Court File No. 27376

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of British Columbia)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

JOHN ROBIN SHARPE

Respondent

FACTUM OF THE INTERVENERS CANADIAN POLICE ASSOCIATION (CPA) CANADIAN ASSOCIATION OF CHIEFS OF POLICE (CACP) and CANADIANS AGAINST VIOLENCE (CAVEAT)

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PART I – THE FACTS

(a) INTRODUCTION

1. Child pornography devalues, degrades and marginalizes children as a class. It portrays children as objects for the sexual exploitation and entertainment of adults. Consequently, child pornography deprives children of their innocence and their unique human character and identity (*R. v. Butler* [1992] 1 S.C.R. 452 at 500-501).

2. Where a real child is used to make the pornography, actual child abuse has been committed against that child. Where the child pornography takes the form of written material, sketches or drawings, children as a class are violated, thereby exposing children to greater risk of injury and harm. Drawing a legal distinction between these two categories of child pornography is misconceived.

3. The fact that one can design or conceive of hypotheticals which present superficially and falsely a purportedly benign picture (i.e., two 16-year-olds videotaping their explicit sexual activity or the private diary locked in a drawer), does not change the essential reality of the overwhelming harm caused by child pornography. Further, there is clearly a range of permissible legislative regimes to respond to the problem. The fact that Parliament drew the line at under 18 years of age rather than under 14 years of age is certainly a policy judgment it is entitled to make (*R. v. Mills* [1999] S.C.J. No. 68, paras. 56-60).

4. Neither the Canadian Police Association ("CPA"), the Canadian Association of Chiefs of Police ("CACP"), or Canadians Against Violence ("CAVEAT") are aware of a single prosecution in Canada based on the hypotheticals relied upon by the British Columbia Court of Appeal. Therefore, if this Court were to find the impugned subsection overbroad and consequently unconstitutional but only to the extent of untested hypotheticals which never have and never will form the basis of a criminal prosecution in Canada, but otherwise maintain the substance of subsection (4), without distinction by reason of its form (that is, whether the pornography uses actual children in its making or takes the form of written material, sketches or drawings not otherwise exempted), the principal police/victim concerns will have been met.

5. At the same time, as presented below, these interveners urge extreme caution over the use of unrealistic and untested hypotheticals as a basis for over-riding the reasoned judgment of Parliament at the expense of one of the most vulnerable members of society – our children.

(b) EVIDENCE OF DETECTIVE INSPECTOR MATTHEWS

6. Prior to August 1, 1993 (the date section 163.1 of the *Criminal Code* came into force), police efforts to investigate child pornography were completely stymied by the fact that it was not an offence to possess child pornography. The obscenity provisions of the *Criminal Code* were entirely non-responsive to the problem. After the enactment of the impugned subsection, this changed significantly. [A.R., XI, pp. 2002, 2004, 2005, paras. 4, 10, 11.]

7. The majority of the child pornography being created and distributed today is communicated by computer through the Internet. Unlike adult pornography, however, there is not a significant commercial market for child pornography. It is largely traded privately between paedophiles for the sole purpose of increasing their private collections. This material is rarely exchanged for money, but when it is, it can be expensive. The personal hand-to-hand distribution of child pornography is virtually non-existent as a direct result of the Internet. Because child pornography is now transmitted by way of the Internet and traded privately (and because of its illegality), the creation and distribution of such pornography are largely shrouded in secrecy and not easily detected. [A.R., XI, pp. 2005, para. 12; Also see evidence of Detective Waters, A.R., I, pp. 35 and 36, 38-40; and Cyber "Paedophile" A Behaviour Perspective, A.R., X, pp. 1811-1817.]

8. Paedophiles create, share, exchange, trade and possess their child pornography through their computers and the Internet. Internet communications are ephemeral. In the case of child pornography, international and inter-jurisdictional interception is rendered impossible. Therefore, a legislative response that treats possession of child pornography separate and apart from its creation and distribution is not only a non-response, it fundamentally misapprehends the very nature of the child pornography industry and the attendant law enforcement problems. [A.R., XI, pp. 2005, 2006-2008, paras. 12, 13, 14, 15, 19, 21; Also see evidence of Detective Waters, A.R., I , p. 36.]

9. With the enactment of subsection 163.1(4), law enforcement agencies finally obtained the required legal justification to obtain search warrants to seize the images and text of child pornography stored on paedophiles' computer "hard drives" and/or diskettes to analyze them to determine where these images and/or text originated and the kind of networking involved in the transmission process. Without such legislation, the ability of the police to enforce subsections 163.1(2) and (3) is effectively foreclosed and the entire legislative scheme rendered inoperable. It is therefore entirely misconceived to determine a legislative objective, piecemeal. [A.R., XI, pp. 2006, 2007-2009, paras. 17, 18, 22.]

10. Further, criminalizing possession of child pornography has proven to be invaluable in assisting the police in their investigations of child abuse, in learning how child pornography is used to lower the inhibitions of children, and how it is used to blackmail, extort favours, and silence child victims. [A.R., XI, pp. 2009, paras. 23-25; Also see: *R. v. Stroempl* (1995) 105 C.C.C. (3d) 186 at 191 (Ont. C/A), and *Osborne v. Ohio*, 495 US 103 at 110 (U.S.S.C.).]

