

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

HER MAJESTY THE QUEEN

**APPELLANT
(Crown)**

- AND -

JOHN ROBIN SHARPE

**RESPONDENT
(Accused)**

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PART I

STATEMENT AS TO FACTS

1. The Attorney General for Ontario (hereinafter the "Intervener") takes no position on the facts set out in the facts of the parties to this appeal.

2. The Intervener intervenes pursuant to Rule 32 of the Rules of the Supreme Court of Canada in order to support the constitutional validity of s. 163.1(4) of the *Criminal Code*, R.S.C., 1985, c. 46.

PART II

POINTS IN ISSUE

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3. By order of the Chief Justice dated August 26, 1999, the following constitutional questions were stated:

I. 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*?

(ii) 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 purpose of s. 1 of the *Charter*?

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

4. If s. 163.1(4) of the *Criminal Code* 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 purposed of s. 1 the *Charter*?

PART III

BRIEF OF ARGUMENT

(a) Position of the Intervener

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4. The Attorney General of Ontario takes the position that the objectives of the legislation, the protection of society's most vulnerable members from the harm of sexual exploitation and the harm of being depicted as appropriate sexual partners, enshrine fundamental societal values. This objective of protecting children is of superordinate importance to Ontario and to the Attorney General, in the

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office of whom the trust of protecting children is reposed. The Canadian perspective, whether rooted in the role of the Attorney General, the role of Parliament or the Legislatures, or in the law pertaining to children, is one that, across the breadth of legal responses has, as a fundamental core principle, a recognition of the need and fundamental responsibility for the protection of children. This value is found in child protection legislation, a separate youth justice system, the *parens patriae* jurisdiction and child support guidelines. It has at its root the protection of the most cherished group of individuals in Canadian society. The enactment of child pornography legislation is an appropriate response to the historical responsibility of protecting vulnerable children. As this Court has recognized, the prevalence of child sexual abuse is “staggering”. The technological developments which facilitate the anonymous dissemination and exchange of child pornography heighten the risk to children.

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R. v. L. (D.O.), [1993] 4 S.C.R. 419 at 439 per L’Heureux-Dube J.

5. It is the position of the Attorney General for Ontario that s. 163.1(4) of the *Criminal Code* infringes s. 2(b) of the *Canadian Charter of Rights and Freedoms* as the freedom has been delimited by this Honourable Court. The legislation is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society. The Attorney General for Ontario takes the position that s. 163.1(4) of the *Criminal Code* does not infringe s. 7 of the *Charter*.

6. The Intervener adopts the written submissions of the Attorney General for British Columbia in substance. The Intervener presents the following submissions as a supplement to those submissions.

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(b) Section 7

7. As the Chief Justice of British Columbia commented in his dissent, s. 163.1(4) does not infringe any liberty interest beyond the liberty interests protected under s. 2(b) of the *Charter*. The legislation prohibits the creation of permanent representations of conduct where the permanent depiction creates a substantial risk of harm to children. Possession of this material is integrally related to the communication of the messages which Parliament has sought to prohibit.

AR Vol. XII, p. 2202, Reasons of the Court of Appeal, at para. 246, per, McEachern, C.J.B.C.

8. This Honourable Court has repeatedly declined to consider the constitutionality of impugned

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legislation under the rubric of a section 7 analysis when specific *Charter* provisions guarantee a *Charter* right. In *Reference re Section Criminal Code, Ss. 193 & 195.1(1)(c)* Lamer, J. (as he then was) writing for the majority of the Court, held that section 7 is mainly concerned with the restrictions on liberty and security of the person which occur as a result of an individual's interaction with the justice system and its administration:

Put shortly, I am of the view that s. 7 is implicated when the state, by resorting to the justice system restricts an individual's physical liberty in *any circumstances*. Section 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity.

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Finally, s. 7 is implicated when the state, either directly or through its agents, restricts certain privileges or liberties by using the threat of punishment in cases of non-compliance.

Although this may appear to be a limited reading of s. 7, it is my view that it is neither wise nor necessary to subsume all other rights in the *Charter* within s. 7. A full and generous interpretation of the *Charter* that extends the full benefit of its protection to individuals can be achieved without the incorporation of other rights and freedoms within s. 7.

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This interpretation of s. 7 is compatible with an expansive view of liberty and security of the person, but as well, and in my view perhaps more importantly, it does not derogate from what I said regarding the scope of the principles of fundamental justice in the *B.C. Motor Vehicle Act* Reference

R. v. Smith, [1987] 1 S.C.R. 1045 at 1072 per Lamer J. (as he then was)

R. v. Lyons, [1987] 2 S.C.R. 309 at 334 per LaForest, J.

Reference Re Criminal Code s. 193 and s. 195.1(1)(c), [1990] 1 S.C.R. 1123 at 1177-78 per Lamer, J. (as he then was)

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9. The liberty interest affected by s. 163.1(4) is the freedom to engage in a process of communication which advocates or counsels criminal sexual activity with children or communicates a message which sexualizes children. The legislation limits the ability of individuals to engage in that process as an originator of the message and as a recipient. Section 163.1(4) curtails the freedom to create certain types of permanent representations depicting children in a sexualized manner. The criminalization of possession of certain representations curtails an individual's capacity to engage in the expressive processes. The legislation does not interfere with an individual's freedom to hold these views or even to advocate these views under certain conditions, where the concomitant risk of harm to children is less substantial. The legislation merely prohibits the communication of these views through resort to a permanent record or depiction. Properly characterized the legislation does not violate any liberty interest independent of the liberty interest protected by s. 2(b) of the *Charter*.

10. For similar reasons any effect s. 163.1(4) may have on the psychological integrity of an individual is not independent of the interests protected under s. 2(b). Indeed this Court has recognized that one of the purposes behind the guarantee of freedom of expression is to ensure diversity in forms of individual self-fulfillment and that human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey meaning and those to whom meaning is conveyed. Individuals are not precluded from engaging in certain sexual behaviour which might implicate the right to security of the person. With respect to the view of Southin, J.A., the legislation is a far remove from criminalizing the entertaining of “bad thoughts.”

Irwin Toy v. Quebec (A.G.), [1989] 1 S.C.R. 926

R. v. Keegstra, [1990] 3 S.C.R. 697 at 728 per Dickson, C.J.

R. v. F. (R. P.) (1996), 105 C.C.C. (3d) 435 at 440 (N.S. C.A.)

A.R. Vol. XII, p. 2129-30, Reasons of the British Columbia Court of Appeal at para. 93-95, per Southin, J.A.

11. Where the right to privacy has been invoked as a precondition to the fostering of the values of dignity, integrity, and autonomy, it has typically been within a situation where the purpose has been to protect “a biographical core of personal information which individuals in a free and democratic society would wish to maintain.” The right to privacy however is not absolute. The legislation under scrutiny does not intrude on the psychological integrity of the individual to compel the production of core information about an individual. To the extent that s.163.1(4) regulates the private conduct of an individual, it does so by limiting an aspect of expression within a particular context. The legislation interferes with the moral autonomy of the individual only to the extent that it prohibits the individual from possessing certain material that communicates a particular message, which Parliament has assessed to pose a substantial risk of harm to children. In *Canada (Human Rights Commission) v. Taylor* this Court examined the constitutionality of legislation prohibiting an individual or a group of individuals from communicating telephonically messages that were likely to expose a person or persons to hatred or contempt, by reason of the fact that the person or persons are identifiable on the basis of a prohibited ground of expression. Although the legislation reached into the private sphere to encompass activity within one’s own home, the constitutional analysis was carried out under s. 2(b) of the *Charter* and not s. 7 or s. 8. Hence the constitutional analysis is more fittingly carried out under the analysis of whether the violation of the right to freedom of expression is reasonable and demonstrably justifiable in a free and democratic society.

R. v. Mills, [1999] S.C.J. No. 68 para 77-89 per McLachlin J.(as she then was) and Iacobucci, J.

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R. v. Dymont, [1988] 2 S.C.R. 417

Thomson Newspapers v. Dir. Of Inv and Res, [1990] 1 S.C. R. 425 at 156-17 per Laforest, J.

Reference Re Ss. 193 and 195.1 of the Criminal Code, *supra* at 1185, per Lamer, J. (as he then was)

Canada (H.R.C.) v. Taylor, [1990] 3 S.C.R. 892

R. v. E. (B.), [1999] O.J. No. 3869 (Ont. C.A.) at paras. 53-58

12. Any definition of the Respondent's s. 7 interest would necessarily require consideration to be given to the s.7 rights of children to security of the person. The right to liberty and security of the person cannot be defined in a manner that significantly jeopardizes these interests for another vulnerable group in society.

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R. v. Mills, *supra* at para 73 per McLachlin J. (as she then was) and Iacobucci J

B. The Relationship Between Section 1 and Section 7

13. In the event that this Honourable Court is of the opinion that the right to life, liberty or security of the person has been infringed by s. 163.1 (4) then the denial has been in conformity with the principles of fundamental justice. As commented upon by the Attorney General for British Columbia at paragraphs 34 and 35 of the Appellant's Factum, the question of whether the denial of a right under s. 7 is in accord with the principles of fundamental justice involves consideration of factors relevant to the inquiry under s. 1. However, as this court recognized in *R. v. Mills*, the analysis is somewhat different when the proportionality of legislation is being considered under s. 7 than it is under s. 1.

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14. Under both s. 1 and s. 7 the question is whether from a substantive point of view the impugned law strikes the right balance between the interests of the individual and the interests of society. This Court has held that the most important difference is that under s. 7, the focus is on the delineation of rights, whereas under s. 1 the focus is on whether the violation is justified. Under s. 7 it is the claimant who bears the burden of justifying the infringement. The principles of fundamental justice are to be found in the basic tenets of the legal system. This Court has contrasted the sections by highlighting the fact that s. 1 is concerned with the values underlying a free and democratic society which are broader in nature.

R. v. Mills, *supra* at paras. 64-68 per McLachlin, J. (as she then was) and Iacobucci, J.

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15. Despite the difference in the emphasis, under both s. 7 and s. 1, the court is required to take a contextual approach to *Charter* values. Under both analyses the court must consider whether society

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has a pressing and substantial objective that is furthered by the legislation. The court is then required to determine whether the legislation infringes the right at issue more than is necessary to achieve the objective. In *R. v. Heywood* this Court held that under the s. 7 analysis a court must accord some deference to the measures selected by Parliament. It is not a question of whether the court would have chosen the selected means of accomplishing the objective, but whether legislation captures more than is necessary to ensure the purpose. The means is considered in relation to the purpose. The overlap between the two tests is readily apparent for, as this Court noted in *Heywood*, once a violation has been found that is rooted in overbreadth, it is difficult to see how the minimal impairment test under s. 1 could be met. Under s. 1 the legislature is required to satisfy the court that the salutary effects of the legislation outweigh the deleterious effects. As the Intervener concedes that there has been a violation of the freedom accorded under s. 2(b) of the *Charter*, it is unnecessary to address the issue of whether Parliament had a pressing and substantial objective and the issue of proportionality under s. 7.

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

R. v. Mills, *supra* at para. 64 per McLachlin, J. (as she then was) and Iacobucci, J.

C. Section 1

1. The Pressing and Substantial Objective

(a) The Proper Characterization of the Legislative Objective

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16. As noted by the Appellant, it is essential to properly characterize the objective of the impugned legislation in order to properly conduct a s.1 analysis. The Attorney General for Ontario adopts the multifaceted characterization of the objectives underlying s.163.1(4) outlined by the Appellant in paragraph 60 of the Appellant's Factum, and rejects the narrow characterization of the government's objective suggested by the Respondent at paragraphs 21, 72 and 98 of his Factum.

b. The objectives identified by Parliament in enacting s.163.1

17. The legislative record indicates that Parliament's fundamental objective in enacting s.163.1 is two-pronged: (1) to protect society's most vulnerable members from the harms of sexual exploitation and (2) to denounce the message imparted in sexual portrayals of children that children are appropriate sexual partners. These objectives are set out in the following statement by the Parliamentary Secretary to the Minister of Justice introducing what is now s.163.1 for second reading in the House of

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Commons:

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We are taking important steps to protect children from sexual abuse and exploitation.

The government is responding to the calls of the Canadian public to curb the flow of child pornography. I share that concern.

As I stated at the National Symposium on Community Safety and Crime Prevention held in Toronto this March, children matter. They are the most vulnerable members of our society. They are vulnerable to emotional, sexual, and physical abuse. Our children must have the opportunity to grow up in safe, nurturing communities protected from such abuse.

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.

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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.

