

**IN THE SUPREME COURT OF CANADA**

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

**BETWEEN:**

**HER MAJESTY THE QUEEN**

Appellant

- and -

**JOHN ROBIN SHARPE**

Respondent

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**FACTUM OF THE INTERVENER,  
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## PART II

### POINTS IN ISSUE

1. The following constitutional questions have been stated in this appeal:

5 1. Does s.163.1(4) of the *Criminal Code*, R.S.C., 1958, c. C-46, violate s.2(b) of the *Canadian Charter of Rights and Freedoms*?

2. If s. 163.1(4) of the *Criminal Code* infringes s.2(b) of the *Canadian Charter of Rights and Freedoms*, is s.163.1(4) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s.1 of the *Charter*?

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

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

2. It is the position of the Intervener, the Attorney General of Canada, that these constitutional questions should be answered:

1. Yes, on the basis of the previous judgments of this Court.

2. Yes.

20 3. No.

4. Not necessary, or alternatively, yes.

### PART III

### ARGUMENT

#### 1. OVERVIEW

3. Child pornography harms children by promoting the notion that they are appropriate sexual objects, in much the same way that hate propaganda damages minority groups and obscenity harms women. However, child pornography goes much further. Its creation and very existence victimize the most vulnerable group in society. It is created and used in ways that directly attack children's equality, dignity, and physical and emotional integrity.

4. Prohibiting not only the creation, distribution and publication of the materials described in s.163.1(1), but also their possession, is necessary to provide an effective deterrent to the exploitation of children in the creation of child pornography and to address the harm caused by pedophiles' use of child pornography. S.163.1 of the *Criminal Code*, which was enacted after a lengthy process of study and consultation, goes no further than is necessary to limit the exercise of freedom of expression which unacceptably diminishes children's rights to equality, dignity and physical and emotional integrity.

5. Prohibiting possession of child pornography is part of Canada's fulfilment of its international commitment as a signatory to the UN Convention on the Rights of the Child to protect children from all forms of sexual exploitation and sexual abuse, including exploitative use of children in pornographic materials. Canada's approach to the problem of child pornography is consistent with the approach taken in the United States and in many other countries.

6. The majority of the Court below failed to consider whether children could be as effectively protected by means other than prohibiting possession of the materials included in the definition of child pornography. Rowles and Southin J.J.A. also seriously underestimated the gravity of the risk of harm to children in comparison to the restriction of the rights of those who want to possess child pornography.



## II. THE PURPOSE OF S.C. 1993, C.46

7. Before the enactment of S.C. 1993, c.46, the *Criminal Code* did not specifically address child pornography. Some child pornography would have come within the definition of "obscene" ("any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of ... crime, horror, cruelty, and violence") or "crime comic" (exclusively or substantially comprising matter depicting pictorially the commission, or events connected with the commission, of crimes, real or fictitious) in *Code* s.163. Neither definition refers to children as a specific subject of concern. Offences include making, printing, publishing, distributing, and possession for distribution, but simple possession of such material was and is not an offence.

8. S.C.1993, c.46, which came into force August 1, 1993, adds the offence of possession of "child pornography", together with production and distribution offences. "Child pornography" is defined to mean:

(a) a photographic, film, or video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) 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, or

(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

(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.

It provides for defences of artistic merit, educational, scientific, or medical purpose and public good.

9. The purpose of creating specific offences relating to child pornography, including prohibiting possession of it, is to protect children under age eighteen from sexual abuse and exploitation that occur:

a) in the use of child victims in the making of child pornography;

- b) in the invasion of the privacy, dignity and reputation of child victims by the permanent record which is beyond the child's control;
- c) from support and encouragement of those who are inclined to abuse or exploit children;
- d) by the use of existing child pornography in the abuse or exploitation of further children, whether by reinforcing cognitive distortions, fueling sexual fantasies or grooming victims; and
- e) in the desensitization of society by the message that children are sexual objects.

*R. v. Stroempl* (1995), 105 C.C.C. (3d) 187 (Ont.C.A.) at pp.190-191

*R. v. Valley*, (March 30, 1999, No.9810000136C30101-4) (Alta Q.B.), at pp.11-12

### 10 III. THE PROBLEM OF CHILD PORNOGRAPHY

10. The harm that child pornography causes children was the subject of study by two committees, the Badgley Committee on Sexual Offences Against Children and Youths in 1984, and the Fraser Committee on Pornography and Prostitution in 1985, a report by Mr. Rix Rogers, Special Adviser to the Minister of Health and Welfare on child sexual abuse in 1990, and 15 submissions to the House of Commons Standing Committee on Justice and the Solicitor-General in 1993. Evidence was also led on the *voir dire* before Shaw J. This material shows that child pornography harms children in a number of different ways.

11. Children may be involved as models in the creation of the pornography by engaging in explicit sexual activity or posing in sexually explicit situations, which activity is recorded in 20 some form. These recordings are permanent records of that abuse and exploitation.

Badgley Report, App.R. Vol. VIII, pp.1350, 1369, 1374, 1382

Testimony of Det. Waters, App.R. Vol. I, pp.28-29, 35-36

Testimony of Dr. Collins, App.R. Vol. I, pp.83, 170, 184-185

House Committee proceedings, App.R Vol. V, pp.718-719, 874-875

25 U.S. Senate Report, Findings, 1, 2, 7, App.R. Vol. IX pp.1576, 1588

12. The Badgley Committee, basing its calculations on a National Population Survey, estimated in 1984 that over 60,000 Canadians may as children have been the subject of sexually

explicit depictions. It considered that research findings suggesting a prevalence of 1 in 400 persons (75,000 today) were likely an underestimate.

Badgley Report, App.R. Vol. VIII, p.1369

13. Representations of children engaged in explicit sexual activity or in sexually explicit poses are degrading and humiliating to the children depicted, whether or not they were directly involved in the production of the representations.

Testimony of Det. Waters, App.R. Vol. I, p.124 ("morphed" images or collages)

Testimony of Dr. Collins, App.R. Vol. I, pp.186-187

U.S. Senate Report, Findings 6, 7, App.R Vol. IX pp.1576, 1589-1590

14. Pedophiles collect child pornography; their use of it victimizes children in various ways detailed in para.24 below.

15. The depiction of children as sexual objects, and written material which advocates treating them that way, is degrading to children in general and causes a desensitization in society at large such that sexual activity with children becomes more acceptable. The Fraser Committee described the harm in these terms:

...we are concerned with depictions that can be seen to undermine the values which we believe are fundamental to our society. It is our view that material which uses and depicts children in a sexual way for the entertainment of adults, undermines the rights of children by diminishing the respect to which they are entitled. In particular, it interferes with their developing sexuality so as to distort it and encourage the children so used to have aberrant views about human sexual relations.

Fraser Report, App.R. Vol.VIII, p.1470 Vol.IX, pp.1502-1503 (depictions and written material)

See also: Badgley Report, App.R. Vol.VIII, p.1350 (depictions)

U.S. Senate Report, Finding 11, App.R. Vol.IX, p.1576

House Committee Proceedings, App.R. Vol.V, p.890

16. This last harm was described by Sopinka J. in *R. v. Butler*, [1992] 1 S.C.R. 452 at pp.496-497:

This court has thus recognized that the harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression. In my view, the harm sought to be avoided in the case of the dissemination of obscene materials is similar. In the words of Nemetz C.J.B.C. in *R. v. Red Hot Video Ltd.* [citation omitted], there is a growing concern that the exploitation of women and children, depicted in publications and films, can, in certain circumstances, lead to "abject and servile victimization". As Anderson J.A. also noted in that same case, if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on "the individual's sense of self-worth and acceptance". (emphasis added)

See also: *Butler, supra*, at pp.513-514 (per Gonthier, J.); *Valley, supra*, at p.11

17. Child sexual abuse is a vicious cycle, in which it is likely that "a molested child is going to molest children".

House Committee proceedings, App.R., Vol. IV, pp.659, 666, 672, 687-688, 694

18. As the U.S. Senate Committee Report stated (at App.R. Vol.IX, p.1586):

Child pornography is a particularly pernicious evil, something that no civilized society can or should tolerate. It abuses, degrades and exploits the weakest and most vulnerable members of our society, our children. It poisons the minds and spirits of our youth, robbing them of their innocence, and debases our society as a whole.