(c) EVIDENCE OF DETECTIVE NOREEN WATERS

11. So-called "fictional" publications or so-called works of the "imagination" such as "Boiled Angel" or publications such as NAMBLA, or child pornography created through "morphing", while not involving real children, are nevertheless deeply disturbing and often sadistic, barbaric, violent, degrading and harmful. They advocate and justify sex between adults and children, discuss how an adult can instigate a relationship with a child and how to prevent a child from speaking to anyone in authority, and further advocate that children want sex with adults, that having anal intercourse with children regardless of the pain to the child is beneficial and that children enjoy being beaten, sexually abused, sexually tortured and enjoy violent sexual activity. [A.R., I , pp. 31-36, 50-51, 128.]

(d) EVIDENCE OF DR. PETER COLLINS

12. Paedophilia is a form of paraphilia, which is the clinical term denoting sexual deviancy. Paedophiles have a "very odd and bizarre thinking process". They are driven by fantasies which are

internalized. Because of the sexual deviancy, paedophiles will collect items or seek out items which will fuel their sexual fantasies. The problem, from a clinical perspective, is to try and stop paedophiles from fantasizing about something that is deeply ingrained and at the very core of their being namely, sexual deviancy with children. Paedophiles perceive their selfish desire for sexual gratification as being healthy for children and consequently, child pornography is used by paedophiles in a way that puts children at risk. [A.R., I, p. 62, lines 28-42, p. 64, lines 19-31, p. 69, lines 34-44, p. 70, lines 1-4, lines 22-23, lines 31-34, p. 88, lines 40-41, p. 138, lines 39-40, p. 159, lines 43-44, p. 160, lines 6-14, p. 161, lines 29-30; A.R., II, p. 202, lines 41-44.]

13. Dr. Collins rejected any suggestion that there is a difference in the harm caused to children by paedophiles by the use of written material as opposed to pictorial material. In Dr. Collins' clinical experience treating paedophiles, he found that the written form of pornography can be even more disturbing and presented greater danger in the way it encouraged and reinforced the sexual fantasies and the acting out of paedophiles. [A.R., I, p. 83, lines 35-47, p. 84, lines 16-18, lines 20-23, lines 40-47, p. 157, lines 27-29, p. 159, lines 19-25, p. 162, lines 29-42, p. 163, lines 31-32, p. 165, lines 34-36, p. 166, lines 39-42, p. 167, lines 1-13, p. 168, lines 26-41, p. 170, lines 10-15, lines 21-27 ; Also see: A.R., IX, p. 1650 *Child Pornography Prevention Act*, 1996.]

14. Dr. Collins rejected the notion that there was a positive cathartic effect in allowing paedophiles to possess child pornography for the purposes of masterbation. [A.R., I, p. 169, lines 15-30, p. 171, lines 11-33, p. 185, lines 1-18.]

15. Dr. Collins testified that there was a "mountain of research" confirming the harmful effects of child pornography and further, that "there is no credible research" to the contrary. Further, paedophiles tend not to seek out treatment and usually the only way they end up receiving treatment is as a result of being arrested. This causes problems for conducting research, and explains the problem of under-reporting. While there can never be scientific certainty, Dr. Collins testified, based on the available research and his own extensive clinical experience, that there was a clear and direct correlation between the increase in child pornography and actual child abuse. [A.R., II, p. 208, lines 36-40, p. 209, lines 25-26, p. 210, lines 20-23, p. 212, lines 45-47, p. 213, lines 1-47, p. 214, lines 1-11, p. 222, lines 24-44, p. 229, lines 19-47, p. 230, lines 1-6, p. 231, lines 11-17.]

PART II – ARGUMENT

(e) CHILD PORNOGRAPHY, EQUALITY RIGHTS AND SECTION ONE CONSIDERATIONS

16. Space restrictions prevent the herein interveners from fully developing the type of equality analysis appropriate to the subject matter of child pornography. It is submitted that the section 15 *Charter* jurisprudence developed and articulated by this Honourable Court permeates every aspect of the debate concerning child pornography. The CPA, the CACP and CAVEAT urge this Honourable Court not to be diverted away from a full and comprehensive equality analysis by reason of the respondent's attempt to shift the focus of the Court toward abstract, unrealistic and untested hypotheticals.

17. The quintessential purpose of section 15 of the *Charter* is to prevent the violation of essential human dignity and to promote a society in which all persons enjoy equal recognition at law as human beings. Another purpose of s. 15 is to ameliorate the position of groups (here children) within Canadian society who have suffered disadvantage (i.e., child abuse). Sexualizing children for adult entertainment violates the core principles of equality. In the context of the exemptions set out in subsection 163.1(6) for material that is alleged to constitute child pornography but having artistic merit or an education, scientific or medical purpose (a significant legislative concession in and of itself), it is submitted that distinguishing between the form the child pornography takes does not diminish the over-riding reality that child pornography makes children feel less capable or less worthy of recognition or value as human beings or as members of Canadian society, less deserving of equal concern, respect and consideration.

> **Reference:** *Andrews v. The Law Society of British Columbia* [1989] 1 S.C.R. 143; *R. v.* Mills [1999] S.C.J. No. 68, at paras. 59, 90-93; *M v. H* (1999) 171 D.L.R. (4th) 577 (S.C.C.); *Law v. Canada (Minister of Employment and Immigration)* (1999) 170 D.L.R. (4th) 1 (S.C.C); *Vriend v. Alberta* (1988), 50 C.R.R. (2d) 1 (S.C.C.); *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624; *Miron v. Trudel* [1995] 2 S.C.R. 418 per Gonthier J. at 704, per L'Heureux Dube J. at 727 and per McLachlin J. at p. 741; Also see *Egan v. Canada* [1995] 2 S.C.R. 513; *Thibodeau v. Canada* [1995] 2 S.C.R. 627; *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241, 41 C.R.R. (2d) 240 (S.C.C.); *R. v. Swain* (1991), 63 C.C.C. (3d) 481 at 518-520 (S.C.C.); *R. v. Turpin* [1989] 1 S.C.R. 1296; *R. v. Hess; R. v. Nguyen* [1990] 2 S.C.R. 906; *McKinney v. University of Guelph* [1990] 3 S.C.R. 229; *Tetreault and Gadoury v. Canada (Employment & Immigration Commission)* [1991] 2 S.C.R. 22, *Symes v. Canada* [1993] 4 S.C.R. 695; *Benner v. Canada (Secretary of State)* [1997] 1 S.C.R. 358; *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519 at 554; *Weatherall v. Canada (Attorney General)* [1993] 2 S.C.R. 872.

