NO. 27376

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Crown)

AND:

JOHN ROBIN SHARPE

RESPONDENT
(Accused)

# RESPONDENT'S FACTUM


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## PART 1 - THE FACTS AND THE COURSE OF THE PROCEEDINGS

### 1. RESPONSE TO THE APPELLANT'S STATEMENT OF FACTS

1. The Respondent generally agrees with the Appellant's Statement of Facts, but wishes to make a number of additions.

### A. Course of Proceedings

2. The decision to appeal the learned trial Judge's ruling before the trial proceedings were completed specifically limited the issue before the Court of Appeal to the constitutionality of the private possession offence (s. 163.1(4)). The constitutionality of the offences set out in subsections 163.1 (2) and (3), including possession for the purposes of distribution and publication, were accordingly not addressed by the Respondent or the Court of Appeal. [Southin J.A., A.R., Vol. XII, pp. 2065-6, paras. 3-4; Rowles J.A. at p. 2162, para. 167].

### B. Dr. Collins' Evidence

3. Dr. Collins testified that photographs of fully clothed children can be erotic and arousing to a pedophile [A.R., Vol. 1, p. 66, ll. 32-35]. Innocuous photographs of children can also fuel the fantasies of pedophiles, but they are not used in the grooming process [A.R., Vol. 1, p. 168, ll. 3-10].

4. Dr. Collins stated that pedophiles use collateral material, including photographs and writings, as a masturbatory aide [A.R., Vol. 1, p. 68, ll. 19-24]. Some pedophiles will use pornographic materials solely for masturbatory fantasies and will not go on to commit an offence [A.R., Vol. 1, p. 79, ll. 36-45, p. 172, ll. 16-19]. He testified that there is some evidence supporting a cathartic effect resulting from the use of such material, for example masturbating to pornography to avoid offending [A.R., Vol. 1, p. 174, ll. 10-14; p. 178, ll. 19-42].

5. Dr. Collins testified that pedophiles will fantasize whether or not they have a collection of pornographic materials. Fantasies can lead to acting out with some but not all pedophiles [A.R., Vol. 1, p. 170, ll. 7-47; p. 171, ll. 25-29]. There are probably pedophiles who have never offended [A.R. Vol. 1, p. 169, ll. 29-33].

6. For pedophiles, the more graphic the pornographic material is, the greater the tendency to incite. The more graphic forms of visual depictions of pornography pose the greatest risk to children [A.R., Vol. 1, p. 183, ll. 20-22; A.R., Vol. 2, p. 215, ll. 4-9].

7. The indirect harm to children theorized by Dr. Collins predominantly relates to visual depictions of actual children [Rowles J.A. at A.R., Vol. XII, p. 2169, para. 182].

8. With the proliferation of images on the Internet, Dr. Collins could not say whether there has been a corresponding increase in child sex abuse [A.R., Vol. 2, p. 211, l. 23 - p. 212, l. 8]. Dr. Collins was not aware of any study that demonstrated an increase in child abuse resulting from an increase in the availability of child pornography [A.R., Vol. 2, p. 213, ll. 16-23].

## C. Findings of the Learned Trial Judge

9. After reviewing the testimony of Det. Waters and Dr. Collins, and discussing the two empirical research studies cited by Dr. Collins, the learned trial judge made nine findings of fact [A.R., Vol. XII, p. 2079, pp. 34-35]:

1. Sexually explicit pornography involving children poses a danger to children because of its use by pedophiles in the seduction process.
2. Children are abused in the production of filmed or videotaped pornography.
3. "Highly erotic" pornography incites some pedophiles to commit offences.
4. "Highly erotic" pornography helps some pedophiles relieve pent-up sexual tension.

5. It is not possible to say which of the two foregoing effects is the greater.
6. "Mildly erotic" pornography appears to inhibit aggression.
7. Pornography involving children can be a factor in augmenting or reinforcing a pedophile's cognitive distortions.
8. There is no evidence which demonstrates an increase in harm to children as a result of pornography augmenting or reinforcing a pedophile's cognitive distortions.
9. The dissemination of written material which counsels or advocates sexual offences against children poses some risk of harm to children.

## 2. THE JUDGMENT OF THE B.C. COURT OF APPEAL

### A. Each judge's analysis

10. **Southin JA.** (A.R., Vol. XII, pp. 2062-2142) observed that, with the exception of a World War I order-in-council, she was aware of no Canadian legislation except s. 163.1 which has ever made the simple possession of any expressive material a crime [para. 92]. She concluded: "legislation which makes simple possession of expressive materials a crime can never be a reasonable limit in a free and democratic society. Such legislation bears the hallmark of tyranny" [para. 95]. She ruled that, in the alternative, the definition of "child pornography" in s. 163.1(1) failed the proportionality test under s. 1 of the *Charter*:

- s-s. (1)(a) is overly-broad by criminalizing images that are works of the imagination that do not involve children in the making, and pictures that record explicit sexual activity between young adults aged 14 to 17 where the activity itself is perfectly legal [paras. 128 and 129], and
- s-s. (1)(b) is arbitrary in its application by criminalizing the possession of materials which advocate or counsel a certain form of criminal activity, where counseling or advocating such activity publicly is not itself a crime [paras. 107-124].

11. **Rowles JA.** (A.R., Vol. XII, pp. 2143-2189) upheld the learned trial judge's ruling that the provision violated s. 2(b) of the *Charter* and was not saved by s. 1. In her view, Parliament had a valid legislative objective in enacting s. 163.1: "preventing harm to children, specifically in the form of sexual abuse or exploitation caused, both directly and

indirectly, by the production and existence of child pornography" [para. 148]. She was satisfied that the Crown had established a rational connection [para. 159].

12. Rowles J.A. ruled that the prohibition on possession did not minimally impair the Respondent's rights because of overbreadth. In her view, making possession of expressive material an offence when it may have been created without abusing children and may never be published constitutes an extreme invasion of the values of liberty, autonomy and privacy, and that proscribing the recording of one's own thoughts and the works of one's own imagination profoundly violates freedom of expression [paras. 171, 174]. She concluded that s. 163.1(4) "overreaches most profoundly by reaching too far and too haphazardly into an individual's private life, thought and expression" [para. 202] and by "criminalizing a vast range of conduct for which no reasoned apprehension of harm can be shown" [para. 205]. Finally, she ruled that the salutary effects of possession are insufficient to outweigh its manifest detrimental effects, noting that the other offences of publishing, importation, sale and distribution, as well as the offence of obscenity, target much of the harm associated with child pornography in a manner that impairs *Charter* rights to a significantly lesser degree [para. 214].

13. **McEachern C.J.B.C.** (A.R., Vol. XII, pp. 2190-2225) dissented. The Chief Justice rejected the Respondent's argument under s. 7, finding that any right to "liberty" or "security of the person" added nothing to the rights protected under s. 2(b) and s. 8 [para. 245]. He dismissed the privacy argument under s. 8, ruling that the validity of searches for child pornography would be resolved when the constitutionality of s. 163.1 was determined [para. 247].

14. Moving to s. 1, McEachern C.J.B.C. concluded that the learned trial judge gave insufficient weight to the abuse done to children in the production of child pornography and the risk of future exploitation of other children as a consequence of creating a market for this kind of material. This legal error entitled the Court of Appeal to undertake its own

independent assessment of the competing factors [paras. 265-266]. He found that the Parliamentary objective of protecting children from being sexually abused and/or exploited through child pornography was sufficiently important to warrant overriding a constitutionally protected right [para. 271]. He was not prepared to second-guess Parliament on the scope of the definition [para. 274]. He found that the legislation minimally impaired the Respondent's rights, noting that the likelihood of anyone being criminalized for "innocent possession" was extremely remote [para. 284]. He endorsed the distinction Parliament drew between private thoughts and thoughts recorded [para. 287]. In balancing the salutary and detrimental effects, he concluded that the risk of harm to children and society as a whole outweighed the right of persons, innocent or nefarious, to possess any kind of child pornography for innocent, predatory or commercial purposes [para. 291]. He was unwilling to conclude that Parliament had drafted the law too broadly, in requiring that "anyone who imagines or muses about sex with children, refrain from recording or possessing such material lest it get into the wrong hands and cause harm to children" [para. 292].

**B. Specific findings**

15. The B.C. Court of Appeal made several specific findings that are relevant to this appeal:

- Section 163.1(4) is specifically targeted at the private possession of the proscribed materials [Rowles J.A. A.R. Vol. XII, p. 2162, para. 167].

- Section 163.1(4) criminalizes the private possession of products of the imagination, including sketches, drawings, sculptures, and written material. The possession offence does not make an exception for those products of the imagination which are self-authored, including the record of a privately-recorded thought [Rowles J.A. at A.R., Vol. X11, pp. 2168-2179, paras. 179-180, 182, 193, 197-198; McEachern C.J.B.C. at p. 2221, para. 287].

- Section 163.1(4) makes it an offence to privately possess depictions of legal sexual activity of persons 14 to 17 years by persons 14 to 17 years who are legally permitted to take part in the depicted conduct. These criminalized visual representations include those created by a young person from his or her imagination, and can include a depiction of himself or herself [Rowles J.A. at A.R. Vol. XII, pp. 2175-2179, paras. 193-197; Southin J.A. at p. 2104, paras. 46-47].

- There is a lack of evidence establishing a link between the private possession of products of the imagination and indirect harm through grooming, incitement, or reinforcement of cognitive disorders [Rowles J.A. at A.R., Vol. XII, pp. 2169 – 2172, paras. 183-186, pp. 2186-2187, para. 213]. The materials criminalized under the provision include those for which there is no reasonable risk of harm arising from their private possession [Rowles J.A. at A.R., Vol. XII, pp. 2166-2179, paras. 175, 178-180, 182-185, 193-197; Southin J.A. at p. 2102, para. 44, p. 2104, para 47, p. 2141, 126; McEachern C.J.B.C. at pp. 2222-2223, para. 290].

- There is little evidence that s.163.1(4) was enacted to address a risk of indirect harm arising from the private possession of products of the imagination [Rowles J.A. at A.R., Vol. XII, pp. 2170-2171, para. 184]. It is also not established that one of the legislative purposes of enacting the possession offence was to provide authorities with an investigative tool to detect more serious crimes [Southin J.A. at A.R., p. 2095, para. 36].

- The breadth of the materials criminalized under the possession provision constitutes an extreme invasion of an individual's liberty, autonomy and privacy, is unprecedented in Canadian legislative history, and is consistent with a totalitarian regime [Rowles J.A. at A.R., Vol. XII, pp. 2162-2166, paras. 167, 171, 175; Southin J.A. at pp. 2126-2130, paras. 88-95].

## PART 2 – ISSUES AND THE RESPONDENT'S POSITION

16. The following constitutional questions were stated by Lamer C.J.C. on August 26, 1999 (re-ordered to reflect the sequence of the Respondent's argument):

1. Does s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46 violate s. 7 of the *Canadian Charter of Rights and Freedoms*?
2. If s. 163.1(4) of the *Criminal Code* infringes s. 7 of the *Canadian Charter of Rights and Freedoms*, is s. 163.1(4) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?
3. Does s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46 violate s. 2(b) of the *Canadian Charter of Rights and Freedoms*?
4. If s. 163.1(4) of the *Criminal Code* infringes s. 2(b) of the *Canadian Charter of Rights and Freedoms*, is s. 163.1(4) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*?

17. In the Respondent's respectful submission, the analysis of those questions depends on the correct interpretation of s. 163.1(1) of the *Criminal Code*. The Respondent therefore proposes to address this issue first, before specifically addressing the constitutional questions.

18. The Respondent's position is that the definition of "child pornography" in s. 163.1(1) is unconstitutionally overbroad in that it proscribes private possession of a wide range of visual and written materials, where children are not harmed in the production and existence of the materials, and the Crown is not able to establish that their private possession will lead to harm. Consequently, the offence of possession (s. 163.1(4)) violates the Respondent's "liberty" and "security of the person" interests under s. 7 in a manner that does not accord with the principles of fundamental justice, and violates the Respondent's right to freedom of expression under s. 2(b), and in neither case is the infringement justified under s. 1.

## PART 3 – ARGUMENT

### 1. OVERVIEW OF THE RESPONDENT'S ARGUMENT

19. Overbreadth is at the heart of the constitutional questions raised on this appeal. It is the Respondent's respectful submission that s. 163.1(4) is unconstitutional and of no force and effect within the meaning of s. 52 (1) of the *Constitution Act, 1982* because the scope of the legislation unnecessarily infringes a person's rights to liberty (including privacy) and security of the person under s. 7 and freedom of expression under s. 2 (b) of the *Charter*, and is not saved by s. 1. In short, 163.1(4) goes significantly beyond what is necessary for the protection of the public.

