

How Canada Can Protect Children from Sexual Exploitation Abroad

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*I am submitting this as my Major paper.

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Panida, a 14-year-old girl from rural Northern Thailand, had just finished her eighth grade studies and hoped to spend her summer break earning some extra money. Panida thought that the potential earnings from a summer job could bring her family some stability. Her family needed the funds badly: Her father had died and her mother was stricken with AIDS. When a local man approached her offering a well-paying job that would last four months, she accepted. However, the man's intentions were never to give her a job: He instead took Panida through a border checkpoint into Malaysia, where he sold her to a local brothel owner.

The brothel owner told Panida that he had paid an enormous sum for her, and that she must reimburse him by selling her body to the brothel's many customers. She was told that she would have to service five to 10 customers a night and that if she failed to meet her quota or hurt refused customers, she would be beaten and abused.

Panida was locked in her new living quarters – a house crowded with other trafficking victims, secured by guards, barred windows and doors that locked from the outside. Terrified and unable to even understand the language spoken around her, Panida awaited her first rape.

However, on the very night on which Panida was to be sold for the first time, Malaysian police, prompted to action by information provided through IJM undercover investigations, entered the brothel and released Panida and 94 other trafficking victims.

An IJM caseworker contacted Panida's mother in Thailand, who was overjoyed to hear that her daughter was safe. IJM paid the cost to reunite Panida and her mother and to sponsor Panida's continuing education. Panida is now home again¹.

I. Introduction

Most Canadians would like to believe that the horror that Panida was so easily drawn into was a unique and isolated situation. However, it is estimated that 20,000 children worldwide are taken into forced prostitution every week². In the time that it takes to read this paper, another forty children have been forced into the sex trade. The situation is desperate, and is at the same time totally overwhelming. What can be done to save these children?

Sex crimes committed against children has become a major international problem. 'Rich' men from countries like Canada are paying to travel to foreign sex tourist hot spots. When they get there,

1 "Rescue: Panida" *International Justice Mission*. (10 November 2007), online:

<http://216.128.18.195/IJMpdfs/IJM_Rescue.pdf>

2 Gary Haugen, "Testimony: Gary Haugen" *InterVarsity* (10 November 2007), online: Urbana 2000

<<http://www.urbana.org/u2000.dec30p.garyhaugen.cfm>>

they pay what is by western standards a trivial amount of money to have sex with children (in some cases eight or nine dollars)³. The extent of this problem is difficult to determine because of the secrecy surrounding this type of crime. But experts estimate that the number of children forced into the sex trade is one million in Asia alone⁴. Child prostitution was estimated in 1995 to be an industry worth five billion dollars worldwide by the United Nations⁵.

But it seems as if no one has an opinion on how many of those children are caught in the sex trade because of sex tourists. Further, the number of children being victimized by Canadians is a big mystery. Former Member of Parliament Paul Forseth presumes a “great number” of Canadian tourists in Thailand are sex tourists, an assumption based on the fact that two thirds of visitors are single men⁶. The former Minister of Foreign Affairs and International Trade indicated that National Revenue had documented incidents of Canadian citizens going abroad to take advantage of children, and Sri Lankan and Philippine authorities have reportedly arrested Canadians for sexually exploiting children⁷. The high profile crimes of Canadians Christopher Neil, Frank Mader, and Donald Bakker (see below) make it clear that some Canadians are contributing to the problem.

What is the international response to this problem? What should Canada's response be? These are questions that have been the subject of debate and analysis over the last twenty years. How the world leaders answer these questions and respond will greatly affect the rights of hundreds of thousands of children all over the world. Furthermore, how Canada views its place in the fight against the sexual exploitation of children will determine whether Canada is effective against the problem, or a

3 *House of Commons Debates*, No. 1535 (10 June 1996) at 3572 (Hon. Paul Forseth).

4 Wikipedia Contributors, “Prostitution of Children” *Wikipedia* (15 November 2007), online: Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/w/index.php?title=Prostitution_of_children&oldid=173728704 >

5 Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at 121

6 *House of Commons Debates*, No. 1535 (10 June 1996) at 3572 (Hon. Paul Forseth).

contributer to the problem⁸.

Canada's Sex Tourism Legislation

Canada and its laws can work to protect children. In 1996, Canada's response to the sexual exploitation of children abroad was introduced in Bill C-27. This was an effort to stop Canadian citizens from committing sex crimes against children in other countries by giving Canada some extraterritorial jurisdiction over crimes committed in those countries. This law is colloquially known as 'child sex tourism legislation'. This extraterritorial legislation is a small but important step in the right direction. It provided a strong legal basis and a tool that Canada can use to act against those Canadians responsible for committing crimes against children. But currently our child sex tourism legislation is nothing but a hollow empty shell, just a bunch of words sitting in a book, unless action is taken to use the law. Canada's process of taking appropriate measures to address the problem is far from over.

In this paper, I will show that Canada's extraterritorial Criminal Code provisions are an excellent starting point for preventing Canadians from committing sex crimes against children abroad. The Criminal Code can and should be used as a tool to punish and prevent Canadians from contributing to this problem. But the Criminal Code provisions alone are ineffective. I will show how the Criminal Code can and should be used by Canadian law enforcement agencies, and what further action is needed for Canada to address this problem. Through effective enforcement measures, s. 7(4.1) of the Criminal Code can become something more than a mostly symbolic law.

⁷ *House of Commons Debates*, No. 1525 (10 June 1996) at 3570 (Hon. Paul Forseth).

⁸ Canada contributes to child sex tourism when Canadians travel abroad and commit sex crimes against children.

II. The Harm and Causes of Sex Tourism

A. *Impact of Sex Tourism on the Child*

The harm caused to children by sexual exploitation seems almost intuitive. The emotional devastation of being raped as a child is unimaginable. Consequently, NGOs like International Justice Mission must put energy and resources into aftercare follow-up for the victims they rescue⁹.

Besides the emotional harm, child sex victims are exposed to physical harm through sexual touching. One source says, “Prostitutes may experience a lifetime of recurrent illnesses, such as venereal diseases, fertility problems, pregnancy complications, malnutrition, tuberculosis and depression. Children involved in the sex trade face new and potentially fatal dangers in light of the spread of HIV and AIDS¹⁰”.

B. *The Complexity in Determining the Cause of Child Sexual Exploitation Abroad*

Admittedly, Canada's individual contribution and effort will never be enough to stop the sexual exploitation of children. In all likelihood, child sex tourism will not be stopped for generations. This is largely due to the underlying issues driving this estimated five billion dollar industry¹¹. AIDS, armed conflict, drug abuse and development issues are complex with solutions that are non-obvious¹².