A.R. Vol. V, pp. 829 and 831, Mr. Rob Nicholson, Parliamentary Secretary to Minister of Justice, Commons Debates, 3 June, 1993, pp. 20328 and 20330

A.R. Vol. XI, p. 1963, Mr. Pierre Blais, Minister of Justice, Senate Standing Committee on Legal and Constitutional Affairs, 22-6-1993, 51:43

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18. In addition to these over-arching objectives, the legislative record reveals that Parliament had a number of more precise objectives in enacting s.163.1. These six sub-objectives were identified by the Appellant at paragraph 60 of the Appellant's Factum, and are as follows:

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- (i) The prevention of the direct harm to children used in the production process;
- (ii) The prevention of the harm to the privacy, dignity and reputation of the child depicted caused by the existence of a permanent record of the sexual activity or graphic pose;
- (iii) The prevention of the risk of harm posed to all children through the use to which child pornography is put by some individuals to rationalize that sex with children is acceptable, to fuel and potentially act upon their pedophilic fantasies and to show children to facilitate their attempts to engage them in sexual activity;
- (iv) The prevention of harm to society caused by imagery which sexualizes children;
- (v) The dampening or, to whatever extent possible, the eradication of the clandestine child pornography market; and
- (vi) The facilitation of police enforcement efforts in the area of child pornography.

19. The Attorney General for Ontario further notes that *all* of the objectives outlined above explicitly or implicitly depend upon the inclusion of s.163.1(4) in the scheme of s.163.1 for their realization. In any case, as this Court indicated in *Vriend v. Alberta*, in a s.1 objective analysis, the broader purposes of the legislation as a whole must be considered in order to fully appreciate its operation in the broader scheme of the legislation. The legislative record supports this characterization of the objective in the portions of the legislative record identified below.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at para 111, per Cory, J. and Iacobucci, J.

(ii) The prevention of the direct harm to children used in the production process

20. This objective is highlighted in the comments of the Parliamentary Secretary to the Minister of Justice excerpted in paragraph 17 above, and is, in any case, self-evident.

(iii) The prevention of the harm to the privacy, dignity and reputation of the child depicted caused by the existence of a permanent record of the sexual activity or graphic pose

21. The Standing Committee on Justice and the Solicitor General heard evidence that the harms of being used in the production of child pornography never fully leaves its victims. That this harm is exacerbated by the creation of a permanent record of the sexual activity was recognized by Parliamentarians during Debates in the House of Commons. It was also noted by the Parliamentary Secretary to Minister of Justice, who stated that the government was concerned about the creation and exchange of “homemade” child pornography, which constitutes “palpable and permanent evidence of the sexual abuse” of children.

Detective Staff Sergeant Robert Matthews, Standing Committee on Justice and the Solicitor General, 10-6-1993, 105:5

A.R. Vol.V, pp. 843-44, Mr. Russell MacLellan (Cape Breton - The Sydneys), Commons Debates, June 15, 1993, pp. 20868-9

A.R. Vol. V, p. 830, Mr. Rob Nicholson, Parliamentary Secretary to Minister of Justice, June 3, 1993, Commons Debates, p. 20329

A.R. Vol. IV, p. 725, Detective Staff Sergeant Robert Mattlows, Standing Committee on Justice and the Solicitor General, 28-4-1993

(iii) The prevention of the risk of harm posed to all children through the use to which child pornography is put by some individuals to rationalize that sex with children is acceptable, to fuel and potentially act upon their pedophilic fantasies and to show children to facilitate their attempts to engage them in sexual activity

22. In the Debates in the House of Commons and in evidence before the Standing Committee on Justice and the Solicitor General, concerns were expressed about the use of child pornography to “motivate sexual conduct”, and to lure children into situations where they might be sexually abused or exploited. Studies by Dr. Marshall were referenced in relation to the first use of child pornography. As to the second use, evidence was led before the Standing Committee on Justice and the Solicitor General that child pornography is “often used as a tool by pedophiles to seduce children. They use it as a tool to lower their inhibitions.”

Mr. Rix Rogers, Standing Committee on Justice and the Solicitor General, April 27, 1993, 90:17

A.R. Vol.V, p. 856, Mr. George S. Rideout (Moncton), Commons Debates, June 15, 1993, p. 20881

A.R. Vol.V, p. 864, Mr. Don Piragoff, General Counsel, Criminal Law Policy Section, Department of Justice,

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Senate Standing Committee on Legal and Constitutional Affairs, June 8, 1993, 104:10

A.R. Vol. V, pp. 841-42, Mr. John Reimer (Kitchener), Commons Debates, June 15, 1993, pp.20866-7

A.R. Vol. V, pp. 843-44, Mr. Russell MacLellan (Cape Breton - The Sydneys), Commons Debates, June 15, 1993, pp. 20868-9

Detective Staff Sergeant Robert Matthews, Standing Committee on Justice and the Solicitor General, 10-6-1993, 105:4 and 105:7

(iv) The prevention of harm to society caused by imagery which sexualizes children

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23. One of Parliament's fundamental objectives in enacting s.163.1 was to send a message that children are not appropriate sexual partners. Throughout the legislative process, profound concern was expressed about the impact of images that sexualize children, and the harm to children and society in the message that children are appropriate sexual partners. Particular concern was expressed about the compelling nature of visual materials in delivering this message. The Minister of Justice had this to say before the Standing Committee on Justice and the Solicitor General, in reference to visual representations that show a person who is or is depicted as being under the age of 18 years engaged in explicit sexual activity:

To allow this type of material to continue to be available perpetuates the message that children are suitable objects of sexual interest. We have to denounce the message and attack the market, thereby reducing the incentive for production.

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A.R. Vol. XI, p. 1964, Mr. Pierre Blais, Minister of Justice, Senate Standing Committee on Legal and Constitutional Affairs, 22-6-1993, 51:44

A.R. Vol. V, pp. 829-30, Mr. Rob Nicholson, Parliamentary Secretary to Minister of Justice and Attorney General of Canada, Commons Debates, June 3, 1993, pp. 20328-9

See also: A.R. Vol. XI, p. 1940, Mr. Richard G. Mosley, Chief Policy Counsel, Criminal and Social Policy, Department of Justice, Senate Standing Committee on Legal and Constitutional Affairs, 21-6-1993, 50:9

(v) The dampening or, to whatever extent possible, the eradication of the clandestine child pornography market

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24. The evidence in committee hearings on Bill C-128 was clear that the major problem in Canada with child pornography related to underground networks, and that there was no mechanism in the *Criminal Code* which provided a means of dealing with that network. The government recognized that in order to eradicate the market for child pornography, it was essential that possession of child pornography be criminalized. As stated by the Minister of Justice, in this respect, s.163.1(4) was vital to achieving its many objectives in enacting s.163.1:

Since all that material is circulating underground, possession has to be targeted. If possession is not targeted, the real problem cannot be addressed. ... From my point of view, one of the major elements of this bill is contained in subclause (4).

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A.R. Vol. XI, p. 1974, Mr. Pierre Blais, Minister of Justice, Senate Standing Committee on Legal and Constitutional Affairs, 22-6-1993, 51:53
 A.R. Vol. V, pp. 829-30, Mr. Rob Nicholson, Parliamentary Secretary to Minister of Justice and Attorney General of Canada, Commons Debates, June 3, 1993, pp. 20328-9
 Detective Staff Sergeant Robert Matthews, Standing Committee on Justice and Solicitor General, 10-6-1993, 105:6
 Detective Noreen Wolff, Standing Committee on Justice and the Solicitor General, 10-6-93, 105:15-16
 A.R. Vol. V, p. 856, Mr. George S. Rideout (Moncton), Commons Debates, June 15, 1993, p. 20881
 A.R. Vol. V, p. 722-25, Detective Matthews, Standing Committee on Justice and Solicitor General 28-4-1993; 92:35-38

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(vi) The facilitation of police enforcement efforts in the area of child pornography

25. The government was urged to create an offence of simple possession in order to better attack the market for child pornography, and to reduce the incentive for their production. Unless possession was criminalized, efforts to curb the flow of child pornography would continue to be frustrated. The inclusion of a provision addressing written materials, and visual representations that advocate or counsel sexual activity with a child that would be an offence under the *Criminal Code*, likewise reflects Parliament's concern about effective law enforcement in the area of child pornography.

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A.R. Vol. V, pp. 829-30, Mr. Rob Nicholson, Parliamentary Secretary to Minister of Justice, Commons Debates, June 3, 1993, pp. 20328-9
 Detective Noreen Wolff, Senate Standing Committee on Legal and Constitutional Affairs, 10-6-93, 105:14
 A.R. Vol. XI, p.1948, Mr. Richard G. Mosley, Chief Policy Counsel, Criminal and Social Policy, Department of Justice, Senate Standing Committee on Legal and Constitutional Affairs, 21-6-1993, 50:44
 Detective Staff Sergeant Robert Matthews, Standing Committee on Justice and the Solicitor General, 10-6-1993, 105:10-13
 A.R. Vol. V, p. 856, Mr. George S. Rideout (Moncton), Commons Debates, June 15, 1993, p. 20881

(c) Parliamentary objectives in enacting s.163.1 reflect the recommendations of the *Badgley* and *Fraser Reports*

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26. At the time Bill C-128 was introduced, a government poll indicated that 94% of Canadians "wanted to do something to prohibit child pornography". Bill C-128 reflected public debate over issues relating to child pornography over a period of 15 years, during which time some 45 bills aimed at addressing the harms of child pornography were introduced in the House of Commons. Further, during this time, the Badgley Committee in 1984 and the Fraser Committee in 1985 considered, *inter alia*, the issue of child pornography and criminal law reform in this area. The work of these committees was repeatedly cited in support of adopting "explicit and severe sanctions" in relation to the visual depiction of explicit sexual conduct of persons under the age of 18.

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A.R. Vol. XI, pp. 1945-6, Mr. Richard G. Mosley, Chief Policy Counsel, Criminal and Social Policy, Department of Justice, Senate Standing Committee on Legal and Constitutional Affairs, 21-6-1993, 50:41-42

A.R. Vol. V, pp. 844-45, Mr. Russell MacLellan (Cape Breton - The Sydneys), Commons Debates, June 15, 1993, pp. 20869-70

A.R. Vol. V, p. 864, Mr. Don Piragoff, General Counsel, Criminal Law Policy Section, Department of Justice, Senate Standing Committee on Legal and Constitutional Affairs, June 8, 1993, 104:10

A.R. Vol. VIII, p. 1348, *Report of the Committee on Sexual Offences Against Children and Youths* (the Badgley Report) (Ottawa: Queen's Printer)

A.R. Vol. VIII, p. 1383, *Report of the Special Committee on Pornography and Prostitution - Vol. I* (the Fraser Report) (Ottawa: Queen's Printer)

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A.R. Vol. VIII, p. 1460, *Report of the Special Committee on Pornography and Prostitution - Vol. II* (the Fraser Report) (Ottawa: Queen's Printer)

27. The Fraser Committee recognized the broad social harms occasioned by images that sexualize children. It argued that material which depicts children in a sexual manner undermines the rights of children, *and* the fundamental values of society. Where pornography profoundly impacted upon the fundamental values of Canadians, the Committee recommended the intervention of the criminal law.

A.R. Vol. VIII, pp. 1469-71, *The Fraser Report*, Vol. 2

A.R. Vol. VIII, p. 1421, *The Fraser Report*, Vol. 1

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28. Furthermore, the following additional arguments in support of enacting legislation prohibiting child pornography were identified in the *Fraser* and *Badgley Reports*:

- Child pornography may be produced directly through the sexual abuse of young persons;
- Child pornography is a permanent record of exploitation and harm exacerbated by the circulation, distribution or sale of such materials;
- Material that sexualizes children is harmful because it constitutes a message to consumers of this matter that children are available for these purposes, and it undermines the rights of children by diminishing the respect to which they are entitled. State intervention in regard to this material is justified before demonstrable physical or psychological harm occurs;
- The objective of 'market eradication' could only be achieved if criminal consequences attached to the conduct of each participant in the process, including the consumer of child pornography.

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A.R. Vol. VIII, p. 1350, *The Badgley Report*

A.R. Vol. VIII, pp. 1470 and 1477, *The Fraser Report*, Vol. 2

(d) **Similar Legislative Objectives Have Been Endorsed by this Court and the United States Supreme Court**

(i) **Objectives endorsed by the United States Supreme Court**

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29. The importance of protecting children from the harms of sexual exploitation was recognized

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by the United States Supreme Court in a similar context. In *New York v. Ferber* the Court considered the constitutionality of a state law proscribing the distribution of material depicting sexual performances by children under the age of 16. The Court held that “it is evident beyond the need for elaboration” that the state’s interest in protecting children from the physical and psychological harms associated with the production of child pornography is compelling, and that this constitutes a government objective of surpassing importance.

New York v. Ferrer, 458 U.S. 747 at 756-57 and 758-60 (1982)

30. In *Osborne v. Ohio*, where the Court upheld a statute prohibiting the private possession of child pornography, it further held that the following interests were similarly sufficient:

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- decreasing production of child pornography by penalizing those who possess and view the product [this was also identified in *Ferber* as a compelling state interest];
- encouraging the destruction of child pornography because it constitutes a permanent record of the victim’s abuse, and because it *may be used to seduce other children into sexual activity*.

Osborne v. Ohio, 495 U.S. 103 (1990)

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31. As the United States Court of Appeals, First Circuit observed in *U.S. v. Hilton*, while the first of the objectives endorsed in *Osborne* “remains intricately tied to the need to protect real children represented in the picture”, the second “marks a subtle, yet crucial, extension of a state’s legitimate interest to the protection of children not actually depicted in prohibited images”.

