supports the constitutionality of a simple possession offence that extends to images that are "virtually indistinguishable" from images that did in fact involve harm in their production. In 1996, Congress passed the *Child Pornography Prevention Act*, which includes in its definitions images that "appear to be of a minor engaging in sexually explicit conduct". Congress was responding to the increasing sophistication of computer graphics technology and "morphing" techniques that enable the production of realistic images that may not involve children in their production. The primary rationale for sanctioning these images is that their proscription is necessary to enable the effective prosecution of pictures that *did* involve harm in their production. If the state had to prove that pictures that appear to have used children in the production of sexual imagery did in fact use children, then effective prosecution would be hampered. This rationale was accepted recently by the First Circuit Court of Appeals. Notably, Judge Bownes, for a unanimous Court, confirmed the limited scope of the Act:

> It follows that drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the reach of the Act. By definition, they would not be *virtually indistinguishable* from an image of an actual minor.
>
> *U.S. v. Hilton*, (1999) 167 F.2d 61 (U.S. Court of Appeals, First Circuit) at p.72
>
> See also, Debra D. Burke, "The Criminalization of Virtual Child Pornography: A Constitutional Question", (1997) 34 Harvard J. Leg. 439; Adam J. Wasserman, "Virtual.child.porn.com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography", (1998) 35 Harvard J. Leg. 245 at 269-70

60. It may be that the Crown could produce evidence that would demonstrably justify the inclusion, in a simple possession offence, of images that appear to have involved harm in their production, as Congress did after extended debate in 1996. Neither the evidence presented to the learned trial judge nor the legislative history of s.163.1 directly addresses the issue of images that appear to have involved harm in their production. Even if the Crown could justify a simple possession offence of "virtual" child pornography, the definitions in s.163.1(1) would remain overly broad. The definitions extend to written or visual representations that caused no harm, nor appear to have caused harm, to anyone in their production. It is respectfully submitted that these overly broad features of s.163.1(1) have not been demonstrably justified by the Crown as minimal or proportional impairments of privacy rights or s.2(b) freedoms in the context of a simple possession offence.

61. Finally, it is respectfully submitted that the failure to include an exemption in s.163.1(4) for children and youth used in the production of sexual imagery that forms the basis of a charge is not proportional to (and in some cases not rationally connected to) the legislative objective of protecting children and youth from sexual exploitation. As Rowles J.A. noted, the possession offence "applies with equal force to the very persons it is purportedly designed to protect." (para.193) Punishing child victims for possession is a disproportionate reaction to the goal of eliminating exploitation. Rational connection is missing in the case of children or youth who privately self-author written or visual representations caught by s.163.1(1).

## PART IV NATURE OF ORDER SOUGHT

62. That the first constitutional issue be answered in the affirmative. That the second constitutional issue be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED December 30, 1999, Vancouver, B.C.

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## LIST OF AUTHORITIES



**Academic and Other Authorities:**

## LIST OF AUTHORITIES (CONT'D)



**Legislative Materials:**

HER MAJESTY THE QUEEN
APPELLANT

and

JOHN ROBIN SHARPE
RESPONDENNT

IN SUPREME COURT OF CANADA

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

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Bill Purchase 12:50 pm

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