The current state of child sex tourism is undoubtedly influenced by globalization, with travel to other parts of the world becoming common place¹³. It is easy for a pedophile to travel to virtually any

9 “Rescue: Panida” *International Justice Mission*. (10 November 2007), online:

<http://216.128.18.195/IJMpdfs/IJM_Rescue.pdf>

10 Wikipedia Contributors, “Prostitution of Children” *Wikipedia* (15 November 2007), online: Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/w/index.php?title=Prostitution_of_children&oldid=173728704>

11 Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at 121

12 Jo de Linde. “ECPAT: A Network for Children.” (2002), online: ECPAT Information Materials

<http://www.ecpat.net/temp/ecpatx/ecpatx/Newsite///PDF/Information_Materials/A_Network_for_Children.pdf>

13 Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed

point in the world that he believes will be relatively 'safe' to carry on his illicit activities. It is not a big deal for a Canadian to purchase a plane ticket from Canada to Thailand.

Poverty is another obvious reasons that the sexual exploitation of children continues to exist. Poverty drives some people to sell their children and their relatives out of desperation¹⁴. Jeremy Seabrook believes that the primary reason for the continuance of the child sex trade is the 'inequality' between the perpetrator and the victim¹⁵:

Extraterritorial legislation is a powerful instrument for curbing the activities of child-abusers who go to poor countries to take advantage of the most defenceless, but it will not of itself 'cure' the problem. It can be only one important element in a broader strategy, which must ultimately include confronting the issue of the great inequalities in wealth and power between abusers and their victims. If little can be done to reduce the inequality between adult and child that makes individual crimes unacceptable, the same fatalism should not operate when it comes to diminishing the great gulfs of social and economic inequality that are a significant factor in creating the opportunities for the offences described in this book.

Given the complexity of the child sex and exploitation issue, the approach of using laws and enforcement measures is too simplistic for permanent long term results. But a planned and reasoned approach to specifically deal with the sexual exploitation of children abroad using laws can nevertheless be considered a necessary step to achieve an ultimate objective.

C. Perspective of the Pedophile

Committing sex crimes against children abroad is just too easy. For men with 'uncontrollable' desires and fantasies involving children, traveling abroad for this type of activity is the obvious choice. Hundreds of thousands of children are available to the pedophile in sex tourist hot spots all over the world. The chances of getting caught for committing this type of crime and being prosecuted is slim

Books, 2000) at xi

14 *Ibid.* at x.

15 *Ibid.* at xiv.

to none.

The pedophile may be particularly brazen in videotaping the crime, and then posting video of that crime on the Internet (Christopher Neil) or keeping a copy of that video in his possession (Donald Bakker). Videotaped evidence could make prosecution significantly more likely. But if the pedophile chooses to not videotape the crime, what are the realistic chances of facing prosecution? It would take a cautious Canadian pedophile about five minutes of Internet research to realize that the risk of prosecution for this type of crime is extremely low without videotaped evidence.

Julia O'Connell agrees that the perspective of the pedophile is a contributing factor to men choosing to abuse children abroad. However, this perception may be combated through awareness and effective laws. O'Connell says¹⁶:

... Westerners know that it is easier, cheaper and safer to obtain sexual access to a child in poor and developing countries than it is back home, and a key objective of campaigns against 'child sex tourism' has been to shift the perception that sex with children in poorer countries is a low-risk crime by raising awareness and encouraging the adoption of laws and policies in both receiving and sending countries that will facilitate the prosecution of foreigners who commit sexual offenses against children abroad.

Does the pedophile know he is a sex tourist? According to one survey, most men don't consider themselves to be sex tourists if they have sex with women from another country while traveling¹⁷. In a survey of 1000 tourists, 661 German men who had sex with one or more girls from Thailand said that they were not sex tourists. This anomaly can be explained by, “personal, noneconomic and self-serving “framing”...of the tourist-prostitute relationship”¹⁸.

Pedophiles have various reasons for committing sex crimes against children abroad. Some of these reasons appear in various pedophile media. Member of Parliament Paul Forseth reported the

16 Julia O'Connell Davidson. *Children in the Global Sex Trade*. (Cambridge: Polity Press, 2005) at 128.

17 *Ibid.* at 135.

findings in one of these newspapers¹⁹:

...the North American Man/Boy Love Association rhapsodized about a 12-year old Asian boy who truly loved his work. The writer of the article went on to say: ``Weigh the pros and cons of becoming involved yourself in sex tourism overseas. Seek and find love from American boys on a platonic, purely emotional level. For sexual satisfaction, travel once or twice yearly overseas. You might get arrested overseas for patronizing a boy prostitute. But the legal consequences of being caught patronizing a boy prostitute in a friendly place overseas will be less severe".

Another Member of Parliament shared that some pedophiles believe that since they are in a country where the culture is different, the moral standards are more liberal. Even though it is wrong to have sex with children in Canada, in some places it is 'acceptable' from the perspective of the pedophile. The Member of Parliament referred to a Radio-Canada television report that said²⁰:

...a French national was interviewed by a reporter who asked him: ``Why are you, a French citizen, fully aware of the fact that you could not do in your country what you are doing here"-they were in Dominican Republic-"taking advantage of young girls of 16, 15, 14 years of age and sometimes even younger?" He gave a direct and very blunt answer, saying: ``Yes, I am perfectly aware that I could not do the same thing in my country, but here, usage and customs are different and we can do this sort of thing".

D. Canada's Embarrassing Connection to Child Sex Tourism

a) Donald Bakker

In 2005, Canada's child sex tourism law was put to the test in *R. v. Bakker*. In this case Bakker pleaded guilty to a total of 10 counts, including seven counts of inviting a female under the age of 14 years to touch him for a sexual purpose²¹. The subject of the last seven counts took place in Cambodia, and the facts admitted to at trial said that the girls were between the ages of seven to twelve years old²².

Bakker admitted to engaging in oral sex with the girls, including ejaculation into the mouth of several

18 *Ibid.* at 136.

19 *House of Commons Debates*, No. 1535 (10 June 1996) at 3572 (Hon. Paul Forseth).

20 *House of Commons Debates*, No. 1550 (10 June 1996) at 3574 (Hon. Maurice Bernier). Page 1550.

21 *R. v. Bakker*. 2005 CarswellBC 1758. B.C. Prov. Court. [para 9]

22 *Ibid.* at [para 18]

of them²³.

The judge cited aggravating factors in this case as including, "...the vulnerability of the complainants... and the fact that the Cambodian complainants are children enslaved into the sex trade, which only exists, or largely exists, because of Mr. Bakker and others like him"²⁴.

The Crown and the Defence in this case recommended a sentence of ten years less time already served, which amounted to 7 years of incarceration for the child sex tourism crimes and other vicious crimes committed against Canadian prostitutes. Five of the seven years were for the sex crimes committed against the Cambodian girls²⁵.

Galati Prov. J., said that regardless of the child sex tourism legislation, the Crown in this case had certain "evidentiary issues" which would have been difficult for the prosecution to overcome had Bakker not agreed to plead guilty²⁶. Further, the constitutionality of the sex tourism laws was in question.

