Court File No. 27376

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOHN ROBIN SHARPE

Respondent

FACTUM OF THE INTERVENOR THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Tory Tory
Suite 3000, Maritime Life Tower
P.O. Box 270
Toronto-Dominion Centre
Toronto, Ontario
M5K 1N2

Patricia D.S. Jackson
Tel: (416) 865-7323

Tycho M.J. Manson
Tel: (416) 865-7827
Fax: (416) 865-7380

Of Counsel for the Intervenor
The Canadian Civil Liberties Association

Lang Michener
Suite 300
50 O'Connor Street
Ottawa, Ontario
K1P 6L2

David M. Attwater
Tel: (613) 360-8600
Fax: (613) 231-3191

Ottawa Agent for the Intervenor

TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO:

JOHN M. GORDON
KATE KER
Ministry of the Attorney General
602-865 Hornby Street
VANCOUVER, British Columbia
V6Z 2G3

Tel: (604) 660-1126
Fax: (604) 660-1142

Counsel for the Appellant

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
OTTAWA, Ontario
K2P 0A2

Robert E. Houston Q.C.
Tel: (613) 236-9965
Fax: (613) 235-4430

Ottawa Agent

GIL D. McKINNON, Q.C.
RICHARD C.C. PECK, Q.C.
Barristers and Solicitors
610-744 West Hastings Street
VANCOUVER, Bristish Columbia
V6C 1A5

Tel: (604) 669-0208
Fax: (604) 669-0616

Counsel for the Respondent

GOWLING, STRATHY & HENDERSON
Barristers and Solicitors
2600-160 Elgin Street
OTTAWA, Ontario
K1N 8S3

Brian A. Crane, Q.C.
Tel: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agent

FACTUM OF THE INTERVENOR
THE CANADIAN CIVIL LIBERTIES ASSOCIATION

TABLE OF CONTENTS

Court File No. 27376

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

JOHN ROBIN SHARPE

Respondent

FACTUM OF THE INTERVENOR, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I - STATEMENT OF FACTS

The CCLA

1. The Canadian Civil Liberties Association ("CCLA") is a national organization constituted to promote respect for and observance of fundamental human rights and civil liberties, and to defend, extend and foster the recognition of those rights and liberties.

2. The CCLA is intervening in this appeal to provide the Court with submissions concerning the constitutionality of s. 163.1(4) of the *Criminal Code* from the wider perspective of an organization committed to the protection of fundamental rights and freedoms beyond the circumstances of this particular case. The CCLA has a particular interest in the present appeal, as it is the CCLA's position that s.163.1(4) constitutes an infringement on the rights of all Canadians to freedom of thought, belief, opinion and expression as guaranteed in section 2(b) of the *Charter of Rights and Freedoms* (the "Charter") which cannot be saved under section 1 of the Charter. The CCLA therefore submits that the trial judge and the majority in the British Columbia Court of Appeal were correct in finding that s. 163.1(4) constitutes an infringement on section 2(b) of the Charter that cannot be saved under section 1 and that this appeal ought to be dismissed.

3. The CCLA accepts the facts as stated in the appellant's factum, subject to the additional points raised in the respondent's factum, which the CCLA also accepts.

PART II - POINTS IN ISSUE

4. It is common ground that s. 163.1(4) of the *Criminal Code* limits freedom of expression and is therefore *prima facie* an infringement of section 2(b) of the Charter.

5. The second question in issue is whether s. 163.1(4) is a reasonable limit on the right to freedom of expression, pursuant to section 1 of the Charter. The CCLA submits that it is not, and that it was properly struck down in the courts below.

6. The CCLA's concerns with s. 163.1(4) are, in the main, premised on the subsection's infringement of s. 2(b) of the Charter. However, insofar as this appeal raises an issue concerning section 7 of the Charter, the CCLA also submits that s.163.1(4) infringes the rights to fundamental justice and privacy guaranteed under s. 7 of the Charter, and the infringement cannot be saved under s. 1.

PART III - ARGUMENT

Overview of the CCLA's Submissions

7. The CCLA's submissions in this appeal may be summarized as follows:

1) The definition of child pornography in s. 163.1(1) (qualified by the defences set out in s. 163.1(6)) upon which section 163.1(4) rests is both overbroad and vague, such that it cannot survive analysis under the test established by this court in *R. v. Oakes*. This is especially so when the definition is applied to mere possession, as opposed to sale or distribution.

2) S. 163.1(4) exposes individuals to criminal prosecution merely for the possession of expressive material. As such it represents so profound a violation of the freedom of thought, belief, opinion and expression that it is incapable of being saved under s. 1 as a reasonable limit on Charter rights. At its root, the legislation violates a realm of individual privacy -- a realm in which individuals should be free to think what they want and to look at whatever expressive material they want -- in which the state has no business interfering.