20. Subsection (1) of s. 163.1 defines "child pornography" and subsection (4) makes it an offence to possess any such materials. As the definition in subsection (1) is incorporated into subsection (4), this Court's interpretation of subsection (1) is critical to the constitutionality of subsection (4). The Respondent submits that the statutory interpretation of the terms in s. 163.1(1) demonstrates the wide scope of the legislation. When measured against the legislative objective of s. 163.1(4), it is apparent that the means chosen by Parliament to accomplish its goal are manifestly disproportionate.

21. The Respondent submits that the legislative objective of the infringing measure (s. 163.1(4)) is *to prevent the sexual abuse and/or exploitation of children that mere possession of "child pornography" causes.* It follows that the legislative intent must have been to prohibit possession only where private possession raises a reasonable risk of harm to children and society. For some expressive materials caught by the definition subsection (s. 163.1(1)), there is no reasonable risk of harm flowing from mere possession. Proscribing these materials also constitutes a profound violation of a person's *Charter* rights and freedoms that cannot be justified in a free and democratic society.

22. The Respondent agrees with the Appellant that the underlying question on this appeal is the one framed by McEachern C.J.B.C., in dissent [Appellant's Factum, para. 24, A.R., Vol. XII, pp. 2195-96]. With a slight variation, the Respondent states the question as follows:

> Whether the private possession of expressive materials defined by s. 163.1(1), which have been created without abusing children and which may never be shown to anyone, published, distributed or sold, creates a sufficient risk of harm to children (and society) that it should be a criminal offence for any one to possess such materials for any purpose, or for no purpose at all?

23. The Appellant's affirmative answer to this question includes the proposition that private possession of these materials poses a risk of harm to children because: 1) possession may lead to cognitive distortions and/or incitement, that may in turn lead to acting out in a manner that harms children, or 2) possession may lead to third parties obtaining these materials and using them in a manner harmful to children. The Respondent submits that neither reason, logic nor common sense, nor the evidence before this Court, establishes this indirect risk of harm.

**Expressive materials caught by subsections 163.1 (1) and (4)**

24. To appreciate the Respondent's submission on overbreadth it is convenient to divide the expressive materials caught by s. 163.1(4) and s. 163.1(1) into two categories, "Category A" and "Category B". The Respondent submits that the risk of harm and the degree of suppression of the *Charter* rights and freedoms differ substantially between these two categories. While Category A materials may give rise to a sufficient degree of harm to be criminalized, it is submitted that proscribing the private possession of Category B materials clearly goes beyond what is required to accomplish that goal.

Category A materials - these "child pornographic" materials include:

**s. 163.1(1)(a)(i):**

- a visual representation in the possession of a third party of an actual person under 14 years of age, or from 14 to 17 years of age in special circumstances of criminality [s. 153 (1), s. 212 (4), s. 271], which shows the person engaged in, or depicted as engaged in, explicit sexual activity;

**s. 163.1(1)(a)(ii):**

- a visual representation in the possession of a third party of an actual person under 14 years of age, or from 14 to 17 years of age in special circumstances of criminality [s. 153 (1), s. 212 (4), s. 271], where the "dominant characteristic" is the depiction, for a sexual purpose, of his or her sexual organ or anal region;

Category B materials - these materials include:

**s. 163.1(1)(a)(i):**

- possession by anyone of works of the imagination, including sketches, drawings, and sculptures of fictitious persons under 18 years which show the person engaged in, or depicted as engaged in, explicit sexual activity; which have no artistic merit or educational, scientific or medical purpose [s. 163.1(6)], or which do not serve the public good [s. 163.1(7), s. 163(3)];

- possession by anyone of visual representations that show sexual activities involving an actual youth (between 14 and 17 years) alone or with another youth(s) or an adult(s), where the commission of the activities themselves is not criminal;

s. 163.1(1)(a)(ii):

- possession by anyone of works of the imagination, including sketches, drawings and sculptures of fictitious persons under 18 years, where the dominant characteristic is the depiction, for a sexual purpose, of a sexual organ or anal region;

- possession by anyone of a visual representation of an actual youth (between 14 and 17 years), where the dominant characteristic is the depiction, for a sexual purpose, of the youth's sexual organ or anal region;

s. 163.1(1)(b):

- written materials or other visual representations of the imagination, which are not intended to be seen by anyone other than the maker, which advocate or counsel sexual activity with a person under the age of 18 years that would be an offence under the *Criminal Code*;

- published written materials in a person's private possession which advocate or counsel sexual activity with a person under the age of 18 years that would be an offence under the *Criminal Code* (since there is no reasoned apprehension of harm arising from private possession, and the harm associated with publication and distribution of such materials is already proscribed under subsections (2) and (3)).

**Constitutional Framework**

25. Resolving the constitutionality of s. 163.1(4) on this appeal may require a consideration of s. 7, s. 2(b) and s. 1 of the *Charter*. Although the three B.C. Court of Appeal Justices chose not to engage directly in a s. 7 analysis, the Respondent respectfully disagrees with the Appellant's submission that such an inquiry is not necessary on this appeal [Appellant's Factum, paras. 32-36]. The Appellant's submission that only a s. 1 analysis is required for the s. 2(b) infringement overlooks the principle that an appeal is

from the judgment or order made in the Court below, and not from the reasons for judgment. The Respondent seeks to uphold the judgment of the B.C. Court of Appeal on the ground that s. 163.1(4) unconstitutionally infringes s. 7 and/or s. 2(b) of the *Charter*. In *R. v. Gee*, [1982] 2 S.C.R. 286, at p. 289, Laskin C.J.C. stated:

> It is a well established principle of our criminal law that a respondent to an appeal here is entitled to hold a judgment in his favour on any grounds available to that respondent which were raised below and are accepted by this court, notwithstanding that those grounds were not supported below and the appellant has based the appeal here on completely different grounds.

26. If this Court finds overbreadth under s. 7, it may decide that it is not necessary to engage in a s. 1 analysis (for s. 7 and s. 2(b)), because the Court has already decided that the legislation has not struck the right balance between the interests of the individual and the interests of society. While the critical issue under s. 7 (overbreadth) and s. 1 (minimal impairment) is similar, the Respondent does not agree with the Appellant's statement that "...the test for overbreadth is the same whether examined under s. 7 or s. 1" (Appellant's Factum, para. 34). This Court has recognized that "...there are several important differences between the balancing exercises under ss. 1 and 7": ***R. v. Mills***, ***supra*** at paras. 66-67:

- the issue under s. 7 is the delineation of the <u>boundaries</u> of the rights in question; under s. 1 it is whether the violation of these boundaries is justified;
- the <u>balancing</u> under s. 7 is through the scope of a principle of fundamental justice found in the basic tenets of the legal system; under s. 1 it is in the wider context of the values which underlie a free and democratic society;
- the <u>burden of proof</u> under s. 7 is on the rights claimant to prove that the balance struck by the impugned legislation violates s. 7; under s. 1 the burden is on the government to justify the infringement of a *Charter* right.

27. The Respondent will ask the Court to recognize, as a principle of fundamental justice, that a law (and particularly a criminal statute) must be proportionate to the legislative objective, and that this is the principle of fundamental justice applicable to the s. 7 analysis in the case at Bar. Under a s. 7 analysis for overbreadth, the Court asks whether the impugned legislation deprives the Respondent of his s. 7 interests in a manner consistent with the principle that the law must be proportionate to the legislative objective. If it does not, because of overbreadth, then s. 7 has been violated. The Respondent will argue that individual and societal interests have already been taken into account in delineating the boundaries and in determining that the principle of proportionality is entitled to the unique status of a "principle of fundamental justice", and thus s. 7 does not call for a further balancing of individual and societal interests under s. 1. A s. 1 analysis triggered solely by a s. 2(b) breach may be quite different. The underlying values of the *Charter* inform every stage of the analysis, and if the value of the expression is considered during the minimal impairment stage, the result too may be different. The Appellant's invitation to the Court to ignore s. 7 and to proceed directly to a s. 1 analysis for a s. 2(b) breach has obvious advantages for the Appellant, but may not permit the legislation to be subjected to proper *Charter* scrutiny.

## 2. STATUTORY INTERPRETATION

28. The first step in an overbreadth analysis requires the Court to exhaust its interpretive function: *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028, at p. 1093, *per* Gonthier J., for the majority (6:3). Since the offence of possession under s. 163.1(4) incorporates the definition of "child pornography" in s.163.1(1), this case calls for a consideration of the meaning of the underlined words and phrases in the definition, which reads:

| | |
|---|---|
| (1) In this section, "child pornography" means | (1) Au présent article, <pornographie juvénile> s'entend, selon le cas: |
| (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means, | (a) de toute représentation photographique, filmée, vidéo ou autre, réalisée par des moyens mécaniques ou électroniques: |
| (i) that shows a person who is or who is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or | (i) soit où figure une personne âgée de moins de dix-huit ans ou présentée comme telle et se livrant ou présentée comme se livrant à une activité sexuelle explicite, |
| (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or | (ii) soit dont la caractéristique dominante est la représentation, dans un but sexuel, d'organes sexuels ou de la région anale d'une personne âgée de moins de dix-huit ans; |
| (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act. | (b) de tout écrit ou de toute représentation qui préconise ou conseille une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi. |

## A. The Contextual Approach

29. In *R. v. Gladue*, [1999] 1 S.C.R. 688, at 704 Cory and Iacobucci JJ. for the Court stated:

> As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment; ***Rizzo & Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, at paras. 20-23; ***R. v. Chartrand***, [1994] 2 S.C.R. 864 at p. 875, 91 C.C.C. (3d) 396, 116 D.L.R. (4th) 207; E.A. Driedger, *Construction of Statutes*, 2nd ed. (1983), at p. 87; *Driedger on the Construction of Statutes*, 3rd ed. (1994), by R. Sullivan, at p. 131.

See also: ***R. v. Davis***, [1999] S.C.J. No. 67, at para. 42.

## B. The purpose of s. 163.1 as a whole

30. The Respondent respectfully submits that the first step in the process of statutory interpretation is to discern the purpose of s. 163.1: ***R. v. Hinchey***, [1996] 3 S.C.R. 1128, at pp. 1137-8, *per* L'Heureux-Dubé J., for the majority (4:3). There are several factors that provide some assistance: the broad aim of the criminal law, the words of the legislative scheme, a Ministerial statement, the social context and legislative history, and judicial pronouncements.

31. The broad aim of the criminal law is to prevent harm to society: ***R. v. Chartrand***, [1994] 2 S.C.R. 864, at p. 881 *per* L'Heureux-Dubé J., and to promote a safe, peaceful and honest society: ***Attorney General of Canada v. Canadianoxy Chemicals Ltd. et al.***, [1999] 1 S.C.R. 743 *per* Major J., who stated, at para. 20: "This is achieved by providing

guidelines prohibiting unacceptable conduct, and providing for the just prosecution and punishment of those who transgress these norms". In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 776, Dickson C.J.C. found that the criminal law could properly be used to prevent the risk of serious harm: see also *R. v. Lucas*, [1998] 1 S.C.R. 439, at p. 476. In *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 493, Sopinka J. broadly defined the legislative objective of the obscenity provision of s. 163 as "...the avoidance of harm."

32. The Act enacting s. 163.1 does not contain a preamble to assist in determining the purpose of the legislation. However, the words in the various subsections of this legislative scheme provide ample support for the conclusion that it was introduced to combat "the evil of child pornography". Although a Minister's statement to Parliament about the purpose of a Bill is not decisive, such a statement may shed light on the mischief Parliament was attempting to remedy: *R. v. Gladue*, *supra*, at S.C.R., p. 712; *R. v. Heywood*, [1994] 3 S.C.R. 761, *per* Cory J. at p.787. On June 3, 1993, M.P. Rob Nicholson (speaking on behalf of the Minister of Justice) introduced second reading debate in the House of Commons of Bill C-128, which enacted s. 163.1, by stating the government's objective in enacting this legislation:

> The purpose of a law specifically addressing child pornography is to deal with the sexual exploitation of children and to make a statement regarding the inappropriate use and portrayal of children in media and art which have sexual aspects. Our message is that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners.

33. Various factors reflect a historic concern over the abuse of actual children in the production of "child pornography": the draft legislation (Bills C-114 (1986), C-54 (1987), C-128 (1993)) which preceded the enactment of s. 163.1, and the social context in which s. 163.1 was enacted, as revealed through Committee Reports (Badgley (1984), Fraser (1986)) and discussions in the Standing Committee on Justice and the Solicitor General.