Kevin McCullough, Bakker's lawyer, would have challenged Canada's jurisdiction to prosecute for this type of crime because it took place outside of Canada. McCullough said, "When Canada starts to say it can police other countries in any form, in my view that sets off a problem in international relations, it offends charter rights and it offends the way Canada ought to be behaving²⁷."

McCullough is likely wrong in his analysis of child sex tourism legislation. Admittedly, there is a common law tradition where Canada avoids extraterritorial criminal jurisdiction²⁸. But part of the

23 *Ibid.* at [para 18]

24 *Ibid.* at [para 25]

25 *R. v. Bakker*. 2005 CarswellBC 1758. B.C. Prov. Court. [para 40]

26 *Ibid.* at [para 29]

27 CBCNews, "Canada's Sex Tourism Law Faces First" *CBC News* (7 September 2004), online: CBC News

<<http://www.cbc.ca/canada/story/2004/09/07/sextourism040907.html>>

28 Mary C. Hurley. Library of Parliament LS-263E, "Bill C-27 An Act to Amend the Criminal Code" (22 August 1996) at 13.

reason for this is that Canada does not want to be in a situation where other countries would exercise criminal jurisdiction for activities taking place in Canada²⁹. Department of Justice officials believe that the law would have a solid basis in International Law because the international community is united against sex crimes involving children³⁰. Canada's extraterritorial legislation can be used to protect some children from sexual exploitation abroad³¹.

b) Christopher Paul Neil

Headline news stories about Canadians committing sex crimes against children abroad have become a continual reminder of one of the most disturbing acts that violate children's rights. In 2007, an international man hunt was conducted to find Christopher Paul Neil of Maple Ridge, British Columbia, who was accused of sexually abusing young boys in Vietnam and Cambodia³². This was the end point of search that began in 2004, when the RCMP became the lead police agency in an international effort to find a man who kept appearing on the Internet engaging in sex crimes against children³³. Neil is accused of molesting at least 12 boys, and could face 20 years in prison if he is convicted in Thailand³⁴. In contrast to this, Neil could spend up to 10 years in prison if convicted in a Canadian court, depending on the precise nature and extent of the crime.

At the time that this paper was being written, the Canadian government was waiting to hear whether Thailand authorities will extradite Neil back to Canada to face charges. In one newspaper report, it was expected that Neil would be returned to Canada, "Because we now have the laws in place to prosecute and because the offender has been identified as a Canadian, he'll be brought back to

29 *Ibid.* at 14.

30 Yvan Roy. Standing committee on Justice and Legal Affairs, *Evidence*, (1 October, 1996) Meeting No. 46.

31 Specifically, cases where the child sex tourist is a Canadian.

32 Meagan Fitzpatrick, "Pedophile Suspect Urged to Surrender by Family" *The StarPhoenix* (17 October 2007) C10.

33 *Ibid.*

34 Bloomberg News, "Canadian Charged With Abusing Boys" *The StarPhoenix* (20 October 2007) D7.

Canada to face the penalties here³⁵.” If Neil is tried and convicted in Thailand, he could face up to twenty years in prison³⁶.

Does Canada really want Neil to be brought back to Canada to face prosecution? Kim Scanlan of the Toronto Police Child Exploitation Unit is confident in the effectiveness of Canada's ability to prosecute Neil³⁷. But there is a risk that a Canadian court would not be able to bring justice to Neil's case because of the evidential requirements for a conviction.

Given that at least some of the crimes took place in Thailand, authorities in that country would presumably be better suited to gather evidence, find and interview the victims, and then ultimately bring justice to Neil. Perhaps Canadian law enforcement agencies should be working with Thailand officials to prosecute Neil in Thailand rather than have Neil extradited back to Canada.

At this point, Canada's child sex tourism law should be considered a backup for times when foreign countries are unable or unwilling to prosecute, because the effectiveness of Canada's CC may be hindered by too many barriers. In writing about the advantages of prosecuting the child sex crime in the jurisdiction that the crime took place, Seabrook says, “Victims can more easily be located, witnesses and other evidence are available, and there are no language problems”³⁸.

c) Frank Mader

Only weeks after the search for Neil, another Canadian pedophile was making headlines. When

35 Kim Scanlan (Toronto Police Child Exploitation Unit), “Canadian Pedophile suspect could be brought back here to face charges” *City News* (16 October 2007), online: CityNews.ca <http://www.citynews.ca/news/news_15798.aspx>

36 Can Tran, “Christopher Paul Neil Was Tracked By Trace on Mobile Phone” *The Ground Report* (19 October 2007) online: Ground Report <<http://www.groundreport.com/article.php?articleID=2836594>>

37 Kim Scanlan (Toronto Police Child Exploitation Unit), “Canadian Pedophile suspect could be brought back here to face charges” *City News* (16 October 2007), online: CityNews.ca <http://www.citynews.ca/news/news_15798.aspx>

38 Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at 115

an eight year old boy was abducted in Thailand and forced to have sex older men, Canadian Frank Mader was accused of paying \$15 for sex with the boy³⁹. But this was not the first time Mader was a suspect for this type of crime, because in February of 2004 he was arrested in Cambodia and charged with molesting five boys aged 10 to 14⁴⁰. Five months later those charges were dropped.

This is another example of a case where justice might not be served if Mader is brought back to Canada to face charges under s. 7(4.1) of the CC. The logistics of Canadian detectives gathering evidence and prosecuting this case are extremely difficult. Canada's current approach to bringing men like Frank Mader to justice may be insufficient, and should not be relied upon⁴¹. Prosecution in the jurisdiction where the child sex crime took place is more likely to bring justice to this situation.

III. A Need to Stop the Canadian Sex Tourist

A. Avoiding the Issue

It's so easy for Canadians to push this issue out of our minds. Canadians are not accustomed to considering or thinking about the global responsibility to take whatever appropriate means needed to protect children from sexual exploitation. To illustrate this phenomenon, consider that not even one journal article has been focused on Canada's child sex tourism legislation since it was enacted over ten years ago. This is remarkable given the short lived fanfare and hype surrounding this law when it was first introduced. But this is perhaps not so surprising considering that Canada has achieved only one prosecution and conviction under this law⁴². Unfortunately, at this point there is not much for one to write about.

39 Meagan Fitzpatrick (CanWest News Service), "Thai Police Seek Second Canadian" *The StarPhoenix* (1 November 2007)

40 *Ibid.*

41 Ideas on how Canada's system can be made sufficient are explored below.

42 *R. v. Bakker*. 2005 CarswellBC 1758. B.C. Prov. Court.