19. Consideration of the harms from the use made of child pornography requires an appreciation of the social context. In this case, relevant contextual factors include:

- a) national and international consensus on the issue of child pornography;
- b) the characteristics of pedophilia, given that much of the harm to which the legislation is addressed is caused by pedophiles;
- c) the age at which the special protection from pedophiles and other sexual predators should be removed, and, on the other hand, the age at which people should be held responsible for their own acts of sexual exploitation;

d) how much child pornography is produced and the forms that it takes.

National and international consensus

20. The overwhelming social consensus in Canada is that sexually explicit material showing children is unacceptable.

5 Fraser Report, App.R. Vol. VIII, p.1414

21. The international community is increasingly recognizing the need to criminalize the simple possession of child pornography. In his 1994 report to the General Assembly of the United Nations on the sale of children, child prostitution and child pornography, the Special Rapporteur welcomed Canada's criminalization of the possession of child pornography.

10 Appellant's Factum, Appendix "A"  
 "National Legislation on International Trafficking in Child Pornography", App.R. Vol. XI, pp.1861-1919  
 Report, Special Rapporteur, Oct. 5, 1994, U.N. General Assembly, A/49/478 at para.183

15 22. The United Nations Convention on the Rights of the Child (App.R. Vol. IX, pp.1660-1666) expresses the international consensus that States Parties must take all appropriate measures to protect children under age 18 from the harmful effects of child pornography. Although as the Respondent asserts at Appendix "A" of his Factum, the Convention itself is not proscriptive, it does support legislation which fosters its objectives. Canada's continuing commitment to these concerns is demonstrated by its participation in conferences and congresses  
 20 (see Appellant's Factum, endnote 3, and the Conference in Vienna, Austria on 29 September - 1 October, 1999 on "Combating Child Pornography on the Internet"), and in Interpol, which in 1996 recommended that member countries prohibit possession of child pornography (Interpol resolution number AGN/65/RES/9,1996). Currently, a Working Group of the United Nations Economic and Social Council Commission on Human Rights is drafting an Optional Protocol to  
 25 the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, in which an offence of intentionally possessing child pornography is proposed to be included. (See: Report dated 25 March 1999, #E/CN.4/1999/74)

23. The international guarantees of privacy cited by the Respondent at Appendix "B" of his Factum apply equally to protect the privacy of the children who are or may be abused or exploited by child pornography.

*R. v. Bowden*, [1999] E.W.J. No. 5727; No. 99/0870/W2, 99/4175/W2 (C.C.A.) at para.25

### Pedophilia

24. The following characteristics of pedophilia are important to determining the appropriate legislative response to the harm and risks of harm that pedophiles cause:

- a) Pedophilia is one of approximately 20 different clinically defined sexual deviancies, or paraphilia. Pedophiles as clinically defined are sexually attracted to pre-pubescent children; hebephiles are sexually attracted to children who have just reached puberty or who are in early adolescence.<sup>1</sup> The incidence of pedophilia is unknown. Some child sexual abusers are not pedophiles, but are situational offenders; although they are sexually attracted to adults, they victimize children for opportunistic or situational reasons.

Testimony of Dr. Collins, App.R. Vol. I, pp.62-63, 139-140, Vol.II p.222

- b) Fantasy is the driving force behind all paraphilic acting out, and paraphilics collect items to fuel their sexual fantasies. Pedophiles are probably the most notorious for being collectors of such material. Materials which pedophiles find erotic is the most common material; the most valued is the most sexually explicit. The materials collected may be pictorial images of children or writings with pedophilic themes, and can be commercially produced or homemade.

Testimony of Dr. Collins, App.R. Vol. I, pp.64, 66-69, 141, 183-184  
House Committee Proceedings, App.R. Vol. V, pp.719, 875

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<sup>1</sup> The use of the term "pedophile" throughout this Factum includes both pedophiles as clinically defined and hebephiles.

c) Pedophiles tend not to seek out treatment, mostly because they believe their conduct is acceptable. The basis of the clinical treatment for pedophilia is that the pedophile avoid fantasizing about children; to that end, he must dispose of his collection. Pedophiles are loathe to throw their collections away. Dr. Collins testified that "You can't successfully treat a pedophile if they're still collecting material in which the erotic focus is children." (p.80)

Testimony of Dr. Collins, App.R. Vol. I, pp.67, 79-80, 138-139, 148-149, 157, 159, 168-169, 191, Vol. II, p.210

Marshall, "*The Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Nonoffenders*", 1988, Journal of Sex Research Vol.25, No.2, App.R. Vol. VII p.1285

d) Representations of children as sexual objects or engaged in sexual activity contribute to the belief by pedophiles that it is normal for children to have sex with adults and that children are not harmed by such activity ("cognitive distortions"); written material which advocates sexual activity between adults and children as appropriate activity which does not harm children also contributes to such cognitive distortions. A second aspect of the treatment for pedophilia is to educate the pedophile to change his cognitive distortion. The more ingrained the cognitive distortion, the harder it is to treat the pedophile.

Testimony of Dr. Collins, App.R. Vol. I, pp.80-81, 83-85, 88, 144-145, 159, 166, 171, Vol. II, p.200-201

U.S. Senate Report, Finding 4, App.R. Vol.IX, pp.1576, 1586-1587

e) Many pedophiles show pornography to children to lower their inhibitions against engaging in sexual activity with the adult by persuading the children that such activity is normal and desirable.

Testimony of Dr. Collins, App.R. Vol. I, pp.69-70, 76, 167-168

Badgley Report, App.R. Vol. VIII, pp.1350, 1374

House Committee proceedings, App.R., Vol. IV, pp.672-673, Vol. V, pp.719, 874-875, 885

U.S. Senate Report, Finding 3, App.R. Vol.IX, pp.1576, 1587-1588

25. Organizations of pedophiles such as the North American Man Boy Love Association ("NAMBLA") give pedophiles psychological support by publishing messages like "sex before

eight or it's too late", pseudo-scientific works indicating that sex with children is not harmful, and strategies of seduction and avoiding detection.

House Committee proceedings, App.R. App.R., Vol. IV, pp.654-662, 665, 667-671, 669-  
Vol. V, p.700, Vol. V, pp.720-721, 725, 749-750, 883-884, 886-888, 889, 894-896  
5 Testimony of Det. Waters, App.R. Vol. I pp.30-34, 97  
Testimony of Dr. Collins, App.R. Vol. I, pp.81, 83

### Children under 18

26. Parliament chose to include children up to the age of 17 in the ambit of s.163.1. Canadian society regards young people as deserving of protection until they are mature enough  
10 to take care of themselves. It also withholds certain liberties, such as driving a car or purchasing alcoholic beverages, until young people are considered to be mature enough to exercise those liberties responsibly. This process is in some respects a gradual one; some protections and restrictions are relaxed or eliminated at various ages, but most are eliminated by the time the young person is 18 or 19 years of age. The Fraser Committee recommended that the child  
15 pornography provisions protect children to age 18, based in part on the fact that 18 is a significant age for many purposes related to majority in many jurisdictions and the substantial social consensus that 18 is an acceptable point for the transition from youth to adulthood. The United Nations Convention on the Rights of the Child defines "child" as one under 18 who has not attained majority.

20 Fraser Report, App.R. Vol. VIII, pp.1466, 1499

27. Similarly, the age of consent to sexual activity is based in part on a determination of when conduct, which may be inappropriate, should be criminalized and when it is better regulated through health education and family guidance. But conduct which is considered a form of sexual exploitation may warrant a different minimum age, reflecting the special  
25 protection children need because of their developmental vulnerability.

28. Contemporary Canadian society is concerned that adolescents are vulnerable to improper influence. Young people discovering and exploring their sexuality are particularly susceptible to enticement and seduction. The need to protect young people from such improper influence is



manifested in the *Criminal Code* in s.153 and s.212(4). Section 153 prohibits sexual touching of a person aged 14 or over but under 18 by a person who is in a position of trust or authority or with whom the young person is in a relationship of dependency. Section 212(4) prohibits obtaining the sexual services of a person under 18 for consideration.

5 29. Like Canada, several of the United States prohibit pornography involving children who are above the age of consent to sexual activity (See Appendix "A" to this Factum).

30. Children under 18 may sexually exploit other children. Rix Rogers, both in his report and in his presentation to the House Standing Committee, referred to survey findings showing that some 30% of sex offenders in Canada are under 18. The Fraser Committee recommended  
10 that under-aged offenders be held responsible according to the terms of the *Young Offenders Act*, saying that:

15 From this [use of 18 as the age limit] follows the real possibility that young persons of 16 or 17 (or perhaps younger) may be involved in taking advantage of still younger children, by introducing them to prostitution, to performing in  
20 pornographic displays for filming, and so on. Such exploitation might be of the older child's own motion, or it might be engineered by adults who perceive the advantage in having as fronts those who are free from serious criminal responsibility. Accordingly, we think that it would be wise to except from the  
25 general principle of the child as victim, those activities where people under 18 exploit others under 18. In such cases, the exploiter should be made to accept responsibility for his or her actions.