34. Aside from the B.C. Court of Appeal's judgment in the case at Bar, no other provincial appellate court has considered the constitutionality of s. 163.1(4). In ***Ontario (Attorney General) v. Langer*** (1995), 97 C.C.C. (3d) 290 at p. 313 (Ont. Ct., Gen. Div.), leave to appeal to S.C.C. dismissed (1995), 42 C.R. (4th) 410*n*, McCombs J. concluded that the purpose of this legislation was the same as Sopinka J. had found for the obscenity legislation in s. 163 – to protect society from harm. More specifically, McCombs J. stated its purpose as being: ". . . to protect children, society's most vulnerable members, from the harm caused by the evil of child pornography." In the case at Bar, Rowles J.A. reached a similar conclusion when she stated: "Section 163.1 as a whole is directed at preventing harm to children, specifically in the form of sexual abuse or exploitation caused, both directly or indirectly, by the production and existence of child pornography." [A.R., Vol. XII, pp. 2151-2, para. 148]. In two sentence appeals, the Ontario Court of Appeal has commented on the importance of s. 163.1 and on the evil of child pornography: ***R. v. Jewell*** (1995), 100 C.C.C. (3d) 270 (Ont. C.A.), ***R. v. Stroempl*** (1995), 105 C.C.C. (3d) 187 (Ont. C.A.).

35. Applying these principles and analyses to the case at Bar, it is respectfully submitted that the purpose of section 163.1 as a whole is to protect children from being victims of sexual abuse and/or exploitation. For statutory construction, such a general determination should suffice. However, for overbreadth analysis under s. 7 and/or s.2(b)/s.1 of the *Charter* there must be a further refinement as the focus is on the objective of the infringing statute, in this case subsection (4), which proscribes possession: see paras. 72, 97-98 *infra.*

## C. Interpretation of words and phrases in s. 163.1(1)

36. It is the Respondent's submission that applying the principles of statutory interpretation to various words and phrases in the definition subsection gives it a very

broad scope, which in some circumstances overreaches the legislative objective of s. 163.1(4). It is submitted that most of the section's wording is clear and unambiguous, to the extent that the intention of Parliament can be taken from the plain language of the provision: ***R. v. Multiform Manufacturing Co.***, [1990] 2 S.C.R. 624, at pp. 630-1. Courts ought not to depart from the "plain meaning" of the text in the absence of ambiguity: ***Winko v. B.C. (Forensic Psychiatric Institute)*** (1999), 175 D.L.R. (4th) 193 (S.C.C.), para. 124 *per* Gonthier J. The only way a narrow interpretation could be given to most of the terms is by the impermissible route of judicial amendment. Writing for the majority (5:4) in ***R. v. McIntosh***, [1995] 1 S.C.R. 686, at p. 701, Lamer C.J.C. agreed with Pierre-Andre Cote's statement in *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Quebec: Yvon Blais, 1991) at p. 231, that:

> Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say.

1. Meaning of the phrase "other visual representation"

37. Section 163.1(1)(a) states that the medium of proscribed "child pornography" is "a photographic, film, video or other visual representation whether or not it was made by electronic or mechanical means". The grammatical and ordinary sense of the words "visual representation" suggests a broad interpretation. The *Shorter Oxford English Dictionary*, 2nd ed., defines *Visual* as "5. Of or pertaining to vision in relation to the object of sight, optical", and *Representation* as "2(c). the action or fact of exhibiting in some visible image or form; 6. the action of presenting to the mind or imagination; an image thus presented; a clearly conceived idea or concept". In ***R. v. Butler, supra***, Gonthier J. (L'Heureux-Dubé J. concurring) stated at p. 511: "A representation is a portrayal, a description meant to evoke something to the mind and senses".

38. In the context of this subsection a representation that can be seen, that is other than a photograph, film or video, and that is made by any means, would logically include all

other forms of visual representation, including drawings, sketches, paintings, and sculptures. The definition would also include computer-generated images that are only temporary: *R. v. Weir*, [1998] 8 W.W.R. 228 (Alta. Q.B.), at p. 259. Such a wide interpretation is consistent with the purpose of s. 163.1.

2. Meaning of the word "person" - s. 163.1(1)(a)(i), (ii)

39. The word "person" in subclauses (a)(i) and (a)(ii) of the definition subsection has two possible interpretations: it could be interpreted broadly to include a fictitious human being as well as an actual human being, or it could be interpreted narrowly to apply only to the latter. A broad interpretation would catch drawings, sketches, paintings, sculptures and computer-generated images that are works of the imagination and that do not involve children in the making. It is the position of both the Appellant and the Respondent that a broad interpretation should be adopted.

40. The grammatical and ordinary sense of the word "person" might support a narrow interpretation of actual human being. The *Shorter Oxford English Dictionary on Historical Principles*, 3rd ed., defines *Person* as: "A human being having rights or duties recognized by law" (Vol. II, p. 1560). This interpretation is applied where "person" appears in the *Criminal Code* and by context cannot include a corporate body: for example, in: s. 183: *R. v. Davie* (1981), 54 C.C.C. (2d) 216 (B.C.C.A.); s. 220: *R. v. Sullivan*, [1991] 1 S.C.R. 489, at p. 503, where this Court rejected a submission that "person" and "human being" are not equivalent terms within the *Criminal Code*.

41. However, the context of s. 163.1 strongly supports a broader interpretation. Under a plain reading of s. 163.1(1)(a), a depiction which "*shows a person*" would logically mean a depiction of an objectively discernible representation of a person. The *Shorter Oxford English Dictionary on Historical Principles*, 3rd ed., defines *Show* as: "1. The action or an act of exhibiting to view or notice. 2. The external aspect (of a person or thing)" (Vol. II, p. 1983). To limit the definition narrowly would require somewhat arbitrary distinctions,

such as whether an accused has drawn a completely "fictional person", and whether an accused has drawn a depiction based on a memory of an actual person. Further support for a broad interpretation comes from the legislative scheme of s. 163.1 as a whole. The definition section applies to all the offences in s. 163.1, including distributing and publishing the proscribed material. A narrow interpretation of the definition of "person" would require the unlikely finding that Parliament did not intend to criminalize the distribution or publication of sexual material related to fictional representations of children and youth.

3. Meaning of the phrase "explicit sexual activity" – s. 163.1(1)(a)(i)

42. The grammatical and ordinary sense of the words "explicit sexual activity" in s. 163.1(1)(a)(i) and the judicial interpretation of the word "sexual" suggest that Parliament intended the phrase to capture a broad range of activity. The *Shorter Oxford English Dictionary On Historical Principles* provides the following definitions: "*Activity*: 1. the state of being active; the exertion of energy. 4. anything active." (Vol. I, p. 20); "*Explicit*: 2. developed in detail; hence clear, definite." (Vol. 1, p. 707); "*Sexual*: 1. Of or pertaining to sex or the attribute of being either male or female; existing or predicated with regard to sex." (Vol. II, p. 1959). In ***R. v. Chase***, [1987] 2 S.C.R. 293 this Court interpreted the word "sexual" in sexual assault (s. 271) to cover a wide range of assaults which, to a reasonable observer, violated the sexual integrity of the victim. The term "explicit sexual activity" probably extends well beyond specific acts of sexual intercourse, masturbation and oral sex, to include kissing, hugging and touching, with or without clothes on, when done in a clear, unambiguous sexual context.

4. Meaning of the phrase "any written material or visual representation" - s. 163.1(1)(b)

43. The grammatical and ordinary sense of the words in the phrase "any written material or visual representation" in s. 163.1(1)(b) lends itself to a broad interpretation. The only limitation is that the medium must advocate or counsel "....sexual activity with a person under the age of eighteen years that would be an offence under this Act." *The*

*Shorter Oxford English Dictionary on Historical Principles* gives the following definitions: "*Advocate*: 3. To argue in favor of; to recommend publicly" (Vol. I, p. 30). "*Counsel*: 1. To give or offer counsel or advice to: to advise. 2. To recommend (a plan, suggestion, etc.)" (Vol. I, p. 437). Section 22 of the *Code* states that for the purposes of the *Criminal Code*, "counsel" includes procure, solicit or incite.

44. This wording leads to the conclusion that a person who writes an article advocating or counselling sexual activity between a 17-year-old and his high school teacher, or anal intercourse between two 17-year-olds, would be guilty of a criminal offence even though the author had only reduced his or her thoughts to paper or tape, the material never left his or her private possession and was never seen or read by another person. In the Court of Appeal, McEachern C.J.B.C. favoured a narrower interpretation, effectively adding "published" before "written material or visual representation" because advocating or counselling requires "private or public publication of some sort"[A.R., Vol. XII, p. 2219, para. 284]. The Respondent submits that there is a crucial difference between a person's oral and written advocacy or counselling. While oral advocacy or counselling must be public in the sense of being communicated to another, a person may write something that advocates or counsels a position, without ever showing it to another. The Appellant agrees with McEachern C.J.B.C.'s interpretation (Appellant's Factum, para. 121), which would not criminalize the private possession of a person's own writings or visual representations, but would criminalize published materials, such as the NAMBLA magazine. While this interpretation would be more consistent with the valid legislative objective of protecting children from harm, it ignores the plain meaning of the words used, and requires this Court to "amend" the statute by inserting the word "published" into the text. Further, given that subsections 163.1(2) and (3) separately criminalize distribution and publication of the materials and possession for those purposes, it is submitted that Parliament intended to criminalize the mere private possession of the proscribed material.

5. Meaning of the word "possession" in s. 163.1(4)

45. Section 163.1(4) provides that "Every person who possesses any child pornography" is guilty of an offence. The Respondent submits that the scheme of s. 163.1 supports the conclusion of Rowles J.A. that "possession" under s. 163.1(4) is solely targeted at the *private possession* of "child pornography" [A.R. Vol. XII, p. 2162]. Possession for the purposes of publication is proscribed by s. 163.1(2), and possession for the purposes of distribution or sale is proscribed by s. 163.1(3).

46. The definition of "possession" in s. 4(3) of the *Code* casts a very wide net for whatever expressive materials are caught by s. 163.1(1). It reads:

> For the purposes of this Act,
> (a) a person has anything in possession when he has it in his personal possession or knowingly
> (i) has it in the actual possession or custody of another person, or
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

47. When read with subsections 163.1(1) and (4), this definition of possession criminalizes possession of visual representations of explicit sexual activity or poses, not just in the hands of a third person, but also in the hands of a young person who is the subject of the representation. For example, a 16-year-old girl who possesses a drawing of her sexual activity with her boyfriend, or a 17-year-old boy who makes a drawing of his erect penis, is guilty of possession of child pornography.

48. The broad definition also means that a father who finds his son's sexually explicit photographs or drawings of himself in the son's bedroom desk, and leaves them there, is guilty of possession, if the father has the right to grant or withhold consent to the material staying there: *R. v. Chambers* (1985), 20 C.C.C. (3d) 440 (Ont. C.A.). Similarly, if a 16-year-old girl encourages her boyfriend to retain possession of a drawing or video of their explicit sexual activity, she would be liable as a party under s. 21(1)(c) for abetting the offence. It would be an extraordinary use of the criminal law to prosecute someone for such indirect possession of Category B materials, where a child was not abused or exploited in the making or where the activity recorded was itself legal.

## 3. SECTION 7 OF THE *CHARTER*

### A. Individual rights guaranteed by section 7

49. Section 7 of the Charter provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

50. This appeal calls for a consideration of whether s. 163.1(4) deprives the Respondent, and any other person charged with possession of child pornography under this subsection, of their right to "liberty" and/or their right to "security of the person" and, if so, whether the deprivation is in accordance with the "principles of fundamental justice". The Respondent submits that charging a person with the offence of private possession of "child pornography" deprives a person of significant s. 7 interests which are worthy of *Charter* protection and that, in the case of possession of Category B materials, the deprivation is not in accordance with the principles of fundamental justice. Subsection 163.1(4) limits two liberty interests (risk of imprisonment and right to privacy) as well as the right to security of the person (psychological integrity). The deprivation of any one of these interests is sufficient to trigger a s. 7 analysis of overbreadth. The cumulative deprivation of all three interests would be a relevant factor in the proportionality analysis of s. 1.

#### 1. The right to liberty

51. "Liberty" under s. 7 of the *Charter* is a multi-dimensional concept which covers interests on a spectrum from the less important to the fundamental: ***Cunningham v. Canada***, [1993] 2 S.C.R. 143, at pp. 149-50, *per* McLachlin J. The liberty interests engaged by the impugned legislation (s. 163.1(4)) are fundamental in a free and democratic society: the risk of imprisonment and the right to privacy.

**Risk of imprisonment**

52. The liberty interests of a person are implicated when the person is charged with possession of child pornography under s. 163.1(4), as the person is exposed to the risk of imprisonment for a term not exceeding five years.