B. The Limited Effectiveness of NGOs

International Justice Mission is the NGO that was responsible for the rescue of Panida in the story described above⁴³. This group's focus is on providing professional legal help to victims of injustice in places where legal representation is not an option for most people (i.e. nations living in poverty). This group is also directly involved in rescue efforts, relying on law enforcement and the justice system in the countries where the crime is taking place. The work of this NGO has been focused and effective in stopping child sex tourism.

But the long term effectiveness of this NGO is seriously limited if the steady flow of sex tourists from rich countries like Canada is not dealt with. Greed is a powerful motivating factor for child sex brothel owners, pimps, and whoever benefits from the tourism industry. Pressure by NGOs may only drive the sex trade further undercover. The child sex industry can shift from one nation of poverty to another as brothel owners and pimps figure out ways to make sure they always have access the sex tourists' \$15 payment⁴⁴.

Something needs to be done to stop the perpetrators from taking advantage of this situation. Specifically, rich western nations like Canada need to take appropriate measures to stop their citizens from committing sex crimes against children abroad. Through laws, bilateral and multilateral co-operation, and effective enforcement measures, Canada can do its part to at the very least prevent Canadians from contributing the problem.

Some NGOs focus on motivating governments to prevent their own citizens from traveling abroad to commit sex crimes against children. ECPAT (End Child Prostitution, Pornography and

43 "Rescue: Panida" *International Justice Mission*. (10 November 2007), online:
<http://216.128.18.195/IJMpdfs/IJM_Rescue.pdf>

44 Meagan Fitzpatrick (CanWest News Service), "Thai Police Seek Second Canadian" *The StarPhoenix* (1 November 2007)

Trafficking in Children) and Beyond Borders work to report on the situation as it stands, and make recommendations to countries like Canada for further prevention measures⁴⁵. There are several areas that these NGOs focus on and emphasize: 1. Travel industry accountability, 2. Enactment of Extraterritorial Legislation, and 3. Enforcement measures of that legislation.

Canada has s. 212 of the CC that can be used for travel industry accountability, and s. 7(4.1) of the CC is Canada's extraterritorial legislation. But Canada is definitely lacking in its enforcement of that legislation. Not only does Canada need trained law enforcement personnel to investigate s. 212 and s. 7(4.1) CC offenses, but also prosecutors trained and willing to use the CC to prosecute these crimes.

C. Contemplating a Proactive Approach to Detecting Canadian Pedophiles

If we truly understood the perspective of the pedophile, perhaps Canada could be proactive in preventing Canadians from committing this type of crime in the first place. Before the sex tourist leaves Canada, are there any indicators that point to the potential of someone committing sex crimes against children?

One professor listed thirteen indicators of typical pedophile behavior in his course syllabus⁴⁶. Some of these indicators included, 'likes making children feel like adults', or 'collector of sex toys or pornography'. Unfortunately, none of these indicators are things that authorities could screen for without intruding on privacy rights.

One academic paper says that 40% of child molesters, who were later diagnosed as having

45 Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at 115

46 Dr. Tom O'Connor, "Profiles and Indicators" *Jus. 415* (21 January 2006), online: North Carolina Wesleyan College <<http://www.apsu.edu/oconnort/3430/3430lect02a.htm>>

pedophilia, had molested a child under age twelve by the time they were fifteen years old⁴⁷. In light of this information, it may be possible to flag those known to have involvement in this sort of activity at a young age. Perhaps Canada could put travel restrictions on those persons in the same way that travel restrictions are put on those suspected of having connections to terrorism. The legality of such restrictions is definitely worth looking into.

If one looks at the profiles of notorious abusers of children for sexual purposes abroad, such as Donald Bakker, Christopher Neil, and Frank Mader, there is perhaps only one discernible pattern. These men traveled alone to areas of the world known as child sex tourism hot spots.

Suspicion based solely on the travelers destination country may be unfounded in many cases, considering that many people travel to child sex tourist hot spots because those areas are also popular for legitimate tourist activities. There are serious questions over the legality and logistics of Canada monitoring men traveling to places like Thailand, Cambodia, and the Philippines. Nevertheless, some degree of monitoring may be an appropriate measure necessary to stop Canadians from committing child sex crimes abroad.

IV. Canada's Legal Jurisdiction Under the Criminal Code

A. Canada's Legal Jurisdiction Defined by the Criminal Code

Section 6(2) of the CC says, “subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an Offense committed outside Canada”⁴⁸. While this section of the criminal code limits CC jurisdictional application, many other sections allow for an

47 Dr. Ryan C.W.H. and Dr. Richard C.W.H. “A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues” (2007) *Mayo Clin Proc.*, at 457-471.

48 Edward L. Greenspan and Marc Rosenberg, *Martens 2008 Annual Criminal Code* (Aurora:Canada Law Book, 2007) at 23

extension of jurisdiction in special circumstances. For example, s. 7(1) covers an Offense committed on a Canadian aircraft, s. 57 covers passport offenses, and s. 465(1)(a) covers conspiracy to commit murder outside of Canada. In total, there are twenty areas of exception to the general rule established in s. 6(2) of the CC. But there was no exception listed for sex crimes committed abroad before 1997.

B. Real and Substantial Link Test

But even in situations where there was no exception listed in the CC, a Canadian court could find that there was a “real and substantial link” between the crime that was committed and Canadian jurisdiction⁴⁹. The trier of fact will first consider all relevant facts that may give Canada a legitimate interest in prosecuting the offense⁵⁰. Next, there must be consideration as to whether there is anything in those facts that would offend international harmony⁵¹.

In the year 2000, a Canadian teacher in a position of trust sexually exploited his seventeen year-old Canadian student in Costa Rica⁵². The child sex tourism legislation could not apply because of a procedural condition in the criminal code⁵³, and the teacher apparently escaped prosecution. In a situation like this, Canada may still have jurisdiction. The fact pattern described should have met the “real and substantial link” test because both the accused and the victim were Canadian citizens. But prosecution for this case reportedly failed because Costa Rican authorities refused ask for a prosecution in Canada. Prosecution would only be requested if, “the victim was under 12, if the person was unable

49 *Ibid.* at 24.

50 *Ibid.*

51 *Ibid.* at 25

52 David Thompson, “Child Sex Tourism Legislation in Canada” *Beyond Borders*. (10 November 2007), online: <<http://www.beyondborders.org/Publications/Fact%20Sheet%20-%20CST3.pdf>>

53 s. 7(4.2) of the Criminal Code.

to resist and if violence or intimidation was used. None of these conditions were met"⁵⁴.

Two different human rights organizations say that the Costa Rica case involving two Canadians failed because of a loophole in the child sex tourism law⁵⁵. But regardless of the content of s. 7 of the CC back in 2000, prosecution should have been possible because of the 'real and substantial link' test. Under the first part of the test, Canada clearly had an interest in prosecuting the crime because both the victim and accused were Canadian citizens. Under the second part of the test, Canada's prosecution would not be consistent with the law in Costa Rica, because the victim was seventeen years old⁵⁶. But given the circumstances of the case, it is difficult to imagine why Costa Rica would be concerned given that both the accused and the victim were Canadians. This is a matter that shouldn't concern Costa Rica in the least, and international harmony should not be affected.