Fraser Report, App.R. Vol. VIII, p.1390

25 "The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada, Reaching for Solutions" ("the Rogers Report"), p.18-19  
House Committee Proceedings App.R. Vol. V, p.707

31. *R. v. Henricks* is a case in point. The accused was a young woman charged with a series of sexual offences committed with respect to children, including one count of making child pornography. She was under 18 at the time of some of the offences including the child pornography count which related to videotapes of her sexual acts with the three year old victim.

30 *R. v. Henricks*, (November 25, 1999, No.C02004S, Prince George Registry) (B.C.S.C.) at para.14, 20-26 (leave to appeal sentence filed, B.C.C.A. No. CA26577)

Dimensions of child pornography

32. The Badgley and Fraser Committees concluded that there is no significant commercial child pornography industry in Canada; the commercially produced pornography found here is generally imported. However, child pornography is produced here privately and informally.
- 5 The Fraser Committee concluded that the private preparation and use of child pornography is a major mode of resorting to this material.

Badgley Report, App.R. Vol. VIII, pp.1359-1360, 1366, 1368-1369  
 Fraser Report, App.R. Vol. VIII, pp.1413-1414, 1469, 1477

33. The problem of child pornography has become even more urgent over time as pornography has become more widespread. Several technological developments since these Committee reports were issued have greatly facilitated the creation and distribution of child pornography. The widespread use and availability of home computers, the Internet, and video cassette recorders have produced an explosion in the amount of child pornography available. People can easily produce their own child pornography and trade it around the world.

- 15 34. The widespread availability and use of home computers has been a key development in the availability of child pornography, in two ways:

- a) computers have provided new ways to create images, by "morphing". Images can be modified, or various innocuous images can be combined, to create an image of a child engaging in sexual activity; this process is a more sophisticated way of producing child pornography than making a collage of various non-pornographic images. An imaginary child can be wholly generated with computer graphics.

- b) pornographic images can be scanned into a computer, enabling them to be stored, reproduced, and distributed anywhere in the world over the Internet.

- 25 Testimony of Det. Waters, App.R. Vol. I pp.35-38, 124  
 U.S. Senate Report, Findings, 5, 6; App.R. Vol. IX pp.1576, 1589-1590  
*R. v. Pecciarich* (1995), 22 O.R. (3d) 748 (Ont. Ct. (P.D.) at pp.752h, 758h  
*U.S. v. Hilton*, 167 F. 3d 61 (1999) (U.S. Court of Appeals, First Circuit) at p.65, 66

35. The Internet has enabled people to develop massive collections of child pornography privately and very easily. The Badgley Committee noted that consumers of child pornography are anxious to avoid detection, and Det. Waters testified that the Internet enables collectors to acquire child pornography in privacy. She also testified that the largest volume of material is being distributed over the Internet, that police have discovered collections in the tens of thousands accumulated via the Internet, and that people can quickly gather collections they would otherwise not have been able to accumulate in a lifetime. She said (at App.R., Vol.I p.34):

Now, computer transmission of child pornography really has opened a tidal wave of material available worldwide.

Dr. Collins testified that the use of the Internet was too recent for empirical studies to have determined its effect on the incidence of child abuse.

Testimony of Det. Waters, App.R., Vol. I pp.36-39

Badgley Report, App.R. Vol. VIII, pp.1367-1368

Testimony of Dr. Collins, App.R. Vol. I, p.149, Vol. II, pp.211-213

36. Det. Waters testified that child pornography is often found on videotape. Video cameras and video cassette recorders have facilitated the creation and reproduction of child pornography. This was a development anticipated by the Badgley Committee and noted by the Fraser Committee and the Ontario Court of Appeal.

Testimony of Det. Waters, App.R., Vol. I pp.29-30

Badgley Report, App.R., Vol. VIII, p.1362

Fraser Report, App.R., Vol. VIII, p.1414

*R. v. Jewell & Gramlick*, (1995), 100 C.C.C. (3d) 270 (Ont.C.A.) at p.277

*R. v. Stroempl, supra*, at p.190 (referring to the above passage from *Jewell*)

#### IV. EXPLORING SOLUTIONS: THE BACKGROUND TO S.C. 1993, c.46

##### A. Reports and Previous Government Bills

37. The problem of child pornography was the subject of studies by the Badgley Committee (1984) and the Fraser Committee (1985). It was also the subject of Government Bills C-114

(1986) and C-54 (1987), both of which died on the Order Paper. All of these recommended that possession of child pornography be made an offence.

Badgley Report, App.R. Vol. VIII, p.1351  
 Fraser Report, App.R. Vol. IX, p.1500  
 5 Bills C-114 and C-54, Resp.Auth. Tabs 71-72

38. With respect to visual representations of those under age 18, the Badgley and Fraser Reports recommended prohibiting depictions of participation in explicit sexual conduct, the definition of which included lewd touching of the breasts or genitals, or lewd exhibition of the genitals. Bill C-114 did not include visual representations. Bill C-54 would have prohibited  
 10 visual matter showing sexual conduct (described in detail) involving or in the presence of one who is or is depicted as being or appears to be under eighteen, or an exhibition very similar to that described in s.163.1(1)(a)(ii).

Badgley Report, App.R. Vol. VIII, p.1351  
 Fraser Report, App.R. Vol. IX, p.1500  
 15 Bills C-114 and C-54, Resp.Auth. Tabs 71-72

39. The Badgley Report recommended that pedophilic literature be left to the general obscenity provisions of the *Code*. The Fraser Report recommended that offences, including simple possession, be created in relation to material, including written material, "advocating, encouraging or presenting as normal the sexual abuse of children." "Sexual abuse" meant "any  
 20 sexual activity or conduct directed against a person under 18 years of age which is prohibited by the *Criminal Code*". Both Bills C-114 and Bill C-54 would have prohibited possession of advocacy material.

Badgley Report, App.R. Vol. VIII, p.1351  
 Fraser Report, App.R. Vol. IX, pp.1502-1503  
 25 Bills C-114 and C-54, Resp.Auth., Tabs 71-72

## B. Bill C-128

40. Under Bill C-128, which was given First Reading on May 13, 1993, possession of child pornography was made an offence. "Child pornography" was defined in terms which later

became s.163.1(1)(a)(i). Under the Bill, it was also an offence to make, print, publish, possess for the purpose of publication, distribute or sell any child pornography.

Bill, C-128, Resp.Auth., Tab 73

### C. House Committee Hearings

5 41. The House of Commons Standing Committee on Justice and the Solicitor General received submissions and heard evidence from witnesses both before and after the introduction of Bill C-128. The witnesses included: police experts (Det. Wolff (Waters), Det. S/Sgt. Matthews), treatment experts (Dr. Marshall), legal experts (Prof. Bala) and such organizations as  
10 the Institute for Prevention of Child Abuse (Rix Rogers), Citizens Against Child Exploitation, the Canadian Civil Liberties Association, the Writer's Guild of Canada, ACTRA, the C.B.C., and film production and distribution associations.

42. Submissions directed to changing the definition of child pornography in the Bill urged that:

15 a) visual representations of children in sexually provocative poses but who are not engaging in explicit sexual activity were not but should be included;

App.R., Vol. V, pp.875-877, 894, 898 (Matthews, Wolff)

b) material which advocates sexual exploitation of children and advises how to do that undetected, including publications of the North American Man Boy Love Association (NAMBLA), should be prohibited;

20 App.R., Vol. V, pp.749-750, 883-884, 886-888, 889, 894-896 (Wolff, Matthews, Rainey)

c) prose "erotica" involving children, particularly on the Internet, should be included;

App.R., Vol. V, pp.749, 880-882, 894 (Matthews)

d) the proposed legislation was unnecessary, dangerously imprecise, and would prohibit or prevent legitimate filming and writing.

App.R., Vol. V, pp.753-807 (the Canadian Civil Liberties Association, the Writer's Guild of Canada, ACTRA, the C.B.C., and film production and distribution associations)

#### D. The Act

43. The Committee amended the definition of "child pornography" in Bill C-128 in two  
 5 ways. First, it added a visual representation, the dominant characteristic of which is the  
 depiction for a sexual purpose of a sexual organ or the anal region of a person under age  
 eighteen [s.163.1(1)(a)(ii)]. Second, it added any written materials or visual representation that  
 advocates or counsels sexual activity with a person under age eighteen that would be an offence  
 under the *Code* [s.163.1(1)(b)]. It also added offences of importing child pornography and  
 10 possessing it for the purpose of distribution or sale [s.163.1(3)]. The House of Commons passed  
 Bill C-128 with these amendments, unanimously.