18. Constitutional equality centres on eliminating disadvantage of historically subordinated groups. This means that the *Charter* is not neutral with respect to practices which promote inequality (e.g., protecting child pornography as "expression" under s. 2(b) of the *Charter*), but rather constitutionally mandates that equality be promoted and inequality diminished (hence, no 2(b) *Charter* protection). Child pornography, regardless of its form shows and promotes unequal power relationships between men and children. The inequality is heightened by dialogue in which expressly unequal roles are taken and graphic aggression, combined with explicit sexual activity is presented. Child pornography imposes a unique burden on children on the basis of their age and sex. It portrays children as a class of objects for sexual exploitation. Depicting children as sexual play things in any context cannot be tolerated. Child pornography also constitutes a gross misrepresentation of the basic humanity of children.[1] *

Reference: *Andrews v. The Law Society of British Columbia, supra*; *R. v. Butler, supra*, at 497, 500-501; The Women's Safety Project cited in Changing the Landscape: Ending Violence - Achieving Equality (The Final Report of the Canadian Panel on Violence Against Women) Minister of Supply and Services Canada, 1993 at p. 9.

19. Pornography is produced by formula wherein hierarchal roles are taken combined with sexual manipulation, coercion and abuse. Repeated exposure to pornography has been documented to increase sex-calloused attitudes by men towards women and children and promote the trivialization of the abuse. These attitudes in turn can directly influence aggressive behaviour by men toward women and children.[2] Further, degrading and dehumanizing non-violent material has been shown to lower inhibitions on aggression by men against children and women, increase acceptance of women and children's servitude and increase the belief in male dominance in intimate relations among its effects, all of which are inconsistent with promoting sex equality.[3] There is no controversy in the research community that exposure to pornography increases aggression against women and children in a laboratory setting and increases attitudes which are related to violence against women and children in the real world.[4] Any dissemination of child pornography has been recognized as constituting a harm to those used to make it (directly or indirectly), a danger to others who may be abused through its use (e.g., grooming), and an incentive for continued production, guaranteeing

* Numbered reference in this part appear in Endnotes at end of this factum.

additional child abuse.[5] For a substantial segment of the population, aggression enhances sexual arousal. Even non-rapist populations can experience sexual arousal from depictions of rape.[6] Paedophiles who have a taste for violent pornography are the most likely to seek it out. They are also the most likely individuals to perpetrate the sex crimes depicted in the pornography (regardless of form), sometimes referred to as "copy cat crimes".[7] Pornographic depictions also generate sexual fantasies.[8]

20. Child pornography undermines a paedophile's internal inhibitions (to the extent that they exist), against acting out the desire to abuse children by: (i) **objectifying children**: as a result, they do not see children as human beings but as body parts. This makes it easier for a paedophile to abuse a child; (ii) **myths**: paedophiles believe sex with children is a good thing and seek it out. If paedophiles believe children enjoy having sex with adults and find it sexually exciting, then this will undermine their inhibitions; (iii) **acceptance of interpersonal violence**: a paedophile's internal inhibitions against acting out can be undermined if they consider sex and violence against children to be acceptable behaviour; (iv) **trivializing sex between adults and children**: the more exposure to what the Courts below and the respondent characterize as "simple" or "mere" possession of pornography has the corresponding effect of trivializing what in fact is taking place; (v) **callous attitudes toward the child's sexuality**: callous attitudes toward the child's sexuality becomes enhanced; (vi) **acceptance of domination**: the child has no independent existence or rights; (vii) **desensitizes paedophiles to consequences of their acts**: possession of child pornography encourages desensitization of a paedophile to the consequences of his acts.[9]

21. In *Re: Vickery & Prothonotary of the Supreme Court of Nova Scotia* (1991) 64 C.C.C. (3d) 65 at 94-95, this Court stated that the protection of the innocent was a social value of **"superordinate importance"** which must be accommodated and protected to the **"greatest extent possible"**. Likewise, this Court has repeatedly held that when considering the issue of privacy and equality rights, the Court must consider the relative power of those whose activities are restricted and those for whose benefit the restriction is made.[10] In the context of children and child pornography, this *dicta* is particularly apposite.

22. Further, as recognized by this Court in *Mills, supra,* (para. 59), Parliament is entitled to recognize "horizontal" equality concerns where children's inequality results from the acts of others who devalue and degrade children to the level of sexual objects for adult entertainment. Likewise, in the context of Bill C-46, this Court also acknowledged (*Mills,* para. 48) the laudable objectives of Parliament to address not only incidences of sexual violence and abuse in Canadian society, but more specifically, its prevalence against women and children and the corresponding disadvantageous impact on the equal participation of women and children in society and their right to the full protection of sections 7, 8, 15 and 28 of the *Charter*.