53. This Court has ruled that mandatory imprisonment for an offence constitutes a deprivation of liberty within the meaning of s. 7: ***Reference re Section 94(2) of the Motor Vehicle Act***, [1985] 2 S.C.R. 486, *per* Lamer J. (as he then was) at p. 515, McIntyre J. at pp. 521-2, and Wilson J. at p. 534. That understanding of liberty was subsequently broadened to include the possibility of imprisonment: ***Reference re Criminal Code, Ss. 193 & 195.1(1)(c)***, [1990] 1 S.C.R. 1123, *per* Dickson C.J.C. at p. 1140, Lamer J. (as he then was) at p. 1156, and Wilson J. at p. 1217; ***R. v. Mills***, *supra*, para. 62.

**Right to privacy**

54. The Respondent submits that the "liberty" interest of a person charged with possession of child pornography also extends to a right to privacy in relation to private thoughts and the recording of those private thoughts in the form of photographs of one's own self, drawings, sculptures, computer-generated images and written materials. Subsection 163.1(4), which criminalizes the private possession of expressive materials, strikes at the heart of fundamental privacy concerns.

55. Under s. 164(1)(b) of the *Code*, the police may obtain a search warrant to search a home for any "representation or written material" that is child pornography within the meaning of s. 163.1(1). In the case at Bar the police searched the Respondent's home, pursuant to a warrant, and obtained a collection of books, manuscripts, stories and photographs which the Crown alleges are caught by the definition of "child pornography".

56. According "liberty" a broad meaning to include significant privacy interests is appropriate, having regard to the fact that the concept of privacy as an aspect of liberty is

recognized in international declarations and conventions (see Appendix B) and has a long lineage in the common law. In *Semayne's Case*, (1604) 5 Co. Rep. 91a, 77 E.R. 194 at p. 195 it was said: "That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose. . . ." *Semayne's Case* was described as "vintage common law" in *Eccles v. Bourque et al.*, [1975] 2 S.C.R. 739, at pp. 742-3. In *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 158-60 Dickson J. (as he then was) for the Court found that privacy is a core societal value, one aspect of which is addressed in s. 8. In *R. v. Dyment,* [1988] 2 S.C.R. 417, LaForest J., speaking for the majority, stated at S.C.R., pp. 427-8:

> The foregoing approach is altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state: see Alan F. Westin, *Privacy and Freedom* (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state. (emphasis added)

57. LaForest J. again addressed the primacy of privacy in ***Thomson Newspapers Ltd. v. Canada (Director, R.T.P.C.)***, [1990] 1 S.C.R. 425, where His Lordship stated at pp. 517-518:

> The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life. It is for the individual to decide what persons or groups he or she will associate with, what books he or she will read, and so on. One does not have to look far in history to find examples of how the mere possibility of the intervention of the eyes and ears of the state can undermine the security and confidence that are essential to the meaningful exercise of the right to make such choices.

58. Most recently, this Court in *R. v. Mills*, *supra*, referred to some of these earlier judgments in emphasizing the significance of privacy to the liberty interest of an individual

in a modern state. Writing for seven members of the Court, McLachlin and Iacobucci JJ. stated at paras. 79-80:

> This Court has most often characterized the values engaged by privacy in terms of liberty, or the right to be left alone by the state. For example, in *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427, La Forest J. commented that "privacy is at the heart of liberty in a modern state". In *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 50, per Cory J., privacy was characterized as including "the right to be free from intrusion or interference."
>
> This interest in being left alone by the state includes the ability to control the dissemination of confidential information. As La Forest J. stated in *R. v. Duarte*, [1990] 1 S.C.R. 30, at pp. 53-54:
>
> > ...it has long been recognized that this freedom not to be compelled to share our confidences with others is the very hallmark of a free society. Yates in *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E.R. 201, states, at p. 2379 and p. 242:
> >
> > > It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of friends.
>
> Those privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information "about one's lifestyle, intimate relations or political or religious opinions": *Thompson Newspapers*, *supra*, at pp. 517-18, *per* La Forest J., cited with approval in *Baron*, *supra*, at pp. 444-45.
>
> The significance of these privacy concerns should not be understated.

59. Although the right to privacy is frequently discussed in the context of s. 8, this Court also treats it as an aspect of "liberty" under s. 7. In *R. v. Mills*, *supra* at para. 87, this Court explored the connection between ss. 7 and 8 of the *Charter* and cited Lamer C.J.C.'s statement in *Ref re s. 94(2) of Motor Vehicle Act*, *supra*, at p. 502 that: "It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14."

60. The Respondent submits that, at least in the criminal law context of s. 163.1(4), the concept of "liberty" in s. 7 includes the right to privacy, because persons may be deprived of their privacy in relation to expressive materials they possess through the actions of the state in investigating and enforcing obedience to the law.

2. The right to security of the person

**Psychological integrity**

61. Subsection 163.1(4) deprives an accused of his or her right to security of the person under s. 7 of the *Charter* because of its serious and profound effect on the psychological integrity of a person charged with this offence.

62. In ***New Brunswick v. G.(J.)***, [1999] S.C.J. No. 47, Lamer C.J.C. for the majority (6:3) reviewed this Court's interpretation of "security of the person", and concluded at paras. 58-60:

> This Court has held on a number of occasions that the right to security of the person protects "both the physical and psychological integrity of the individual": see ***R. v. Morgentaler***, [1988] 1 S.C.R. 30, at p. 173 (per Wilson J.); ***Reference re ss. 193 and 195.1(1)(c) of the Criminal Code***, [1990] 1 S.C.R. 1123, at p. 1177; ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519, at pp. 587-88. [para 58]
>
> Delineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science. . . . It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. . . . [para 59]
>
> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensitivity. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. [para 60]

63. In finding that state removal of a child from parental custody constituted a serious interference with the psychological integrity of the parent, Lamer C.J.C. built on his finding in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 919-920, that "stigmatization of the accused" is one of the factors that constitutes a restriction of security of the person. He concluded that a parent is often stigmatized as "unfit" when relieved of custody, and "the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct" [*New Brunswick v. G.(J.), supra*, para 61]. For the minority, L'Heureux-Dubé J. agreed with Lamer C.J.C. that the appellant's security of the person was implicated, stating at para. 116: ". . . the importance of one's identity as a parent, and the serious stigma and psychological stress that will occur if the child is removed from the home because of the removal of the parent's power to care for him or her mean that the parent's security of the person will be violated if the child is removed from the home".

64. The Respondent submits that the extraordinarily broad statutory definition of "child pornography" in s. 163.1(1) has the effect of criminalizing private possession of materials that have not harmed children in the making, that depict activities that are themselves legal and that do not pose a risk of harm to children. To expose an individual to criminal prosecution for private possession of such Category B materials, with the inevitable labelling even before trial of "child pornographer", introduces a stigmatization that is rarely paralleled in the criminal law. In the Court below, Rowles J.A. stated that there is a ". . . horrific stigma associated with being labelled a child pornographer" [A.R., Vol. XII, p. 2180 at para. 201]. Southin J.A.'s observation about the "outrage" generated in the media by the learned trial judge's decision in the case at Bar indicates the strong public reaction to matters labeled "child pornography" [A.R., Vol. XII, p. 2066, para. 5].

## B. Deprivation of rights, and the principles of fundamental justice

65. The protection afforded s. 7 rights is not absolute; the state may limit them as long as it is done in accordance with the principles of fundamental justice: ***B.(R.) v. Children's Aid Society (Toronto)***, [1995] 1 S.C.R. 315, p. 339, *per* Lamer C.J.C. This Court has determined that if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, the limitations on those rights must be fundamentally just not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against the principles of fundamental justice: ***Godbout v. Longueuil (City)***, [1997] 3 S.C.R. 844, at p. 898. The Respondent's attack is on the substantive effects of s. 163.1(4), and not on any procedural aspect of its implementation.

### 1. Proportionality as a principle of fundamental justice

66. Requiring a law to be proportionate to its legislative objective should qualify as a principle of fundamental justice under s. 7 of the *Charter* for three reasons. First, it is concerned not only with the interest of the person who claims his or her right has been limited, but also with the protection of society: ***Cunningham v. Canada, supra***, at pp. 151-2, *per* McLachlin J. Second, it is capable of determining the proper boundary between the competing interests by delineating the "area of risk". Third, it represents a basic notion in our judicial and legal systems. Writing for the majority (5:4) in ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519, Sopinka J. addressed at pp. 590-1 the difficult question of ascertaining a principle of fundamental justice for the purpose of s. 7 of the *Charter*:

> Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not,

however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. (as he then was) in *Ref. Re s. 94(2) of Motor Vehicle Act*, *supra*, at p. 513, are as follows:

> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system....
>
> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves. (emphasis added)

67. This Court's decision in *R. v. Heywood*, *supra*, suggests that the principle of proportionality has emerged as a principle of fundamental justice under s. 7, although in that case it was described negatively as "overbreadth". The Respondent prefers to characterize the principle of fundamental justice positively as the requirement that legislation be proportionate to the legislative objective. To the extent that it is not proportionate, it is overbroad.

68. In *R. v. Heywood*, *supra*, this Court struck down s. 179(1)(b) of the *Code* which made it an offence for persons convicted of certain offences to be "found loitering in or near a school ground, playground, public park or bathing area." The Court found that the statute was overbroad in that it went beyond what was necessary to accomplish its goal of protecting children from becoming victims of sexual offences. Cory J. for the majority (5:4) gave the following description of overbreadth analysis under s. 7:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: Are those means necessary to achieve the state objective? If the state, in pursuing a legitimate objective, uses means which are broader than is

> necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate (S.C.R., pp. 792-793).

69. The *Heywood* principle is consistent with earlier statements from this Court concerning overbreadth under s. 7. In *Cunningham v. Canada, supra*, the Court found that a 1986 amendment to the *Parole Act* changing the conditions for release on mandatory supervision did not amount to a denial of the inmate's liberty interest under s. 7 because the prisoner's liberty was limited only to the extent necessary to protect the public. In discussing the principles of fundamental justice under s. 7 in ***Rodriguez v. British Columbia (Attorney General), supra,*** Sopinka J., writing for the majority (6:3), stated at p. 594:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be). . . a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

70. ***Heywood*** supports the proposition that overbreadth is no longer a mere analytical tool subsumed under the "minimal impairment branch" of the ***Oakes*** test under s. 1 of the *Charter*, as indicated in earlier judgments: ***Committee for Commonwealth of Canada v. Canada,*** [1991] 1 S.C.R. 139, at pp. 215-9, *per* L'Heureux Dubé; ***R. v. Nova Scotia Pharmaceutical Society,*** [1992] 2 S.C.R. 606, at pp. 621-30, *per* Gonthier J. Subsequent judgments from this Court and provincial appellate courts appear to have accepted the *Heywood* principle as a principle of fundamental justice under s. 7 of the *Charter*: ***R. v. Canadian Pacific Ltd.***, *supra* at p. 1048, *per* Lamer C.J.C. in dissent; ***Winko v. B.C. (Forensic Psychiatric Institute), supra,*** at p. 232; ***Winko v. B.C. (Forensic Psychiatric Institute)*** (1996), 112 C.C.C. (3d) 31 (B.C.C.A.), ***R. v. Hoeppner***, [1999] M.J. No. 113 (QL) (Man. C.A.); ***R. v. Pan*** (1999), 134 C.C.C. (3d) 1 (Ont. C.A.); ***R. v. Biller*** (1999), 174 D.L.R. (4th) 721 (Sask. C.A.), at pp. 729-36.

2. Tools for Overbreadth Analysis

71. The authorities indicate that there are three basic tools for overbreadth analysis - the legislative objective, the means chosen to attain the objective and reasonable hypotheticals.

**Legislative Objective**

72. As stated in para. 21, the Respondent submits that the legislative objective of s. 163.1(4) is *to prevent the sexual abuse and/or exploitation of children that mere possession of child pornography causes.* This interpretation is in keeping with this Court's concern that the legislative objective of the infringing measure not be overstated. McLachlin J.'s statement in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199, at p. 335 is also apposite for a s. 7 analysis:

> Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.

See also: paras. 97-99, *infra*, under the Section 1 analysis.

73. The wider the legislative objective, the more difficult it is for an accused to discharge its burden of demonstrating an infringement under s. 7, and the easier it is for the government to justify an infringement under s. 1. The Respondent submits that the Appellant's statement of the legislative objective of s. 163.1(4) is so broad that it addresses not just the "mischief" occasioned by private possession, but extends to "the eradication of the clandestine child pornography market; and the facilitation of police enforcement efforts in the areas of child pornography" [Appellant's Factum, para. 60]. While there may be an argument that those objectives are valid for the more serious offences set out in

subsections (2) and (3), they far exceed any legitimate objective arising from private possession.