#### V. THE BROAD SCOPE OF *CHARTER*, s.2(b)

44. The purpose of s.2(b) of the *Charter* is to permit free expression to the end of seeking  
 and attaining truth, participation in political and social decision making, and individual self-  
 15 fulfilment and human flourishing. This Court has given an extremely wide scope to s.2(b),  
 holding that the content of a statement is irrelevant, and that even offensive, deliberately false,  
 and harmful statements come within s.2(b).

*Irwin Toy Ltd. v. A.G. Quebec*, [1989] 1 S.C.R. 927 at pp.976-977.

*R. v. Butler*, *supra*, at p.488

20 *R. v. Zundel*, [1992] 2 S.C.R. 731 at pp.753-759, 801-802

*Ross v. New Brunswick S.D. No. 15*, [1996] 1 S.C.R. 825 at paras.59-63

*R. v. Lucas*, [1998] 1 S.C.R., 439 at paras.24-28

45. The Attorney General takes the position that child pornography is both offensive and  
 harmful, and is not deserving of constitutional protection. However, the foregoing authorities  
 25 establish that the nature of the material can only be considered, and the determination of whether  
 it contravenes the *Charter* must be made, under s.1. The offensive and harmful nature of child  
 pornography helps justify the legislative restriction, because it lies so far from the core of values  
 enshrined in s.2(b).

## VI. THE FLEXIBLE AND CONTEXTUAL APPROACH TO CHARTER, s.1 ANALYSIS

46. The approach to the analysis of whether a statutory limitation on a *Charter* right or freedom can be demonstrably justified in a free and democratic society is set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 at pp.135-140, as modified in *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 at pp.887-889 and explained in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras.123-126.

47. A careful consideration of the factual and social context of the infringed right and the values relied on to justify the infringement is essential at all stages of the s.1 analysis. In this case, the relevant contextual factors include:

- a) the nature of the activity which is restricted; activity which lies far from the core of the values enshrined in s.2(b) requires a less searching degree of scrutiny, or a more easily reached standard of justification;

*RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, at paras.71-77, 132, 170-171

*Ross v. New Brunswick S.D. No. 15, supra*, at paras.89-94

*C.B.C. v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480 at para.63

*Thomson Newspapers, supra*, at paras.91-93

*R. v. Lucas, supra*, at paras.33-34, 57, 88-96, 114-119

*R. v. E(B)* (8 October 1999, No. C27253), (Ont. C.A) at paras. 53, 71.

- b) the vulnerability of the group which the legislature seeks to protect:

*Irwin Toy, supra*, at pp.987-991, 993, 998-999

*R. v. Butler, supra*, at pp.496-497

*Ross v. New Brunswick S.D. No. 15, supra*, at para.88

*Thomson Newspapers, supra*, at para.90

- c) the nature of the issues, which determine the sort of evidence available. As McLachlin J. said in *RJR-MacDonald Inc. supra*, at para.137:

Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view.

See also: *Oakes, supra*, at p.138; *Thomson Newspapers, supra*, at paras.21, 88

48. The presence of the words "free and democratic society" in s.1 means, as Dickson C.J. said in *R. v. Oakes, supra*, at p.136:

5 The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles in a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [emphasis added.]

15 These underlying values and principles are broader than the rights and freedoms enumerated in the *Charter*. These competing rights and values must be respected and balanced in a contextual manner.

*R. v. Keegstra*, [1990] 3 S.C.R. 697 at pp.735-738

*R. v. Butler, supra*, at pp.496-497

*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras.100-121

20 *Ross v. New Brunswick S.D. No. 15, supra*, at paras.77-78

*C.B.C. v. New Brunswick, supra*, at paras.36-43

*M. v. H.*, [1999] 2 S.C.R. 3, at para.106

*R. v. Mills* (25 November 1999, No. 26358, S.C.C.) at para.67

## VII. THE IMPORTANCE OF THE OBJECTIVE

25 49. The objective of the provision which limits the *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. It must relate to pressing and substantial concerns.

*R. v. Oakes, supra*, at pp.138-139

*RJR-MacDonald Inc., supra*, at para.144

30 *Thomson Newspapers Ltd., supra*, at para.125

50. The importance of the objective may be measured *inter alia* by the extent to which



- a) it upholds *Charter* rights or freedoms or other values of a free and democratic society which underlie the *Charter*;
- b) it supports Canada's international treaty and convention obligations, and
- c) it is recognized as a valid objective by the international community.

5        *R. v. Keegstra, supra*, at p.758  
       *R. v. Butler, supra*, at pp.496-498  
       *Ross v. New Brunswick S.D. No. 15, supra*, at para.98  
       *R. v. Lucas, supra*, at paras.48-51

51.     This Court has held (in *Irwin Toy, supra*, at pp.986-991) that protection of children from  
 10     commercial manipulation by advertising, and (in *R. v. Butler, supra*, at pp.496-499) that  
       protection of women from the risk of harm from the proliferation of violent or degrading  
       material, are pressing and substantial objectives.

52.     The Respondent in para.72-73 of his Factum defines the objectives of s.163.1(4) far too  
       narrowly in confining them to the harms that "mere possession of child pornography causes",  
 15     and in his restrictive description of those harms. S.163.1 is a comprehensive attack on child  
       pornography, from its creation to its ultimate use. The prohibition of possession in s.163.1(4) is  
       an integral part of the package; not only does it address the injury caused directly by the use of  
       child pornography, it is essential to the effectiveness of the prohibitions on creation and  
       dissemination, as set out below, particularly in paras. 72 to 75.

20     53.     By enacting s.163.1, Parliament provided protection to children's rights to equality,  
       dignity and physical and emotional integrity.

54.     Physical and emotional integrity are basic to human dignity. The Fraser Committee  
       found that pornography and prostitution raise important issues of equality and dignity with  
       respect to children, stating:

25                They are, in many important respects, fully the equals of adults: they deserve the  
                   same respect as human beings, regard for individual differences and concern for  
                   human dignity that we, as adults expect for ourselves. In our view, social policy  
                   should proceed on the basis of a firm recognition of the child's right to equality in  
                   these important areas.

Fraser Report, App.R. Vol. VIII, p.1390; see also p.1391

55. Having rejected as a principle upon which to structure the criminal law the concept that adult women involved in pornography and prostitution are victims, the Fraser Report took a much different view of the situation of children, saying at App.R. Vol. VIII, p.1390:

5 In contrast, it is our view that children should be regarded as vulnerable, and in need of society's protection, when dealing with the issues of pornography and prostitution. Children would thus be seen as victims or potential victims of people engaged, or wanting to engage, in these activities.

56. Recently, in *Valley, supra*, at p.11, Bensler J. said:

10 Children are the most vulnerable members of our society. Children have the right to privacy and the right to dignity.

57. Protecting children from the harms engendered by the creation, dissemination and use of child pornography is an objective of fundamental importance.

#### VIII. THE RATIONAL CONNECTION

15 58. The issue at this stage of the analysis is whether the impugned legislation is a logical method of accomplishing the objective. The Court must determine whether there is a coherence and an efficiency between the justified purpose and the measures employed. The focus is on the relationship between the objective and the measures, not the relationship between the measures and the *Charter* rights.

20 *R. v. Oakes, supra*, at p.139  
*R. v. Laba*, [1994] 3 S.C.R. 965 at pp.1007-1008  
*Thomson Newspapers, supra*, at paras.124-125

59. Parliament need not have conclusive evidence before acting. It may act upon conflicting or inconclusive scientific evidence, and reasonable inferences may be drawn from such  
 25 evidence. Parliament must have a reasoned apprehension of harm.

*Irwin Toy, supra*, at pp.988-991, 994, 999  
*R. v. Butler, supra*, at pp.501-504  
*RJR-MacDonald Inc., supra*, at paras.86, 156-158  
*Thomson Newspapers, supra*, at paras.88, 90

60. The creation of these offences involving child pornography, including possession of the material defined in s.163.1(1), is a logical method of accomplishing Parliament's objectives.

*Ontario (Attorney General) v. Langer*, (1995), 97 C.C.C. (3d) 290 (Ont. Ct.-G.D.) at pp.322-323

5 61. It is beyond dispute that proscription of explicit material involving actual children is rationally connected to the objective.