Osborne v. Ohio, 495 U.S. 103 (1990)

U.S. v. Hilton, 167 F. 3d 61 at 70 and 73 (1st Cir.) (1999)

contra: Free Speech v. Reno, [1999] U.S. App. Lexis 32704 (9th Cir.) online: LEXIS (California, CAMERA)

(ii) **A further objective endorsed by this Honourable Court**

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32. This Court has adopted an even broader approach, and has recognized the compelling nature of a state’s objective in protecting *society* from the desensitization and attitudinal harms occasioned by certain images and speech. In *R. v. Butler* and *R. v. Keegstra*, this Court unanimously accepted that the “the harm caused by the proliferation of materials which seriously offend the values fundamental to our society” was sufficient to warrant a limit upon freedom of expression. In *Butler*, Justice Sopinka applied the following words of Dickson C.J. in *R. v. Keegstra* with respect to the harms related to exposure

10 to hate propaganda to obscene publications:

... the alteration of views held by the recipients of hate propaganda may occur subtly, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted

The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society.

20 This Court held in *Butler* that the attitudinal harms sought to be avoided by the dissemination of obscene materials were similar to those sought to be avoided in *Keegstra*. In both cases, this Court held that the legislative objective in this respect was pressing and substantial. This reasoning should extend to the instant case.

R. v. Butler, [1992] 1 S.C.R. 452 at 469 per Sopinka, J.

R. v. Keegstra, *supra* at 747-48 per Dickson, C.J.

33. This position is further supported by the decisions of this Court, most notably *Irwin Toy* and *Young v. Young*, which recognize that the vulnerability of children to images and speech in other contexts may require that the freedom of speech of other individuals be limited in some respect in order to protect the rights and interests of children.

Young v. Young, [1993] 4 S.C.R. 1 at 97-100 per L'Heureux-Dube J.

30 *Irwin Toy v. Quebec (A.G.)*, *supra* at 987, 990-91, and 999 per Dickson C.J.

34. The Intervener also notes that in *Butler*, this Court found that "the burgeoning pornography industry renders the concern [addressed by the legislation] even more pressing and substantial than when the impugned provisions were first enacted". Such is the case here, where advances in technology have had a profound impact upon the nature and amount of child pornography being created as well as on the extent of its dissemination (see paragraphs 38-43 below). The objectives of s.163.1(4) are even more pressing and substantial today than when the provision was first enacted.

R. v. Butler, *supra* at 498 per Sopinka, J.

40 e. **International Obligations and the Movement to Eradicate Child Pornography**
 (i) **Canada is a participant in the international movement to eradicate child pornography**

35. As indicated by this Court in *Butler* and *Taylor*, the analysis of the nature of the legislative objective must also be informed by consideration of Canada's obligations to adhere to instruments of

international law, and by the fact that similar legislation has been enacted in other countries. There is a global commitment to protecting children from sexual maltreatment, and growing trends towards expanding the definition of child pornography to include works of the imagination, and criminalizing its possession. Canada has actively participated in fora aimed at reducing the sexual maltreatment of children. In the last decade, the international community has signaled its deep concern about the sexual exploitation of children inherent in child pornography in the following manner:

- The *Convention on the Rights of the Child* has been ratified or acceded to by 191 States as of August 1st, 1999, and is **the most universally accepted human rights instrument in history**. Canada became a signatory to the *UNCRC* on May 28, 1990 and ratified on December 13, 1991.

Article 34 of the *UNCRC* requires that State parties undertake to protect children from all forms of sexual exploitation and sexual abuse, and in particular, that they take national, bilateral and multilateral measures to prevent the exploitative use of children in pornographic performances and materials. No State Party has notified a reservation on article 34.

Article 39 further imposes upon State parties a duty to “promote the physical and psychological recovery and social reintegration” of children who have been victims of, *inter alia*, “any form of neglect, exploitation or abuse”.

- The office of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography [hereinafter “the Special Rapporteur”] was established by the United Nations Commission on Human Rights in 1990 to address these “phenomena of child abuse that have reached alarming proportions in all corners of the world.” The mandate of the Special Rapporteur has been repeatedly extended. The Special Rapporteur reports to the Commission on Human Rights annually.
- In 1992, the United Nations Commission on Human Rights adopted the *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, which directs:

53. States that have not yet done so are urged to enact legislation making it a crime to produce, distribute or possess pornographic material involving children

54. Where required, new legislation and penalties should be introduced for the mass media which broadcast or publish material threatening the psychic or moral integrity of children or containing unhealthy or pornographic depictions and to prevent new technology being used to produce pornography, including video films and pornographic computer games.

- In 1994, the United Nations Commission on Human Rights established a working group of the Commission responsible for elaborating, as a matter of priority, guidelines for a possible draft

10 optional protocol to the *UNCRC* on the sale of children, child prostitution and child pornography, as well as the basic measures needed for their prevention and eradication.

Canada is represented in the working group, which has condemned child pornography, and has emphasized the importance of combating this practice at national and international levels. The objective of the protocol will be to fill the gaps in existing international standards. The Commission on Human Rights has requested that the Working Group continue to meet early in 2000, with the aim of finalizing its work before the tenth anniversary of the entry into force of the *UNCRC*.

20 • Between 1993 and 1999, various World Congresses and international expert meetings have been held to address issues relating to child pornography. They include: the World Conference on Human Rights held in Vienna in 1993, the World Congress on Commercial Sexual Exploitation of Children held in Stockholm, Sweden, in 1996, the UNESCO Expert Meeting ("Sexual abuse of children, child pornography and paedophilia on the Internet: an international challenge") held in Paris in 1999, and an international conference ("Combating child pornography on the Internet") held in Vienna in 1999. These meetings have produced a number of declarations for action that call upon states to actively combat the sexual exploitation of children inherent in child pornography.

30 • As of 1999, the United Nations Commission on Human Rights continues in its resolutions to urge States to prevent the sexual exploitation or abuse of children including child pornography, taking into account the particular problems posed by the use of the Internet in this regard. The Commission has also urged states to "enact, review and revise, where appropriate, relevant laws ...", to "criminalize effectively and to ensure the prosecution of offenders", and to increase concerted action *to combat effectively the existence of a market that encourages such criminal practices against children*.

40 • A number of non-governmental organizations such as End Child Prostitution in Asian Tourism (ECPAT) have been formed to address issues relating to the sexual exploitation of children, including child pornography. These issues have also been considered by organizations with an international reach, such as Interpol. In 1996, Interpol adopted a resolution recommending that member countries prohibit the possession of child pornography. The resolution also stressed that "such legislation should take account of the types of support currently used to transmit such material, but also leave room for new technology, such as computers and other virtual representations, so as to avoid any legal void which might favour offenders".

R. v. Butler, supra

Canada (H.R.C.) v. Taylor, [1990] 3 S.C.R. 892

Convention on the Rights of the Child, UN General Assembly, 44th Sess., UN DOC A/RES/44/25 (1989), Articles 34, 36 and 39

50 *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, UN Commission on Human Rights, 55th Mtg., 1992/74 (1992) at paras 53-54

Rights of the Child: Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, UN Commission on Human Rights, 53rd Sess., UN Doc. E/CN.4/1997/95 (1997) at paras 3 and

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Sale of Children, Child Prostitution and child Pornography: Note by the Secretary-General, UN General Assembly, 50th Sess., UN Doc. A/50/456 (1995) at paras 2-14

Commission on Human Rights, *Question of a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as well as the basic measures needed for their eradication: Report of the working group*, 51st Sess., UN Doc. E/CN.4/1995/95 (1995) at paras 1,5,14
Rights of the Child, UN Commission on Human Rights 1990/80, 60th Mtg., UN Doc. E/CN.4/RES/1999/80 (1980) at paras 11 and 13(b) (ii)

Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24 (Part I) (1993) at paras 21 and 48
International Traffic in Child Pornography, ICPO-Interpol General Assembly, 65th Session, AGN/65/RES/9 (1996)

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UNESCO, News Release 99-05, "Meeting Maps Strategy to Curb Child Pornography and Paedophilia on the Internet" (Paris, January 19, 1999)

D. Hodgson, "Combating the Organized Sexual Exploitation of Asian Children: Recent Developments and Prospects" (1995) 9 *International Journal of Law and the Family* 23 at 23 and 46-7

A.R. Vol. X, pp. 1799-1802 and pp. 1807-09, J. Foreman, "Can We End the Shame? - Recent Multilateral Efforts to Address the World Child Pornography Market" (1990) 23 *Vanderbilt Journal of Transnational Law* 435 at 447-453 and 463-466

R. Levesque, "Combating Child Sexual Maltreatment: Advances and Obstacles in International Progress" (1995) *October Law & Policy* 441 at 441

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(ii) **Section 163.1 reflects a growing trend towards the criminalization of the possession of child pornography**

(aa) **International organizations calling for prohibitions on the possession of child pornography**

36. A number of international bodies have recognized that in order to effectively address the harms of child pornography, a philosophy of 'market eradication' must be adopted, and all players must be targeted. The Special Rapporteur of the United Nations Commission on Human Rights provided the following advice to the Swedish Children's Ombudsman when Sweden was considering whether to prohibit possession of child pornography, and requested an opinion on the need for making the possession of child pornography a criminal offence:

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States that have not yet done so are urged to enact legislation making it a crime to produce, distribute or possess pornographic material involving children'. (Emphasis added) In my report to the Commission on Human Rights, and in my capacity as Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, I have consistently emphasized the need to criminalize possession of child pornography. This is partly due to the need to tackle the 'demand' factor whereby customers of child pornography contribute to the proliferation of child pornography world wide. It does not suffice to tackle the 'supply', we must also address the 'demand' factor of which possession of child pornography is a key component.

Similarly, Interpol has adopted a resolution recommending that member countries enact legislation making the possession of child pornography a criminal offence. The Council of Europe has provided the same direction.

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Sale of Children, Child Prostitution and child Pornography: Note by the Secretary-General, UN General Assembly, 49th Sess., UN Doc. A/49/478 (1994) at paras 196-7
Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, UN Commission on Human Rights, 55th Mtg., 1992/74 (1992) at para 53
Draft Joint Action to Combat Child Pornography on the Internet, Council of Europe, April 13, 1999, (10850/5/98--C4-0674/98-98/0917 (CNS)), Article 1
International Traffic in Child Pornography, *supra*

(bb) Other nations prohibit the possession of child pornography

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37. These recommendations are reflected in the legislation of the following countries, all of which criminalize the possession of child pornography regardless of the possessor's purpose in possessing the material: Australia, Austria, Belgium, Denmark, Ireland, New Zealand, Norway, the United Kingdom, the United States, and Sweden. Further, all Australian states and territories and 33 U.S. states have enacted legislation criminalizing the possession of child pornography regardless of the possessor's purpose for possessing the material.

Appendix A - Table Comparing Legislation from Foreign Jurisdictions

Appendix B - Table Comparing Legislation from the United States

(iii) Section 163.1 addresses concerns expressed by the international community and other nations about the impact of new technologies upon efforts to eradicate child pornography

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38. Various international bodies and nations have recognized the impact of new technologies on approaches to addressing child pornography. The concerns expressed can be categorized as follows:

- (i) technological advances have led to an increased proliferation of material and an expansion of the market for child pornography;
- (ii) technological advances have rendered obsolete legislation which solely addresses the use of real children in the production of pornography, and will lead to increasing enforcement difficulties as distinctions between real and fictional children become more difficult to delineate; and
- (iii) technological advances result in the repeated victimization of a child used in the production of pornography on an unprecedented scale.

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(aa) technological advances have led to an increased proliferation of material and an expansion of the market for child pornography:

39. The development of new technology has had a tremendous impact on the international production and distribution of child pornography. It permits, for instance, the anonymous distribution of images in an 'amateur' home video or photograph world-wide *via* the Internet. As one commentator put it,

[c]omputer technology has transformed the production of child pornography into a sophisticated global cottage industry. Anyone who has access to a computer and a modem potentially has access to commercial on-line services and to the Internet, a remarkable global network of nearly 30 million persons joined by computers. Among other things, such access means that it is possible both to send and receive pornography. The Internet is becoming an increasingly significant factor in child sexual exploitation and the development of increasingly inexpensive personal computers and modems has given ascent to what is rapidly becoming the most important exchange medium for child pornography.