8. These submissions are based on the following grounds:

- S. 163.1(4) of the Criminal Code is fundamentally flawed by the definition (including the defences) of child pornography on which it is premised and the range of conduct thereby criminalized. The section is both overbroad and vague and is deficient at most stages of

Oakes analysis. The vagueness of the offence means that the prohibition is not prescribed by law. The overbreadth of the offence means that the legislation is not rationally connected to its purported objective, and it fails to infringe on the affected rights as little as possible. Finally, all these difficulties with the offence amount to significant deleterious effects which far outweigh the purported salutary effects of the legislation, especially given the inconclusive state of the evidence on those salutary effects.

- A criminal prohibition on the right to possess expressive material affects more than just the Charter right to freedom of expression. It also affects the other rights enumerated in s. 2(b) -- the rights to freedom of thought, belief and opinion. It has rarely fallen to the courts to consider the scope of those rights, perhaps because state regulation of such private matters would be an extreme step even in totalitarian societies, let alone in a free and democratic society. However, the present appeal raises those issues. In addition, and as part of raising those issues, this appeal raises the issue of the right to privacy, and the relation between privacy and freedom of expression. The CCLA submits that a prohibition on expression is far more intrusive where an individual engages in thought, belief, opinion or expression on a strictly private level.

The importance of the right to freedom of expression

9. It is conceded by the appellant that s. 163.1(4) infringes the freedom of expression guaranteed by section 2(b) of the Charter. The right to freedom of expression is at the very core of our free and democratic society.

10. This Court has repeatedly reaffirmed the centrality of the right to free expression in a free and democratic society, even in circumstances where the right to free expression may conflict with other fundamental constitutional values. In such circumstances, the courts must strike a balance that fully respects both rights.

> *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 at 877, per Lamer C.J.C.
>
> *Irwin Toy Limited v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 968-69
>
> *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336

11. The CCLA's position, in part, is that the breadth of expression captured by s. 163.1 includes much which cannot be said to be far from the core values of s.2(b) -- including political advocacy, works of imagination and self-expression. Given the scope of the expression captured by s.163.1, it would not be appropriate for the Court to diminish its scrutiny of s. 163.1(4) at any stage of its analysis on the basis of the argument that the expression captured by the subsection is far from the core of the values of s. 2(b) of the Charter.

R. v. Lucas, [1998] 1 S.C.R. 439

The definition of child pornography is both overbroad and vague

12. While it is only subsection (4) of s. 163.1 that is formally at issue in this appeal, subsection (4) necessarily rests upon the definition of child pornography which is contained in subsection (1). Thus, consideration of the constitutionality of subsection (4) necessarily entails consideration of the scope of the definition of child pornography. It is submitted that Madam Justice Rowles, in the Court of Appeal, was correct in addressing the issues raised by the "definition" subsection, although that subsection was not formally in issue, and in finding that it could not survive scrutiny under the *Oakes* test.

Appeal decision at para 177 et seq.

13. From the inception of s. 163.1 as part of Bill C-128, the CCLA has maintained that the definition of child pornography in s. 163.1(1) is fatally flawed because it is both overbroad and vague. It is overbroad in the sense that it captures material that is not pornographic and poses no harm or risk of harm to minors or to anyone else. It is vague in two senses: it contains terms which are inherently subjective and it contains a defence that is not capable of objective formulation.

Testimony of Alan Borovoy on behalf of the CCLA before the House of Commons Committee considering Bill C-128, Appeal Record, vol. V at 773-779

14. The CCLA accepts that Parliament may legitimately enact legislation that is aimed at preventing harm to minors that is a direct result of child pornography. The CCLA shares the widespread public abhorrence for the sexual abuse of minors, and the CCLA acknowledges the possible permissibility of criminal sanctions in connection with material that involved -- or was held out as involving -- the unlawful abuse of *real* children. For that reason, a law which defines child pornography as visual

representations of unlawful sexual abuse of actual children, or visual representations which hold themselves out as depicting the unlawful sexual abuse of actual minors, is not constitutionally objectionable.

15. However, s. 163.1(1) reaches well beyond such material. Subsection (1) applies not just to visual representations of persons under the age of 18 engaged in explicit sexual activity, but also applies to visual representations of persons who are merely *depicted* as being under the age of 18, and are *depicted* as engaging in explicit sexual activity. This definition therefore captures far more than material which actually shows criminal activity in the form of an adult having illegal sexual relations with a minor, or which holds itself out as such. It captures pure works of the imagination -- such as paintings, sculptures and drawings -- which did not involve the abuse of a real child.