This case is an example of where Canadian prosecutors were perhaps too hesitant to prosecute. Even though there were perhaps concerns and uncertainties regarding prosecution, prosecutors should have taken a risk in an attempt to bring justice to this situation.

V. Development of Sex Tourism Legislation in Canada

A. Prosecution Under s. 212(1)(a) and s. 212(1)(g)

In a very limited fashion, the Criminal Code contemplated a sex tourism situation that might arise before child sex tourism legislation was enacted in 1997. According to Department of Justice officials at the time s. 7(4.1) of the CC was created, s. 212 of the CC already addressed the child sex

54 Roz Prober, "e-doc center" *The Human Rights Databank* (7 September 2000) online:

<<http://www.hri.ca/tribune/viewArticle.asp?ID=2574>>

55 Marina Jiminez, "Child sex tourism law fails first test: Teacher accused of molesting student in Costa Rica can't be charged" [*National Edition*] *National Post* (9 August 2000)

56 Anne McLellan. Standing committee on Justice and Human Rights, *Evidence*, (2 October, 2001) at 1725.

tourism issue indirectly⁵⁷. Section 212(1)(a) and 212(1)(g) would apply to prevent tour operators or travel agents from offering sex tours in or out of Canada⁵⁸.

PROCURING

s. 212(1)(a) Everyone who procures, attempts to procure or solicits a person to have illicit intercourse with another person, whether in or out of Canada.

s. 212(1)(g) Everyone who procures a person to enter or leave Canada, for the purpose of prostitution.

What is revealed from the standing committee discussion about travel agencies, is that travel agencies within Canada are not known to be a problem. Instead, it is travel agencies abroad that are sometimes guilty of arranging sex tours⁵⁹.

People who organize child sex tours are not part of 'travel agencies' in the traditional sense of the phrase. Organizations that promote child sex tourism tend to be informal networks of people (not for profit), or groups who use mainstream tourism for carrying out their activities⁶⁰. For example, in one instance that came to the attention of Julia O'Connell, an 'ex-pat' German provided the information and lodging for prospective child sex tourists through an informal network of friends.

Travel and the Single Male (TSM) is an American organization that promotes sex tourism⁶¹. The organization has been in operation for the last 13 years with approximately 5000 members (each paying \$20 per month or \$50 for the year). On the web-site members have access to a guidebook,

57 Mary C. Hurley. Library of Parliament LS-263E, "Bill C-27 An Act to Ammend the Criminal Code" (22 August 1996) at 10.

58 Yvan Roy. Standing committee on Justice and Legal Affairs, *Evidence*, (1 October, 1996) Meeting No. 46.

59 *Ibid.* at 1705.

60 Julia O'Connell Davidson. *Children in the Global Sex Trade*. (Cambridge: Polity Press, 2005) at 129.

61 *TSM Travel Adult Website 2007* (10 November 2007), online: <<http://www.tsmtravel.com/2007/>>

pictures, video, and reports from other members. The reports are organized by geographic location, starting with Asia.

The reports include information on Thailand, Cambodia, and the Philippines, which are coincidentally (or perhaps not) child sex tourism hot spots. Julia O'Connell interviewed several members from this group and found out that some members interested in child sex tourism would make the Dominican Republic their destination of choice⁶². It was also interesting to find out during the interview that a police officer from the United States who is involved with the group does not consider someone who has sex with an 11 year-old to be a pedophile. But an age, "...like 5, 6, 7" should be considered pedophile activity⁶³.

Information from the message boards make it clear that some members of this site are promoting child sex tourism⁶⁴. Davidson says that these organizations tend to promote child sex tourism, even when the organizational mandate says that they prohibit this type of promotion⁶⁵.

If there are Canadians promoting child sex tourism on this web-site, law enforcement authorities can investigate and charge these men under s. 212(a) and s. 212(g) of the CC. This would be a good starting point for Canadian authorities efforts to stop Canadians from exploiting children for a sexual purpose abroad.

B. The Effect of s. 7(4.1) and (4.3) of the Criminal Code.

Section 7 of the CC deals with acts or omissions outside of Canada that are an exception to the general rule found in s. 6 of the CC. This section covers aircraft (s. 7(1)), ships (7(2.1)), a crime

62 Julia O'Connell Davidson. *Children in the Global Sex Trade*. (Cambridge: Polity Press, 2005) at 131.

63 *Ibid.*

64 *Ibid.* at 129.

65 Julia O'Connell Davidson. *Children in the Global Sex Trade*. (Cambridge: Polity Press, 2005) at 129.

against an 'internationally protected person' (s. 7(3)), nuclear material (s. 7(3.6)), and a variety of other possibilities. Section 7(4.1) was an 'add-in' section of the CC that specifically deals with sex crimes committed by Canadians abroad, asserting Canada's jurisdiction over these matters.

Canada's sex tourism legislation was added to the CC in 1997⁶⁶, which says⁶⁷:

s. 7 (4.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offense against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

s. 7 (4.3) Proceedings with respect to an act or omission deemed to have been committed in Canada under subsection (4.1) may only be instituted with the consent of the Attorney General.

Originally, 7 (4.1) of the Criminal Code was limited to the commercial exploitation of children (i.e. Prostitution). However, Rosalind Prober believed that this approach was too narrow and the law should apply to all forms of sexual exploitation against children committed abroad⁶⁸.

Even in the earliest stages of the development of this law, Bill C-27 was described as proposing a "...small and insignificant step..." toward resolving this complex problem⁶⁹. This was largely due to concerns over the enforceability of this legislation. The proposed law looked to many like nothing more than a symbolic gesture, and would provide a limited impact on the child sex tourism industry.

To illustrate the obvious limitations of this law, consider that the Canadian Department of Foreign Affairs would not be conducting its own investigations of child sexual abuse overseas and would only launch a prosecution if a foreign government provided it with enough evidence to support a

66 David Goetz and Gerald Lafreniere. Library of Parliament, "Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts." (30 September 2002).

67 s. 7 (4.1) of the Criminal Code.

68 David Thompson, "Child Sex Tourism Legislation in Canada" *Beyond Borders*. (10 November 2007), online: <<http://www.beyondborders.org/Publications/Fact%20Sheet%20-%20CST3.pdf>>

69 Mary C. Hurley. Library of Parliament LS-263E, "Bill C-27 An Act to Ammend the Criminal Code" (22 August 1996) at 24.

charge⁷⁰. This 'wait and see' approach to child sex tourism was controversial, and to some signaled a lack of commitment to stopping child sex tourism.