M. Healy, "Child pornography: an international perspective" (prepared as a working document for the World Congress against Commercial Exploitation of Children, Stockholm, Sweden, 1996) [unpublished] at 4 and 6-8
 M. Rimm, "Marketing Pornography on the Information Superhighway: A Survey of 917, 410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories" (1995) 83 *The Georgetown Law Journal*
 Working Group on the illegal and harmful use of the Internet, Department of Justice, Equality and Law Reform, Republic of Ireland, *Illegal and Harmful Use of the Internet: First Report of the Working Group* (Dublin: Stationery Office) at 29, 31, 35

A. Fournier de Saint Mauer, "Sexual Abuse of Children on Internet: A New Challenge for INTERPOL", (Address to the UNESCO Expert Meeting "Sexual Abuse of Children, Child Pornography and Paedophilia on the Internet", Paris 18-19 January) [unpublished] at 1

(bb) technological advances have rendered obsolete legislation which solely addresses the use of real children in the production of pornography, and will lead to increasing enforcement difficulties as distinctions between real and fictional children become more difficult to delineate:

International bodies calling for expansion of the definition of child pornography

40. The Special Rapporteur has observed that "the advent of new technology raises many questions regarding the efficacy of existing laws on the subject [of child pornography]", and has stated that she "feels very strongly that whether the image used for child pornography is real or imaginary, the effects remain the same and the legislation should address both issues in the same way". Interpol has also adopted a resolution recommending that all countries enact legislation that criminalizes child pornography, and that such legislation should address computer and other virtual representations.

Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, supra at para 54

Sale of Children, Child Prostitution and child Pornography: Note by the Secretary-General, UN General Assembly, 49th Sess., UN Doc. A/49/478 (1994) at para 169

Rights of the Child: Report of the Special Rapporteur to the United States of America on the Issue of the Commercial Exploitation of Children, UN Commission on Human Rights, 53rd Sess., UN Doc. E/CN.4/1997/95/Add.2 (1997) at 12

Promotion and Protection of the Rights of Children: Note by the Secretary General, UN General Assembly, 52nd Sess., UN Doc. A/52/482 (1997) at para 53

International Traffic in Child Pornography, supra

10 Other nations have expanded their definitions of child pornography

41. In response to like concerns, several countries have passed legislation supporting an expanded definition of child pornography which includes computer-generated or ‘pseudo’ child pornography, and/or other works of the imagination. Ireland, Sweden, the United Kingdom and the United States (federal and state governments) have all enacted legislation to address computer-generated images. The Netherlands is currently considering a similar amendment to its legislation. A number of countries and states also include other works of the imagination (such as drawings and the written word) in their definitions of child pornography. They include: the state of Indiana, Belgium, Ireland, Australia (including most territories and states), New Zealand, and Switzerland. Many other legislative enactments of various nations and states are worded broadly enough to arguably capture works of the

20 imagination.

A. Wasserman, “Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the *Child Pornography Prevention Act of 1996* - A Reply to Professor Burke and Other Critics” (1998) 35 *Harvard Journal on Legislation* 245 at 269-70

P. Toth and K. McClure, “An Overview of Selected Legal Issues Involved in Computer Related Child Exploitation: Many Questions, Few Answers” (1998) 11 *APSAC [American Professional Society on the Abuse of Children] Advisor* 19 at 19

M. Healy, *supra* 13-15

Appendix A - Table Comparing Legislation from Foreign Jurisdictions

Appendix B - Table Comparing Legislation from the United States

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42. Insofar as the American legislation (the *CPPA*) is concerned, the soundness of Congress’s logic in targeting computer-generated images that did not involve actual children in their production was affirmed by the United States Court of Appeals, First District, in *Hilton*. The Court held that these images could be used to “further the child pornography trade or to facilitate the abuse of children”. Its reasoning is apposite to the instant case:

Computer-created or enhanced material can be bought, sold, or traded like any other form of child pornography, adding further fuel to an underground child pornography industry. It can be used just as effectively as pictures of actual children to entice or blackmail children into cooperating with would-be abusers. Moreover, the material may have been created through the abuse of an actual minor but altered so that it may be impossible to show that a real child was ever involved in its creation. As technology improves and access to technology increases, efforts to eradicate the child pornography industry could be effectively frustrated if Congress were prevented from targeting sexually explicit material that “appears to be” of real children. The government’s interest in addressing these forms of child pornography is no less powerful than in instances where an actual child is actually used and abused during the production process.

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U.S. v. Hilton, supra at 73

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(cc) **technological advances result in the repeated victimization of the child on an unprecedented scale:**

43. An image introduced on the Internet can be downloaded by any number of users and can be reproduced repeatedly. As the Special Rapporteur has astutely observed where pornographic images of children are concerned, this “results in the repeated victimization of the child on an unprecedented scale”.

Rights of the Child: Report of the Special Rapporteur to the United States of America on the Issue of the Commercial Exploitation of Children, supra at 12

Promotion and Protection of the Rights of Children: Note by the Secretary General, UN General Assembly, 52nd Sess., UN Doc. A/52/482 (1997) at para 97

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2. Rational Connection to the Legislative Objective

(a) The Position

44. As delineated above in paragraphs 17 and 18, the legislative objective is two-pronged. The evidence suggests that the prohibited depictions operate to fuel cognitive distortions and reduce inhibitions in some individuals. Research has established that depictions of sexualized children are used to entice and to encourage children to participate in sexual activity. Societal tolerance of the possession of child pornography undermines the legislative efforts to halt the production and dissemination of child pornography. Societal tolerance of possession of child pornography also sends the message to persons inclined to sexualize children that the sexualization of children is tolerated by society.

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Vriend v. Alberta, supra at para. 11 per Cory, J and Iacobucci, J.

A.R. Vol. XI, pp. 1963-64, Standing Committee on Legal and Constitutional Affairs 22-6-1993, 51:43-44

45. Rowles J.A. recognized that the Crown had succeeded in showing a reasoned apprehension of harm to children, resulting from both the potential use of child pornography by pedophiles and from the desensitization of society to the use of children as sexual objects. Curiously, however, her conclusion that certain types of depictions, such as works of the imagination or works depicting consensual legal activity, need not be prescribed in order for the legislative objective to be met does not follow logically from her acceptance that there was a reasoned apprehension of harm against which Parliament was entitled to act. Once it is accepted that depictions which sexualize children can desensitize society, it follows logically that the sexually explicit depictions of children are capable of

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10 affecting attitudes about the sexualization of children and desensitizing society to the use of children as sexual objects whether or not actual children are depicted. Depictions that do not represent real children, such as cartoons and works of the imagination, may be useful to pedophiles both to fuel cognitive distortions about the nature of sexual relations with children and to groom children. Although during the voir dire only limited evidence was called on this point, a fair reading of the evidence of Dr. Collins suggests that sexually explicit material, whether depictions of imaginary or real children, pose a risk of harm. Even written material will reinforce cognitive distortions, which were described by Dr. Collins as “offence facilitating beliefs.”

A.R. Vol. I, Evid. P. Collins, p.70, l. 4-35; p. 80, ll. 1-47; p. 84, ll. 8-20
Irwin Toy v. Quebec (A.G.), *supra* at 987-88 per Dickson C.J.

20 (b) The Nature of the Harm

(i) Desensitization and Attitudinal Harm

46. It is a fundamental assumption animating this Court’s decisions in *Irwin Toy*, *Keegstra*, *Taylor*, *Butler*, and *Mara and East* that expression, be it words or images, powerfully affects how individuals think and act. There is sufficient evidence upon which to found a reasonable apprehension that children, adolescents and pedophiles, as well as other members of society, are affected in a negative manner by depictions which sexualize children. This Court in *Butler* reasoned:

30 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 justified restricting the otherwise full exercise of freedom of expression. In my view the harm sought to be avoided in the case of dissemination of obscene materials is similar.

R. v. Keegstra, *supra*
R. v. Butler, *supra* at 496 per Sopinka, J.
R. v. Mara and East, [1997] 2 S.C.R. 103
Canada v. (H.C.R.) v. Taylor, *supra*

47. Where expression promotes beliefs and attitudes that are antithetical to fundamental values held
 40 by our society, Parliament may legislate in the absence of proof of a causative link between the expression and the harmful attitude. In *Butler* this Court held:

While a direct link between obscenity and harm to society may be difficult, if not impossible to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

This Court relied upon *Keegstra* and concluded:

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Similarly, in *Keegstra*, supra, the absence of proof of a causative link between hate propaganda and hatred of an identifiable group was discounted as a determinative factor in assessing the hate literature provision of the *Criminal Code*.

It might be suggested that proof of actual harm should be required. It is apparent from what I have said above that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm.

R. v. Butler, supra at 503 per Sopinka, J.

R. v. Keegstra, supra, at 776 per Dickson, C.J.

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48. Parliament was entitled to act on a reasonable apprehension that exposure to child pornography in general poses a risk of desensitization of society to the sexualization of children. As the Attorney General for British Columbia has argued, the message of sexualization of children can be depicted without employing an actual child as the subject of the depiction.

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49. Although Rowles, J.A. read the *Fraser Report* as being primarily concerned with materials that depicted actual children, the *Report* supports a conclusion that possession of a wider array of materials should be proscribed. The *Report* classified pornography into three groups. The first tier of pornography included actual depictions of children. This category would also include material which encourages counsels or condones sexual abuse and material which was produced through a process which caused harm to a child. The Committee recommended that the defence of artistic merit not apply to tier one. The second tier of material includes "any material or performance which depicts or describes sexually violent behaviour, bestiality incest or necrophilia". Recommendation 5 recognizes that in some cases pornography that does not employ actual persons should nevertheless be prohibited. The Committee recommended that possession of tier 1 material should be criminalized. Furthermore, the Committee recognized that pornography is used primarily in private and that there is a link between harm and private consumption:

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In our view a number of serious deficiencies exist in the present law relating to child pornography. Similarly, material prepared for only private use should not, in our view, escape criminalization. At present, it may do so, because of the application of what is, in effect, a more forgiving community standard for materials used privately. Our hearings and research have disclosed that private preparation and use of child pornography is a major mode of resorting to this material. We have also learned that contemporary Canadian community standards are running strongly against such use.

A.R. Vol. VIII, pp. 1449 to 1453, *The Fraser Report*, Vol. 1, Recommendation 5

A.R. Vol. VIII, p. 1477, *The Fraser Report*, Vol. 2, Recommendation 67

- 10 50. The Fraser Committee came to strong conclusions about the potential threat to societal values posed by pornography and in particular to the psychological development of impressionable children and adolescents:

Further more, as we have argued elsewhere in the Report, 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 to encourage the children so used to have aberrant views about human sexual relations. . .

- 20 Given the mindless, degrading and sometimes violent depictions of human sexual relations common to some pornographic material, the argument that children should be protected from such distorting images is very powerful. We simply should not run the risk of encouraging young people to believe that the behaviour depicted in pornography is to be accepted or encouraged

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 is justified before demonstrable physical or psychological harm occurs.

- 30 51. Whether the materials depict actual children, digitalized images of children constructed by computers or depictions of imagined children the capacity to affect the developing attitudes of children accompanies the depiction.

A.R. Vol. VIII, p. 1470, *The Fraser Report*, Vol. 2

52. Parliament was specifically directed to the conclusion of Fraser Committee that criminalizing the possession of child pornography would advance the objective of reducing the demand for child pornography and the amount of pornography produced. Although the Committee focused on the production of pornography involving real children, the Committee recognized the logical link between criminalizing possession, the demand for pornography and the amount of pornography produced, and
- 40 concluded that criminalizing possession would reduce the demand. It is also reasonable to conclude that there is a relationship between the wider availability of child pornography and an expanded desensitizing effect. Increased availability of pornography is also logically related to increased consumption by pedophiles, with the attendant risks that the material will intensify their fantasies of sexual contact with children and their cognitive distortions, which in turn contribute to the increase in the risk that children will be abused. Presentations in the Senate and to the House of Commons

10 Standing Committee focused on the fact that a significant portion of child pornography is “home made by pedophiles who have private pornography networks or exchange clubs.”

A.R. Vol. XI, p. 1929, Senate Debates, 23-6-1993, 3696

See also:

A.R. Vol. XI, p. 1947, Senate Standing Committee on Legal and Constitutional Affairs, 21-6-1993, 50: 43

A.R. Vol. XI, p. 1964, Senate Standing Committee on Legal and Constitutional Affairs, 22-6-1993, 51:44

A.R. Vol. V, pp. 722-25, Standing Committee on Justice and the Solicitor General 28-4-1993, 92:35 - 92:725

A.R. Vol. V, p. 830, Commons Debates, June 3, 1993, p. 20329

A.R. Vol. V, p. 844, Commons Debates, June 15, 1993, 20869

A.R. Vol. XI, p. 2009-10, Affidavit of Det. Matthews, para. 26

20 53. As the Appellant notes in paragraph 50 of the Appellants' Factum, the harms which Dr. Collins described as being associated with child pornography in his evidence on the voir dire, were identified in the hearings before the *United States Senate Committee on the Judiciary* respecting the *Child Pornography Prevention Act*. In its report the Committee concluded that the “sexualization of minors [depicted in child pornography] creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children.” The Committee recognized that there was a negative effect on not only the development of children and adolescents, that was harmful insofar as the depictions in child pornography condition children to
30 objectify themselves and respond as sex objects, but on society as a whole; the Committee also commented that children were most vulnerable to being influenced by the depictions sexualizing children. The Committee reported: “Peer pressure can have a tremendous effect on children, helping to persuade a child that participating [in] sexual activity, such as that depicted in the material is ‘all right’.”