16. The history of art abounds with examples of materials which could be defined as child pornography under the definition contained in s. 163.1(1). Examples include the classic painting of Cupid (depicted in the painting as a child) fondling the nipple of the goddess Venus, or the modern sculpture by George Segal which shows the Biblical figure Lot in a drunken state being straddled by his apparently under-age daughter, while another daughter looks on.

17. These are not hypothetical examples, in the sense that they are imagined instances of the application of s. 163.1. They are works which, at least at first instance (i.e. prior to the application of the defence contained in subsection (6)), would be captured by the definition of child pornography in s. 163.1(1) because they depict sexual activity involving persons depicted as being under the age of 18. As such, the definition is overbroad.

Borovoy testimony, Appeal Record, supra

18. The "depiction" portions of the definition would also extend to other forms of artistic expression, such as film. It is easy to conceive of a film or television production featuring an adult actor who is "depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity."

19. Moreover, s. 163.1(1)(a)(ii) includes within the definition of child pornography material in which "the dominant characteristic" is the depiction "for a sexual purpose" of the sexual organs or anal region of a person under 18. The section provides no guidance as to how the phrases "dominant characteristic"

or "for a sexual purpose" are to be interpreted. This is unsurprising, because the dominant characteristic of a work, or the purpose for which it was created, are often inherently subjective, or at least inherently contestable. This aspect of the definition is therefore inherently vague.

20. The prohibition on written or visual material which "advocates or counsels" sexual activity with a person under 18 where such activity would be an offence under the Criminal Code also suffers from vagueness. First, the section contains no explanation of the meaning of the terms "advocate" or "counsel". The counselling of a criminal offence is already prohibited in s. 22 of the Criminal Code, thus the inclusion of counselling within s. 163.1 adds nothing to the law. However, the prohibition of advocacy must be intended to encompass something other than counselling (if not, it is doubly redundant) -- including the advocacy of a position for philosophical, artistic, scholarly or other purposes.

21. Among the works thus apparently criminalized are:

(a) Vladimir Nabokov's novel *Lolita*, which could be read as advocating sexual relations between an adult male and a minor female because its narrator engages in such activities and depicts them as beautiful and praiseworthy;

(b) Plato's philosophical dialogue *The Symposium*, which includes an apparently approving discussion of "love" between older men and younger boys;

(c) Petronius's *Satyricon* and Boccaccio's *Decameron*, whose ribald humour could be taken as encouraging sexual behaviour with small children;

(d) works of scholarship such as the writings of anthropologists who have written about the sexual practices of adolescents in other cultures, and who have described such adolescents as well-adjusted and healthy;

(e) legitimate political advocacy such as an argument by adults that the age of consent for sexual activity ought to be lower, or advocacy of the availability of condoms for minors.

22. Moreover, the prohibition on advocacy does not extend to *oral* advocacy of sexual activity with a person under the age of 18 years. It therefore gives rise to the apparently absurd situation that it is illegal to possess written material advocating such activity, even if the material is never shared with anyone else, but it is not illegal to orally espouse such a view in public.

The flaw in the defence

23. Defenders of s. 163.1 point to the defence contained in subsection (6) as assurance that works which have artistic merit or an educational, scientific or medical purpose will not be captured by the definition of child pornography. But this response ignores a number of significant difficulties:

(a) Any determination of merit or of purpose -- even by courts -- is subjective especially (but not exclusively) as to what constitutes artistic merit. Many works whose artistic merit is today widely recognized were reviled or dismissed when they were originally created.

(b) The enforcement of s. 163.1 is a matter, at first instance, for the police and the Crown, rather than for the courts. The police and the Crown are simply not equipped to make the judgments that subsection (6) calls for. Unlike the courts, the police and the Crown are not obliged to hear all sides before they make their decision. A number of now-notorious examples illustrate the difficulties which face those charged with enforcement and prosecution when they are called upon to make determinations of artistic merit or legitimate purpose. A list of such examples which arose in the obscenity context is attached as Appendix "A".

(c) Even though the courts may ultimately vindicate works that have artistic merit or an educational, scientific or medical purpose, the provision, in effect, requires an individual to endure the ordeal of a criminal charge and possible trial before receiving such vindication. The resulting expense and public notoriety may make any victory in the courts pyrrhic.

(d) The section affords no protection for serious and genuine but (in the eyes of a court) unsuccessful attempts to achieve artistic standards.

24. Courts have characterized subsection (6) as an "objective" standard, suggesting merit can be measured by resort to the yardsticks of expert advice and community values. In effect, the effort to render objective what is inherently not so -- in particular, artistic merit, but also purpose, educational, scientific or otherwise -- does not achieve its objective, but produces the result that subsection (6) is incapable of protecting freedom of expression where it is most necessary. The defence will not apply to that which consensus does not recognize as meritorious -- the controversial, the novel, the expression

that is not in the mainstream. Resort to expert evidence or community standards of what constitutes artistic merit affords protection against censorship only to those whose expression represents consensus values.