Nevertheless, the child sex tourism legislation extended the jurisdiction of a number of criminal code provisions related to sex crimes committed against children. In this sense, s. 7(4.1) of the CC was a positive step forward. Now Canadian law enforcement personnel need to learn the implications of s. 7(4.1) of the CC and how it relates to child sex tourism acts. This is necessary for the CC to be useful in Canada's efforts against the problem.

Section 7(4.1) lists eleven sections of the CC that Canada will prosecute if the crime is committed outside of Canada. These include:

SEXUAL INTERFERENCE

151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years.

The key section in regards to child sex tourism legislation is the age component of s. 151 of the CC. The application of this law applies to children less than fourteen years old, which can be proved under section 658. Section 658 of the CC requires proof of age through the victims testimony (658(1)), parents testimony (658(2)), birth or baptismal certificate (658(3)(a)), or an entry record or an incorporated society record created when a person comes to Canada (658(3)(b)). In the absence of this information, the trier of fact can receive and act on any other information provided (658(4)), or infer the age of a child or young person from his or her appearance (658(5)).

In a situation where the perpetrator takes video of himself committing a crime against children

⁷⁰ David Thompson, "Child Sex Tourism Legislation in Canada" *Beyond Borders*. (10 November 2007), online: <<http://www.beyondborders.org/Publications/Fact%20Sheet%20-%20CST3.pdf>>

abroad, it can be extremely difficult to determine who the victim is, and impossible to determine with any degree of certainty the age of the child. But s. 658(5) of the CC will allow the trier of fact to make a determination on the child's age based on that child's appearance. Presumably, in some cases it may be possible to make an age determination just from looking at the video⁷¹.

Age determination may be important in a situation where law enforcement has found videotaped evidence only with no other corroborating evidence (see 'Corroboration Not Required' section below).

Another key area of s. 151 of the CC is that the touching must have a 'sexual purpose'. But the phrase here is not defined, which will likely allow the trier of fact some discretion in the matter. But the prosecution must have evidence to prove that there was a sexual purpose⁷². Even when the sexual interaction is suggested by the child, an accused who intends to engage in sexual interaction and follows through with that intention is deemed to have touched the child⁷³.

INVITATION TO SEXUAL TOUCHING

152. Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of fourteen years.

This section is similar to section 151, except in this instance it refers to a situation where the child is the one touching the accused either directly or indirectly. The case law for this section says

⁷¹ For example, in the Bakker case, the judge could have fairly concluded and known that the seven year old girl in the video was less than fourteen years old based on the appearance of the child.

⁷² Edward L. Greenspan and Marc Rosenberg, *Martens 2008 Annual Criminal Code* (Aurora:Canada Law Book, 2007) at 289.

⁷³ *R v. Sears* (1990), 58 C.C.C. (3d) 62 (Man. C.A.)

that 'incitement' requires some positive act by the accused to cause the complainant to engage in the touching; therefore, failure to resist is not inciting⁷⁴. What happens if a person enters a place where he is approached by young girls who begin performing sex acts on him? If it can be established that he simply failed to resist and took no positive steps to make that situation happen, then he cannot be charged under s. 152 of the CC.

This provision of the CC may be relevant to child sex tourism cases. Much of the literature about child sex tourism makes a distinction between the sex tourist who travels with the intent to have sex with children, and the 'situational sex tourist' who just happens to be in the wrong place at the wrong time⁷⁵. If the situational sex tourist takes positive steps toward sexual interaction with a child, he can still be charged under s. 152 of the CC.

SEXUAL EXPLOITATION OF PERSON WITH DISABILITY

153. Every person commits an Offense who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person...

(1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

- (a) the age of the young person*
- (b) the age difference between the person and the young person;*
- (c) the evolution of the relationship; and*

⁷⁴ *R. v. Rhynes* (2004), 186 C.C.C. (3d) 29.

⁷⁵ Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at 115.

(d) the degree of control or influence by the person over the young person.

(2) In this section, “young person” means a person fourteen years of age or more but under the age of eighteen years.

Some of the terms in this provision of the CC, such as “position of trust or authority”, are not defined. The Report of the Committee on Sexual offenses Against Children and Youths (the “Badgley” Report), provided the basis for the enactment of the law⁷⁶. In that report, a person in a position of trust included a parent, grandparent, foster parent, teacher, baby-sitter, group home worker, employer, etc.

This law is possibly applicable to the Christopher Neil case, because he was a teacher. If it turns out that any of the children in the video are Neil's students, and age seventeen or younger, Neil can be charged under s. 153 because he was in a position of trust and authority.

This law is also applicable to the Costa Rican case where the Canadian school teacher touched a seventeen year-old Canadian student, because he was in a position of trust and authority. If this same case were to come before the court today, it could proceed under s. 7(4.1) of the CC because of the removal of the s. 7(4.2) procedural condition⁷⁷.

INCEST s. 155

ANAL INTERCOURSE s. 159

⁷⁶ Edward L. Greenspan and Marc Rosenberg, *Martens 2008 Annual Criminal Code* (Aurora:Canada Law Book, 2007) at 293.

⁷⁷ This was the condition that required officials in the country where the crime took place to request a prosecution in Canada. (s. 7(4.2) of the Criminal Code Repealed)

BESTIALITY s. 160(2) and (3)

Sub-section (3) provides a special provision of a person commits bestiality in front of a person under age of fourteen years, or incites a person under age fourteen years to commit this crime.

DEFINITION OF “CHILD PORNOGRAPHY”

s. 163.1 (2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty...

This provision of the criminal code will be particularly relevant for the Christopher Neil case, because he distributed Internet pornographic videos depicting his crime. Canada has the jurisdiction to prosecute this crime under s. 7(4.1) because Neil is a Canadian.

PARENT OR GUARDIAN PROCURING SEXUAL ACTIVITY s. 170

This section refers to a parent or guardian who would set up a situation where his or her child under the age of eighteen would engage in any sexual activity prohibited in the CC.

HOUSEHOLDER PERMITTING SEXUAL ACTIVITY

s. 171 Every owner... who knowingly permits a person under the age of eighteen years to resort to or be in or on the premises for the purpose of engaging in any sexual activity prohibited by this Act is guilty...

Here the householder has an obligation to make sure that any sexual activity prohibited in the criminal code is not taking place in their home. This is important, because in one situation described by Julia O'Connell, a man from Germany who was in danger of being prosecuted for sex crimes

purchased a home in the Dominican Republic⁷⁸. He would allow men from other countries (a teacher from Canada was specifically mentioned in this instance) to stay in his home, and bring young boys back to the home so that the perpetrator could commit sexual acts against the boy⁷⁹.

If the owner of the home was from Canada rather than Germany, he could be extradited back to Canada, and then be charged under s. 171 of the CC.

INDECENT ACTS s. 173

PROCURING

s. 212(4) Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of eighteen years is guilty...

This is essentially a prostitution provision in the criminal code that can be used to stop crimes against children caught in the sex trade. This is significant in the area of child sex tourism, because Canadians like Donald Bakker have taken advantage of child prostitutes.