62. It is also clear that visual representations, including those not made using actual children, are used to reinforce distortions, to fuel fantasies and to groom other children for sexual purposes. The existence of a causal link between the use of child pornography and the  
10 commission of acts of child sexual abuse is controversial. However, empirical studies that would demonstrate whether such a link exists would be difficult if not impossible to construct, as noted in *Langer, supra*, and by the Fraser Committee.

Fraser Report, App.R. Vol. VIII, pp.1419-1421  
*Langer, supra*, at p.304

15 63. The demand for and use of child pornography by pedophiles establishes a correlation between such material and the commission of acts of child sexual abuse. Therefore prohibiting possession of child pornography is a logical method of accomplishing the objective. In a situation in which there is little statistical data, it is up to Parliament to decide what weight to attribute to the available evidence, statistical and otherwise, as this Court observed recently in  
20 *Mills, supra*, at para.125.

Testimony of Dr. Collins, App.R. Vol.I, pp.76-79, 166-172, 174-178, Vol. II, pp.211-213, 234

Marshall study, App.R. Vol.VII, p.1285

25 Carter *et al.*, "Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders", Journal of Interpersonal Violence, 1987, App.R. Vol. VII, pp.1294-1295

House Committee Proceedings, App.R. Vol.IV, pp.664-665

64. The vulnerability of children further justifies action on the basis of the available information without waiting for conclusive evidence that may or may not be available in the future. As the Fraser Committee said in its report (at App.R. Vol. VIII, p.1470):

It will be apparent that our argument rests on a belief that the harms which have to be demonstrated in order to justify intervention by the state are different for children in comparison with adults. Precisely because of their status as children, they are entitled to protection over a wider range of activities than are adults. That is, intervention by responsible people and authorities is justified before demonstrable physical or psychological harm occurs.

65. The rational connection between reducing sexual abuse and exploitation of children and the proscription of material which advocates or counsels it is self-evident.

#### IX. MINIMIZING THE IMPAIRMENT WHILE ACHIEVING THE OBJECTIVE

66. The test under this stage of the analysis was recently restated by Iacobucci J. in *M. v. H.*, *supra*, at para.118:

When legislative action impairs constitutional rights, the government must demonstrate that the impairment is no more than is reasonably necessary to achieve its goals (see, e.g., *Eldridge*, *supra*, at para.86, *Miron*, *supra*, at para.163).

The nature and extent of the infringement on the *Charter* right in issue is relevant in determining whether the infringement could be avoided or would be less severe if different means were used to accomplish the legislative objective.

67. As Lamer C.J. said in *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at p.1341:

Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively.

68. The focus at this stage is on the relationship between the objective of the legislation and the means employed to achieve it. Given the validity of the legislative purpose, the issue is whether the government has demonstrated a reasonable basis for concluding that the legislative objective could not be achieved as effectively by other means which intrude less on the constitutionally protected right. Legislation will fail the "minimum impairment" test only if

there are other clearly superior measures, that is, measures which are equally effective but significantly less intrusive.

*Butler, supra*, pp.504-509

*Irwin Toy, supra*, p.994

5 *RJR-MacDonald Inc., supra*, at para.160

*Thomson Newspapers, supra*, at paras.122, 124-125

*Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569, at paras.62-63

69. The issue raised by the “minimal impairment” analysis in the context of this case is whether s.163.1(4) impairs freedom of expression any more than is reasonably necessary to  
10 protect children and society from the harms and risks of harm caused by the creation, dissemination and use of the particular forms of child pornography defined in s.163.1(1).

70. To put the question another way, would legislation that is any less comprehensive protect children as effectively? For the reasons set out below, it would not. As McCombs J. said in *Langer, supra*, at p.326:

15                   The scope of s.163.1 is large, but a large scope is required to ensure that the objectives of the legislation are addressed.

71. In this case there are two aspects to the issue of minimizing impairment:

- a) whether prohibiting possession of child pornography is reasonably necessary to protect children, and
- 20       b) whether prohibiting all of the forms of child pornography defined by s.163.1(1) is reasonably necessary to protect children.

#### A. Possession

72. The particular nature of the harms caused by the creation, dissemination and use of child pornography dictates that simple possession be prohibited. Ultimately, any legislative scheme  
25 that prohibits the creation, distribution and publication of child pornography without prohibiting its possession falls seriously short of providing an effective deterrent to the exploitation of child victims in the creation of child pornography and fails to address the harm caused by pedophiles’ use of child pornography.

73. An offence of possession is an integral part of the legislative scheme, because:

- a) it is the private use of child pornography which causes much harm. As set out above, these harmful uses include convincing other children to engage in similar conduct, reinforcing the possessor's cognitive distortions, and enriching the possessor's deviant sexual fantasies;
- b) enforcement of the prohibition against making pornography will in many cases be impossible. Often, there will be no clue as to who made the pornography. Where the maker can be ascertained, in many cases the only witness to the making of the pornography will be the child victim, who may be unwilling or unable to provide the evidence;
- c) sanctions against possession of child pornography are required to diminish the incentive to produce such materials by reducing, if not eliminating, the market. In the words of the Badgley Committee:

In the Committee's judgment, the only effective way to curtail the production of child pornography, and to eradicate it from the Canadian market entirely, is to attach criminal consequences to the conduct of each participant in the process, from the importer or maker of child pornography to the ultimate consumer of child pornography, and to all intermediate parties who are culpable.

Badgley Report, App.R. Vol. VIII, p.1350

Fraser Report, App.R. Vol. VIII, p.1477, Vol. IX, p.1501

U.S. Senate Report, Finding 12, App.R. Vol. IX, pp.1576, 1592-1593

74. In *Stroempl, supra*, the Ontario Court of Appeal recognized that the prohibition on possession of child pornography is an important part of the legislative scheme to curb its production. Morden A.C.J.O. said at p.191:

The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense possessors such as the appellant instigate the production and distribution of child pornography – and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some

distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

75. Much of the child pornography that exists in Canada is imported from other countries.  
 5 Prohibiting possession of child pornography contributes to the fulfilment of Canada's international obligations by reducing the market for imported child pornography.

Fraser Report, App.R. Vol. IX, p.1501  
 United Nations Convention on the Rights of the Child, Can.T.S. 1992/3, App.R., Vol. IX, pp.1660-1666

- 10 76. Parliament has provided exemptions where the pornographic material has artistic merit or an educational, scientific or medical purpose, or would serve the public good. These are the situations in which pornography has a use that is conceivably beneficial. The innocent purposes remaining are restricted to such purposes as idle curiosity and prurient interest where there is no possibility of acting out. As McEachern C.J.B.C. said:

- 15 As I have already said, this definition seems to provide an exemption from criminal liability for almost all conceivable kinds of innocent possession.

App.R. Vol. XII, p.2220, para.285

77. The accused need only raise a reasonable doubt as to whether the material comes within these exemptions. For example, in *Langer, supra*, at p.326, McCombs J. dealt with the  
 20 submission that the sincere but failed artist would face possible criminal sanction:

Despite the fact that purported art must meet an objective merit standard, I think that it would be the rare case in which an artist, acting with sincerity and integrity in the creation of a work, would run afoul of this law. The words of Sopinka J. in *Butler, supra*, [citation omitted] apply to the defence of artistic merit:

- 25 Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression. (emphasis added by McCombs J.)

78. Similarly, for the offence of possession, the Crown must prove knowledge of the actual or apparent age of the depicted child beyond a reasonable doubt. This is a greater obligation

than that found in s.163.1(5), which requires a maker, printer or publisher to establish due diligence.

79. No legislative standard can distinguish between innocent possessors on the one hand, and pedophiles and other individuals who are likely to use child pornography in ways directly harmful to children, on the other. This reality was acknowledged by both Rowles J.A. and McEachern C.J.B.C.

App.R. Vol. XII, p.2177, para.196, p.2220, para.285

80. Only the most egregious types of material have been included in s.163.1(1). The definition of child pornography cannot be restricted further without failing to address a significant risk of harm to children posed by such material if it were in the wrong hands. If possessors who are likely to use child pornography in harmful ways cannot be distinguished from those who are not, it follows that the legislation must prohibit possession of a certain type of material which is harmful in some hands but not in others. For example, a pedophile might use a computer to generate a totally imaginary representation of a child engaged in sexual activity and then use that representation to "groom" a child. Excluding imaginary representations from the definition of child pornography because someone with innocent intentions might create the same representation would leave that pedophile's victim unprotected.