23. Child pornography directly attacks the innate dignity, intrinsic worthiness and importance of all children. Dignity is harmed when individuals are devalued and it is enhanced when laws recognize the full place of all individuals and groups within Canadian society. The impugned legislative scheme promotes the notion that children (and thereby the public at large), should be secure in the knowledge that the laws of this land will recognize children as full human beings, equally deserving concern, respect and consideration. The legislated regime also recognizes that children are a powerless and vulnerable group, and it is necessary to ameliorate the position of children within Canadian society in a manner consistent with the remedial purpose of the equality guarantee.

24. As Detective Waters and Dr. Collins testified, and as fully documented by the U.S. *Attorney General's Commission on Pornography*, paedophiles use child pornography (regardless of form), to undermine a child's resistance, to persuade the child to engage in certain acts, to legitimize the acts, and undermine their resistance, refusal or disclosure of these acts.[11]

25. Abel and his colleagues reported that 56% of the rapists and 42% of the child molesters implicated pornography in the commission of their offences. It is clear that a high percentage of non-incarcerated rapists and child molesters have said that they have been incited by pornography to commit crimes. Edna Einsiedel, in her review of the social science research for the 1985 *Attorney*

General's Commission on Pornography, concluded that these studies "are suggestive of the implication of pornography in the commission of sex crimes among rapists and child molesters".[12]

26. Child pornography is a direct product of the sexual abuse and exploitation of children which results in serious, often life-long, even life-threatening consequences for the physical, psychological and social health and development of the child.[13]

(f) CHILD PORNOGRAPHY AS FREE SPEECH: THE PARADIGM OF CONTRADICTION

27. Having regard to the generous exemptions set out in subsection 163.1(6) of the *Criminal Code* for child pornography that has artistic merit or an educational, scientific or medical purpose, it is submitted that the child pornography that remains proscribed falls outside the ambit of section 2(b) *Charter* protection because it does not convey meaning within the purposive approach established by this Honourable Court to determine what merits constitutional protection and further, because to give it such meaning would violate core equality rights of children and render the constitutional imperative to promote equality, nugatory.

28. Child pornography constitutes a permanent record of child abuse directly or indirectly, and is either, in substance, a violent form of expression or is tantamount or analogous to a violent form of expression as considered by this Honourable Court in *Attorney General of Quebec v. Irwin Toy Limited* [1989] 1 S.C.R. 927. Because child pornography relies on violence and/or coercion, or otherwise feeds on the most egregious violation of equality and privacy rights of children, it is in substance, the very antithesis of freedom. Further, because child pornography sexualizes children for the purpose of entertaining adults, it is not deserving of constitutional protection under section 2(b) of the *Charter*. In *Irwin Toy* at page 976 [S.C.R.], this Court stated that the purpose of section 2(b) of the *Charter* is to seek and attain the truth, to encourage and foster participation in social and political decision-making, and to cultivate diversity in forms of individual self-fulfilment in a tolerant and welcoming environment for both those who convey expression and those to whom expression is conveyed. In cases such as *Irwin Toy, Keegstra, Zundel* and others, this Court has

stated that direct acts of violence involving direct attacks on physical liberty and integrity of others are not protected by section 2(b) of the *Charter*. Child pornography manifests coercion, violence, degradation and abuse, and is therefore exempt from section 2(b) protection.

29. In the alternative, the case at bar is distinguishable from *Irwin Toy* and *R. v. Butler*. In *Butler* (which did not involve child pornography), this Court decided that "showing" violence did not amount to a violent form of expression. In *Irwin Toy*, this Court decided that acts of murder or rape would amount to a violent form of expression. It is submitted that because child pornography uses children, it falls between the activity considered by this Court in *Butler* and *Irwin Toy*. Neither in *Butler* nor *Irwin Toy* did this Court consider the issues raised by child pornography in the formulation of its "violent form" test.

30. Further, because we treat children differently than adults and the harm caused by child pornography is unique and objectively identifiable, it is appropriate to consider whether the 2(b) jurisprudence of this Court requires adjustment to respond to the circumstances presented by child pornography. A blanket assumption that all child pornography is "expressive" (and hence all child pornography is the same for 2(b) purposes), thus requiring resort to s. 1 in all cases, appears to be inconsistent with a purposive and contextual approach to constitutional analysis. It is submitted that the unique circumstances presented by child pornography and the burden it imposes on children, requires a balancing of rights at the breach stage of the analysis, before even reaching s.1.

31. Expression, by degrading and devaluing children with the corresponding harms discussed above, not only fails to engage the purpose of the *Charter* 2(b) constitutional guarantee, it can only operate at the expense of the *Charter*'s equality guarantee, which, unlike other *Charter* guarantees, has a pro-active component to promote equality. (Miron *v. Turdel, supra*, at para. 132, per McLachlin J.) Removing child pornography from the scope of s.2(b) will not have the effect of imposing a real or substantive disadvantage on the offender having regard to the social and political context in which the offender makes his claim. Further, in the context of the identifiable and unique harm caused by child pornography, it would be regrettable if the respondent's "expressive" rights had the effect of rolling back legislation designed to protect core constitutional rights of children. (*R. v. Edwards* Books [1986] 2 S.C.R. 713 at 779.)

32. In the further alternative, it is submitted that not all child pornography can be treated the same. A blanket finding that any restriction on any child pornography is contrary to section 2(b) of the *Charter* cannot be sustained. Given the unique nature of societies' special responsibility to protect children from abuse, it is not enough to simply recognize child pornography as low level expression far from the core meaning contemplated by s. 2(b) and therefore deal with the balancing of competing rights under section one. No one can dispute that certain forms of child pornography (i.e, the *Bernardo* videotapes) are nothing but a pure form of violence and therefore, it is respectfully submitted that it is offensive to first principles of constitutional analysis to raise all child pornography to a level deserving any form of constitutional protection. Accordingly, unlike s.486(1) of the *Criminal Code*, s.163.1(4) is not facially unconstitutional. (*CBC v. AGNB* [1996] 3 S.C.R. 480.)