The age of the child in this instance is of particular importance, because there is a lot of room for error if the trier of fact needs to make a determination about age if the child shown in the evidence. For example, if the child depicted in videotaped evidence is only twelve, the trier of fact should have no difficulty in determining that the child is under the age of eighteen through the appearance of the child alone.

An important case for this area of law is from the Saskatchewan Court of Appeal in *R. v.*

⁷⁸ Julia O'Connell Davidson. *Children in the Global Sex Trade*. (Cambridge: Polity Press, 2005) at 129.

⁷⁹ *Ibid.*

*Slater*⁸⁰. It says that if the accused provides a defense that he was unaware of the child's age at the time of the crime, that defense must consist of something more than the accused posing a mere question about age to the victim. In the absence of any other efforts made to determine age, the accused will be determined to have not taken reasonable steps and can be found guilty under this section.

C. A Loophole in s. 7(4.2) of the Criminal Code

The intent of the s. 7(4.1) legislation was to stop Canadians from committing sex crimes in other countries. The force of this law was further qualified by s. 7(4.2) and s. 7(4.3), which required the consent of the country in which the crime took place, and the consent of Canada's Attorney General before prosecution could proceed. This was considered by some human rights groups to be a 'loophole' that prevented a Canadian teacher from being prosecuted when he molested his 17 year-old Canadian student in Costa Rica, because the teacher's acts were not considered to be a crime by Costa Rican authorities⁸¹.

The loophole in the law is known as the principle of "double criminality", which requires that the crime committed abroad must be a crime in both countries⁸². This condition was removed from Canada's Criminal Code in 2002⁸³. This amendment easily passed in the House of Commons with no debate⁸⁴.

80 *R. v. Slater* (2005), 201 C.C.C. (3d) 85

81 David Thompson, "Child Sex Tourism Legislation in Canada" *Beyond Borders*. (10 November 2007), online: <<http://www.beyondborders.org/Publications/Fact%20Sheet%20-%20CST3.pdf>>

82 Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at 5.

83 David Thompson, "Child Sex Tourism Legislation in Canada" *Beyond Borders*. (10 November 2007), online: <<http://www.beyondborders.org/Publications/Fact%20Sheet%20-%20CST3.pdf>>

84 David Goetz and Gerald Lafreniere. Library of Parliament, "Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts." (30 September 2002).

D. Evidence Requirements

CORROBORATION NOT REQUIRED

274. If an accused is charged with an Offense under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Corroboration is any evidence that would support the sexual complainant's evidence. The former common law position was that corroboration was necessary when a sexual complaint was made⁸⁵. But now corroborating evidence is not a requirement.

Is it possible to have a successful prosecution with videotaped evidence alone, with no corroboration? There is no precedent in Canadian case law for a prosecution taking place where the identity of the victim is unknown. However, according to Norman Zlotkin, it may be possible to prosecute with the video evidence alone, and no victim testimony⁸⁶. If the trier of fact was satisfied beyond a reasonable doubt that accused was guilty of a sex crime as defined in the criminal code, then it is possible that a conviction could take place with the video evidence alone because no corroborating evidence is required. A brave prosecutor should test this theory some day.

In the United States, the civil justice system has implemented a polity that does not require the victim to travel to the United States for the trial⁸⁷;

Under U.S. Law, it is a crime for an American to sexually abuse any child under the age of 18 in a foreign country [18 U.S.C. Para 2423]”. The same law allows the victim “the right to file a civil action against the perpetrator in the United States District Court [18 U.S.C. Para2255].

85 *R. v. Camp* (1997), 36 C.C.C. (2d) 511 (Ont. C.A.)

86 Interview of Norman Zlotkin by Evan Jenkins (23 November 2007) Professor of Criminal Law at the University of Saskatchewan.

87 David Replogle, “Can Civil Action Stop Child Sex Tourism and Bring Justice to Victims” *Beyond Borders*. (Fall 2006) online: <<http://www.beyondborders.org/Publications/BB%20newsletter%20Fall06.pdf>>

The minimum amount of damages that can be awarded to the child is 150,000 plus attorneys' fees and court costs. There is no requirement that the victim travel to the U.S.A. For a claim to be filed. A prosecution / conviction is not necessary for a successful civil claim. U.S. Lawyer David Replogle got a “substantial settlement” in 2005 for a civil claim brought on behalf of 20 victims of child sex tourism in Puerto Vallarta, Mexico.

The 'substantial settlement' in the 2005 civil claim was seven million dollars. Settlements like this could provide a lot of motivation for lawyers to prosecute child sex tourism offenses.

CHILDREN'S EVIDENCE

659. Any requirement whereby it is mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child is abrogated.

The former common law position was that the trial judge was required to warn the jury as to the danger of convicting the accused on the evidence of a child⁸⁸. This section of the Criminal Code takes away this requirement. The trier of fact can consider the complaint of the child victim and weigh the credibility of the testimony. The judge still has discretion when reviewing the evidence to discuss the weight the Jury might give to that evidence⁸⁹.

It was noted in *R. v. B. (G.)* that young children may not be able to say precisely where and when the abuse took place, but the trier of fact cannot infer from this that the child was mistaken as to what happened to them and who did it⁹⁰. Given the language limitations in the case of a child from another country, the testimony of those children must be viewed in a way that takes all the relevant factors into account. One of these factors, for example, would be to consider the age of the child with reference to his or her level of mental development.

88 Edward L. Greenspan and Marc Rosenberg, *Martens 2008 Annual Criminal Code* (Aurora:Canada Law Book, 2007) at 1204.

89 *R. v. Saulnier* (1989), 48 C.C.C. (3d) 301

90 *R. v. B. (G)* [1990] 2 S.C.R. 3

In making a decision on credibility of the child complainant, the trier of fact will likely have to deal with language limitations and cultural differences. The child's testimony would likely require a translator. In relying on the translation and dealing with cultural differences, a finding of credibility would be difficult. The difficulties associated with such testimony may make it impossible for the trier of fact to find the accused guilty beyond a reasonable doubt.

486.2 ...the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years... order that the witness testify outside the court room... unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

486.2(7) A witness shall not testify outside the court room under subsection (1), (2), (4) or (6) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

Based on this section of the CC, it may be possible for the child complainant to give testimony (via television) against the accused without leaving his or her country. This is significant, because the logistics of removing a child from their country so that they can testify in Canada could be impossible or prohibitively expensive.

Admittedly though, the purpose of this section of the CC appears to be for a witness who does not wish to face the accused because of the witness' age or other reasons. However, the judge can take into account the nature of the allegations and the circumstances of the case in determining whether an order should be made for the witness to testify outside of court⁹¹. Perhaps it is necessary for Parliament

91 *R. v. Levogiannis*, [1993] 4 S.C.R. 475

to extend this section of the criminal code with the purpose to give children from other countries the chance to testify against the accused, without leaving their own country.