25. The response to the examples in paragraph 21 that charges would never be brought with respect to such works is no more than the recognition that today (though for many of the examples not at the time of their creation) consensus values accept them as art.

26. Moreover, the subsection does not purport to protect a failed work of art -- a work which attempts to achieve artistic standards but, in the eyes of the court, does not succeed. The fact that a creator of a work is animated by an artistic purpose is insufficient to invoke the defence in subsection (6).

27. These concerns are not hypothetical. The prosecution of the Toronto artist Eli Langer, and the subsequent attempt by the Crown to maintain the seizure of his works, illustrate the difficulties faced by legitimate artists when they employ themes that appear to fall within the terms of s. 163.1(1). Langer was an artist who was charged under s. 163.1. His works depicted males who appeared to be below the age of 18 engaged in sexual activities, in some cases with adults. After many months of the ordeal of having a criminal charge hanging over Langer's head, the Crown chose not to proceed, but the Ontario government did seize Langer's works and proceeded with an attempt to obtain an order that those works be destroyed as child pornography. The court ultimately accepted a defence of artistic merit, but not before Langer was put through the ordeal of a criminal charge, the seizure of his works, and the public association of his name with child pornography.

> *Ontario (A.G.) v. Langer* (1995), 97 C.C.C. (3d) 290 (Ont. Gen. Div.), leave to appeal to S.C.C. denied (1995) 42 C.R. (4th) at 410*n*

28. As the Court found in *Langer*, one of the purposes of Langer's work was to draw attention to child sexual abuse and to lament its existence. This illustrates the point that art must be free to depict evil as well as good. Yet *Langer* shows how, under this section, an artist who creates a visual representation with an artistic intent to depict an evil such as child sexual abuse can be the target of our awesome criminal processes.

> *Ontario (A.G.) v. Langer* at 307

29. *Langer* shows that s. 163.1 poses a real danger to artists who deal with such sexual subject matters. First, these artists face a real danger of investigation, arrest and prosecution -- a disquieting ordeal. Secondly, the fact that their works were created with an artistic purpose is no guarantee that they will avoid conviction under s. 163.1. If the court cannot be persuaded that their work has artistic merit both in the eyes of expert and in the eyes of the community, they may be convicted.

30. Freedom of expression cannot viably function when those engaged in legitimate activity are forced to look over their shoulders in fear of a criminal charge.

31. In view of the above considerations, the CCLA submits that the definition of child pornography in 163.1 is both overbroad and vague. These flaws affect every aspect of s. 163.1. However, their effect on constitutional rights is especially significant with respect to subsection (4), the prohibition on possession alone, because of the special privacy issues entailed by such a prohibition.

The privacy issues raised by subsection (4)

32. It is important to bear in mind that s. 2(b) of the Charter extends to thought, belief and opinion, as well as to expression. While most of the case law under s. 2(b) has focused on instances in which the impugned law affects the *expression* of ideas, the Court must not lose sight of the extent to which the clear terms of s. 2(b) extend to thought, belief and opinion as well -- in other words, to purely private ideas that may never be expressed to anyone else, and may never have been intended to be expressed to anyone else. Expressive material in the possession of an individual falls into this category.

33. It has not been necessary for the courts to consider the scope of the protection afforded to thought, belief and opinion under s. 2(b) of the Charter, because intrusions on thought, belief and opinion are so drastic and so rare. As Peter Hogg has observed, "[t]he references to 'thought, belief, opinion' will have little impact, since even a totalitarian state cannot suppress unexpressed ideas."

> Peter W. Hogg, *Constitutional Law of Canada*, vol. 2, 3rd ed., Scarborough, Ont.: Carswell, 1992 (loose leaf) at 40.3

34. However, the criminalization of unexpressed ideas is precisely the effect of s. 163.1(4). The subsection criminalizes material in the possession of an individual even if there is no intent on the part of the individual to share that material with anyone else. Thus, the constitutional challenge to this provision requires the Court to bear in mind the scope of the other protections guaranteed in s. 2(b).

35. As this Court has observed, s. 1 of the Charter serves a dual function. It both guarantees the rights enumerated in the Charter, and it establishes that those rights may only be infringed in a manner that can be demonstrably justified in accordance with the values of a free and democratic society. Thus, section 1 is not (as it is sometimes taken to be) simply the instrument by which limitations on rights are justified. It is also a statement of the source of those rights in the values of a free and democratic society.

R. v. Oakes, [1986] 1 S.C.R. 103 at 136, *per* Dickson C.J.C.
R. v. Keegstra, [1990] 3 S.C.R. 697 at 736, *per* Dickson C.J.C.