(g) DECLARING SUBSECTION 163.1(4) OF THE *CRIMINAL CODE* UNCONSTITUTIONAL HAS THE EFFECT OF DECLARING THE ENTIRE LEGISLATIVE SCHEME UNCONSTITUTIONAL

33. For all the reasons summarized in paragraphs 6 to 10 above, and more particularized in the Matthews' affidavit, striking down subsection 163.1(4) seriously and irreparably undermines the ability of the police to effectively enforce subsections 163.1(2) and (3) of the *Criminal Code* pertaining to the creation and distribution of child pornography. Simply put, criminalization of possession of child pornography in subsection 163.1(4) of the *Criminal Code* is the linchpin to law enforcement of the section as a whole because unlike the adult commercial pornography industry, the child pornography industry operates principally through the Internet. The dynamics of the child pornography industry is such that offenders cannot receive child pornography without sending it in return (distribution). Therefore, even if a paedophile produces a purported work of the "imagination", it is virtually certain that it will not be for private consumption, but rather, will be traded and exchanged for other material. Stated differently, possession of child pornography is, for all intents and purposes, inseparable from its creation and distribution (*U.S. v. Controni* [1989] 1 S.C.R. 1469 at 1485-6).

34. Parliament is duty-bound to respond to the speed and evolving technology presented by a child pornography Internet industry and the problems this presents for adequate law enforcement.

If possession of child pornography were legal, the police would be unable to obtain search warrants to seize the very computers which contain the evidence which establish the distribution and creation of child pornography (i.e., sending and receiving of pornographic images and text, down-loading same, copying same on diskettes, and printing same). Consequently, the legalization of possession of child pornography will encourage and promote its creation and distribution, with the additional loss of extremely important collateral law enforcement benefits such as assisting police investigations into child sexual abuse and pursuing tips from international sources on the cross-border dissemination of child pornography through the Internet.

(h) DISTINCTION BETWEEN CHILD PORNOGRAPHY INVOLVING ACTUAL CHILDREN AND CHILD PORNOGRAPHY IN THE FORM OF WRITTEN MATERIAL, DRAWINGS OR SKETCHES

35. A serious criticism of the impugned law relates to the fact that it criminalizes so-called works of the "imagination" such as drawings, sketches or written material (hence "fictional"), and therefore not harmful. It was argued and accepted by the majority of the British Columbia Court of Appeal that extending the scope of the law to include such material is constitutionally impermissible. Respectfully, such a conclusion is erroneous, contrary to the practical experience of the police and victims organizations, and inconsistent and contrary to the scientific and empirical research.

36. Whether the child pornography involves actual children or not, the expert evidence confirms that the effect of the material on, and use by, the paedophile is at least the same. The research confirms that child pornography in written form fuels the fantasies of paedophiles more than the pictorial, thereby increasing the risk that they will act out those fantasies. Even child pornography that does not use actual children is effectively used by paedophiles to trick children into believing that sex with adults is appropriate. Child pornography in a comic book format is extremely effective. There is nothing fictional or imaginary about the effect of this material on paedophiles, nor is there anything fictional or imaginary about a paedophile's use of such material and its corresponding harm on children.

37. The CPA, CACP and CAVEAT take strong objection to characterizing possession of child pornography in the form of writing, drawings or sketches as "mere" or "simple" works of the

"imagination" or "fictional". All of this has the effect of minimalizing and diminishing the serious harm caused by this material, and misrepresents and distorts the truth about children.

38. What is missing from this aspect of the discussion is an air of reality. The so-called "works of the imagination" referred to by the majority in the Court below which concerns the police community and victims organizations across Canada, is not the individual who maintains a private diary or private drawing or sketch detailing explicit sex between adults and children, which are locked in a desk drawer at home*, but rather the "works of the imagination" which are sadistic, grotesque, barbaric, violent and generally degrade and devalue children as a class, such as "Boiled Angel", "Chicken" and the publication 'How To Have Sex With Kids", which formed part of these interveners' applications to intervene in the herein appeal. These materials are representative of the type of child pornography which is targeted by the impugned legislation and is of great concern to these interveners, the public at large and Parliament. The extreme violence and descriptive sexual brutalization as reflected in these materials is horrific and cannot be dismissed as a mere work of the "imagination".

39. Implicit in the argument concerning "works of the imagination" is the notion that it is benign and harmless. Nothing could be further from the truth. A review of "Boiled Angel #7 and #Ate" and "Chicken" illustrates that Justice Rowles' statement that the law is one step removed from criminalizing simply having objectionable thoughts cannot be reconciled with the true nature of this material and the corresponding empirical and expert evidence confirming its harmful effects. If the majority decision of the British Columbia Court of Appeal were to stand, it would mean, contrary to the recent *dicta* of this Court in *Mills, supra,* that the Court is dictating to Parliament that it must distinguish between child pornography that uses actual children and child pornography that takes the form of written material, drawings or sketches. It would further mean that Parliament cannot

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* A person (as will be argued below) that does not exist in any event.

criminalize child pornography of the nature of "Boiled Angel" and "Chicken" because actual children are not being used and it is only a work of the "imagination".