**Examples of Overbreadth**

74. This Court has ruled that, in overbreadth analysis, it is appropriate to consider reasonable hypotheticals: *R. v. Heywood,* at p. 799, and *R. v. Canadian Pacific Ltd., per* Gonthier J. for the majority, at p. 1091, para. 81. This approach is consistent with this Court's use of reasonable hypotheticals to determine whether legislation violates s. 12 of the *Charter*: *R. v. Smith* [1987] 1 S.C.R. 1045, at p. 1053; *R. v. Goltz,* [1991] 3 S.C.R. 485, at pp. 504-6.

75. In the case at Bar the majority of the B.C. Court of Appeal held that a number of the proscribed Category B materials created no reasonable risk of harm. Rowles J.A. concluded that: "The definition of child pornography in s. 163.1(1) captures a vast range of materials, a significant portion of which cannot be shown to pose a danger to children, especially when the materials remain in the private possession of their creator" [A.R., Vol. XII, pp. 2186-7, para. 213].

76. It is respectfully submitted that the offence of possession of child pornography is constitutionally overbroad in that it criminalizes the private possession:

**under s. 163.1(1)(a)(i):**

- of drawings and sculptures which show a person under 18 years engaged in explicit sexual activity, when such works of the imagination do not, in their production, abuse or exploit children. This would include a representation which is self-authored and a depiction of the possessor [Rowles J.A. at A.R., Vol. XII, pp. 2168-72, para. 179, pp. 2186-7, paras. 183-6, 213; Southin J.A., p. 2141, para. 128];

- of photographs, drawings or videos of a person between 14 and 17 years engaged in explicit sexual activity, where the act itself is not criminal [Rowles J.A., A.R., Vol. XII, pp. 2175-80, paras. 193-197, 200; Southin J.A., pp. 2102-4, paras. 44-47, pp. 2141-2, para. 128];

- of drawings or imaginary depictions of legal sexual activity even if the depiction is of photographs, drawings or videos of a married couple, one or both of whom are between 14 and 17 years of age, recording their sexual activity [Rowles J.A., A.R., Vol. XII, pp. 2175-80, paras. 193-197, 200];

- of photographs, videos or drawings of a person actually over 18 years of age who is depicted as between 14 and 17 years of age, engaging in explicit sexual activity, where the act itself is not criminal. For example, it is legal in Canada for a 14-17-year-old to engage in explicit sexual activity, but this section makes it a criminal offence to possess a video of an 18-year-old actor playing the role of a 14-17-year-old engaged in such activity [Rowles J.A., A.R., Vol. XII, pp. 2175-80, paras. 193-197; Southin J.A., pp. 2102-4, paras. 44-47, pp. 2141-2, paras. 128-9];

- by a person between 14 and 17 years, of photographs or videos of themselves engaged in explicit sexual activity or of drawings of such imagined activity, rather than just criminalizing possession by an adult. [Rowles J.A., A.R., Vol. XII, pp. 2175-80, paras. 193-197; Southin J.A., pp. 2102-4, paras. 44-47, pp. 2141-2, paras. 128-9].

**under s. 163.1(1)(a)(ii):**

- of drawings and sculptures in which the dominant characteristic is the depiction of a sexual organ (which may include breasts: *R. v. Chase*, *supra*) or the anal region of a person under 18 years of age, when such works of the imagination do not, in their production, abuse or exploit children [Rowles J.A., A.R., Vol. XII, pp. 2169-72, paras. 183-6, p. 2178, para. 197, pp. 2186-7, para. 213];

- of photographs or videos in which the dominant characteristic is the depiction of a sexual organ or the anal region (or even just the buttocks) of a 14-17-year-old, when posing for such a photograph (at least in private) is not criminal;

- of photographs or videos of a married couple, one or both of whom are between 14 and 17 years of age, recording their sexual activity [Rowles J.A., A.R., Vol. XII, pp. 2178-9, para. 197];

- by a person between 14 and 17 years, of photographs, videos or drawings of himself or herself in which the dominant characteristic is the depiction of a sexual organ or the anal region, rather than just criminalizing possession by an adult [Rowles J.A., A.R., Vol. XII, pp. 2178-9, para. 197];

**under s. 163.1(1)(b):**

- of visual representations that do not abuse or exploit children in the production;

- of written material advocating sexual offences with children under 18 years of age, when the material is only a written record of the author's private thoughts [Rowles, J.A, A.R., Vol. XII, pp. 2168-9, paras. 180-2, p. 2179, para. 198; Southin J.A., pp. 2128-30, paras. 191-6, p. 2140, paras. 122-3];

- of the written text of a speech advocating sexual offences with children under 18 years of age, when no one else in the world reads the text [Rowles, J.A, A.R., Vol. XII, pp. 2168-9, paras. 180-2, p. 2179, para. 198; Southin J.A., pp. 2128-30, paras. 191-6, p. 2140, para. 122].

77. The Respondent further submits that these areas of overbreadth cannot be saved through selective policing or prosecutions. Where legislation is found to be overly broad, it is not enough for the Crown to assure the court that it will exercise its discretion in

deciding when to prosecute. In *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1078, where the Court struck down the seven-year minimum sentence for importing narcotics, Lamer J. (as he then was) said:

> In my view, the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the Charter. To do so would be to disregard totally s. 52 of the *Constitution act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty-bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.

78. In *R. v. Zundel, supra*, at p. 773, McLachlin J. reiterated that view:

> I, for one, find cold comfort in the assurance that a prosecutor's perception of "over-all beneficial or neutral effect" affords adequate protection against undue impingement on the free expression of facts and opinions. The whole purpose of enshrining rights in the Charter is to afford the individual protection against even the well-intentioned majority. To justify an invasion of a constitutional right on the ground that public authorities can be trusted not to violate it unduly is to undermine the very premise upon which the Charter is predicated.

See also *R. v. Hess, supra*, at p. 924.

79. During the public hearings before the Standing Committee on Justice and the Solicitor General, Det. S/Sgt. Matthews testified that: "I don't think the arts community should have any concern about the type of material we're trying to eliminate" [A.R., Vol. V, p. 752]. Ironically, the first reported case after this legislation came into force was the forfeiture of drawings in an art gallery, in *Ontario v. Langer, supra.*

**Deference**

80. The Respondent recognizes that a measure of deference must be given to the means selected by Parliament. However, two points should not be overlooked. First, the degree

of deference should not be carried ". . . to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult...": *RJR-MacDonald Inc. v. Canada (A.G.), supra,* at pp. 332-3, *per* McLachlin J.; *Vriend v. Alberta,* [1998] 1 S.C.R. 493, at p. 561, *per* Cory and Iacobucci JJ. Second, less deference is accorded criminal legislation than social policy legislation. In *RJR-MacDonald Inc. v. Canada (A.G.), supra* at p. 277 La Forest J. stated:

> Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary. (emphasis added)

**Making s. 163.1(4) proportionate to the legislative objective**

81. Even when proper deference is given to Parliament's legislation in s. 163.1(1) and (4), the Respondent submits that they are unconstitutional because, "in pursuing a legitimate objective, [Parliament] uses means which are broader than is necessary to accomplish that objective": *R. v. Heywood, supra,* at pp. 792-3.

82. Parliament could have limited the breadth of possession through certain defences, including:

- a defence that the private possession offence be limited to the depiction of actual children, computer-generated images that appear to be actual children, or images in which actual children were used for their production;
- a defence that the private possession offence does not apply to written material or drawings created by someone for their own use;
- a defence that the youth depicted in the representation is the accused;

- a defence for private possession where the accused made the material, or was given the material by a young person (14-17 years), and that at the time of the making or being given the material, the accused was not more than two years older than the young person was or appeared to be [see, for example, s. 150.1(2) and (3) of the *Criminal Code*].

[See also less sweeping child pornography legislation in other countries, at Appendix A.]

3. Taking into account individual and societal interests

83. If this Court finds a breach under s. 7, it may conclude that it is not necessary to go on to consider s. 1 because, in determining that s. 163.1(4) is overbroad, the Court has, in two significant respects, already taken into account the interests of the individual and the state:

- **formulation of the principle:** if it is accepted that the principles of fundamental justice are limited to the basic tenets of our justice and legal systems, they are only elevated to that unique status after intense and protracted scrutiny, which inevitably involves a balancing of competing interests. In ***Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)***, *supra*, L'Heureux-Dubé J. stated at p. 583: "Fundamental justice in our Canadian legal tradition . . . is primarily designed to ensure that *a fair balance be struck between the interests of society and those of its citizens*". In *Rodriguez v. British Columbia (A.G.)*, *supra*, at pp. 592-3, Sopinka J. (writing for the majority) stated: "I cannot subscribe to the opinion . . . that the state interest is an inappropriate consideration in recognizing the principles of fundamental justice in this case. *This Court has affirmed that in arriving at these principles, a balancing of the interest of the state and the individual is required*" (emphasis added). The principle of fundamental justice that requires in criminal law proof beyond a reasonable doubt reflects a balancing by our justice system of the state's interest in conviction and an accused's interest that only the guilty be punished. Similarly, the principle of

fundamental justice requiring procedural fairness (as discussed in *New Brunswick v. G.(J.)*, *supra*) reflects a balancing between the state's interest in administrative efficiency and the individual's interest in being treated fairly by the state. Similarly, the principle of fundamental justice that precludes disproportionate legislation reflects a balancing by our justice system of the state's interest in criminalizing antisocial conduct and an accused's right to liberty from state interference when his or her conduct creates no risk of harm to others.

- **application of the principle:** when examining specific legislation for overbreadth, it is clear that at the "proportionate" end of the spectrum the interests of the state predominate, because the legislation promotes the legislative objective. However, at the point along the spectrum toward the "disproportionate" end where the legislation ceases to promote the legislative objective, the state's interest (here, preventing harm to children) falls away, and the individual's interest in liberty (privacy) and security of the person takes on greater importance. In this sense, the s. 7 analysis requires the court to take into account the interests of the individual and the state. The Respondent submits that this analysis is consistent with Cory J.'s statement in ***R. v. Heywood,*** *supra* at p. 793, that:

> Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the state interest against that of the individual.

84. Where a court finds a breach under s. 7 arising from overbreadth, it is difficult to conceive how the government could then establish that the legislation is demonstrably justified under s. 1. Various judgments of this Court have noted that violations of s. 7 are rarely saved by s. 1: ***Reference re s. 94(2) of the Motor Vehicle Act***, *supra*; ***R. v. Heywood***, *supra*, at pp. 802-3; ***Godbout v. Longueuil (City)***, *supra*, *per* LaForest J.; ***New Brunswick (Minister of Health and Community Services) v. G.(J.)***, *supra*, at para. 99; and *R. v. Mills*, *supra*, at para. 10, *per* Lamer, C.J.C., dissenting in part.

## 4. SECTION 2(b) OF THE *CHARTER*

### A. Freedom of expression

85. The Appellant concedes that s. 163.1(4) infringes freedom of expression as guaranteed by s. 2(b) of the *Charter* (Appellant's Factum, para. 37). It is obvious that s. 163.1(4), when read in conjunction with the definition of "child pornography" in s. 163.1(1), encroaches upon s. 2(b). The purpose and effect of this legislation is to restrict an individual's freedom of expression in the area of "child pornography". In ***R. v. Keegstra,*** *supra,* at p. 729, all nine Judges agreed that if an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of s. 2(b). Dickson C.J.C. said that the term "expression" in this section embraces all content of expression irrespective of the particular meaning or message sought to be conveyed. Writing for the majority (4:3) in ***R. v. Zundel,*** [1992] 2 S.C.R. 731, at p.753, McLachlin J. stated:

> This court in *Keegstra* held that the hate propaganda there at issue was protected by s. 2(b) of the Charter. There is no ground for refusing the same protection to the communications at issue in this case. The court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s. 2(b), unless the physical form by which the communication is made (for example, by a violent act) excludes protection: *Irwin Toy, supra,* at p. 607, *per* Dickson C.J.C. and Lamer and Wilson JJ. In determining whether a communication falls under s. 2(b), this court has consistently refused to take into account the content of the communication, adhering to the precept that it is often the unpopular statement which is most in need of protection under the guarantee of free speech: see, *e.g.*, *Keegstra, supra,* at p. 97, *per* McLachlin J.; *R. v. Butler* (1992), 70 C.C.C. (3d) 129 at p. 153, 89 D.L.R. (4th) 449 at p. 473, [1992] 1 S.C.R. 452, *per* Sopinka J.

86. Writing for seven Judges in *R. v. Butler, supra,* Sopinka J. stated: ". . . activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed. . . . Meaning sought to be expressed need not be 'redeeming' in the eyes of the court to merit the protection of s. 2(b) whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure" (S.C.R., pp. 488-489).