#### **B. Categories of prohibited material**

##### Sexually explicit conduct & depiction of sexual organ, etc. (s.163.1(1)(a))

81. Section 163.1(1)(a) covers a small part of the range of the materials that might colloquially be termed pornographic. The requirement in ss.(a)(i) that the activity depicted be "explicit sexual activity" and that the child be engaged in that activity excludes a wide variety of material that may be simply suggestive, or in which the child is present in the depiction but is not actively involved. Ss.(1)(a)(ii) requires that the visual representation have as its dominant characteristic the depiction of a sexual organ or anal region and that the depiction be for a sexual purpose.



82. Pedophiles collect and use a much wider range of material than that which is included in the definition of child pornography in s.163.1(1). Dr. Collins testified that pedophiles collect a wide variety of material which is erotic to them, including images of scantily clad or nude children and accounts, real and fictional, of sexual activity involving children. The Standing  
 5 Committee also heard submissions of concern that prose erotica should be included in the definition of child pornography. (see para.42 above). However, these materials are not encompassed by the definition in s.163.1(1).

Advocacy (s.163.1(1)(b))

83. S.163.1(1)(b) includes both written materials and visual representations. It is limited in  
 10 two respects. The first is that it encompasses only material or a representation "that advocates or counsels", which includes only hortatory material. Diaries and other similar personal writings are unlikely to come within this category. Previous proposals also included descriptive or approving material: "advocating, encouraging or presenting as normal" (Fraser Report); "advocates, encourages, condones or presents as normal" (Bill C-114); and "incites, promotes,  
 15 encourages or advocates" (Bill C-54).

84. The second limitation that the advocacy or counseling be of activity with a person under eighteen that would be an offence under the *Code* is appropriately restricting.

**C. Visual Representations**

Exploitation of children directly involved in creating pornographic representations

20 85. An effective strategy to prevent the exploitation of children by recording them engaged in sexual activity or modeling in explicitly sexual poses (the kind of activity described in para.163.1(1)(a)) requires more than prohibition of photography, film, video, and other electronic forms of recording such activity as it is taking place. An effective strategy also requires that:

- 25 a) all means of recording such activity, including manual methods such as drawing, be prohibited, and
- b) depictions of imaginary events be prohibited because:

- i) where the child depicted cannot be located, there is no practical way to ascertain if the events are real or imaginary,
- ii) if the representation is a drawing or other image created manually, an examination of the image will not reveal whether the activities depicted are real or imaginary.. and
- 5      iii) Computer-generated or "morphed" images of various types may be indistinguishable from untreated recordings

U.S. Senate Report, Findings 8, 9, App.R. Vol.IX, pp.1576, 1589-1594  
*Hilton, supra*, p.65, 73

86.      Any legislative prohibition that does not cover images of young people who are over 14  
 10      years but under 18 years engaged in consensual sexual activity would be an incomplete solution to the problem of the use of actual children to create the images defined in s.163.1(1)(a). The most that anyone could ascertain from viewing the image is that the young person is apparently consenting. As set out above, young people under 18 are still considered to be vulnerable to improper influence. S.153 and s.212(4) of the *Criminal Code* manifest a concern that young  
 15      people will be victimized by those who would misuse a position of trust or authority or a relationship of dependency or use monetary or other consideration to induce young people to engage in sexual activity.

87.      This concern is particularly poignant with respect to the creation of child pornography. The Badgley Committee found that, in a majority of incidents it studied, pornographers were in  
 20      some sort of position of trust and bribed or lured children to their homes. Dr. Collins testified that most pedophiles are seductive in their approach to children. He described the process of "grooming" a child which can include using pornography to lower the child's inhibitions.

Badgley Report, App.R. Vol. VIII, p.1374  
 Testimony of Dr. Collins, App.R. Vol. I, pp.69-70, 76, 201

25      88.      The problem is illustrated by two cases involving charges under s.163.1. In *Jewell, supra*, many of the victims were between the ages of 14 and 18. The two accused enticed their victims with money, cigarettes, and alcohol. One of the accused posed as a friendly father figure

and disguised his house as a place of refuge when the young boys left their own homes. He also took some of the boys on trips to places like Disney World. In *Henricks, supra*, the accused, a woman who was acting in concert with her husband, drugged girls, one of whom was her cousin. Some of her victims were under 14, one was not.

5           *Jewell, supra*, pp.274, 276  
             *Henricks, supra*, paras.31, 35, 37, 44, 50, 53, 54

89. If the child is the only witness but is not available to testify (for example, if the pornography is imported), the issue of consent remains unresolved.

Humiliation to children from images of sexual exploitation

10   90. Even where the visual representation does depict an imaginary event rather than an actual one, a real child who is depicted will suffer no less humiliation than if the event actually occurred. Further, children in general suffer the same assault to their dignity and sense of self-worth whether the children and events depicted are real or imaginary. The damage occurs regardless of the form of the depiction, whether it is a photograph, film, sketch, cartoon or  
 15 anything else.

Pedophilic activity

91. Any type of visual representation is capable of being used by pedophiles for the purpose of “grooming” child victims, to enhance their deviant sexual fantasies, or to reinforce a cognitive distortion that sexual activity with children is acceptable. Drawings, comics or other cartoons  
 20 are all logically capable of use for such purposes. Det. Waters testified that child pornography is found in comics, and described two, “Cherubino” and “Boiled Angel”, which depict young children and adults engaged in sex acts. Arguably, children, especially young children, are more attracted to cartoon images than adults and are therefore more vulnerable to representations in that form.

25           Testimony of Det. Waters, App.R. Vol. I, pp.32, 33-34  
             House Committee Proceedings, App.R. Vol.V, p.885

92. Whether the representation is a recording of an actual event or merely depicts an imaginary event is irrelevant to its potential for misuse by pedophiles.

U.S. Senate Report, Findings 8-11, App.R. Vol.IX, pp.1576, 1591-1594

*Hilton, supra*, at p.73

5 *U.S. v. Acheson*, (Nov.12, 1999 No.98-3559) (U.S. 11<sup>th</sup> Circuit Court of Appeals) at p.3  
*contra, Free Speech Coalition v. Reno*, (Dec. 17, 1999, No.97-16536) (U.S. 9<sup>th</sup> Circuit Court of Appeals) at p.13

93. Whether the child depicted is actually under 18 or only appears to be under 18 is similarly irrelevant to its potential for misuse by pedophiles.

10 Fraser Report, App.R. Vol. VIII, p.1470

94. Whether the child depicted actually consented to engaging in the sexual activity or to posing for a picture (within the definition in s.163.1(a)(ii)) or whether the consent was obtained by improper means is also irrelevant to its potential for misuse by pedophiles.

#### **D. Position of the Court Below and of the Respondent**

15 95. Rowles J.A. (at para.197-201, App.R. Vol.XII, pp.2178-2180) reviewed the various hypothetical situations posed by the Respondent and concluded that in those particular situations there is no significant risk of harm to children and they are therefore not included in the ambit of the legislative objective. For the reasons set out by the Appellant in para. 66-90 and 99-106 of his Factum, this conclusion is erroneous. However, even to the extent that there may be some  
 20 situations in which the possession of child pornography poses no significant risk of harm to children, that determination does not dispose of the issue. Simply because legislation captures some activity which falls outside the ambit of its objective does not *per se* mean that it is unnecessarily intrusive. The issue is whether the legislation could be drafted in such a way as to capture all the harmful activity and at the same time intrude less on the right under s.2(b) by  
 25 capturing less activity that is not harmful.

96. With respect, Rowles J.A. simply did not go far enough in her analysis. For example, having determined that a person who created a pornographic representation of an imaginary event and did not show it to anyone posed no risk to children and therefore the legislation did

not need to cover that situation, Rowles J.A. needed to go further. She needed to determine whether the legislation needed to prohibit self-made pornographic representations of imaginary events in order to capture the activity of the pedophile who would use such representations to "groom" a child victim, reinforce his cognitive distortions, or fuel his sexual fantasies. She  
 5 needed to consider whether the legislation could be drafted so that the possession of such material in the hands of the pedophile could be distinguished from the possession of such material in the hands of someone who would not misuse it, so that the legislation would accomplish its goal as effectively while reducing its intrusion on freedom of expression. Having determined that legislation could not distinguish innocent from potentially nefarious possessors,  
 10 had Rowles J.A. completed her analysis she would, in the Attorney General's submission, have concluded that in this situation the legislation was not overbroad.