40. The notion of the "imagination" is misleading. Expert and empirical evidence suggests all or part of such material reflects actual experiences, in whole or in part. It is neither benign nor innocuous. Hence, great caution is required. Even in this context, if this Honourable Court were to accept the premise of some of the hypotheticals relied upon by the British Columbia Court of Appeal, the legal solution is not to make a substantive legal distinction between child pornography involving actual children and child pornography in the form of written material, drawings or sketches, but rather, to read down the impugned subsection to exclude the circumstances represented by some of the hypotheticals. Child pornography (or so-called works of the imagination) such as "Boiled Angel" and "Chicken", must remain illegal.

41. Further, while it can be argued that child pornography that uses children in its making is evidence of actual child abuse, and therefore more harmful than child pornography that does not use real children in its making, this is no basis upon which to make a constitutional distinction. There is a level of harm, which can be objectively measured and weighed against the community standard of tolerance, where Parliament has the right to draw a line and declare beyond a certain point, that the harm will not be tolerated. The fact that one form of child pornography might be more harmful than another confuses the issue. There is a level and quality of harm over which society, through its elected officials, has a right to draw the line.

(i) HYPOTHETICALS INFORMING OVERBREADTH ANALYSIS

42. Just as there is an absence of an "air of reality" concerning the discussion about child pornography involving actual children and child pornography that takes the form of written material, drawings or sketches, the CPA, the CACP and CAVEAT feel the same criticism applies to the use by the respondent and acceptance by the majority of the British Columbia Court of Appeal of hypotheticals in reaching the conclusion of constitutional invalidity.

43. The herein interveners recognize the legitimate use of hypotheticals in the context of an overbreadth constitutional analysis. However, in the case at bar, far too much weight was given to completely untested hypotheticals at the expense of real and practical considerations. Consequently, the net effect of the hypotheticals was to divert one's attention away from the facts of this case and the substantive problems created by mainstream child pornography, and to create intellectual confusion and false arguments. The hypotheticals are not only far removed from the actual circumstances presented by the respondent at trial, but ironically, the welcomed concessions made by the respondent's counsel are equally distantly removed and inconsistent with the respondent's evidence and position at trial. It did however allow counsel to alter the direction and focus of the appeal.

44. With respect to the hypothetical examples concerning two children between the ages of 14 and 17 engaged in explicit consensual sex in the privacy of their own bedroom and who choose to videotape and/or photograph their sexual activity for private use only, no evidence was called at trial that would allow counsel to explore, through cross-examination, why children would videotape or photograph their sexual activity, whether any in fact do, whether they understood the implications and potential use of such material, whether there truly was informed consent, and what use was, in fact, made of it. Further, a mere physical inspection of the material of itself does not tell the police whether the activity is consensual or not, or whether there was an absence of pressure and coercion, whose bedroom is being used, whose idea it was, who was operating the camera or set it up, or whether one of the individuals was mentally challenged. There are some serious questions to be asked and they cannot be answered on the basis of untested assumptions which, in and of themselves, may be the product of unacceptable stereotyping. It is submitted that the Court should refrain from commenting on such hypotheticals in the absence of any tested evidentiary foundation. These are not the kinds of issues that should be determined in the abstract.

45. The herein interveners are unaware of any enforcement agency in Canada who has ever laid charges under the circumstances described above. If the factual underpinnings of the hypotheticals are to be accepted, and therefore the activity and material was truly "private" and "personal", the

subject material would never come to the attention of the police. Further, there are all kinds of procedural and substantive protections in existence which would keep the police from being in a position to act on the circumstances presented by the hypotheticals in any event. Respectfully, the respondent cannot have it both ways. They cannot argue that the impugned law is unconstitutional based on the overbreadth argument (which relies exclusively on the reliability and accuracy of untested hypotheticals), and then repudiate the very facts that would prevent the authorities of ever knowing about the existence of the material. Even if the police learned of the existence and whereabouts of this material in the above-stated circumstances by happenstance, no charges would be laid in the absence of being connected with some type of other criminal behaviour. Discretion in the hands of the police and the Crown is an indispensable component of the criminal justice system without which it could not operate. Every day, the police choose not to lay charges even though there is no legal impediment to do so. Sometimes, warnings are given, and in other circumstances the activity is overlooked. While this Court has stated previously that the constitutional validity of legislation cannot be contingent upon well intended police officers and Crown Attorneys, this argument cannot be extended to the point where it undermines the importance and necessity of judicial and prosecutorial discretion whilst requiring legislative perfection.

46. From a police perspective, simple common sense dictates whether the circumstances presented give rise to criminal activity necessitating criminal prosecution and sanction. With respect to child pornography, the law is intended to protect children and society at large from the direct and indirect harms caused by child pornography. The hypotheticals relied upon by the majority of the British Columbia Court of Appeal fail to give any weight to the existence of police and prosecutional discretion and the fact that there has never been a criminal prosecution based on the hypotheticals. Sounding the alarm bells about Plato's "The Symposium", Ayn Rand's novel "The Fountain Head", Agnolo Bronzino's "An Allegory (Venus, Cupid, Time and Folly), or Ingmar Bergman's classic film, "The Virgin Spring" is, with the greatest of respect, absurd. Entirely apart from the statutory exemptions set out in subsection 163.1(6) for artistic merit or material with an educational, scientific or medical purpose, this is not the type of material that has or ever will lead to a criminal prosecution.

47. If newspaper reports are accurate (i.e., Toronto Star, August 11, 1999 "Child pron law endangers art rights group says"), the Canadian Civil Liberties Association goes so far as to suggest that possession of educational material advocating the promotion and availability of condoms or pictures of nude babies could be the subject matter of a prosecution under the impugned subsection. This type of gross distortion and misrepresentation is not very helpful to a meaningful analysis of the impugned subsection.