36. In her reasons in the Court of Appeal, Madam Justice Southin drew upon this aspect of s. 1 in finding that the prohibition on possession in s. 163.1(4) was incapable of justification under s. 1. She noted that there are no laws prohibiting the mere possession of material that advocates genocide, or that is seditious, or that is obscene. (She did not add, although it is implicit in her discussion, that the propagation or distribution of such materials is or has at some time been prohibited under Canadian law.) Madam Justice Southin cited *Entick v. Carrington* (1765) 2 Wils. K.B. 275, as authority for the proposition that the thoughts, opinions and beliefs of an individual, "as disclosed by his books and papers have been thought immune from intrusion." She therefore concluded that such an intrusion, as embodied in Section 163.1(4), is so fundamental in its effect on rights and liberties that it "bears the hallmark of tyranny" and is incapable of being justified under Section 1.

Appeal Decision at para. 95

37. In effect, Madam Justice Southin held that it is essential to the values of a free and democratic society that it would never criminalize the mere possession of expressive material; when it does so, it betrays its own values. As one academic commentator has noted, in reaching this conclusion, Madam Justice Southin "took the words of s. 1 to reflect a political value so powerful that no other value could derogate from it."

Hamish Stewart, "A Judicious Response to Overbreadth: *R. v. Sharpe*," forthcoming, *Criminal Law Quarterly* at 10-11

38. Madam Justice Southin's conclusion based on s. 1 is supported by a number of statements of this Court with respect to the value of privacy. This Court has, for instance, recognized that intrusions on

privacy will entail stricter constitutional scrutiny, by virtue of their "profound significance for the public order". As Mr. Justice La Forest said in *R. v. Dyment*: "The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state."

R. v. Dyment, [1988] 2 S.C.R. 417 at 427-428

39. Furthermore, on occasions when this Court has upheld statutory provisions restricting freedom of expression, a significant factor in allowing the Court to do so was the fact that the impugned statutes did not affect purely private communications. For example, in *R. v. Keegstra*, Chief Justice Dickson drew attention to the fact that s. 319(2) of the Criminal Code does not criminalize statements made in private conversation, "indicating Parliament's concern not to intrude upon the privacy of the individual." Similarly, in *R. v. Butler*, the Court held that the fact that the obscenity provisions in s. 163 of the Criminal Code did not extend to the private viewing of obscene materials was a factor which helped to save s. 163 under the "minimal impairment" branch of the *Oakes* test. This centrality of privacy to the rights of the individual in a free society was recently underscored by this Court in *R. v. Mills*.

R. v. Keegstra, at 772-773, *per* Dickson C.J.C.

R. v. Butler, [1992] 1 S.C.R. 452 at 506

R. v. Mills, S.C.J. No. 68, November 25, 1999, at paras. 79-80

Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892 at 936-37, *per* Dickson C.J.C.

40. These authorities confirm the centrality of privacy as a value that informs and underlies the rights enumerated in the Charter. They therefore add weight to Madam Justice Southin's conclusion that a statutory provision which extends to an individual's private thoughts, opinions and beliefs cannot be justified under s. 1.

41. At the trial level, attention was drawn to the increasing prevalence and availability of child pornography on the Internet, as a factor which should assist the court in concluding that the problem of child pornography is sufficiently urgent that it justifies the infringement on s. 2(b) contained in this legislation.

Appeal Record, vol X, pp. 1811-1817, vol. XI, p. 205-206

42. If anything, the increased availability of such material on the Internet dictates increased vigilance on the part of the courts to the infringement on the right to privacy contained in this section. It is no longer the case that child pornography must be purchased from secret, clandestine sources. Anyone with access to the Internet may encounter sexually explicit materials which fall within the definition of child pornography in s. 163.1 on his or her computer. An individual might encounter such material accidentally, while searching for other materials on the Internet, or might seek out and save such material out of a desire for further understanding of the issues raised by child pornography, or even out of sheer curiosity. In other words, with the advent of the Internet, greater numbers of individuals than ever before may be in possession of materials captured by s. 163.1(1) as a result of actions which neither abuse children nor create a commercial market for such abuse, including individuals who may have downloaded such materials for legitimate purposes such as scholarship or journalism. Nonetheless, s. 163.1(4) exposes them to the risk of prosecution, conviction and imprisonment.

43. In view of these special privacy considerations, it is submitted that the effects of the flaws in the definition of child pornography in s. 163.1 are especially egregious with respect to the prohibition on possession. The law, in effect, criminalizes the purely private possession of a broad range of material that is far beyond the material which the law is intended to capture.

Section 1 analysis: subsection (4) fails to meet the "prescribed by law" test

44. Professor Peter Hogg summarizes one rationale of the "prescribed by law" head of the *Oakes* test as ensuring that citizens have "a reasonable opportunity to know what is prohibited so that they can act accordingly."