97. As set out in paras.85- 94 above, and by the Appellant at paras.99-106 of his Factum, narrowing the definition of child pornography by eliminating works of the imagination, depictions of sexual activity which is not criminal, possession by the author, or possession by a  
 15 young person who is depicted in the pornographic representation, would significantly reduce the scope and effectiveness of the protection of children from the harms identified.

98. The Respondent at para.82 of his Factum suggests several options for limiting the breadth of the offence of possession. However, for the reasons set out in the preceding paragraph, the adoption of any of these measures would significantly reduce the scope and  
 20 effectiveness of the protection of children.

99. One of the Respondent's suggested alternatives is to exempt a youth depicted in the representation from prosecution. As children under 18 may be the ones sexually exploiting other children (see paras.30-31 above), it is necessary that they be included in the prohibition. Their presence in the depiction is no guarantee that they are victims rather than exploiters. Insofar as  
 25 young people under 18 wish to record their own sexual activity, their freedom to do so is necessarily but only temporarily constrained in order to provide the protection against exploitation.

## E. Conclusion

100. In selecting the legislative means to accomplish its objective, Parliament was required to strike a balance between the critical interests of vulnerable children, and the interests of those who would use child pornography. Parliament was also required to assess social science  
 5 evidence regarding the nature and extent of the injury child pornography causes to children's equality, dignity and physical and emotional integrity. These are determinations that Parliament is institutionally competent to make. The courts, on the other hand, cannot assess whether the least drastic means to achieve the purpose have been chosen in such circumstances with the same degree of certainty as they can in cases relating to maintaining the authority and  
 10 impartiality of the judicial system.

*Irwin Toy, supra*, at pp.992-994  
*M. v. H., supra*, at para.79

101. The Attorney General submits that Parliament had a reasonable basis for concluding that prohibiting possession of the materials described in s.163.1(1) is necessary to protect children  
 15 from the profound invasion of their equality, dignity and physical and emotional integrity caused by child pornography. The minimal impairment requirement does not force the government to scale down the critically important objective of protecting children from sexual exploitation through pornography. As this Court stated in *Irwin Toy, supra*, at p.999:

20 This court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.

102. The words of Sopinka J. in *Butler, supra*, at p.508, are also apt here:

25 However, given the gravity of the harm, and the threat to the values at stake, I do not believe that the measure chosen by Parliament is equaled by the alternatives which have been suggested.

## X. PROPORTIONALITY BETWEEN SALUTARY AND DELETERIOUS EFFECTS

103. The last stage of the modified *Oakes* analysis assesses the proportionality between the benefits of the limitation and the deleterious effects measured by the values underlying the

*Charter*, asking whether or not the consequences of the violation outweigh the benefits to be achieved.

*Thomson Newspapers, supra*, at paras.123-126

104. This involves balancing the values and principles underlying the *Charter*, which are  
 5 broader than the enumerated rights and freedoms (See para.48 above). The protection of  
 vulnerable children from the harms of sexual abuse and exploitation caused by the creation and  
 use of child pornography supports their dignity, privacy, equality, and indeed physical and  
 emotional integrity, which are values and principles of a free and democratic society underlying  
 the *Charter*. In *Keegstra, supra*, at p.787, and in *Lucas, supra*, at para.94, this Court stressed  
 10 the importance of the objective at this stage of the analysis. The objectives at issue in those  
 cases, the dissipation of racism and protection of the individual's reputation, are of no greater  
 importance in a free and democratic society than the objectives of s.163.1(4).

105. Section 2(b) protects the right of an individual to have thoughts that are not only  
 offensive to most people, and not only deliberately false, but also positively harmful to others.  
 15 But child pornography has no redeeming social value, and accordingly the government's burden  
 of justification is significantly reduced. Prohibiting possession, and not only distribution, is an  
 integral part of a comprehensive scheme that justifiably attempts to protect children from the  
 harms produced by the creation, dissemination and use of child pornography.

*RJR-MacDonald Inc., supra*, at paras.71-77, 132, 170-171

*Ross v. New Brunswick S.D. No. 15, supra*, at paras.89-94

*Thomson Newspapers, supra*, at para.91

*R. v. Lucas, supra*, at paras.33-34, 57, 88-96, 114-119

*R. v. E(B), supra*, at paras.56, 71-72

106. A prohibition on possession, and the consequent limitation on private use, of material is  
 25 undeniably a more intrusive restriction than a prohibition on publication or dissemination.  
 While this is a factor in the analysis, it is clearly not determinative. Even taking this factor into  
 account, the activity of possession of child pornography remains far from the core of the values  
 protected by s.2(b) of the *Charter*. Furthermore, a prohibition on possession is essential if the  
 harm to children from private use of child pornography is to be prevented. In *E(B), supra*,

although the prohibition reached activity in the home, the Ontario Court of Appeal concluded at para.72, that the prohibition's deleterious effects were outweighed by the objective of *Criminal Code* s.172, protecting children from activity that endangered their morals.

107. The Attorney General submits that Southin J.A. erred in ruling (at para.95 App. R. Vol XII p.2130) that a prohibition of simple possession of expressive materials could never be justified. Such a ruling elevates a particular expression of the s.2(b) right into an absolute right. S.1 of the *Charter*, in its terms, applies to all *Charter* rights without exception.

108. The deleterious effects of s.163.1(4) of the *Code* on the right under s.2(b) are greatly restricted because the provision covers only a narrow range of materials and because the purposes of the possession which have redeeming social value have been exempted. Only a very small proportion of material which might be considered erotica falls within the definition in s.163.1(1) of the *Code*, especially since all erotica portraying adults may be possessed. At the end of the day s.163.1(4) presents few limitations to those who wish to possess erotica.

109. The test involves balancing all of the beneficial effects of the impugned legislation against all of its deleterious effects. The Respondent, in para.116 of his Factum, erroneously considers only society's interest in private possession of those materials that he says raise no risk of harm to society at large and have not harmed children in their production. All of the beneficial effects of s.163.1(4) must be weighed in the balance, not only the beneficial effects which might accrue in the hypothetical situations that the Respondent argues are instances of overbreadth.

110. The correct approach to this balancing is set out by McEachern C.J.B.C. dissenting at para.291 (App.R. p.2223):

[291] I stress that the balancing is not just between the admitted risk of harm to children by simple possession against a right of innocent enjoyment of child pornography. Rather, the balancing is between the risk of harm to both children and society as a whole by simple possession, against the right of every person, innocent or nefarious, to possess any kind of child pornography for innocent, predatory or commercial purposes.

111. The Attorney General agrees with paragraphs 129 to 144 of the Appellant's Factum, and particularly with the criticisms that Rowles J.A. ignores or underestimates the dampening effect



of prohibiting possession on the child pornography market, the nefarious uses which possessors of child pornography make of it, the small number of truly innocent possessors, and the impossibility of defining innocent possession.

112. Both the ability to possess private visual representations and writings, including particularly those made by and of oneself, and the protection of children from sexual abuse and exploitation, reflect important social values. The balancing requires an examination of how possession of the materials described in each portion of the definition of "child pornography" impacts the first and supports the second. The analysis in the preceding parts of this Factum demonstrates how prohibiting possession of these materials helps to protect children; the protection extends to the hypothetical situations put forward by the Respondent.

113. In many of the examples cited by the Respondent at paragraph 76 of his Factum, the possessor is the maker or author; the freedom is more restricted in this situation than where the possessor is a consumer of the products of others. However, the social value of the expression remains minimal.

#### 15 A. Section 163.1(1)(a)(i)

114. This subsection is limited to visual representations of explicit sexual activity by one who is or is depicted as being under eighteen. Visual representations are the most stimulating. "Explicit sexual activity" is derived from this Court's categorization of the types of pornography in *R. v. Butler, supra*, at pp.484-485. Representations that have artistic merit or an educational, scientific or medical purpose or that serve the public good are not proscribed.

115. The examples which the Respondent gives at paragraph 76 of his Factum focus on:

- (a) photos, videos or drawings of explicit sexual activity, including those made by the possessor. If these are of others or include others there may have been abuse or exploitation of children in their making which is not apparent. Some will have been made without abuse or exploitation and those depicting only the possessor can be assumed to be. But the permanent record of an identifiable child is itself an abuse.

(b) photos, videos or drawings of those fourteen and over engaged in legal explicit sexual activity (including oneself). Similarly, although the sexual activity appears to be legal it may not really be. Even if it is at the time, the representation of it remains a permanent record. This is true whether or not the possessor is one of the depicted participants.

(c) possession by one under eighteen is an offence. A disturbing number of sex offenders are young.

(d) depictions by older actors appearing to be under eighteen. The legislation does not seek to prevent a risk of harm to the person depicted.