87. This Court has identified, as one of the core values of freedom of expression, the protection of individual autonomy: *R. v. Lucas*, *supra*, at para. 90 *per* Cory J; *RJR-MacDonald*, *supra*, at para. 72 *per* LaForest J.; *C.B.C. v. New Brunswick*, *supra*, at p. 513. Where legislation criminalizes the private possession of products of one's imagination, this core value is in issue. One's autonomy is inextricably linked to one's s. 7 right to privacy, which is also engaged by this legislation: see paras. 54-60, *supra*.

**B. Freedom of thought, belief and opinion**

88. Although the findings of the Court of Appeal focused on the infringement of the freedom of expression, it is difficult to isolate that value from the other freedoms protected by s. 2(b) of the *Charter* – the freedom of thought, belief and opinion. The Respondent's position is that s. 163.1(4) of the *Criminal Code* infringes all four values in s. 2(b). In *R. v. Reid* (1988), 40 C.C.C. (3d) 282 (Alta. C.A.) the accused argued that s. 151 of the *Income Tax Act*, requiring the taxpayer to "estimate" in his tax return the amount payable, violated his right to freedom of "opinion" under s. 2(b). In dismissing the argument, the court stated at p. 285:

> The cases dealing with this section of the Charter deal almost exclusively with freedom of expression. That is undoubtedly because it is difficult to imagine legislation aimed at thought or belief or opinion in isolation from some expression or other manifestation of them. Even a totalitarian state would have difficulty in suppressing the thoughts of its citizens; it would be feasible to attack only the outward display of those thoughts. There are, moreover, no clear lines which separate thought, belief and opinion from expression.

89. The Respondent submits that the definition of "child pornography", especially clause 163.1(1)(b) as it relates to written material, infringes the Respondent's right to freedom of belief and opinion. In criminalizing the conversion onto paper of one's thoughts, it comes perilously close to criminalizing an individual's right to freedom of thought.

## 5. SECTION 1 ANALYSIS

### A. The context for a s. 1 analysis

90. A s. 1 analysis is based on the guidelines set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, as modified by *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835, and *Egan v. Canada*, [1995] 2 S.C.R. 513, p. 605. As Bastarache J. stated in *M. v. H.*, [1999] 1 S.C.R. 3, at para. 293:

> This Court has developed a consistent approach to whether legislation is a reasonable limit demonstrably justified in a free and democratic society, as required by s. 1. There are two stages to this analysis. At the first stage, the objective or purpose behind the limit on the *Charter* guarantee is evaluated to determine if it is of sufficient importance; the second stage considers whether the legislative means chosen are rationally connected to the legislative objective, whether those means minimally impair the *Charter* guarantee that has been infringed, and, finally, whether the infringement of the *Charter* right is nevertheless too severe relative to the benefits arising from the measure. In short, the first stage evaluates legislative ends, while the second stage evaluates legislative means. Both evaluations are made in light of the underlying values of the *Charter*, which inform the application of s. 1 at every stage.

91. As indicated *supra*, if this Court finds overbreadth under s. 7, it may see no need to undertake a s. 1 analysis, for two reasons. First, most of the *relevant* considerations for a s. 1 inquiry have already been examined under s. 7. Second, there do not appear to be any exceptional conditions in the case at Bar that could justify, under s. 1, a violation of a s. 7 right to liberty. However, if this Court decides that a s. 1 analysis is appropriate notwithstanding a s. 7 breach, the Respondent submits that the s. 1 analysis must take into account all of the infringed rights – the freedom of expression violation under s. 2(b) as well as the liberty (privacy) and security of the person breaches under s. 7. By contrast, the Appellant's submissions under s. 1 are based only on a s. 2(b) infringement. That narrow focus is appropriate only if this Court does not find a s. 7 infringement or otherwise chooses to engage solely in a s. 2(b)/s. 1 analysis.

92. The Respondent respectfully disagrees, in three respects, with the Appellant's approach to context in its s. 1 analysis. First, the Appellant submits that there are eleven contextual factors that inform every stage of the s. 1 analysis (Appellant's Factum, paras. 41-42). The Respondent recognizes that every s. 1 analysis is context-driven and that, to provide the proper factual and social context, it may be appropriate to begin with a general discussion of the infringed rights, the societal needs, international obligations and the legislation. However, to go beyond this and list "contextual" factors, as if they were general principles, tends to undermine the integrity of the specific inquiries of the *Oakes* formulation. Of the eleven factors listed by the Appellant, there is only one principle applicable to every s. 1 analysis and to every stage of the inquiry -- ((*h*) - the underlying values and principles of the *Charter*).

93. The second point raises a significant subsidiary issue for this Court's determination. The Appellant submits that the low value of the expressive activity of child pornography should be considered a relevant factor throughout the s. 1 analysis, including the minimal impairment stage (Appellant's Factum, paras. 51-55). The Respondent agrees with the Appellant's observation that the jurisprudence from this Court has expressed different viewpoints on this issue: see ***R. v. Lucas***, *supra.* The Respondent invites the Court to resolve this issue by finding that the value of the expression in issue should only be considered at the third stage of the proportionality analysis. As McLachlin J. (dissenting in part, L'Heureux-Dubé J. concurring), stated in ***R. v. Lucas***, *supra,* at para. 116: "In my view, justice is better served if the Crown is required to demonstrate a pressing and substantial objective, rational connection and minimal impairment independent of the perception that the content of the expressive activity is offensive or without value. . . ." See also: ***RJR-MacDonald***, *supra, per* McLachlin J., at para. 169.

94. The Appellant's approach is also inconsistent with the statement of Bastarache J., writing for the majority, in ***Thomson Newspapers v. Canada***, *supra*, at para. 125:

> Determining whether there is a pressing and substantial objective behind the provision under scrutiny necessarily occurs in the abstract, before the specific nature of the legislation and its impact on the *Charter* right has been analysed. Of course, ascertaining that objective requires a consideration of what the provision actually does, as well as documentary evidence as to what the legislator thought it was doing. Moreover, the relevant purpose is the purpose specific to the provision which limits the *Charter* right. But the purpose must, nevertheless, be articulated abstractly because a purpose is a goal or outcome which, by definition, may be achieved in different ways. Before the specific effects of the measures in question have been scrutinized and concretized through the first two steps of the proportionality analysis, it is often difficult to assess, in the abstract, the possible impact on *Charter* freedoms of a laudable legislative objective. The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed (emphasis added). Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose (emphasis in original). The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.

95. Third, it is respectfully submitted that weighing the value of the restricted expression at the minimal impairment stage does not assist the Court in its determination of that inquiry. Where the expression may be some distance from the core value, such an approach invariably leads to an argument that the level of justification should be lowered. The Respondent respectfully disagrees with the notion that the standard of justification for minimal impairment should vary, depending on the value of the particular right or freedom in issue. Reserving that weighing function until the third stage of the proportionality analysis is preferable; as McLachlin J. stated in *R. v. Lucas*, *supra*, at para. 119: "Legislative limits on expression that falls far from the core values underlying s. 2(b) are easier to justify, not because the standard of justification is lowered, but rather because the beneficial effects of the limitation more easily outweigh any negative effects flowing from the limitation".

96. The Respondent submits, however, that if the Court concludes that the value of the expression is relevant under the minimal impairment analysis, then other contextual factors, including the invasiveness of the legislative measures, must also be considered at this stage; see para. 109, *infra*.

**B. The legislative objective relates to pressing and substantial concerns**

97. In *Vriend v. Alberta, supra,* Cory and Iacobucci JJ., speaking for six of eight judges, decided that the proper focus at this stage in the s. 1 analysis is not the purpose of the legislation in its entirety, but the purpose of the limitation that allegedly infringes the *Charter*:

> Section 1 of the Charter states that it is the *limits* on Charter rights and freedoms that must be demonstrably justified in a free and democratic society. It follows that under the first part of the *Oakes* test, the analysis must focus upon the objective of the impugned limitation, or in this case, the omission. Indeed, in *Oakes*, *supra*, at p. 138, Dickson C.J. noted that it was the objective "which the measures responsible for a *limit* on a *Charter* right or freedom are designed to serve" (emphasis added) that must be pressing and substantial. (S.C.R. p. 555).

See also *M. v. H., supra, per* Bastarache J. at page 182, ***Thomson Newspapers Co. v. Canada (Attorney General)***, [1998] 1 S.C.R. 877, at p. 939; ***RJR-MacDonald Inc. v. Canada (Attorney General)***, *supra*, at p. 335; and ***Canada (Human Rights Commission) v. Taylor,*** [1990] 3 S.C.R. 892, *per* McLachlin J. at p. 957.

98. As stated *supra*, the Respondent submits that the legislative objective of the infringing measure (possession in s. 163.1(4)) is to prevent the sexual abuse and/or exploitation of children that arises from the *mere private possession of the proscribed materials*. The Respondent recognizes that the legislative objective so defined is pressing and substantial within Canadian society. However, the Respondent submits that the means of achieving this objective are not proportionate because of overbreadth, as discussed under s. 7 of the *Charter*, *supra*, and under the proportionality heading below.

99. The Appellant submits that the sweeping definition of "child pornography", as it relates to private possession, is defensible on the bases that: 1.) possession often leads to publication and/or "grooming", which does put children at risk, and 2.) law enforcement authorities need possession to be an offence in order to facilitate their investigation of importation and distribution. With respect to the latter, the real objective of s. 163.1(4) is not to prohibit what it purports to prohibit (*i.e.* private possession) but to prohibit another crime (*i.e.* importation and distribution). In *Rodriguez v. British Columbia*, *supra*, at p. 625, McLachlin J. criticized the practice of criminalizing one activity as a cloak for investigating another. [see also Southin J.A., A.R., Vol. XII, pp. 2095-2096, para. 36]

## C. Proportionality

100. At the second stage of the s. 1 analysis, ". . . the focus shifts from the objective alone to the nexus between the objective of the provisions under attack and the means chosen by the government to implement this objective": *M. v. H.*, *supra*, *per* Iacobucci J. for the majority, at p. 73.

### 1. Rational connection

101. The Respondent submits that s. 163.1(4), in its application to Category B materials, is not rationally connected to the legislation's objective. At this first stage of the proportionality analysis the question is: will the impugned legislation actually further the objective: *R. v. Lucas*, *supra*, *per* McLachlin J. (in dissent on other grounds), at para. 113. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Beetz J. expressed the view that a rule that is unnecessary in respect of Parliament's objectives cannot be said to be rationally connected to it, or to be carefully designed to achieve the objective in question. In His Lordship's view, some of the rules in s. 251 of the *Criminal Code* dealing with abortion were not only unnecessary to the legislative objectives of protecting the foetus and the pregnant woman's

life or health, but actually undermined those objectives (p. 125). In *Canada (HRC) v. Taylor, supra* at pp. 925-6, Dickson, C.J.C. for the majority said:

> As for the "rational connection" aspect of proportionality, the presence in an impugned measure of care of design and lack of arbitrariness – the hallmarks of a rational connection – allows the government to pass a sort of preliminary hurdle, and as long as the challenged provision can be said to further in a general way an important government aim it cannot be seen as irrational.

102. To pass the preliminary hurdle, the onus is on the Crown to establish that proscribing the private possession of expressive materials can further the legislative objective of protecting children from harm: "Rational connection is to be established, upon a civil standard, through reason, logic and simply common sense": ***RJR-MacDonald, supra, per*** Iacobucci J. at p. 352. Assuming that the causal connection for matters in one's private possession can be established by a "reasoned apprehension of harm", it is respectfully submitted that the discussion in earlier cases of this standard (such as ***R. v. Butler, supra, Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*** (1998), 125 C.C.C. (3d) 484 (B.C.C.A.)) should be read in the light of ***RJR-MacDonald, supra*** and ***Thomson Newspapers Co. v. Canada (Attorney General), supra.*** It is clear from the authorities that the Crown bears the civil burden of proof to establish on a balance of probabilities that private possession of all materials caught by s. 163.1(1) causes harm to children. While it is equally clear that the Crown does not need to produce definitive social science conclusions of this causal connection, it must still meet the civil burden. This is particularly so in a criminal case, where an accused's liberty is at stake.