> Hogg, *Constitutional Law of Canada* at 35.7

45. In order for the courts to find that a statutory provision is prescribed by law, the provision must set out intelligible standards for the exercise of a limitation of a Charter right. A vague provision may fail to meet this aspect of the Oakes test under s. 1 (in addition to being subject to scrutiny under s. 7 of the Charter).

> *Irwin Toy Limited v. Quebec (Attorney-General)*, [1989] 1 S.C.R. 927 at 983
>
> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (hereinafter *Prostitution Reference*) at 1155, *per* Lamer J.

46. The rationale for striking down vague laws is that persons must be able to determine with some degree of assurance what activities will fall within the ambit of the criminal law. In the words of Mr. Justice Lamer (as he then was):

> It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards....
>
> *Prostitution Reference* at 1152, *per* Lamer J.
>
> *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606

47. Two aspects of s. 163.1 are vague. First, the section does not define the crucial terms "dominant characteristic" and "for a sexual purpose". Secondly, the defence contained in s. 163.1(6) relies on standards that are in principle incapable of objective formulation. As such, an individual who possesses material that is at first instance captured by the definition of child pornography in s. 163.1(1) will be unable to predict whether his possession of such material will be saved by the defence contained in subsection (6). Thus, such an individual cannot know in advance whether he is breaking the law or not. For that reason, subsection (4), when read in the light of subsections (1) and (6), does not meet the "prescribed by law" test. The criminal law requires greater certainty than s. 163.1 affords, especially when it affects a Charter right as fundamental as the right to freedom of expression.

Pressing and substantial objective

48. The CCLA agrees with the Respondent that the appropriate focus for the Court at this stage of the s. 1 analysis is the objective of the statutory provision at issue in the appeal, rather than that of the statute (or section) as a whole. The onus is therefore on the Crown to show that the objective of a prohibition on *possession* of material defined as child pornography is sufficient to justify overriding s. 2(b) rights.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at 555

49. The harm which s. 163.1 is intended to address is, it is submitted, the prevention of the criminal abuse of children. The CCLA accepts that such an objective is pressing and substantial. However, in accordance with the principle set out in *Vriend*, the Court must conduct the rest of the *Oakes* test -- and

in particular the "rational connection" component of the test -- bearing in mind that the question to be answered is whether subsection (4) can be justified in light of this purpose.

50. The Appellant suggests six distinct objectives which s. 163.1 as a whole is said to serve, ranging from the prevention of imagery which sexualizes children to the facilitation of police enforcement efforts. However, each of these purported objectives is in fact only sustainable as pressing and substantial if each is rationally and proportionately linked to the prevention of the criminal abuse of children. They are not in and of themselves pressing and substantial objectives. To be sustained, each must survive analysis under the various stages of the *Oakes* test.

The prohibition on possession is not rationally connected to the aims of s. 163.1

51. Under this head of the *Oakes* test, the Court must consider whether the legislation has been carefully designed to achieve its intended purposes.

R. v. Oakes at 139

52. In the context of s. 7 of the Charter, this court has defined an overbroad law as one in which "the means are too sweeping in relation to the objective." Analyzing a law for overbreadth requires the court to determine whether the state has used "means which are broader than is necessary to accomplish the objective."

R. v. Heywood, [1994] 3 S.C.R. 761 at 792, *per* Cory J.

53. Although this Court has analyzed the concept of overbreadth most fully in the context of s. 7, the concept of overbreadth may also be employed in determining whether an infringement of a Charter right can be justified under s.1.

R. v. Nova Scotia Pharmaceutical Society at 629-31

54. As argued above, the definition of child pornography in this section encompasses a broad range of material, both visual and written, that ought not to be criminalized. Under the "rational connection" head of the Oakes test, the Appellant must show that mere possession of the material captured by the definition in subsection (1) -- including mere possession of material that neither depicts nor purports to depict the abuse of actual children -- advances the purpose of preventing the criminal abuse of children. It is difficult to see how prohibiting the possession of works such as those referred to in paragraphs 16

and 21 above contributes to that objective. The definition either captures too much or fails to make clear exactly what is captured. In that sense, the law is overbroad, because it is "too sweeping in relation to its objective." In addition, as argued above, the law is vague because it does not permit an individual to know with certainty whether or not material in his or her possession will give rise to a criminal charge and possible conviction. A criminal law that is both overbroad and vague cannot be regarded as carefully tailored to meet its objective, and therefore fails to be rationally connected to the objective of preventing criminal abuse of children.

55. The evidentiary record indicates significant uncertainty as to whether child pornography has a causal relationship to abuse of children. For instance, Dr. Collins was unable to say whether there was a causal connection between pornography and child abuse, and was unable to point to a study showing that an increase in the availability of child pornography led to an increase in abuse. Similarly, Det. Waters was unable to say that an increase in the availability of child pornography on the Internet had led to a corresponding increase in sexual assaults on children.