116. The specific danger posed by these examples is that the apparently innocent possessor may use them in ways that lead to abuse or exploitation of further children. More generally, all of these convey the inappropriate message that explicit sexual activity with those under eighteen is appropriate, and contribute to the desensitization of society by the message that youths are sexual objects.

#### 15 B. Section 163.1(1)(a)(ii)

117. This subsection is limited to visual representations, the dominant characteristic of which is the depiction for a sexual purpose of a sexual organ or anal region of a person under age eighteen. As with the previous sub-section visual representations are the most stimulating. The same defences are applicable.

118. The examples which the Respondent provides at paragraph 76 in his Factum focus on:

(a) those which do not abuse or exploit children in their production. It is impossible to tell from viewing a drawing or sculpture whether or not a child was used as a model, abused or exploited in its making.

(b) those which record a lawful pose. It is impossible to tell whether or not the child was abused or exploited in the making.

(c) photos or videos of a married couple. The same considerations apply here as to example (b) under ss.1(1)(a)(i).

(d) those of oneself. The risk of harm is not in the creation in this case.

119. The specific danger of each of these is that the apparently innocent possessor may use them in ways that lead to abuse or exploitation of further children. Generally, all of these depictions are of extremely limited expressive value and all contribute to the desensitization of society by the message that youths are sexual objects.

### C. Section 163.1(b)

120. This subsection is limited to material that advocates or counsels sexual activity with a person under eighteen that would be an offence under the *Code*. This is restricted to hortatory and not merely descriptive or approving material. It is also restricted by the requirement that the advocacy or counseling must be of a *Code* offence.

121. With respect to each of the examples set out by the Respondent at paragraph 76 of his Factum the specific danger is that the possessor may be persuaded to commit a *Criminal Code* offence against one or more children. The general concern is that material that advocates or counsels activity which constitutes an offence against children presents the message that they are sexual objects and thereby desensitizes society.

### D. Conclusion

122. Child pornography as defined in s.163.1(1) consists of materials which are either the product of sexual abuse or exploitation, or are used in ways that may well lead to it, or both. Like obscenity, child pornography “appeals only to the most base aspect of individual fulfilment” (*Butler, supra*, at p.509). Child pornography lies very far from the core of values enshrined in s.2(b).

123. In balancing the limits on s.2(b) of prohibiting possession of limited non-core materials, even those made by or of the possessor, against the support of the physical and emotional integrity, privacy and dignity of children by protecting them from the harms of sexual abuse and exploitation in the making of child pornography as defined and the use to which it is all too frequently put, the Court must come down on the side of the children. As McEachern C.J.B.C. dissenting said at para.291 (App.R. p.2223):

Possession for purely innocent purposes cannot be assured by any legislation and it is impossible to know how much harm will be done to children by allegedly innocent possession. Future harm to children cannot be predicted with any degree of accuracy. Any real risk of harm to children is enough to tip the scales in favour of the legislation in the context of this case.

See also: *Langer, supra*, at pp.327-328

See also: *Valley, supra*, at pp.13-14

124. What the Court is weighing is the health and safety of all children, whom child pornography victimizes.

#### 10 XI. CHARTER, s.7

125. The Attorney General agrees with the position of the Appellant set out in paragraphs 32 to 36 of his Factum that the more specific guarantee in s.2(b) is the one that should be examined first.

126. The Respondent's argument is one of overbreadth. In an examination of it under s.7, he would bear the burden of proof that the legislation contravenes the principles of fundamental justice. However, examination of it under s.1 gives him the advantage that the government bears the burden of proof of justifying the infringement.

127. The Respondent's s.7 argument assumes that the only interest involved is that of the possessor of child pornography. But an appropriate balancing requires consideration of the rights of the victims: *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Mills, supra*, at paras.61-67. Indeed the portion of the *Mills* judgment, which the Respondent quotes at para.58 of his Factum, refers to the privacy not of the accused, but of the complainant.

128. If the Respondent's argument were to be accepted without considering the rights of children in the s.7 analysis, then those rights, and the values and principles underlying the need for their protection, must be weighed in the balance under s.1.

129. Legislation which limits fundamental freedoms in s.2(b), but is a reasonable limit on those guaranteed freedoms prescribed by law as can be demonstrably justified in a free and

democratic society, is in accordance with the principles of fundamental justice and cannot violate s.7 of the *Charter*.

## XII. REMEDY

130. If, contrary to the submission of the Attorney General, s.163.1(4) is found to infringe the  
5 *Charter* unjustifiably, the possible remedies are:

- a) to strike down the legislation;
- b) to sever the offending portion of the legislation;
- c) to read down the legislation;
- d) to read into the legislation;
- 10 e) to temporarily suspend the declaration of invalidity of the whole or a severed portion of the legislation.

*Schachter v. Canada*, [1992] 2 S.C.R. 679 at pp.695-720

131. These proceedings have involved no challenge to any portion of s.163.1 other than to ss.(4), including the incorporated definition of "child pornography". Accordingly, any remedy  
15 should be expressly limited to the offence of possession under s.163.1(4).

132. S.52 of the *Constitution Act, 1982* provides that a law that is inconsistent with the provisions of the Constitution is of no force or effect "to the extent of the inconsistency". Therefore, if the Court should find the definition of child pornography in relation to possession to be somewhat overbroad, it should declare the law unconstitutional only to that extent.

20 133. The Respondent's only challenge to s.163.1(4) is that it is overbroad in that prohibiting possession of the defined materials is invalid in some hypothetical situations. The parties agree that there is at least a core of materials within the definition of child pornography the possession of which can validly be proscribed. The moral obligation to protect children from the physical and psychological injury caused by child pornography is of surpassing importance. Thus, if this  
25 Honourable Court declines to uphold the constitutionality of these provisions, contrary to the submission of the Attorney General, the appropriate remedy should be to declare invalid only

that portion of the law that is overbroad, and to seek to preserve the valid portion of the law, thereby maximizing its continuing protection of children from being victimized by child pornography.

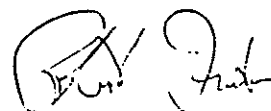
**PART IV**

**ORDER REQUESTED**

134. The Attorney General submits that the Appeal herein should be allowed and the constitutional questions answered in accordance with the foregoing submissions.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dated at Vancouver, British Columbia, this 5th day of January, 2000.



for Cheryl J. Tobias  
Of Counsel for the Intervener,  
The Attorney General of Canada



for Kenneth J. Yule  
Of Counsel for the Intervener,  
The Attorney General of Canada

**PART V****AUTHORITIES**

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## APPENDIX "A"

### Some of the United States Having Different Ages with Respect to Consent to Sexual Activity and Child Pornography

State	Age of Consent to Sexual Activity	Age with Respect to Child Pornography	Citation
Alaska	13	18	Alaska Statutes. Title 11. Chapter 41. s.434 (Sexual abuse of a Minor in the First Degree) Chapter 61. s.127 (Possession of Child Pornography)
Colorado	15	18	Colorado Statutes 1999. Title 18. s.18-3-405 (Sexual assault on a child) s.18-3-403 (Sexual exploitation of children)
Delaware	12	18	Delaware Code. Title 11. s.761 (Definitions generally applicable to sexual offenses) s.1103 (Definitions relating to children)
Florida	12	18	Title 46. Chapter 794. s.794.05 (Unlawful sexual activity with certain minors) Chapter 827. s.827.071 (Sexual performance by a child)
Georgia	16	18	Georgia Code. Title 16. s.16-6-3 (Statutory rape) s.16-12-100 (Definitions)
Idaho	16	18	Idaho Statutes. Title 18. Chapter 15. s.18-1505 (Sexual abuse of a child under the age of 16 years) s.18-1507 (Sexual exploitation of a child)
Indiana	14	16 for possession; 18 for production	Indiana Code. Title 35. Article 42. Chapter 4. s.3 (Sexual activity with a child) Article 42. Chapter 4. s.4(c) (Possession of child pornography)
Iowa	14	18	Iowa Code 1999. s.702.5 (Definition of child) s.728.1 (Definitions in relation to child pornography)
Kansas	14	18	Kansas Statutes. Chapter 21. Part II. Article 35. s.21-3502 (Rape) s.21-3516 (Sexual exploitation of a child - possession of child pornography)
Kentucky	16	18/16 (penalty depends on age of child portrayed in pornographic material)	Kentucky Revised Statutes Title 50 (Kentucky Penal Code). c.510. s.510.020 (Lack of consent) c.531. s.531.330 (Presumption as to minority)