48. The example of the two teenagers referred to above, married or otherwise, is another case in point. In and of itself, private consensual sexual activity is not harmful and not what the legislation was intended to proscribe. Having said this, it is one thing for children ages 14 and 17 to engage in explicit consensual sexual activity in the privacy of their own bedrooms. It is quite another to produce, distribute or possess videotape and/or photographs of the activity with the potential risk of it being used for exploitive or coercive reasons, including as blackmail. Once there is a permanent record created of children engaged in sexual activity, there is the danger that the partners themselves, in different circumstances, could use the material in an exploitive or coercive manner against each other, including one of the partners selling it or sharing it with friends (e.g., bragging rights). Further, there is always the risk of the material being exploited by adult third parties, with or without the consent of the children involved. The material could be stolen and sold. Even further, a decision made by a child should not be permanent. A 14-year-old may consent to engaging in explicit sexual activity and through ignorance and naivete, fail to understand the implications of a permanent record being made of it. However, when the child grows up, he or she may be harmed because such a record exists over which they have lost control. Facts of such circumstances could have been developed at trial, if this argument had been made timely. Respectfully, it is unwise to use such a seriously untested hypothetical (and other similar-type hypotheticals) as a basis for furthering the overbreadth analysis.

49. Further, the pictures form a permanent record of what might have been produced by an immature teenager. One very public example (albeit in a different context), is that of actress Brooke Shields who had numerous nude pictures taken of her when she was prepubescent. She later tried

in vain to stop the distribution of these photographs but was unsuccessful because apparently her mother consented to the pictures being taken. Further, nude pictures of children, even erotic nude pictures, of themselves, do not constitute child pornography. These photographs of Ms. Shields are now sold through pornography distributors for exorbitant prices. (*Brooke Shields et al v. Gross et al* 563 F. SUPP. 1253 S.D.N.Y. 1983.)

50. The point here is that in less pressing circumstances (i.e., nude pictures of a prepubescent child that do not constitute child pornography), nevertheless cause enormous grief and embarrassment in later life. If the pictures were pornographic, the harm would be that much greater. It is submitted that Parliament is justified in intervening to respond to these latter circumstances, and unless pressing and exceptional circumstances exist, the Courts should not set social policy over the reasoned judgment of Parliament.

51. Had the various hypotheticals relied upon by the British Columbia Court of Appeal been the subject matter of consideration at trial, the evidence may have established that the hypotheticals bear no connection to reality, allowing the academic and largely counter-factual nature of the hypotheticals to be considered against a functional analysis of the legislative objective.

52. By way of further illustration, the herein interveners also dispute the accuracy of the hypothetical circumstances of the individual who maintains a private diary detailing his imaginary sexual activity with children and keeps the said diary in his desk drawer at home. Such a hypothetical person does not exist other than in the theoretical world. Like the previous example, if the diary was truly private and personal, the police would never know of its existence. There would have to be some other type of criminal behaviour or information received by the police to be aware that the diary even existed. From a practical perspective, the police would receive certain information; in the appropriate circumstances obtain a search warrant; execute on the warrant, seize all sorts of child pornography that may include the diary. Like in the previous example, if the police learned of the diary, by itself, no charges would be laid.

53. It is the position of the herein interveners that the hypotheticals far from assisting the Court, in fact, obscure reality. If the untested activity presented in the hypotheticals does not exist or would never form the basis of a criminal prosecution, they should not be allowed to be used to invalidate laws against activity that does exist. The real effect of declaring the impugned law unconstitutional based on the hypotheticals is to effectively make laws based on myths rather than fact.

54. One of the hypotheticals dealt with what has been referred to as the "dress down" law, where two adult actors/actresses dress down to appear as children. The reason for this provision was to respond to the circumstances existing in 1993 namely, an adult pornography industry that was pushing the outer limits of the obscenity laws. The police were intercepting magazines of females over the age of 18 who were dressed as young teenagers and the photographs progressed to nudity. These individuals would shave their vaginal area to reinforce the image intended namely, that the girls were children. The viewer would not know otherwise unless told. The pornographers knew or assumed that if they used real children, they would be going beyond the outer limits of the obscenity laws and beyond community standards of tolerance, thereby risking prosecution and conviction for creating and distributing obscene material. The use of persons over 18 to appear as children was specifically designed to meet this legal impediment. Consequently, this was specifically addressed in the definition of child pornography (ss. 163.1(1) -- "... or is depicted as being under the age of 18 ..."), as well as providing for a countervailing protection in 163.1(6) (artistic merit or an educational, scientific or medical purpose).

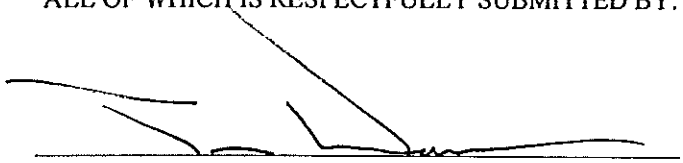
55. Finally, the net effect of the respondent's submissions with respect to the hypotheticals and his submissions that the legislation is over-broad because it captures works of the "imagination" such as child pornography in the form of writing, drawings or sketches and hence harmless, creates a deeply disturbing picture. The appearance of simulated consent and pleasure in child pornography regardless of whether actual children are used, is particularly harmful in promoting sexual abuse myths and desensitizing its consumers to abuse and degradation. Other harmful effects are the legitimization of sexual violence and abuse instilling attitudes of domination and discrimination against children as well as attitudinal denigration and subordination in general. It further lowers

inhibitions on aggression by adults against children and incites imitation and enhances sexual fantasies. It also encourages negative social learning and conditioning which in turn manifests in attitudes which objectify children, increase tolerance for violence, inequality, domination, trivializes sexual abuse, desensitizes responses to abuse, diminishes inhibitions and fear of sanctions or disapproval by peers concerning sexual abuse, and increases sexual aggression. Further still, the research confirms a real causal link between the formation of sexual predators to the development of deviant sexual arousal patterns caused by child pornography of any kind. There is a surprising level of tolerance toward violence in society and the degree to which it is institutionally entrenched can be enhanced if possession of child pornography is not proscribed.