Appeal Record, Vol. II at 211-213, Vol. I at 108

56. If Parliament can suppress expression which depicts or discusses criminal or otherwise evil ideas on the basis that it is reasonable to presume a rational connection between such ideas and the commission of criminal or evil actions, then the Charter's protection of freedom of expression rings hollow, and the ability to understand and debate ideas is diminished. This is so even when, for some individuals, such materials may reinforce an already-present disposition to commit a crime (as in the suggestion that child pornography reinforces the cognitive distortions of pedophiles and thus increases their likelihood to abuse children, or is used by pedophiles in the "grooming" of their victims).

57. Extreme acts of violence are routinely described or shown, for example, on television news broadcasts. There are no serious suggestions that the news should be censored on the grounds that individuals might be desensitized by such exposure and thereby induced to copy the depicted acts -- even though "copycat" crimes are hardly unheard of. Similarly, unstable individuals have been known to commit criminal acts on the apparent authority of religious texts such as the Bible or the Koran, and it is not seriously suggested that possession of such texts should be prohibited because they might induce some people to commit crimes.

58. A law censoring television news or religious texts in order to prevent suggestible individuals from committing violent acts under their influence would rightly be considered absurd by most people, and would be unlikely to survive constitutional scrutiny by the Courts. It is submitted that to prohibit the possession of the broad range of material captured by s.163.1(1), on the basis of evidence that is at best inconclusive, is similarly suspect, and lacks rational connection to the objective of preventing the criminal abuse of children.

59. Finally, s. 163.1 criminalizes the possession of written material advocating sexual activity with minors, even though such material may never be shared with anyone else, yet the oral advocacy of such activity is nowhere prohibited. If anything, the oral advocacy of sexual activity with children is more likely to lead to criminal abuse than the mere possession of written material advocating the same thing. This inconsistency further reinforces the conclusion that s. 163.1(4) is not rationally connected to its objectives.

S. 163.1(4) does not impair the right to freedom of expression as little as possible

60. In order to be saved under s. 1, an infringement on a Charter right must impair the right at issue as little as possible.

> *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 342-43, *per* McLachlin J.

61. A statutory provision that creates a greater restriction of liberty than is necessary to accomplish its purpose is overbroad, and fails the minimal impairment test under s. 1.

> *R. v. Heywood* at 802, *per Cory J.*

62. Subsection (4) fails the minimal impairment test in two respects. First, even if this court does not accept that a ban on possession of expressive material can never be justified under s. 1, the gross intrusion on freedom of thought, opinion and belief and individual privacy created by s. 163.1(4) supports a finding that the subsection does not impair the affected rights as little as possible. Indeed, it is difficult to imagine a broader intrusion on s. 2(b) rights than a prohibition on the right to possess expressive material in the privacy of one's own home or person.

63. Secondly, insofar as subsection (4) rests on an overbroad and vague definition of child pornography, contained in subsection (1), it exposes individuals to criminal prosecution for works that

may in no way lead to the abuse of children, and exposes them to the vagaries of the court's interpretation of the artistic merit of such works.

64. As suggested earlier, a provision that would impair freedom of expression much less and address the contemplated evil much more than the provision at issue would be one that confined the definition of child pornography to material that involved or was held out to involve the unlawful abuse of a *real* child. Similarly, instead of targeting the mere possession of child pornography (so narrowly defined), a more focused provision would address the *purchase* of such material. After all, it is the purchase, not the mere possession, that might be seen as fuelling the market for materials that abuse children. But, to be minimally intrusive, even a provision of this kind would have to exempt purchases for uses such as scholarship or journalism.

65. An additional indication that s. 163.1(4) fails the minimal impairment test is raised by the reliance on police enforcement strategies as a justification for prohibiting possession of child pornography. Such a rationale creates far too expansive a scope for police powers. It is based on the proposition that some of those engaged in the abuse of, or the creation of a market for the abuse of children may be among those in possession of child pornography as broadly defined in the section. If that is so, it probably does assist the police to be able to arrest and prosecute all those in possession, whether or not that possession has anything to do with actions which directly or indirectly harm actual children. Enforcement may thereby be easier, but it is not justifiable.

The detrimental effects of the legislation outweigh its salutary effects

66. Under this head of the *Oakes* test, an infringement of a Charter right is not a reasonable limit on the right if the effects of the infringement are disproportionate to the ends which the provision giving rise to the infringement is intended to achieve. In *Dagenais*, this Court explained that at this stage of the test, the Court must try to determine whether the detrimental effects of the infringement outweigh its salutary effects.