103. The Respondent recognizes a rational connection between the legislative objective and Category A materials. However, there is no rational connection for Category B materials. Proscribing possession of Category B materials is unnecessary to protect children from harm and may actually undermine that objective by, for example, making youths themselves (not just adults) liable to be prosecuted for possession of these materials. In this sense the Respondent's submissions on rational connection and minimal

impairment are interrelated. There are six respects in which the evidence does not establish that a reasoned apprehension of harm arises from private possession of Category B materials:

- first, the evidence does not establish that the private possession of works of the imagination creates a reasonable risk of direct harm, or of indirect harm through grooming, incitement or cognitive distortion (see Rowles, J.A. at A.R. Vol. XII, pp. 2169-2172, p. 2186-2187, para. 213, Southin J.A. at A.R., Vol. XII, p.2106-2107, para. 52);

- second, there is "scant evidence" that the legislation was aimed at addressing any risk arising from possession of Category B materials; the Respondent agrees with the Appellant's submission that Category B materials bear "little relation to the reality of the child pornography that is being produced and finding its way into people's homes" (Appellant's Factum, para. 42);

- third, there is less likely to be a reasoned apprehension of harm arising from the private possession of the proscribed materials which do not use children in their production (see Rowles J.A. at A.R., Vol. XII, p. 2171, para. 185, pp. 2186-7, para. 213). This Court has ruled that the public viewing of sexual conduct and images is much more likely to result in attitudinal harm than is private possession: ***R. v. Mara***, [1997] 2 S.C.R. 636. The Ontario Court of Appeal in ***R. v. Mara*** (1996), 105 C.C.C. (3d) 147 (Ont. C.A.) at p. 160 found that there is a: ". . . substantial difference between sexual acts presented electronically on a T.V. set, to be viewed in someone's living room, and live sexual acts being engaged in a public tavern. There is a substantial difference in the risk of physical and attitudinal harm." This Court agreed with that finding of the Court of Appeal, and held that attitudinal harm was less likely to arise where electronic images are viewed in the privacy of a living room (at S.C.R., p. 649). In this case, the circumstances in issue are significantly more private than purchasing a video and

viewing it in one's home. The materials criminalized under s. 163.1(4) include the private possession of written material and sketches, including those created by an author in the privacy of his or her own home and never seen by anyone else.

- fourth, the legislation criminalizes possession, by a 14-17-year-old youth, of visual representations of legal, non-exploitative explicit sexual activity, including representations in which the possessor is depicted. The provision's criminalization of youth for privately possessing images of legal, non-exploitative sexual acts is inconsistent with the legislation's objective of protecting them from harm. Section 163.1(4) suffers from the same flaw as s. 159 of the *Criminal Code*. Abella J.A. in *R. v. M.(C.)* (1995), 98 C.C.C. (3d) 481 (Ont. C.A.) at 490, in striking down s. 159, held that the legislation's objective of protecting young persons was inconsistent with its permitting persons 14-18 years to be convicted under the section; see also *R. v. Roy* (1998), 125 C.C.C. (3d) 442 (Que. C.A.) at pp. 464, 469-70.

- fifth, criminalizing private possession of materials because of the risk that they may be stolen or lost and subsequently published is an implicit admission that possession itself is not harmful, but that publication is, and ignores the fact that other subsections prohibit publication and distribution and possession for those purposes: s. 163.1(2), (3).

- sixth, a court should not readily assume a risk of harm arising from the private possession of expressive materials. In *R. v. Keegstra*, *supra*, at pp. 772-3, and in *R. v. Butler*, *supra*, at pp. 506-7, a significant factor in upholding the constitutionality of legislative provisions which limited freedom of expression was their non-application to *private* viewing and *private* communication. In *Canada (H.R.C.) v. Taylor*, *supra*, at pp. 936-7, Dickson C.J.C. set out how the risk of harm and *Charter* scrutiny are different, depending on whether the expression is of a public or private nature:

> In determining in *Keegstra* that the criminal prohibition of hate propaganda in s. 319(2) of the *Criminal Code* is not constitutionally overbroad, I relied to an extent upon the fact that private communications were not affected. The connection between s. 2(b) and privacy is thus not to be rashly dismissed, and I am open to the view that justifications for abrogating the freedom of expression are less easily envisioned where expressive activity is not intended to be public, in large part because the harms which might arise from the dissemination of meaning are usually minimized when communication takes place in private, but perhaps also because the freedom of conscience, thought and belief are particularly engaged in a private setting.

104. Therefore, numerous applications of the law prohibiting possession are not rationally connected to the legislative objective.

2. Minimal impairment

105. The test for minimal impairment requires an analysis of whether the legislative provision could have been drafted in a significantly less intrusive fashion. The inquiry focuses on the reach or breadth of the legislation. In ***RJR-MacDonald Inc. v. Canada (Attorney General)***, *supra*, McLachlin J. stated at pp. 342-343:

> As for the second step of the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. (emphasis added)

See also ***R. v. Zundel***, *supra*, at p. 768.

106. Even where the legislative objective is important, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms

guaranteed by the *Charter*. The constitution, as interpreted by the courts, determines those limits: ". . . care must be taken not to devalue the need for demonstration of minimal impairment by arguing that the legislation is important and the infringement of no great moment": ***RJR-MacDonald***, *supra, per* McLachlin J. at p. 346. In response to the Appellant's submissions concerning the failure of Rowles J.A. to accord sufficient deference to Parliament's laudable objective, the Respondent respectfully submits that this Court has held on numerous occasions that the presence of the most worthy and pressing objectives will not accord legislation a significantly lower level of *Charter* scrutiny: ***R.J.R.-MacDonald Inc. v. Canada (A.G.)***, *supra* at pp. 335-6, 347, 353-4; ***R. v. Smith***, *supra*, at pp. 1053, 1080-1; ***R. v. Vaillancourt***, [1987] 2 S.C.R. 636, at p. 660; ***R. v. Zundel***, *supra*, at p. 768. Even legislation with the most laudable objectives, including preventing children from becoming the victims of sexual offences, will contravene the *Charter* where overly broad legislative means are chosen to achieve those objectives: see Rowles J.A. at A.R., Vol. XII, pp. 2182-2183, para. 206; ***R. v. Heywood***, *supra*, at p. 794; ***R. v. Hess***, [1990] 2 S.C.R. 906, at pp. 947-8.

107. Further, the fact that legislation has a particularly pressing objective does not necessarily mean that the provisions were carefully drafted to meet that objective. As the legislative history of s. 163.1 reveals, the Bill was "rushed through the legislative process with unusual speed, despite considerable criticism from diverse interests": "The New Child Pornography Law: Difficulties of Bill C-128", by B. Blugerman, (1995), 4 M.C.L.R. 17 at p. 19.

108. In deciding whether proscribing possession of Category B materials minimally impairs the Respondent's rights, the Respondent submits (for the reasons stated at the beginning of this "Section 1" analysis) that the relatively low value of child pornography is not relevant. At this stage, the inquiry focuses on whether Parliament has restricted the *Charter* right as little as reasonably possible to achieve the desired objective. The inquiry focuses on the reach or breadth of the legislation, not on the value of the restricted

expression: see *R. v. Lucas*, *supra*, *per* McLachlin J. at para. 116. The central purpose of the minimal impairment analysis is to determine whether Parliament could have achieved its legislative objective of protecting children from harm without proscribing possession of Category B materials. Answering that question essentially requires the Court to determine whether the definition of "child pornography" in s. 163.1(1) is overbroad because of its inclusion of Category B materials.

109. If this Court decides that the relatively low value of child pornography is a relevant consideration in a minimal impairment analysis under s. 1 triggered by a s. 2(b) breach, other contextual factors must also be considered. Specifically, the low value of the expression must be balanced against the nature and extent of the suppression of *Charter* rights and values. This counter-balance is even more powerful if the Court finds that privacy interests under s. 7 have also been deprived. Rowles J.A. (at A.R., Vol. XII, p. 2164, para. 171) noted that the criminalization of the private possession of expressive materials, including writings and drawings which did not use children in their production, constitutes "...an extreme invasion of the values of liberty, autonomy and privacy protected by the rights and freedoms enshrined in the *Charter*." Southin J.A. held (at A.R. Vol. XII, pp. 2128-2130, paras. 91-95) that it is inconsistent with a free and democratic society, and consistent with a totalitarian society, to ban the private possession of expressive materials. Thus, if the Appellant's minimal impairment analysis is accepted, the Respondent submits that the low value of the expression must be balanced by the invasiveness of the legislative means employed. The means used in s. 163.1(4) are so invasive to one's privacy and one's right to express oneself that they actually impair a core value of freedom of expression, that of preserving personal autonomy.

110. This discussion illustrates the problems that are created when the Court takes into consideration the relative value of the expressive interest during the minimal impairment analysis. It results in a different minimal impairment exercise when a s. 2 interest is infringed than when a s. 7 right is deprived, and creates confusion if both s. 2(b) and s. 7 infringements are being considered. This problem is removed when the Court reserves its consideration of the relative value of the expressive interest until the third stage of the proportionality analysis.

111. More broadly, this discussion illustrates why the Court should find it unnecessary to embark on a s. 1 analysis at all, if it has been established that s. 7 has been breached because of overbreadth.

112. For its minimal impairment analysis, the Respondent relies on its submissions at paragraph 103 relating to the lack of harm arising from the Category B materials, and the specific examples of overbreadth set out in paragraphs 76 to 82 of the Section 7 submissions.

3. Balance between deleterious and salutary effects of the prohibition

113. The Respondent respectfully submits that if this Court finds that the Crown has failed to establish that s. 163.1(4): i.) is rationally connected to Category B materials, and/or ii.) minimally impairs the Respondent's s. 7 and/or s. 2(b) rights, the Court does not need to go on to the balancing exercise in the final stage of the proportionality analysis. In ***Libman v. Quebec (Attorney General)***, *supra*, the full Court found that provincial legislation respecting referendum expenses violated s. 2(b) of the *Charter*, and was not justified under s. 1 because it did not meet the minimal impairment test. The Court added:

> Having concluded that the system set up by the *Referendum Act* does not meet the requirements of the minimal impairment test, it is in principle unnecessary to consider the final test, namely proportionality between the deleterious and salutary effects of the system (p. 621).

114. If the Court concludes that, even though the government has failed to satisfy the rational connection and/or minimal impairment tests, the Court should go on to the third stage of the proportionality analysis, the Respondent submits that the deleterious effects of proscribing possession of Category B materials substantially outweigh the salutary effects.

115. In this balancing exercise, all of the Respondent's interests under sections 7 and 2(b) that have been deprived or infringed must be taken into account. The Respondent:

- **risks imprisonment** for up to five years for private possession of materials that have not harmed children in their production or existence, that do not give rise to a reasoned apprehension of harm from possession, and that may include self-authored works of the imagination;

- is denied **privacy**, by being subjected to the search of his private dwelling and the seizure, under s. 164(1)(b), of any representation or written material that falls within the broad definition of "child pornography";

- is deprived of his **psychological integrity** by being labelled a child pornographer before trial, even if the only materials found in his possession are drawings or written material that are works of his own imagination, or visual representations of *lawful* explicit sexual activity; and

- is deprived of his **freedom of expression** to reduce his thoughts, opinions and beliefs to paper, in the privacy of his own home, when no one else in the world has access to them. The implications of state prohibitions on the private possession of recorded thoughts was contemplated by George Orwell in ***Nineteen Eighty-Four*** (Penguin Books, 1987 edition). Orwell described the protagonist's fear that the state would discover his prohibited personal writings:

> Two fingers of his right hand were inkstained. It was exactly the kind of detail that might betray you. Some nosing zealot in the Ministry... might start wondering why he had been writing during the lunch interval, why he had used an old-fashioned pen, *what* he had been writing- and then drop a hint in the appropriate quarter. He went to the bathroom and carefully scrubbed the ink away... He put the diary away in the drawer. It was quite useless to think of hiding it, but he could at least make sure whether or not its existence had been discovered. [pp.30-31]

See also *Bradenburg v. Ohio* (1969), U.S.S.C.R. 23 L. Ed. (2d) 430 where Douglas J. held at p. 439: "The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts. . . . [G]overnment has no power to invade that sanctuary of belief and conscience."

116. All of these individual interests must be balanced against the societal interest in prohibiting private possession of a category of materials that have not harmed children in their production, and have not been shown to pose a risk of harm to children or to society at large. The Respondent submits that, however low the value of child pornography, the individual interests far outweigh the societal interest which, in these circumstances, is devoid of risk of harm.

117. Finally, if the Court concludes that the government has discharged its burden under the rational connection and minimal impairment stages, that means effectively that there is no difference between Category A and Category B materials. In such circumstances, it would be difficult for the Respondent to contend that his s. 7 and/or s. 2(b) interests outweigh society's interest in protecting children from harm.

## 6. CONSEQUENCES OF FINDING THAT S. 163.1(4) BREACHES THE *CHARTER* AND IS NOT SAVED BY S. 1

118. A ruling by this Court that the offence of possession of child pornography is unconstitutional because of the overbreadth of the definition of "child pornography":

- does not mean that the constitutionality of the other child pornography offences is affected. There may be valid legal and policy grounds why the present definition would survive *Charter* scrutiny in relation to the other offences in s. 163.1(2) and (3):
  - (2) makes, prints, publishes or possesses for the purpose of publication;
  - (3) imports, distributes, sells or possesses for the purpose of distribution or sale.

- does not mean that there can be no constitutionally-valid offence of possession of child pornography.