PART III – NATURE OF ORDER REQUESTED

56. While it is implicit from the aforesaid that the CPA, the CACP and CAVEAT believe that the impugned subsection is constitutional, they do not take a specific position concerning the constitutional questions. Should the Court find that the impugned subsection is over-broad, these interveners submit that the remedy is to read down the legislation to exclude the offending hypothetical factual circumstances from its scope and otherwise confirm that it is well within the constitutional jurisdiction of Parliament to criminalize possession of child pornography irrespective of whether actual children are used in its production.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:



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January 6, 2000.

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ENDNOTES

[1] In the research literature on child sexual abuse, even a five-year age difference between the two parties involved in a sexual encounter automatically qualifies the incident as a case of sexual abuse, whether or not the younger party was a willing participant. This convention is based on researchers' recognition that an age difference of five years between a child and another child or an adult constitutes a significant power differential between the two, making it impossible for the younger party to freely consent to sex with the older party, regardless of their gender. The ability to force another to do things against their will is *ipso facto* of a power difference. In many cases, victims are rendered powerless by their lack of knowledge about what was happening to them.

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8 Edna Einsidel points out:

> Current evidence suggests a **high correlation between deviant fantasies and deviant behaviours** ... Some treatment methods are also predicated on the link **between fantasies and behaviour** by attempting to alter fantasy patterns in order to change the deviant behaviours.

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11 Two examples from the *Attorney General's Commission on Pornography* demonstrate how easy it is to see how a child's vulnerability to sexual abuse can be increased as a result of being shown pornography:

> I was sexually abused by my foster father from the time I was 7 until I was 13. He had stacks and stacks of *Playboys*. He would take me to his bedroom or his

> workshop, show me the pictures and say "this is what big girls do. If you want to be a big girl, you have to do this, but you can never tell anyone". Then I would have to pose like the woman in the pictures. I also remember being shown a *Playboy* cartoon of a man having sex with a child. (*Attorney General's Commission on Pornography: Final Report, supra*, p. 783.)
>
> He encouraged me by showing me pornographic magazines which they kept in the bathroom and told me it was not wrong because they were doing it in the magazines and that made it okay. He told me all fathers do it to their daughters and said even pastors do it to their daughters. The magazines were to help me learn more about sex. ((*Attorney General's Commission on Pornography: Final Report, supra*, p. 786).

Also see Zillmann, Dolf, and Bryant, Jennings, supra, (1984) Effects of Massive Exposure to Pornography. In Neil Malamuth and Edward Donnerstein (Eds.) *Pornography and Sexual Aggression* New York: Academic Press at pp. 132, 133;.*Attorney General's Commission on Pornography: Final Report* (1986) Volumes I - II, at p. 786, Washington, D.C.: U.S. Department of Justice; Every Woman (1988) *Pornography and Sexual Violence: Evidence of the Linx*, London: Every Woman; Russell, Diana (Ed.)(1993a) *Making Violence Sexy: Feminist Views on Pornography*, New York: Teachers College Press; Mosher, Donald (1971) Sex Callousness Towards Women *Technical Reports of the Commission on Obscenity and Pornography* 8, Washington, D.C., U.S. Government Printing Office; Senn, Charlene (1992 June) Women's Contact with Male Consumers: One Link Between Pornography and Womens' Experiences of Male Violence. Paper Presented at the Canadian Psychological Association Meetings, Quebec; *Sexual Offences Against Children*, Vol. I, p. 101; *Child Pornography Prevention Act of 1995*, p. 13.

12 Abel, Gene, Mittelman, Mary, and Becker, Judith (1985) Sexual Offenders: Results of Assessment and Recommendations for Treatment. In Mark Ben-Aron, Stephen Hucker and Christopher Webster (Eds.) *Clinical Criminology: The Assessment and Treatment of Criminal Behaviour* (pp. 191-205) Toronto: Clark Institute of Psychiatry: University of Toronto; Einsidel, Edna, (1986) Social Science Report. Paper Prepared for the Attorney General's Commission on Pornography, Department of Justice, Washington, D.C., at p. 63.

13 *Sexual Offences Against Children*, vol.1, pp. 100, *Can We End the Shame?*, (1990/1991), 23 Vanderbilt Journal of Transnational Law, pp. 439; *Commercial Sexual Exploitation of Children, World Congress against Commercial Sexual Exploitation of Children*, pp. 7, 12, 23, 25 & 27; *Associated Harms*, Chapter 55, pp.1271, 1283; *Child Pornography Protection Act of 1995*, pp. 12; *Pornography and Prostitution in Canada, Report of the Special Committee on Pornography and Prostitution*, vol. 2, Chapter 42, pp.571; *Child Pornography Prevention Act of 1995*, pp. 12; *Commercial Sexual Exploitation of Children; The Criminal Code*, Chapter 20, pp.265.

HER MAJESTY THE QUEEN

Appellant

v.

JOHN ROBIN SHARPE

Respondent

Court File No.27376

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

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