Dagenais v. C.B.C. at 889

67. Given the objective of preventing the criminal abuse of children, the beneficial effects of s. 163.1(4) must be regarded as minimal; the evidence fails to demonstrate that prohibition of possession of child pornography actually prevents such abuse. On the other hand, as argued above, the overbreadth

and vagueness of the definition of child pornography, and the broad invasion of privacy that results from the prohibition on possession, constitute profound and significant infringements on the rights guaranteed in s. 2(b). The salutary effects of the legislation can be achieved by narrower means, and the deleterious effects are deep and fundamental. As such, it is clear that the detrimental effects of the subsection outweigh its salutary effects, and the infringement of Charter rights is significantly disproportionate to its objectives.

Conclusion with respect to s.1

68. It is therefore submitted that s. 163.1(4), when considered in the light of the definitions of child pornography set out in s. 163.1(1), fails the *Oakes* test at each stage, and cannot be saved as a reasonable limit under s.1.

69. The circumstances of the passage of the legislation -- hasty enactment, a lack of opportunity for debate, and expressed concerns in Parliament about its ability to withstand scrutiny under the Charter -- are indicative of a parliamentary process which did not allow for a considered assessment of whether the declared objective warranted the substantial violations of thought, belief, expression and privacy which this offence creates.

Appeal Record, Vol. 5, pp. 819-858; Vol. 11, pp. 1921-1925, p. 1928

Stewart, *supra,* at note 60

B. Blugerman & L. May, "The New Child Pornography Law: Difficulties of Bill C-128" (1995), 4 Media and Communications Law Rev. 17 at 25-26

S. 163.1(4) also infringes s. 7 of the Charter

70. Overbreadth and vagueness in legislation will trigger scrutiny under s. 7 of the Charter as well as under s. 1. For the reasons discussed above, s. 163.1(4) exposes individuals to criminal prosecution, and the concomitant loss of liberty upon conviction, for possession of material that is both overbroad and vague in definition, and in circumstances where the defence to a charge is inherently vague. As such, the CCLA submits that s. 163.1(4) also violates s. 7 of the Charter, and that violation cannot be saved under s. 1, for the reasons set out above. The CCLA adopts the arguments of the Respondent with respect to s. 7.

R. v. Heywood at 790-793

PART IV - NATURE OF ORDER SOUGHT

71. The CCLA therefore requests that the Court answer the constitutional questions as follows and dismiss the appeal:

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

   Answer: Yes.

2. If s. 163.1(4) of the *Criminal Code* infringes section 2(b) of the *Canadian Charter of Rights and Freedom*, 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 section 1 of the Charter?

   Answer: No.

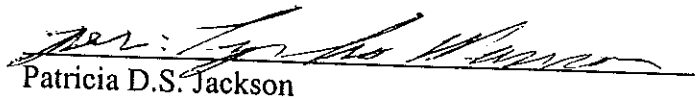
3. Does s. 163.1(4) of the *Criminal Code,* R.S.C. 1985, c. C-46 infringe section 7 of the *Canadian Charter of Rights and Freedoms*?

   Answer: Yes.

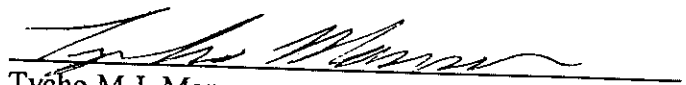
4. If s. 163.1(4) of the *Criminal Code* infringes section 7 of the *Canadian Charter of Rights and Freedom*, is s. 163.1(4) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of section 1 of the Charter?

   Answer: No.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Patricia D.S. Jackson



Tycho M.J. Manson

PART V - AUTHORITIES

CASE LAW

ARTICLES AND MONOGRAPHS

TEXTS

APPENDIX "A"

1. In the early 1990s, customs officials confiscated the manuscript of a novel, even though it was written by a psychologist to illuminate the behaviour of pedophiles.

2. In the late 1980s, a police department in Alberta seized material belonging to a feminist organization, even thought the material was part of an *anti*-pornography campaign.

3. In the mid-1980s, Toronto police targeted a painting that depicted the rape of a Mayan woman by Guatemalan soldiers, even thought the painting was reportedly a political statement sympathetic to Guatemalan women.

4. In the mid-1980s, customs officials confiscated, *Erotic Poems*, even though the material was from a Greek anthology of sixth century B.C.

5. In the mid-1980s, customs officials seized a film on male masturbation even though the film was headed for the University of Manitoba medical school.

6. In the mid-1970s, police laid charges over the movie, *Last Tango in Paris*, even though the movie was widely acclaimed in film circles.

7. In the mid-1970s, there was a prosecution involving the book, *Show Me*, even though the book was designed to teach children about sex.

SERVICE OF A TRUE COPY HEREOF
SIGNIFICATION DE COPIE CONFORME

Admitted the 5th day
Acceptée le jour

of January 2000
de

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

1:45 p.m.