A.R. IX p. 1576; p. 1586-88, *Report of the United States Senate Committee on the Judiciary on the Child Pornography Prevention Act: Report 104-358*, 104th Congress 2d Session 1996
U.S. v. Hilton, *supra*

40 54. The findings of the United States Senate Committee on the Judiciary respecting the vulnerability of children and adolescents to influence from exposure to depictions of other children and adolescents is supported by the literature on the development of children and adolescents. In addition it is also relevant that adolescents develop in their moral reasoning and cognitive thinking at varying rates. Steven Prymachuk has noted that children with more advanced cognitive abilities are more able to deal with the concepts inherent in sexual behaviour. Such concepts include understanding the implications

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of sexual contact within the context of their lives and managing birth control. Therefore, it is legitimate for Parliament to have selected the age of 18 as the minimum age of subjects of sexual depictions, where some other public benefit is not implicated and one of the defences engaged. The process of sexual maturation is directly related to central issues of individuality and sense of identity, and negative experiences can have detrimental consequences to the development of a sense of identity, agency and autonomy. Janice Grant and Joseph Roberts have described the transition from child to adult in the following manner:

Adolescents are in a potentially fragile psychological and emotional state as they move from total dependence on their parents or careers to a state of relative independence in society with its accompanying responsibilities.

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Section 163.1(4) is therefore rationally connected to the objective of preventing the desensitization of children by protecting children from the consequences of exposure to child pornography to their developing sense of their own sexual identity and self-image and protecting them from seeing themselves as sexualized objects. Section 163.1(4) also protects children from the potential consequence of the creation of a permanent record of any legal sexual activity in which they chose to engage. Researchers, including Karin A. Martin, have noted that many adolescent girls and some adolescent boys report ambivalent or negative feelings associated with their sexual experiences. Given that adolescents are in a process of development and transition it is legitimate for Parliament to intervene to protect adolescents from being exploited and psychologically harmed by an adult or even another adolescent through the process of the creation of a permanent record of consensual sexual activity an adolescent might come to regret.

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J. Grant and J. Roberts "Psychological Development: Sex and Sexuality in Adolescence" in *Children and Sexuality: Perspectives in Health Care* ed. Tony Harrison (London: Bailliere Tindall, 1998) 67 at 68-69
 S.Pryjimachuk "Sexuoerotic Development in Children and Young Peoples" in *Children and Sexuality: Perspectives in Health Care* ed. Tony Harrison 42 at 55-56
 S. Hooton "Contemporary Cultural Influences Upon Development of Sexuality, Sexual Expression and Morality of Children Living in the UK" in *Children and Sexuality: Perspective in Health Care* ed. Tony Harrison (London: Bailliere Tindall, 1998), 19 at 21-22
 K. Martin, *Puberty, Sexuality and the Self* Routledge: New York, 1996, p. 10-15 pp. 81-87
 J. Graber, Jeanne Brooks-Gunn and Britt R. Galen, "Betwixt and between: Sexuality in the context of adolescent transitions" in *New Perspectives on Adolescent Risk Behaviour* ed. Richard Jessor (Cambridge: University Press, 1998), pp. 270-315 at 279-91
 B. Miller and Patricia Dyk, "Sexuality" in *The Handbook of Clinical Research and Practice with Adolescents* ed. P.H. Tolan and B.J. Cohler (Toronto: John Wiley and Sons, Inc. 1993) pp. 95-123 at 105-113
 See Also:
 A.R. Vol. V, p. 700, Proceedings Before the House of Commons Standing Committee, 27-4-1993 90:18

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(ii) Cognitive Distortions

55. In addition to the desensitization of children and society in general resulting from depictions sexualizing children, child pornography is linked to sustaining attitudes relied upon by pedophiles. Permitting the private possession of materials which feed the cognitive distortions which facilitate the commission of offences against children heightens the risk to children that they may become victims of sexual abuse.

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56. While sexualized depictions of children are not a necessary or sufficient condition for the development of sexual offending behaviour, it has been posited by researchers that the opportunity to view sexualized depictions of children, wherein the children are portrayed as appropriate sex partners and depicted as seeking out sex with adults, and adults child molesters are represented as powerful, may well exert a powerful influence on the formative attitudes of young males, particularly vulnerable males.

W. Marshall, "Pornography and Sex Offenders" in *Pornography: Research Advances and Policy Considerations* ed. D. Zillmann and J. Bryant (Hillsdale: Lawrence Erlbaum Associates, 1989) 185 at 189

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57. Proof of a direct causative relationship between the harm and the material proscribed has not been required under Canadian law, unlike some of the jurisprudence to date in the United States. The majority of the 9th Circuit Court of Appeal of the United States concluded that there was no demonstrated link between computer generated child pornography that did not involve real children in its production and acts of sexual abuse. In so concluding the Court specifically held that "the unhappy effects of pornography depend on mental intermediation". Therefore, the Court ruled that "any victimization of children that may arise from pedophiles" sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for the CPPA's [the *Child Pornography Protection Act*] speech restrictions." Although the United States Appeals Court was not prepared to accept the argument that there is a basis for a reasonable apprehension that images of sexualized images of sexualized children are harmful to children, it should be noted that the Canadian approach to these issues is very different. This Honourable Court has not required a direct causative link to be established between the proscribed material and the harm. As this Court held in *Butler*, it is enough if there is a reasonable apprehension that the material contributes to

40 the development of antisocial attitudes that pose a substantial risk of harm to members of society.

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Indeed, the reasoning in *Free Speech v. Reno* is at odds with the decision of the United States Supreme Court in *Osborne v. Ohio*, which recognized that depictions sexualizing children can be used to lure other children into sexual activity.

Free Speech v. Reno, *supra* at paras. 6-8
R. v. Butler, *supra* at 502-03 per Sopinka J.
Osborne v. Ohio, *supra*
U.S. v. Hilton, *supra*
A. Wasserman, *supra*

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58. Although a direct causal link between viewing child pornography and the creation of interest in children as sexual objects has not been conclusively established, researchers have recognized a link between the consumption of child pornography and reinforcement of offence facilitating beliefs, referred to as cognitive distortions.

K. Lanning and A.W. Burgess, "Child Pornography and Sex Rings" in *Pornography: Research Advances and Policy Considerations* ed. Dolf Zillman and J. Bryant (Hillsdale: Lawrence Erlbaum Associates, 1989) 235 at 240-41
 A.R. Vol. I. Evid. Of Dr. Collins, p. 171, ll. 8- 47

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59. At the time the legislation was enacted, Parliament had evidence before it that child pornography was used by pedophiles to reinforce the view that sexual contact between children and adults is a positive experience for the children, and, if not sought after by children, is welcomed by them. The evidence of Dr. Collins echoed the viewpoint presented to Parliament. Dr. Collins described the importance of child pornography to pedophiles in maintaining their belief system:

Pornography is important in one aspect of the way that pedophiles think. Pedophiles have what we term cognitive distortions; cognitive distortions regarding their sexual contact with children. What are cognitive distortions? They are the rationalizations and the justifications that these people have for their deviant behaviour. Another way of putting it is that they are offence-facilitating beliefs.

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The term cognitive distortion is a term that we use in clinical forensic psychiatry that covers a variety of way that a pedophile thinks, including the denial and minimization of the harm that they cause to children. Cognitive distortions also are a way of shifting the responsibility towards the child and they have various attitudes and beliefs which are pro-offending in nature.

Dr. Collins also gave expert evidence that a wide range of materials is useful to pedophiles in their efforts to bolster their beliefs that children are appropriate sexual objects. Dr. Collins recognized that the continuum of material found in the collections of pedophiles included benign depictions of children as well as more sexually explicit depictions. He specifically noted that material in both "picture and written form" is important to pedophiles.

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A.R. Vol. IV pp. 658- 663, Standing Committee on Justice and the Solicitor General, 20-1-1993, 84:8- 13
 A.R. Vol. IV, p. 672, Standing Committee on Justice and the Solicitor General, 20-1-1993; 84:22
 A.R. Vol. V, p. 719, Standing Committee of Justice and the Solicitor General 28-4-1993, 92:32
 AR Vol. I, Evid. Of P. Collins, p. 79, l. 36 to p. 82, l. 17; p. 171, ll. 8-30

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60. The record reflects that the availability of child pornography always operates to endanger children. It was the expert opinion of Dr. Collins that child pornography could never serve the role of protecting children, for the very reason that “having pornography encourages the pedophile to have sex with children and this is where the cognitive distortions come in and you can’t separate the two.” For this reason, it was Dr. Collins’ evidence that child pornography could never serve a preventative role. Dr. Collins gave evidence that there were some individuals who might use pornography as an aid in fantasizing and masturbation, and not offend. However, this does not mean that availability of child pornography has prevented an act of sexual aggression from occurring. That individual might never offend. As Dr. Collins commented:

. . . its situation specific. There are some who, based on their fantasies, will not go out and offend and there are others who will fantasize using child pornography who also go out and offend. It’s a problematic issue because the issue with pornography is not as much it as a masturbatory aid, its important to consider that. It’s pornography endorses and validates for them that it’s okay to have sex [with children.]

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AR Vol. I, Evid. Of P. Collins, p. 171, ll. 7-33
 AR Vol. II, Evid. Of P. Collins, p. 214, l. 42 to p. 215, l. 36

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61. The record reflects sufficient evidence to conclude that written materials and works of the imagination, including drawings, paintings and cartoons, which present children in a sexualized manner are useful to pedophiles in their efforts to sustain offence facilitating beliefs. Although highly realistic or explicit depictions may be highly valued by pedophiles, materials which are less realistic nevertheless pose a risk of harm to children insofar as they operate to bolster attitudes and beliefs that facilitate the commission of sexual offences against children. Similarly there was evidence before Parliament that written materials posed a risk of harm. Detective Waters (nee Wolff) testified before the House of Commons Standing Committee on Justice and the Solicitor General that provisions proscribing possession of written material, such the publications of NAMBLA, PAEDIKA and the Rene Guyon Society, were necessary in order to control pedophiles’s access to material which “glorifies sex with children” and provides suggestions for attaining this objective. Detective Matthews illustrated the point that the materials depict children as desiring sexual contact with adults with the example of the

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story of a young child who is raped at age 12, becomes pregnant and continues to be gang banged until her 8 month. She becomes a teen prostitute and raises her daughter, who is initiated into sexual activity at age 6. The story describes a number of sexual acts in detail and describes the 6 year old enjoying sex with 5 other men. Detective Matthews also provided the Standing Committee with a copy of the comic book *Cherubino*, which describes a crime fighting episode that ends with a sexual encounter between a child and an adult male.

A.R. Vol. IV, p. 658-653; Standing Committee on Justice and the Solicitor General, 20-1-1993, 84:8 - 84:1
A.R. Vol. III, p. 392, Exhibit 1: NAMBLA Bulletin, May 1993, p. 2
Standing Committee on Justice and the Solicitor General, 10-6-1993, 105:12-15

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62. On the voir dire the Respondent filed excerpts from the NAMBLA bulletins which illustrate the points made by Detectives Wolff and Matthews. A discussion on the issue of consent in the May 1993 issue typifies the type of distorted reasoning that the publication promotes:

As for the question of at what age consent becomes meaningful, I think both boy-lovers and our critics would do well to stop focusing on consent. The view of consent as a rational process of which one needs well-developed rational thinking skills is a totally false description of how people actually make choices. A baby or a dog can make its desires and feelings about a situation crystal clear, and neither one has 'rationality' in the usual sense. That doesn't mean that anything a baby or dog consents to is OK. . . . A better focus is figuring out what modes of intergenerational sexuality contribute to a young persons well-being?

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The publication clearly promotes an understanding of a young person's well being that does not value the young person's ability to make decisions with an appreciation of the consequences. It provides an entirely instrumental objectifying approach towards young persons, presented in the guise of a rational debate which purports to value the well-being of the child. Further the publication is replete with articles and letters from readers reporting on the sexually provocative nature of children.

A.R. Vol. III, p. 405; p. 417; p. 462; p. 481; p. 488, Exhibit 1: NAMBLA May 1993
A. R. Vol. III, p. 490; Exhibit 2: Flaunting it: A Decade of Gay Journalism from the Body Politic, 150

(iii) Fueling of Fantasies and Incitement to Offend

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63. Dr. Collins testified that the collections of child pornography created by pedophiles are used to "augment the fantasies" and in some cases "it [the collection] will actually instigate acting out." Dr. Collins assessed both "pictures" and "written" pornography as material which fuels the sexual fantasies of pedophiles. Dr. Collins did not limit his remarks to pornography which depicted actual children as subjects. Dr. Collin's referred to both "pictorial pornography" and "pornographic photographs". It appears that he was not confining his remarks to actual photographs or realistic depictions such as

computer-generated or morphed images. Dr. Collins recognized a continuum of material was important to pedophiles. Since sanctions against the production or distribution of material cannot address the use of this material in private to incite acts victimizing children, it is necessary to proscribe possession to prevent use of child pornography in this manner.

A.R. Vol. I Evid. Of Dr. Collins, p.170, ll. 6-15; p. 84, ll. 9-19

64. Other published research supports Dr. Collin's conclusions. A 1988 study conducted by W. Marshall found that 1/3 of the child molesters surveyed reported that they had been incited to commit an offence by exposure to sexually explicit materials. Daniel Carter et. al found that child molesters reported a significantly greater use of pornography both prior to and during criminal offences than did rapists. Although Carter et al. also found that child molesters reported using pornography to relieve an impulse to commit an offence, Carter et al. concluded that this finding should not be used to conclude that pornography functions to inhibit sexual acting out. Carter et al. reasoned:

the use of pornography to relieve an impulse does not preclude its role in intensifying an already active, and in many cases rich, fantasy life. Such intensification is supported by the greater use of pornography prior to offenses by child molesters. Thus if an individual is prone to act on his fantasies, it is likely that he will do so irrespective of the availability of or exposure to pornography.

As Dr. Collins testified, the pornography intensifies the fantasies and reinforces the beliefs which facilitate the offence.

A.R. Vol. VII, p. 1285, Ex 21: W. Marshall "The Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Nonoffenders" (1988), 26:2 *Journal of Sex Research* 267 at 284
 A.R. Vol. VII, p. 1293 and 1294, Ex. 22: D. Carter, R. Prentky, R. Knight, P. Vanderveer and R. Boucher, "Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders" (1987) 2:2 *Journal of Interpersonal Violence* 196 at 205 and 207
 K. Lanning and A. Burgess, *supra* at 241

65. A relationship between the possession of child pornography and abuse of children is presumed by current treatment approaches to pedophilia. This is further evidence that the proscription against the possession of child pornography is rationally connected to the objective of protecting children from the harm of sexual abuse. Dr. Collins testified that it was a prerequisite to treatment that the pedophile purge his collection. This approach is well documented in literature outlining various treatment programs for pedophiles. The aim of the therapeutic intervention is to substitute to object of sexual fantasy, whether the approach is orgasmic reconditioning, covert sensitization or satiation treatment.

A.R. Vol I, Evid. Of Dr. Collins, p. 191, ll. 2-12

D.R. Laws and W. Marshall "A Conditioning Theory of the Etiology and Maintenance of Deviant Sexual

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Preference and Behaviour" in *Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender* ed. W. Marshall, D. Laws and H. Barbaree (New York: Plenum Press, 1990) 209 at 226-227

V. Quinsey and C. Earls "The Modification of Sexual Preferences" in *Handbook of Sexual Assault: Issues, theories and Treatment of the Offender* ed. W. Marshall, D. Laws and H. Barbaree (New York: Plenum Press, 1990), 279

W. Marshall and H.E. Barbaree "Outcome of comprehensive Cognitive-Behavioral Treatment Programs" in *Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender* ed. W. Marshall and H. Barbaree (New York: Plenum Press, 1990), 363 at 365-66

W. Marshall and H. Barbaree "Treatment of the Sexual Offender" in *Treatment of Offenders with Mental Disorders* ed. Robert Wettstein (New York: The Guilford Press, 1998) 265 at 300-308

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66. It is the powerful legitimizing and eroticizing effect that child pornography can have on pedophiles that requires a rational approach to the problem of child abuse to include restrictions on the possession of child pornography. As the 7th Circuit Court held in *American Booksellers Assoc'n v. Hudnut*, messages of subordination when presented through a medium which provokes sexual responses and unthinking responses often have a substantial effect on the audience. Similarly, representations of children in sexualized contexts send a message which operates in a nonrational manner to foster and intensify the message that sexual contact with children is okay.

American Booksellers Assc'n v. Hudnut, 771 F. 2d 323 (U.S. C.A., 7th Cir. 1985); aff'd 106 S.Ct. 1172
U.S. v. Hilton, *supra* at 73

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(iv) Luring and Grooming of Children

67. In *Irwin Toy* this Court recognized that children are particularly vulnerable and susceptible to the messages conveyed by imagery, irrespective of whether the images depict actual persons or imaginary subjects. This Court noted:

Broadly speaking, the concerns which have motivated both legislative and voluntary regulation in this area are the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message.

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Irwin Toy Ltd. v. Quebec (A.G.), *supra* at 987 per Dickson, C. J.

68. There was evidence before Parliament as well as the trial court in the instant case as to the significant use that is made of child pornography by pedophiles to encourage children to engage in sexual activity. Pornography is often used by pedophiles to normalize sexual activity and to lower the inhibitions of children.

A.R. Vol. IV, p. 672, Standing Committee on Justice and the Solicitor General, 20-1-1993, 84:22
 A.R. Vol. V, p. 719, Standing Committee on Justice and the Solicitor General, 28-4-1993, 92:30
 A.R. Vol. I, Evid. Of Dr. Collins, p. 69, l. 38 to p. 70, l. 33
 A.R. Vol. III, p. 462 Ex. 1 NAMBLA May 1993

(v) **Conclusion**

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69. The evidence establishes that a significant portion of pedophiles who have been apprehended and convicted of an offence use pornography either before or during the commission of an offence. The evidence supports a conclusion that this material reinforces offence facilitating beliefs and is used to lower the inhibitions of children. Further, the evidence supports the conclusion that use of this material reinforces fantasies about children as sexual objects. There is also a body of evidence that suggests a substantial amount of child pornography is homemade and is traded privately. The harmful use of grooming to which explicit depictions of children is put occurs in private. Therefore, criminalization of possession is rationally connected to the objective of protecting children. There is also a basis upon which to reasonably presume that a prohibition on possession of child pornography would be reflected in a reduced demand for and production of child pornography. The evidence supports a conclusion that written material advocating the commission of sexual offences victimizing children and sexually explicit depictions of imaginary children are also capable of reinforcing cognitive distortions, fueling fantasies and promoting offence facilitating beliefs. It is rational to presume that comic depictions and other imaginary works are capable of influencing the sensibilities of vulnerable and impressionable children and adolescents.

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70. Although the trial judge found both that “highly erotic” pornography incited some pedophiles to commit offences and that highly erotic pornography helps some pedophiles relieve tensions, this is very different from a finding that child pornography prevents abuse of children by providing an outlet for individuals who might otherwise abuse children. The trial judge also found that pornography can be a factor in augmenting and reinforcing a pedophile’s cognitive distortions. Dr. Collins testified that these cognitive distortions are offence facilitating beliefs. Carter et al. found that there was a basis to conclude that the consumption of pornography intensified fantasies. As noted in *Thomson Newspapers v. Canada (A.G.)* this Court has repeatedly recognized that in circumstances where the social science evidence is in a state of controversy, it is not for this Court to second guess the judgment of the legislature when it has made a reasonable assessment that an apprehension of harm exists. In this case, the evidence before the Parliament and the trial court supports a conclusion that there is a reasonable

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apprehension of harm. Moreover, the evidence does not suggest that there is any clear protective benefit flowing from consumption of child pornography. As this Court held in *Irwin Toy* when the legislation is aimed at protecting the interests of a vulnerable group, the Court must be “mindful of the legislature’s representative function.”

Thomson Newspapers v. Canada (A.G.), [1998] 1 S.C.R. 877 at 942 per Bastarache, J.

Irwin Toy Ltd. v. Quebec (A.G.), *supra*

R. v. Keegstra, *supra* at 764-65

A.R. Vol. XII, p. 2066, Reasons for Judgment at Trial, para 6

3. Minimal Impairment

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(a) The Position

71. In applying the test of whether the right in question has been impaired “as little as reasonably possible in order to achieve the legislative objective” this Court has held that the test is not whether the Court can conceive of an alternative which might better tailor objective to infringement, but whether the law falls within a range of reasonable alternatives. Some deference has been accorded to the legislature.

RJR-MacDonald Ltd. v. Canada (A.G.), [1995] 3 S.C.R. 199 at para 160 per McLachlin, J. (as she then was)
Thomson Newspapers v. A.G. (Can.), *supra* at 962 para. 118 per Bastarache, J.

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72. In the instant case, protection of children cannot be achieved by a less restrictive provision. While it is possible to conceive of circumstances where material proscribed by the legislation might in fact not be put to a harmful use, their very existence creates the potential for harm. Moreover, for the reasons set out by the Attorney General for British Columbia, it is impossible to draft legislation which would be more specifically tailored to distinguish between situations depending on the magnitude of the risk of harm. Even where the materials do not involve the use of actual children, the risk of harm flowing from the materials provides a basis upon which Parliament was entitled to act. It is note worthy that to the extent that the right to freedom of expression is impaired, the impact is most significant is circumstances where the risk of harm is greatest. While courts have recognized child pornography as expressive material worthy of constitutional protection, courts have characterized it as low grade expression and as being only tangentially connected to the core values protected by the right to freedom of expression. To the extent that the record addresses the issue of which individuals in our society possess child pornography, the record reflects that it is primarily pedophiles,

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rather than children and adolescents. While it is arguable that in some circumstances individuals may find the messages communicated by child pornography to be integral to their sense of self-fulfilment, it is precisely in those circumstances that the apprehension of a risk of harm increases.

R. v. Butler, supra at 500 per Sopinka, J.

(b) Possession Restrictions Not Unnecessarily Invasive

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73. The legislation has been attacked as overbroad on a number of fronts. The complaint that possession of expressive material has not been proscribed in other situations, has been addressed in relation to whether it is rationally connected to the objective. Due to the vulnerability and impressionability of children and adolescents, the analogy to obscenity legislation is not identical. While both child pornography and obscene materials are consumed in private, the use of child pornography to groom children and lure them into sexual activity justifies the additional proscription against possession of child pornography.

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74. The fact that the legislation prohibits the creation of a permanent record of some activity that is legal does not operate to render the legislation overbroad. Even the obscenity provisions of the *Criminal Code* prohibit the making and distributing of permanent depictions of some activity that is legal. Individuals are free to engage in degrading and dehumanizing sexual conduct; however, they are not free to make and distribute depictions of that conduct. The risk of harm flows from the use to which that permanent record may be put and the effect the images may be reasonably presumed to have on society. That the activity represented may comply with the legal definition for consensual conduct does not mean that the risk the materials pose is reduced. Indeed, consent or the appearance of consent, may be reasonably presumed to augment the risk of harm such material presents. That the material depicts children in a sexualized manner in a context which suggests that this activity is desired by the child makes this material a valuable source of reinforcement of the cognitive distortions held by pedophiles. It also poses a significant risk of impressing upon vulnerable children, who are sensitive to peer pressure, the message that other children are willingly engaging in sexual activity.

R. v. Butler, supra at 479 per Sopinka, J.

(c) The Age Limit

75. Resort to the age of majority to delimit the material proscribed is completely justified. Not only does the social science material suggest that adolescence is a state of transition, experimentation and cognitive development, which is not uniformly related to chronologically age, physical development and maturation also take place at different chronological ages. Researchers in the area of adolescent sexuality have recorded that there is great variation as to the age at which puberty begins. Most adolescents begin puberty between the ages of 9 and 16. The changes which occur take place over 4 to 5 years for boys and 3 to 4 years for girls. Therefore, despite the decision by Parliament to set the age of consent to sexual activity at the age of 14, it is entirely reasonable for Parliament to classify child pornography as material which depicts children under the age of 18 years. Given that older children might nevertheless look relatively immature, it is entirely reasonable to define child pornography as material which depicts children that are under the age of 18 years or depicts individuals which appear to be under the age of 18 years. If such a proscription were not in place, pedophiles could use depictions of older adolescents to reduce the inhibitions of younger children and lure children below the age of consent into sexual activity. This rationale holds for both depictions involving actual children as subjects and imaginary subjects. It also applies to pornography which utilises adults as models and depicts them as under the age of 18 years. Secondly, given the vast variation in rates of both cognitive and physical development generally and the vulnerability of children and adolescents, Parliament was entitled to protect children from manipulation of children. As the Attorney General for British Columbia has noted, it is one thing to be involved in a fleeting sexual encounter; it is another to have a permanent record made of that encounter.

Betty Gordon and Carolyn Schroeder, *Sexuality: A Developmental Approach to Problems* (New York: Plenum Press, 1995) at p. 4

S. Moore and D. Rosenthal, *Sexuality in Adolescence* (New York: Routledge) pp. 47-48

U.S. v. Hilton, supra

New York v. Ferrer, supra

R. v. J.(J.T.), [1990] 2 S.C.R. 755 at 758 per Cory J.

(d) Depictions that Do Not Use Actual Children in their Creation

76. While computer generated depictions and other work of the imagination do not generate the direct harm that is occasioned when a child is exploited in the production of photographic depictions, these depictions pose a risk of harm in that they still operate to desensitize individuals to the sexualization of children and have value as aids to groom children for sexual activity. It is also reasonable to presume that these representations operate to fuel cognitive distortions and fuel fantasies.

10 This is more properly analysed in terms of whether the proscription is rationally connected to the legislative objective.

(e) The Defences

77. As detailed in the Factum of the Attorney General for British Columbia in paragraphs 119 to 126 the inclusion of subsections 163.1(6) and (7) which incorporate the defence of artistic merit or educational, scientific or medical purpose and the public good defence are well tailored to ensuring that it is material which poses a substantial risk of harm that is captured by the provisions. The interpretation of the defence of artistic merit delineated in *Ontario (Attorney General) v. Langer* is urged upon this Court. The principles outlined by Justice McCombs balance the need to accord artists the room to challenge existing norms within society, while also protecting children from the proliferation of material which is harmful to them and without redeeming social value. An objective approach to the determination of artistic merit, which resolves any doubt in favour of an accused, but which ultimately recognizes that where extreme harm is engendered by the material the community standards of tolerance will operate to prohibit the material, minimally impairs the right to freedom of expression bearing in mind the objective of the legislation.