## 7. REMEDIES

119. The Respondent recognizes that: "In determining the appropriate remedy, the Court must be guided by the principles of respect for the purposes and values of the *Charter*, and respect for the role of the legislature": ***Corbière v. Canada (Minister of Indian and Northern Affairs)*** (1999), 173 D.L.R. (4th) 1 (S.C.C.), para. 110, *per* L'Heureux-Dubé J.

### Reading in or reading down

120. It is respectfully submitted that it would not be appropriate for this Court to sever, read down or read in provisions. In *Schachter v. Canada,* [1992] 2 S.C.R. 679 at p. 718 Lamer C.J.C. for the majority ruled that reading down or reading in will only be warranted

in exceptional circumstances. As LaForest J., (L'Heureux-Dubé J. concurring) stated in a concurring judgment, at p. 728:

> The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance, there is perhaps more room (and certainly more temptation) for judicial intervention, in cases like *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)* (1991), 81 D.L.R. (4th) 358, [1991] 2 S.C.R. 22, 50 Admin. L.R. 1, for example, where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fail. But when one is dealing with laws that impinge on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective. (emphasis added)

121. In *M. v. H.*, *supra*, at para. 138, Cory and Iacobucci JJ. for the majority described the four options available to the Court: striking down the entire legislative scheme, severing the offending portion, reading in and/or reading down so as to replace the offending words, or one of the above with a temporary suspension of the Court's order so that the government has an opportunity to enact a constitutionally valid scheme. At para. 139 the Court added:

> In determining whether the reading in/reading down option is more appropriate than either striking down or severance, the Court must consider how precisely the remedy can be stated, budgetary implications, the effect the remedy would have on the remaining portion of the legislation, the significance or long-standing nature of the remaining portion and the extent to which a remedy would interfere with legislative objectives (see *Schachter, supra; Vriend, supra*). As to the first of these criteria, the remedy of reading in is only available where the court can direct with a sufficient degree of precision what is to be read in to comply with the Constitution. Remedial precision requires that the insertion of a handful of words will, without more, ensure the validity of the legislation and remedy the constitutional wrong (see *Egan, supra*, at para. 223, *per* Cory and Iacobucci JJ.; *Vriend, supra*, at para. 155).

122. Reading down and reading in was rejected in *R. v. Heywood, supra*, because the changes that would be required would amount to judicial rewriting of the legislation: pp. 803-804.

123. It is the Respondent's respectful submission that re-drafting the definition of "child pornography", in the context of possession, to comply with the *Charter* would require significant judicial re-writing. For example:

- with respect to visual representations, criminalizing possession *by adults* of sexually explicit material that:
  - uses *children* in the production;
  - depicts *actual* children *under 14 years of age*;
  - depicts *actual* children engaged in sexual activity that would be an *offence* under the *Criminal Code;* and
  - was created with no artistic *purpose* (*i.e.* the creator's subjective intention) rather than with no artistic *merit* (*i.e.* an objective assessment of quality).

- with respect to written material, criminalizing *an adult* publicly advocating or counseling (in an oral, visual or written form) criminal sexual activity with a child under 14 years of age.

## PART 4 - NATURE OF ORDER REQUESTED

124. The Respondent seeks an Order that the Appellant's appeal be dismissed, that s. 163.1(4) of the *Criminal Code* be declared of no force or effect and that Counts 2 and 4 of the Indictment remain quashed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Gil. D. McKinnon, Q.C.
Counsel for the Respondent

Richard C.C. Peck, Q.C.
Counsel for the Respondent

December 6, 1999
Vancouver, B.C.

## PART 5 - TABLE OF AUTHORITIES

<u>Legislation</u>

**Journals**

Azimov, B. "Proscribing the Private Possession of Child Pornography: Is It Legislative Overkill?", [1996] 12 Journal of Juvenile Law 91 Appendix A

Blugerman, B. "The New Child Pornography Law: Difficulties of Bill C-128", (1995), 4 M.C.L.R. 17 52

Quigley, J. "Child Pornography and the Right to Privacy", [1991] 43 Florida Law Review 347. Appendix A

**Treatises**

Orwell, George, *Nineteen Eighty-Four* (Penguin, 1987 edition) 55-56

Yolles, Vanessa, *The United Nations Convention on the Rights of the Child: A Practical Guide to Its Use in Canadian Courts*, UNICEF Canada, 1998 App. A

# APPENDICES

APPENDIX A

## CANADA'S INTERNATIONAL OBLIGATIONS, AND CHILD PORNOGRAPHY LEGISLATION IN OTHER COUNTRIES

### Canada's obligations under the U. N. Convention on the Rights of the Child

1. The U. N. *Convention on the Rights of the Child* (Appellant's Record, Vol. IX, pp. 1660-1666), adopted by the General Assembly in 1989, is the first comprehensive international code of minimum rights and standard protections for children. With 191 countries having ratified it, the Convention is the most widely ratified human rights treaty in history. The only two U. N. members who have not ratified it are Somalia and the United States: *The United Nations Convention on the Rights of the Child: A Practical Guide to Its Use in Canadian Courts*", by Vanessa Yolles, UNICEF Canada, 1998, pp. 29-30. In the Convention, "child" means a person below the age of 18 years. Two Articles are relevant to the case at Bar:

- **Article 19(1)** provides:

  > States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (p. 1662);

- **Article 34** provides:

  > States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
  > (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
  > (b) The exploitative use of children in prostitution or other unlawful sexual practises;
  > (c) The exploitative use of children in pornographic performances and materials (p. 1664).

2. The *Convention* focuses exclusively on the exploitative use of children in pornographic materials and performances. It does not proscribe:

- simple possession of child pornography,
- works of the imagination, or
- written materials advocating or counselling sexual offences against children.

3. International treaty obligations and legislation in other countries are relevant factors under the infringement analysis (***Rodriguez** v. B.C., supra*) and under the s. 1 analysis: ***R.** v. Zundel, supra.*

## Comparative analysis of child pornography legislation in other countries

### United States (Federal) (Appellant's Record, Vol. IX, pp. 1621-1659)

4. The U.S. federal legislation prohibits the simple possession of child pornography, but the definition of "child pornography" is significantly more limited than the Canadian definition. It focuses on visual depictions of actual children, including "morphed" representations, which are photographic images of actual children manipulated by computer. It does not include drawings or other works of the imagination, and does not extend to the written word. The U.S. legislation has been criticized for its application to private possession:

- B. Azimov, "Proscribing the Private Possession of Child Pornography: Is It Legislative Overkill?", [1996] 12 Journal of Juvenile Law 91; and
- J. Quigley, "Child Pornography and the Right to Privacy", [1991] 43 Florida Law review 347.

### Australia (Appellant's Record, Vol. X, pp. 1738-1753)

5. All Australian states and territories make it an offence to possess child pornography. Although each jurisdiction varies somewhat in defining child pornography, all the statutes are based on the federal *Classification (Publications, Films and Computer Games) Act 1995*. That Act includes as a "refused classification" category, publications,

films and computer games that: "describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 (whether the person is engaged in sexual activity or not)". This would appear to include written as well as visual depictions, but would appear to exclude works of the imagination such as drawings. It would also seem to exclude depictions of sexual activity involving young persons where the act itself is not criminal. The legislation in the State of Victoria provides for two important defences:

- that the defendant made the film or took the photograph or was given the film or photograph by the minor and that, at the time of making, taking or being given the film or photograph, the defendant was not more than 2 years older than the minor was or appeared to be, and
- that the minor or one of the minors depicted in the film or photograph was the defendant.

**New Zealand (Appellant's Record, Vol. X, pp. 1754-1778)**

6. Section 131(1) of the *Films, Videos, and Publications Classification Act 1993* makes it an offence to possess an "objectionable publication". "Publication" includes visual and written material, and a publication is "objectionable" if it "describes, depicts, expresses or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good" (s. 3(1)). A publication is deemed to be objectionable if it promotes or supports "the exploitation of children, or young persons, or both, for sexual purposes" (s. 3(2)(a)). The legislation clearly catches pornographic material that uses children in the production, but probably excludes:

- works of the imagination, and
- visual depictions of sexual activity where the activity itself is not criminal.

**United Kingdom (Appellant's Record, Vol. X, pp. 1779-1792)**

7. S. 160 of the *Criminal Justice Act 1988* makes it an offence to possess "any indecent photograph [or pseudo-photograph]" of a person under the age of 16 years. A "photograph" includes a video recording and data stored on a computer disk. The term

"indecent" is not defined. The legislation does not criminalize works of the imagination such as drawings, or the written word. Depending how the term "indecent" is interpreted, it may or may not criminalize visual images of sexual activity where the act itself, if conducted in private, would not be an offence.

## APPENDIX B

## INTERNATIONAL GUARANTEES OF PRIVACY

*Universal Declaration of Human Rights*, Article 12 provides:

> No one shall be subjected to arbitrary interference with his privacy, family home or correspondence, nor to attacks upon his honour and reputation. Every one has the right to the protection of the law against interference or attacks.

*European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no infringement by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*International Covenant on Civil and Political Rights*, Article 19 provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   a. For respect of the rights or reputations of others;
   b. For the protection of national security or of public order *ordre public*, or of public health or morals.

## APPENDIX C

## LEGISLATIVE HISTORY OF SECTION 163.1 OF THE *CRIMINAL CODE*

**Badgley Committee Report, 1984**

8. The *Report of the Committee on Sexual Offences Against Children and Youths* (Appellant's Record, Volume VIII, pp. 1348-1382) focused on the visual representation of a person under 18 years of age participating in explicit sexual activity. It would be an indictable offence (10 years maximum) to participate in such a production, use a person under 18 in such a production, or produce, publish, distribute, sell, advertise, expose to public view or possess for any of those purposes. Simple possession would be an indictable offence punishable on summary conviction. The commentary preceding the draft legislation makes it clear that the Committee was concerned exclusively with the use of children in the production of child pornographic materials. The draft legislation does not appear to have proscribed drawings or other works of the imagination. Written materials were left to the general obscenity law.

**Fraser Committee Report, 1986**

9. The *Report of the Special Committee on Pornography and Prostitution* (Appellant's Record, Volumes VIII and IX, pp. 1383-1574) made recommendations "to address the use of young persons in the production of sexually explicit material" (p. 1499). It recommended legislation similar to that advocated by the Badgley Committee as set out above, extending it to cover live performances and retailers. The Committee justified an offence of possession on the basis that private consumption is very frequently the method of using pornography involving children, it may be the only way to prove that a child was used in production, and it may reduce international child pornography traffic (p. 1501). The Committee also recommended a new indictable offence of producing, disseminating or possessing written, visual or recorded material advocating, encouraging or presenting as normal sexual activity or conduct directed against a person under 18 years of age which is prohibited by the *Criminal Code* (p. 1502).

**Bill C-114, 1986**

10. This Bill (see Respondent's Book of Authorities), which received first reading on June 10, 1986, but which was not enacted, would have implemented the recommendations of the Fraser Committee Report. It would have created new offences (ss. 162-162.1) for:

- using a person who is or appears to be under 18 years of age in a performance or in a visual representation of sexual conduct;
- importing, making, distributing or possessing for the purpose of distribution any visual representation of sexual conduct that shows a person who is or appears to be under 18 years of age;
- selling or renting any such child pornography;
- possessing any visual representation of sexual conduct that shows a person who is or appears to be under 18 years of age;
- importing, making, distributing or possessing for the purpose of distribution anything that advocates, encourages, condones or presents as normal, sexual activity or conduct directed against or performed with or by a person who is or appears to be under the age of 18 years that is prohibited by the *Criminal Code*.

**Bill C-54, 1987**

11. This Bill (see Respondent's Book of Authorities) received first reading on May 4, 1987, but was not enacted. It would have adopted a very detailed definition of "pornography", including visual matters showing sexual conduct causing bodily harm, sexually violent or degrading conduct, bestiality, incest, necrophilia, masturbation and vaginal, anal or oral intercourse. It extended to:

- such sexual conduct involving or conducted in the presence of a person under 18 years of age; or
- the exhibition, for a sexual purpose, of a human sexual organ, a female breast or the human anal region of a person under the age of 18 years.

12. The definition also included any matter or commercial communication inciting, promoting, encouraging or advocating any of the conduct referred to above, except masturbation and intercourse.

13. The Bill created offences for dealing in pornography, using children under 18 years to participate in the production of pornography, depicting a person as being under 18 years in pornography, and possession of pornography that involved children under 18 years in the production.

**Bill C-128, 1993**

14. On May 13, 1993 Bill C-128 (which enacted s. 163.1 – see Respondent's Book of Authorities) was given First Reading in the House of Commons. The Bill defined "child pornography" as:

> . . . a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means, that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity.