

# BEYOND BORDERS INC.

## *Au-Delà Des Frontières Inc.*

*Ensuring Global Justice for Children*

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## Canada's Child Pornography Legislation

**What is the definition of “child pornography” under the law?** With *Bill C-2* passed in the summer of 2005 and soon to come into force, the definition of what constitutes child pornography has been expanded. The current definition is below, with new amendments italicized:

- any photo, film, video (or other visual representation) that shows a person who is or is depicted as being under 18 engaged in or depicted as engaged in explicit sexual activity,<sup>1</sup> or which shows a sexual organ or anal region of someone under 18 for a sexual purpose<sup>2</sup>
- any written material, visual representation *or audio recording* that advocates or counsels sexual activity with someone under 18
- *written material whose dominant characteristic is the description, for a sexual purpose, of illegal sexual activity with someone under 18*
- *any audio recording whose dominant characteristic is the description, presentation or representation, for a sexual purpose, of illegal sexual activity with someone under 18*<sup>3</sup>

**What are child pornography offences?** (*Bill C-2* amendments italicized)

- making, printing, publishing or possessing child pornography for the purpose of publication
- transmitting, making available, distributing, selling, *advertising*, importing, exporting or possessing child pornography for the purpose of all of the above
- possessing child pornography
- accessing child pornography – where the accused knowingly causes child pornography to be viewed by, or transmitted to, himself or herself<sup>4</sup>

**What defenses are available to those accused of child pornography offences?** (*Bill*

<sup>1</sup> *R. v. Sharpe*, 2001 Carswell BC 82 at 128 (S.C.C.) (eC): The Supreme Court of Canada has clarified that “visual representations of any activity that falls short of this threshold are not caught. Thus representations of casual intimacy, such as depictions of kissing or hugging” are not child pornography.

<sup>2</sup> *Ibid*: Innocent pictures of a baby in a bath and non-sexual nudity are not child pornography.

<sup>3</sup> *Criminal Code*, R.S.C. 1985, c. C-46 s. 163.1.

<sup>4</sup> *Ibid*.

C-2 amendments italicized)

- If the accused believed that the person depicted in a visual representation that is alleged to be child pornography was 18 or older, and they have taken all reasonable steps to ascertain the age of that person, and all reasonable steps to ensure that the representation did not depict that person as being under 18, they will not be convicted of an offence involving that representation.
- *The accused will not be convicted if the work in question has a “legitimate public purpose related to the administration of justice or to science, medicine, education or art” and does not pose and undue risk of harm to those under 18.*<sup>5</sup>

Bill C-2 eliminates the formerly available defense of artistic merit, as well as exceptions created by the Supreme Court of Canada in *R v. John Robin Sharpe*: written or visual material created and kept by the accused to be used for his or her personal use, and private recordings of legal sexual activity with were kept by the accused for his or her own personal use.<sup>6</sup> Now, the onus is placed on the possessor of material alleged to be child pornography to prove that it has a “legitimate purpose” and does not harm children.

**Does the new legislation unjustifiably infringe upon freedom of expression?** Many Canadian artists and writers have criticized Bill C-2 for infringing upon fictional accounts of children engaged in sexual activity. Some fear that those involved in modern stage or film productions of *Lolita* or *Romeo and Juliet* could be liable for prosecution, since the defense of artistic merit has been removed.<sup>7</sup> The new defense of “legitimate purpose related to art” has a scope which is unknown, and some artists, publishers, or filmmakers fear they could potentially be imprisoned for their work.<sup>8</sup> Some suggest that child pornography should be redefined so as to only target material that involves the unlawful abuse of a real child.<sup>9</sup>

Narrowing the definition of child pornography in this manner is not the answer. All material which depicts or describes illegal child sexual activity *for a sexual purpose* should remain illegal because it may be used to incite the creator of the material or others to engage in such activity.<sup>10</sup> Canadian artists should rather focus their energies on

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Supra* note 1.

<sup>7</sup> “Submission of the Writers’ Union of Canada, League of Canadian Poets, Periodical Writers Association of Canada, and Playwrights Guild of Canada to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness on Bill C-2,” online: The Writers’ Union of Canada <<http://www.writersunion.ca/justice.pdf>>.

<sup>8</sup> *Ibid.*

<sup>9</sup> Robin MacKay, “Bill C-2: An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act,” online: Library of Parliament <<http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&query=4199&List=toc&Session=13>>.

<sup>10</sup> In June 2004 Michael Briere, Holly Jones’ killer, told a Toronto court that he was motivated by child pornography to commit the crime. (Shannon Kari “Child pornography fuelled killer’s appetite for ‘sexual relations with a little girl,’ court told” CanWest News (17 June 2004)). While there is considerable debate about what the connection is between viewing child pornography and abusing children, Briere’s testimony and statistics that show that a high percentage of child sex offenders view child pornography should alert lawmakers to err on the side of caution. (For statistics see Margaret A Healy, “Child Pornography: an

lobbying the government to carve out a more specific defense for “legitimate purpose related to art” in legislation so that there will be less confusion in the courts.

**Bill C-2 introduces stiffer penalties for child pornography offences.** The new legislation introduces minimum sentences for all child pornography offences. This is an important and welcome change, because until recently it has been common for offenders convicted of child pornography offences to receive extremely light sentences, such as a few months house arrest. Now, for possessing or accessing child pornography, offenders will receive a minimum of 14 days imprisonment.<sup>11</sup> If distribution or publication is involved, the minimum sentences are 90 days and one year, respectively.<sup>12</sup> If profit is the motive, then the court must consider this as an aggravating factor.<sup>13</sup> All of this sends a clear signal to would-be offenders that if they are involved in the any part of child pornography and are caught, *they will go to jail*.

**How are victims of child pornography represented in court?** Normally in criminal trials victims are able to read, or have presented in any other manner the court considers appropriate, a victim impact statement, describing the harm done to them or loss suffered by them. The court is to consider this statement in determining the appropriate sentence to be imposed on the offender.<sup>14</sup> Victim impact statements are also important because they become part of the public record and can be quoted in the media.

Unfortunately, victims of child pornography are often nameless and are never found. They rarely are part of the court process convicting their abusers (or those who feed the demand for their abuse by downloading their images), and thus do not have the opportunity to explain to the court the harm they have suffered. Beyond Borders, when permitted by the court, reads victim impact statements on behalf of child pornography victims. These statements help educate the courts that there is a human dimension to these crimes and that they involve real children who will be scarred for life.

**What to do if you encounter child pornography or know of a child pornography offense occurring:** Report it to [www.cybertip.ca](http://www.cybertip.ca), Canada’s national tipline. On this site you will fill out a form to report the sexual exploitation and analysts will review, prioritize and add value to the report. Potentially illegal reports are sent to the appropriate law enforcement jurisdiction.<sup>15</sup>

### **Recommendations:**

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international perspective,” online: Computer Crime Research Center <<http://www.crime-research.org/articles/536/4>>.)

<sup>11</sup> Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1<sup>st</sup> Sess., 38<sup>th</sup> Parl., 2005, cl. 4 and 5 (assented to 20 July 2005).

<sup>12</sup> *Ibid.* cl. 2 and 3.

<sup>13</sup> *Ibid.* cl. 6.

<sup>14</sup> *Supra* note 3 s. 722.

<sup>15</sup> “Cybertip!ca,” online: Cybertip!ca <[www.cybertip.ca](http://www.cybertip.ca)>.

**1. Legislative reform: make 3<sup>rd</sup>-party victim impact statements mandatory for child pornography cases.**

**2. Legislative reform: allow NGOs to sue on behalf of the children in cases where affluent perpetrators are convicted of child pornography.**

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