Ontario (Attorney General) v. Langer (1995), 97 C.C.C. (3d) 290 at 315-316; leave to appeal to the S.C.C. refused [1995] 4 S.C.R. vii

30 **4. Balancing of Salutory and Deleterious Effects**

78. The inclusion of the public good defence and the artistic merit defence countervail against any chilling effect the legislation might otherwise have, and operate to bring under constitutional protection expression which is more closely related to the core values protected by the right to freedom of expression. When the beneficial effects of the legislation are weighed against the negative effects of proscribing possession of child pornography the legislation is clearly proportional in its effect to the seriousness of the legislative objective.

79. The effects of child sexual abuse are all too frequently the subject of comment by our courts. The trauma and devastation resulting from child sexual abuse engenders effects that are manifest for generations. Detective Wolff provided expert evidence that in her experience as a police officer, an

10 estimated 98% of the children she encountered living on the streets had been sexually abused as children. The benefits of measures which guard against this devastation cannot be surpassed in importance.

M.(K.) v. M.(H.), [1992] 3 S.C.R. 6

R. v. L. (D.O.), [1993] 4 S.C.R. 419 at 439, per L'Heureux-Dube, J.

R. v. Hess; R. v. Nguyen, [1990] 2 S.C.R. 906 at 948 per McLachlin, J. (as she then was)

R. v. S. (W.B.) (1992), 73 C.C.C. (3d) 530 at 536 (Alta. C.A.)

R. v. M.(G.) (1992), 77 C.C.C. (3d) 310 (Ont. C.A.)

R. v. Alyward (1992), 71 C.C.C. (3d) 71 at 80 (Nfld. C.A.)

A.R. Vol. IV, p. 666, Standing Committee on Justice and the Solicitor General, 20-1-1993 84:16

20 80. Contrary to the conclusion of the majority of the British Columbia Court of Appeal, there was no credible evidence to suggest that possession of child pornography is linked to the prevention of sexual abuse of children. The evidence on the voir dire and before Parliament established a reasonable apprehension of harm flowing from the proscribed materials. Given the recidivism rates for pedophiles attested to by Dr. Marshall and his evidence that the research of Dr. Gene Abel suggests that pedophiles typically victimize a large number of children over a lifetime, Dr. Marshall's further evidence that approximately 1/3 of pedophiles use pornography provides a reasoned apprehension that the material pose a significant risk of harm to children. One study involving 232 child molesters conducted by Dr. Abel et al. found that these individuals had collectively attempted 55,250 molestations and
30 completed 38,727 molestations of children under the age of 14 years. The total number of victims was 17,585. On the average, each offender had attempted 238.2 child molestations and completed 166.9 molestations involving 75.8 victims.

A.R. Vol. 5, pp. 738-42 Proceedings before the House of Commons Standing Committee on Justice and the Solicitor General, 12-5-1993 100:7-11

W. Marshall, *supra* at 284

G. Abel, M. Mittelman and J. Becker, "Sexual Offenders: Results of Assessment and Recommendations for Treatment" in *Clinical Criminology* 191 at 192-93

A.R. Vol. VII, p. 1294, D. Carter et al., *supra* at 207

40 81. In assessing the deleterious effects of the legislation it is appropriate to consider the relationship of the expression to the fundamental values underlying freedom of expression. As this Court observed in *R. v. Keegstra* the section 1 analysis cannot ignore the nature of the expressive activity which the state seeks to restrict, since to do so is destructive of the principles at the core of s. 2(b). In *R. v. Butler* this Court concluded that the type of expression sought to be advanced in obscene publications "does not stand on an equal footing with other kinds of expression which directly engage the 'core' of

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the freedom of expression values.”

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82. Like obscene publications and hate propaganda child pornography contributes little to the aspirations of Canadians in the quest for truth, the promotion of individual self-development or the protection or fostering of a vibrant democracy. To the extent that child pornography can be said to be meaningfully related to these underlying values, the defences set out in s. 163.1(6) and (7) apply. To the extent that child pornography is characterized as related to personal autonomy and self-fulfilment, it must also be recognized that the self-development and personal autonomy of children are imperilled by this material and hence any conception of self-fulfilment that is integrally linked to the possession of material which imperils the autonomy and freedom of other individuals is fundamentally at odds with the protection and fostering of a vibrant democracy. Child pornography does not advance the third underlying objective of s. 2(b), as articulated in *Keegstra*: “diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated *in a tolerant and welcoming environment for the sake of both those who convey meaning and those to whom meaning is conveyed*” [emphasis added]. The type of material prohibited by the legislation is material which threatens the security of children and their process of self-actualization in a profound manner. **Child pornography communicates messages that militate against the creation of a tolerant and welcoming environment for children and contributes to a risk of harm which undermines children’s security of the person. The curtailment of the right to possess child pornography amounts to only the most minimal infringement on the right to freedom of expression. As Dickson, C.J. stated in *R. v. Keegstra*, at the core of freedom of expression “lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavours or in the process of determining the best course to take in our political affairs.”**

R. v. Keegstra, *supra* at 726-28, 760, and 762-63 per Dickson, C.J.

R. v. Butler, *supra* at 493, and 500-01 per Sopinka, J.

Young v. Young, [1993] 4 S.C.R. 1 at 97-100 per L’Heureux-Dube, J.

R. v. Lucas, [1998] 1 S.C.R. 439 at 478 per Cory, J.

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83. In assessing whether the salutary effects of the legislation outweigh the effects of the infringement it is important to note that a number of other free and democratic societies have criminalized the possession of child pornography. The jurisdictions within Australia have incorporated restrictions prohibiting the possession of computer generated images, drawings and writings into their

10 classes of proscribed material. Within the United States, thirty-three states criminalize the private possession of child pornography. Of these states a significant number have employed language which is arguably broad enough to encompass material that does not require a child to participate in a sexual act during the creation of the representation. The state of Indiana has enacted legislation which closely parallels the Canadian legislation. The United States has enacted the federal *Child Pornography and Protection Act 1996*. The Irish *Child Trafficking and Pornography Act 1998* reflects an appreciation of the risk of harm inherent in images which sexualize children and which counsel sexual offences against children, and written descriptions that imply a child is available for sexual exploitation are prohibited. The legislation prohibits any visual or audio representation which advocates or counsels sexual activity which is otherwise an offence. The Irish legislation does not require that an actual child

20 (defined as a person under 17 years) be employed in the production of the pornography. It is enough if the subject is “depicted as being a child” and is depicted in explicit sexual activity. Computer generated or modified computer graphic depictions that convey an impression that the individual is a child are proscribed. Even if the depictions retain certain adult features they will not be exempted from restriction if the predominant impression conveyed is that the figure is a child.

A.R. Vol. IX, p. 1652, *Child Pornography and Protection Act 1996* 18 USC s.2256(8)

A.R. Vol. XI, pp. 1990-1992 *Child Trafficking and Pornography Act, 1998* (Ireland), no. 22

Appendix A - Table Comparing Legislation from Foreign Jurisdictions

Appendix B - Table Comparing Legislation from the United States

See also: para 37 above

30 84. Our Parliament and the governments of other free and democratic societies have recognized the overwhelming importance of introducing measures to counter the risk of harm posed by the proliferation of child pornography. At the international level there has been growing awareness of the need to prohibit possession of child pornography and recently enacted legislation has responded to evidence that the risk of harm is not contingent upon the use of actual children in the production of the pornography. Parliament has struck a fair balance in s. 163.1(4): it has attempted to curtail the

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proliferation of material which poses a substantial risk of harm to the security of children while providing for defences which protect materials which contribute to the core values at the heart of the guarantee of freedom of expression.

R. v. Keegstra, *supra* at 762 per Dickson, C.J.

PART IV

NATURE OF THE ORDER REQUESTED

85. The Intervener submits that the constitutional questions ought to be answered in the following manner:

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

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*? Answer: Yes

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3. Does s. 163.1(4) of the *Criminal Code* infringe s. 7 of the *Canadian Charter of Rights and Freedoms*? Answer: It is not necessary to answer this question. In the alternative the answer is No.

4. 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*? Answer: It is not necessary to answer this question. In the alternative the answer is No.

ALL OF WHICH is respectfully submitted by

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Dated: January 6, 2000
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TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there a provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
Australia (Commonwealth of Australia)	<i>Classification (Publications, Films and Computer Games) Act of 1995</i> [A.R. Vol.X, pp. 1706-1710]	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	Under 16, or who appears to be under 16	Yes - includes computer images, and the definition of publication includes any written or pictorial matter	Yes - material that is not offensive to a reasonable adult will not be caught	Yes
Australian Capital Territory	<i>Crimes Act, 1900</i> , s.92NB [A.R. Vol.X, p. 1696]	Film, photograph, drawing, audio tape, video tape or any other thing depicting or otherwise representing a young person engaged in, or in the presence of another person engaged in, an act of a sexual nature, being a depiction or representation that would offend a reasonable adult person	Under 16	Yes - includes drawings	Yes - material that is not offensive to a reasonable adult will not be caught	Yes
New South Wales	<i>Crimes Act, 1900</i> , s. 578B; <i>Classification (Publications, Films and Computer Games) Enforcement Act 1995</i> No 63 [A.R. Vol.X, p. 1697, pp.1711-1737]	A film, publication or computer game classified as RC, or an unclassified film, publication or computer game that would, if classified, be classified RC, on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is a child under 16 or who looks like a child under 16	Under 16, or who appears to be under 16	Yes - includes computer images, and the definition of publication includes any written or pictorial matter	Yes - material that is not offensive to a reasonable adult will not be caught	Yes

TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
Northern Territory	<i>Criminal Code Amendment Act 1996</i> , S.125A and B [A.R. Vol.X, p.1698]	A film, publication or computer game classified RC, or an unclassified film, publication or computer game that would, if classified, be classified RC, on the basis that it describes or depicts, in a way that is likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is a child who has not attained the age of 16 years or who looks like a child who has not attained that age	Under 16, or who appears to be under 16	Yes - includes computer images, and the definition of publication includes any written or pictorial matter	Yes - material that is not offensive to a reasonable adult will not be caught	Yes
Queensland	<i>Classification of Computer Games and Images Act 1995</i> , schedule 2 and s.26.(3); <i>Classification of Films Act 1991</i> ss.3 and 41; <i>Classification of Publications Act 1991</i> , ss.3 and 14 [A.R. Vol.X, pp. 1699-1701]	Computer games, films and publications that depict a child (whether engaged in sexual activity or otherwise) who is, or is apparently, under 16 years in a way likely to cause offence to a reasonable adult	Under 16, or who appears to be under 16	Yes - includes computer images, and the definition of publication includes any written or pictorial matter	Yes - material that is not offensive to a reasonable adult will not be caught	Yes

TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
South Australia	<i>Summary Offences Act 1953</i> , s.33 [A.R. Vol.X, p. 1702]	Indecent or offensive material in which a child (whether engaged in sexual activity or not) is depicted or described in a way that is likely to cause serious and general offence amongst reasonable adult members of the community	Under 16, or who appears to be under 16	Uses broad terms "describe" and "depict"	Yes - material that is not offensive to a reasonable adult will not be caught	Yes
Tasmania	<i>Classification (Publications, Films and Computer Games) Enforcement Act 1995</i> , ss. 71 and 74 [A.R. Vol.X, p.1703]	A publication, film or computer game that describes or depicts a person (whether engaged in sexual activity or otherwise) who is, or who looks like, a child in a manner that is likely to cause offence to a reasonable adult		Yes - includes publications and computer games	Yes - material that is not offensive to a reasonable adult will not be caught	Yes
Victoria	<i>Crimes Act 1958</i> , ss.67A and 70; <i>Classification (Publications, Films and Computer Games)(Enforcement) Act 1995</i> [A.R. Vol. X, p. 1704, pp. 1739-1753]	A film, photograph, publication or computer game that describes or depicts a person who is, or looks like, a minor under 16 engaging in sexual activity or depicted in an indecent sexual manner or context	Under 16, or who appears to be under 16	Yes - includes publications and computer games	Yes - material that is not offensive to a reasonable adult will not be caught	Yes

TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
Western Australia	<i>Censorship Act</i> 1996, ss.3 and 60 [A.R. Vol. X, p. 1705]	An article that describes or depicts, in a manner that is likely to cause offence to a reasonable adult, a person who is, or who looks like, a child under 16 years of age (whether or not the person is engaged in sexual activity or not)	Under 16 or who appears to be under 16	Uses broad terms "describes" or "depicts"	Yes - material that is not offensive to a reasonable adult will not be caught	Yes
Austria	Criminal Code, Par. 207a StGB	Pictorial representation of a sexual act on a minor or by a minor on himself or herself, the viewing of which in the circumstances creates the impression that in its production such a sexual act occurred	Minor not defined in s.207a	Unclear	No	Yes
Belgium	Criminal Code, Chapter II, Art.7	Figures, things, films, photos, slides or other visual supports that represent sexual acts or positions that can be characterized as pornographic	Under 16	Yes	No	Yes
Denmark	Danish Criminal Code, Art. 235 *see N. Lederer, A.R. Vol.XI, p. 1889	Photographs, films or similar objects of children having sexual intercourse or other sexual relations, or of children having sexual relations with animals or using objects in a grossly obscene manner		Unclear		Yes

TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
England	<i>Protection of Children Act 1978</i> , c.37, ss.1 and 7; <i>Criminal Justice Act 1988</i> , s.160; <i>Criminal Justice and Public Order Act, 1994</i> , ss. 84-86 [A.R., Vol.X, pp. 1779-1793]	Indecent photographs and pseudo-photographs	Under 16, or appears to be under 16	Yes - "pseudo-photographs" include computer-generated images	No	Yes

TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
Ireland	<i>Child Trafficking and Pornography Act, 1998</i> , ss. 2 and 6 [A.R. Vol. XI, pp.1990- 2000]	The following materials are prohibited: (1) any visual representation that shows a child engaged in or witnessing explicit sexual activity, or whose dominant characteristic is the depiction, for a sexual purpose, of the genital or anal region of a child; (2) any audio representation of a person who is or is represented as being a child and who is engaged in or is represented as being engaged in explicit sexual activity; (3) any visual or audio representation that advocates, encourages or counsels any sexual activity with children which is an offence under any enactment; (4) any visual representation or description of, or information relating to, a child that indicates or implies that the child is available to be used for the purpose of sexual exploitation	Under 17, or depicted as being under 17	Yes - the definition of child pornography applies irrespective of how, or the medium through which, it has been produced, transmitted or conveyed. The legislation also provides that the definition of "child pornography" shall be construed as including a reference to a figure resembling a person no matter how produced.	Yes - the definition of child pornography does not apply to books or periodicals that have been examined by the Censorship of Publications Board but in respect of which a prohibition order is not in force, or a file or video work in respect of which the appropriate certificate is in force	Yes

TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
The Netherlands	Criminal Code, s.240b	Images of a sexual act in which a person who clearly has not reached the age of sixteen is involved	Under 16	* Considering is being given to including computer-generated images	Yes - a person who has such an image in stock is not liable if it is used for scientific, educational or therapeutic purposes	No
New Zealand	<i>Films, Videos, and Publications Act of 1993</i> , ss.2-3, 131 [A.R. Vol.X, pp. 1754-1778]	Publications that describe, depict, express or otherwise deal 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. A publication is objectionable if it promotes, supports or tends to promote or support the exploitation of children, or young persons, for sexual purposes	'Children' and 'young persons' are not defined in the legislation	Yes - publication is defined to include the written word	Yes - in determining whether a publication is objectionable, consideration is to be given to any merit it has in relation to literary, artistic, social, cultural, educational, scientific, or other matters	Yes

TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
Norway	Criminal Code, s.211 *see N. Lederer, A.R. Vol.XI, p. 1906	Pictures, films, videos, or similar objects where person who is or appears to be under sixteen years of age is shown in an obscene or pornographic manner; obscene or pornographic depictions mean sexual depictions which are offensive or which otherwise may be perceived as being degrading or debasing, including sexual depictions involving children, animals, violence, force or sadism	Under 16, or appears to be under 16	Arguably		Yes
Sweden	Swedish Penal Code, Chapter 16, para 10a, s.1	Pictures, (including all kinds of media and the electronic environment), that are pornographic (this extends beyond involvement in sexual activity of any kind to include pictures that in any way depict a child in a manner likely to appeal to the sexual urge - per release from Minister of Justice, not text of legislation)	Under 18, or where the pubertal development is not complete	Hand-crafted pictures will not be caught unless the image is intended to be made available to others in any way	Yes - the act will not constitute a crime if having regard to the circumstances, it is justifiable	Yes

TABLE COMPARING LEGISLATION FROM FOREIGN JURISDICTIONS

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is there provision for a defence based on the value of the expression or purpose of possession?	Is private possession prohibited, regardless of intent to disseminate?
Switzerland	Penal Code, Art. 197	Writings, visual or audio recordings, images or pornographic objects or representations	Under 16	Yes	Yes - items will not be considered pornographic if they have cultural or scientific value worthy of protection	No

TABLE COMPARING LEGISLATION FROM THE UNITED STATES

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is private possession prohibited regardless of intent to disseminate?
United States - Federal	18 U.S.C., Chap. 110, as amended by the <i>Child Pornography Protection Act 1996</i> and the <i>Protection of Children from Sexual Predators Act 1998</i> , ss. 2252(a)(4)(B) and 2256 [A.R. Vol.IX, pp. 1621-1659]	Includes any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct	Under 18	Yes - includes computer-generated images	Yes
Alaska	Alaska Stat. s.11.61.127 (1999)	Any material that visually or aurally depicts (1) sexual penetration (2) the lewd touching of another person's genitals, anus, or breast (3) the lewd touching by another person of the child's genitals, anus, or breast; (4) masturbation; (5) bestiality; (6) the lewd exhibition of the child's genitals; or (7) sexual masochism or sadism involving the use of a child	Under 18	No	Yes
Arkansas	Ark.Stat.Ann. S.5-27-304 (1997)	Any visual or print medium depicting a child participating or engaging in sexually explicit conduct		Unclear	Yes
Arizona	A.R.S. s.13-3553 (1999)	Any visual depiction in which minors are engaged in exploitive exhibition or other sexual conduct		Unclear	Yes

TABLE COMPARING LEGISLATION FROM THE UNITED STATES

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is private possession prohibited, regardless of intent to disseminate?
California	Cal Pen Code s.311.11 (1999)	Any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years	Under 18	No - but does include a computer-generated image where an actual child is involved in production	Yes
Colorado	C.R.S. 18-6-403 (1998)	Any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct	Under 18	Unclear	Yes
Connecticut	Conn.Gen.Stat. ss. 53a-193 and 53a-196d (1999)	Any material involving a live performance or photographic or other visual reproduction of a live performance which depicts a minor in a prohibited sexual act		No	Yes
Delaware	11 Del. C. s. 1111 (1998)	Any visual matter depicting a child engaging in a prohibited sexual act or in the simulation of such an act, or any computerized file or data which contains any image depicting a child engaging in a prohibited sexual act or in the simulation of such act.		Unclear	Yes

TABLE COMPARING LEGISLATION FROM THE UNITED STATES

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is private possession prohibited, regardless of intent to disseminate?
Georgia	O.C.G.A. s.16-12-100 (1999)	Any material which depicts a minor engaged in any sexually explicit conduct	Under 18	No - <i>Aman v. State</i> , 261 Ga. 669, 409 S.E. 2d 645 (1991): The statutory term "depict a minor" must be understood as limited to any photographic representation that was made of a human being who at that time was a minor and was "engaged in any sexually explicit conduct," as defined by the statute.	Yes
Idaho	Idaho Code ss.18-507 and 18-507A (1999)	Any photograph, motion picture, videotape, print, negative, slide or other mechanically, electronically, or chemically reproduced visual material which depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct	Under 18	Unclear	Yes
Illinois	720 ILCS 5/11-20.1 (1999)	Any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child or institutionalized severely or profoundly mentally retarded person	Under 18	Unclear	Yes
Indiana	Burns. Ind. Code Ann. s.35-42-4-4 (1999)	A picture, drawing, photograph, negative image, undeveloped film, motion picture, videotape or any pictorial representation that depicts or describes sexual conduct by a child who is less than 16 years of age, or appears to be less than sixteen years of age, and that lacks serious artistic, political, or scientific value	Under 16	Yes - includes drawings and other pictorial representations	Yes
Iowa	Iowa Code s.728.12 (1997)	A negative, slide, book, magazine, or other print or visual medium depicting a minor engaging in a prohibited sexual act or the simulation of a prohibited sexual act		Arguably	Yes
Kentucky	KRS s.531.335 (1998)	Any matter which visually depicts an actual sexual performance by a minor person		No	Yes

TABLE COMPARING LEGISLATION FROM THE UNITED STATES

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is private possession prohibited, regardless of intent to disseminate?
Maine	17 M.R.S. s.2924 (1998)	Any book, magazine, print, negative, slide, motion picture, videotape or other mechanically reproduced visual material that depicts another person engaging in sexually explicit conduct	Under 14	No	Yes
Michigan	MSA s.28.342a (1999)	A developed or undeveloped photograph, film, slide, electronic visual image, computer diskette, or sound recording of a child engaging in a listed sexual act; a book, magazine, or other visual or print medium containing such a photograph, film, slide, electronic visual image, book, magazine, other visual or print medium, or sound recording.	Under 18	No	Yes
Minnesota	Minn. Stat. s.617.247 (1999)	Pornographic work means: (1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or (2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that: (i) uses a minor to depict sexual conduct; (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or (iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.	Under 18	Yes - includes: (1) works that may be entirely of the imagination but the subject matter of which is an identifiable child and (2) depictions that are promoted or presented as depicting an actual minor engaging in sexual activity	Yes
Mississippi	Miss.Code Ann. S.97-5-33 (1999)	Any photograph, drawing, sketch, film or video tape which depicts a child engaging in sexually explicit conduct		No - but does include drawings and sketches of an actual child	Yes
Missouri	R.S.Mo. S.573.037 (1999)	Any obscene material that has a minor as one of its participants or portrays as an observer of sexual conduct, sexual contact or a sexual performance a minor		Unclear	Yes

TABLE COMPARING LEGISLATION FROM THE UNITED STATES

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is private possession prohibited, regardless of intent to disseminate?
Montana	Mont. Code. Anno., s. 45-5-625 (1999)	Any visual or print medium in which children are engaged in sexual conduct, actual or simulated		Arguably	Yes
Nevada	Nev. Rev. Stat. Ann., s. 200.730 (1999)	Any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating, or assisting others to engage in or simulate, sexual conduct	Under 16	No	Yes
New Hampshire	RSA 649-A:3 (1999)	Any visual representation of a child engaging in sexual activity		Arguably	Yes
New Jersey	N.J. Stat. S.2C:24-4 (1999)	Any photograph, film, videotape, computer program or file, video game or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such an act, including on the Internet	Under 16	Arguably	Yes
North Carolina	N.C. Gen. Stat. s. 14-190.17A (1999)	Material that contains a visual representation of a minor engaging in sexual activity		Arguably	Yes
North Dakota	N.D. Cent. Code, s. 12.1-27.2-04.1 (1999)	Any motion picture, photograph, or other visual representation that includes sexual conduct by a minor		Arguably	Yes
Ohio	ORC Ann., s. 2907.322 (1999)	Any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality		Unclear	Yes
Oklahoma	21 Okl. St., s. 1021.2 (1998)	Any obscene material (appears to include any film, motion picture, videotape, photograph, negative, slide, drawing, painting, play, or performance where the minor is engaged in or portrayed, depicted, or represented as engaging in any act of sexual intercourse, in any act of fellatio or cunnilingus, in any act of excretion in the context of sexual activity, and in any lewd exhibition of the uncovered genitals or pubic area or areola of the breasts)	Under 18	No - but does include drawings and paintings of actual children represented as engaged in sexual acts	Yes

TABLE COMPARING LEGISLATION FROM THE UNITED STATES

Jurisdiction	Citation	Material Prohibited	Age of Children Protected	Does the legislation extend beyond material that employs actual children in its production?	Is private possession prohibited, regardless of intent to disseminate?
South Carolina	S.C. Code Ann. s. 16-15-410 (1998)	Material that contains a visual representation of a minor engaging in sexual activity		Arguably	Yes
South Dakota	S.D. Codified Laws s.22-22-23.1 (1999)	Any book, magazine, pamphlet, slide, photograph, or film depicting a minor under the age of eighteen years engaging in a prohibited sexual act or in the simulation of such an act	Under 18	Arguably	Yes
Texas	Tex. Penal Code s. 43.26 (1999)	Any visual material that visually depicts a child younger than 18 years of age at the time the image was made who is engaging in sexual conduct. "Visual material" means any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method	Under 18	No	Yes
Virginia	Va. Code Ann. s.18.2-374.1:1 (1999)	Any sexually explicit visual material utilizing or having as a subject a person less than eighteen years of age. The provision includes an expansive public interest defence	Under 18	Arguably	Yes
Washington	Rev. Code Wash. (ARCW) s.9.68A.070 (1999)	Visual or printed matter depicting a minor engaged in sexually explicit conduct		Arguably	Yes
West Virginia	W. Va. Code s.61-8C-3 (1999)	Any material visually portraying a minor engaged in any sexually explicit conduct		Arguably	Yes
Wisconsin	Wis. Stat. s. 948.12 (1998)	Undeveloped film, photographic negative, photograph, motion picture, videotape or other pictorial reproduction or audio recording of a child engaged in sexually explicit conduct	Under 18	No	Yes