E. Enforceability of s. 7(4.1) of the Criminal Code

Extraterritorial legislation designed to stop Canadians from committing sex crimes abroad is extremely difficult to enforce. This is largely due to the evidence requirement needed to prosecute child sex crimes. One law professor from Australia stated:

The enactment of such legislation will be an important symbolic and political statement. However, there is real danger that, if the legislation is not accompanied by effective enforcement measures at the national and international level, its promises could turn out to be rather hollow. Prosecuting a sexual offence where a child has been the victim is a difficult enough task in any event; when it is further complicated by the problems of obtaining evidence in a foreign country, ensuring the willingness of witnesses to testify in that country where proceedings are conducted in a foreign language, that task becomes even more onerous. Furthermore, the reasons for the lack of effective enforcement of local laws in certain countries may also result in a lack of the close law enforcement co-operation needed to put together a case of this sort⁹².

To illustrate the problems with evidence gathering, consider the Donald Bakker case.

According to Dateline, Canadian police found a video tape which depicted Bakker engaged in sex acts with young girls⁹³. It was later known that some of those girls were as young as age seven. With the video footage alone, police were unwilling and perhaps unable to proceed with a s.7(4.1) CC charge.

When Canada's approach to this situation was being debated in the House of Commons, critics of this law immediately pointed to three areas in need of improvement, all of them directly related to evidence gathering issues⁹⁴;

92 *House of Commons Debates*, No. 1535 (10 June 1996) at 3572 (Hon. Paul Forseth).

93 "IJM in the News" *International Justice Mission* (10 November 2007), online:

<<http://www.ijm.org/NETCOMMUNITY/Page.aspx?pid=706&srcid=178>>

94 Mary C. Hurley. Library of Parliament LS-263E, "Bill C-27 An Act to Amend the Criminal Code" (22 August 1996) at 10.

1. Enhanced Resource Allocation Required for Effective and Consistent Implementation
2. Evidence-gathering abroad
3. Mechanisms for obtaining complainants' testimony for the purpose of domestic court proceedings.

But difficulties with child sex tourism may not be limited to evidence gathering issues. Jeremy Seabrook says that in practice, there are a variety of barriers to extraterritorial legislation to prevent child sex tourism. Some barriers have been questions over the validity of the evidence, child victims being treated insensitively, confusion over the role of NGOs and law enforcement agencies, communication between the countries, cultural attitudes, and inadequate resources⁹⁵.

Making Canada's sex tourism legislation effective and enforceable is clearly a complex and difficult task that will take many years to achieve.

V. The Need for International Cooperation

A. Convention on the Rights of the Child

There is virtually a worldwide commitment to fight against the exploitation of children for a sexual purpose. This commitment extends even to countries that are known for being child sex tourism hot spots⁹⁶. Article 34 of the United Nations' Convention on the Rights of the Child says,

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- a) The inducement or coercion of a child to engage in any unlawful sexual activity
- b) The exploitative use of children in prostitution or other unlawful sexual practices
- c) The exploitative use of children in pornographic performances and materials⁹⁷.

⁹⁵ Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at 1.

⁹⁶ Thailand and Cambodia have both ratified the Convention on the Rights of the Child.

⁹⁷ “Convention on the Rights of the Child” *Office of the United Nations High Commissioner for Human Rights* (2

This convention has been signed by 140 countries. The implementation of laws designed to stop the sexual exploitation of children has been the standard response to Article 34 by most countries⁹⁸. Canada ratified this convention on May 28th, 1991. In 1997, Canada's sex tourism legislation was enacted which added s. 7(4.1), (4.2), and (4.3) to the Criminal Code, which might be seen as Canada's effort to take 'appropriate national measures' as stated in the convention.

But Canada's efforts to take appropriate 'bilateral and multilateral measures' is unclear. Co-operation with other countries is an important component of Article 34, and is necessary for enforcing s. 7 of the criminal code. Specifically, information sharing and evidence gathering would be extremely difficult without appropriate 'bilateral and multilateral measures'. In contrast to Canada, other countries have made clear efforts in this area. For example, liaison officers from Sweden, Norway, Australia, and the United States are working to enforce sex tourism legislation in sex tourism hot spots, such as Thailand⁹⁹. Perhaps Canada should work with these countries to stop child sex tourism.

B. Appropriate Bilateral Measures

One bilateral effort Canada has made was to work with officials in Cambodia to gather evidence for the prosecution of Donald Bakker (The only person to be tried and convicted under Canada's sex tourism legislation)¹⁰⁰. This co-operation was necessary for Canadian detectives to gather the evidence needed for a successful prosecution in Canada¹⁰¹. Another area that Canada is taking initiative is in

September 1990) online: <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>

98 Canada's legal response came in the form of s. 7(4.1), (4.2) and (4.3) of the Criminal Code.

99 David Thompson, "Child Sex Tourism Legislation in Canada" *Beyond Borders*. (10 November 2007), online: <<http://www.beyondborders.org/Publications/Fact%20Sheet%20-%20CST3.pdf>>

100 CBCNews, "Vancouver Sex Crimes Officers Could be Stationed in Cambodia" *CBC News* (18 August 2006), online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2006/08/18/bc-sex-crime.html>>

101 *Ibid.*

the international effort to stop the spread of child pornography on the Internet. Canadian law enforcement officials were in charge of co-ordinating the international child pornography investigation that led to the arrest of Christopher Neil¹⁰².

Canada's bilateral measures to prevent the sexual exploitation of children thus far are a good start in the right direction, but those efforts have not gone far enough. Canada needs to make more effort by way of the sharing of information with other countries and evidence gathering abroad.

To illustrate the problem with information sharing, consider the situation detectives found themselves in when they found videotape evidence of Donald Bakker committing sexual offenses against very young girls. At first, the detectives believed that the child victims were somewhere in Southeast Asia, but they had no means of narrowing their search beyond this assumption¹⁰³. What these detectives needed was a way to share images and other information they had with other countries and NGOs in an effort to find the victims.

Detective Ronald Bieg, who was involved with the Bakker case, recognizes the importance of Canada's involvement in evidence gathering efforts. Bieg said that the Vancouver police department is considering sending two full time police officers to Cambodia to investigate sex crimes against children¹⁰⁴. Bieg said, "If we are going to be laying charges in Canadian courts, we have to make sure that evidence is gathered in a manner that is acceptable to them"¹⁰⁵. The idea of posting officers overseas to conduct investigations is an option that would be consistent with the commitments Canada made in the United Nations Convention on the Rights of the Child.

102 Meagan Fitzpatrick, "Pedophile Suspect Urged to Surrender by Family" *The StarPhoenix* (17 October 2007) C10.

103 "IJM in the News" *International Justice Mission* (10 November 2007), online:

<<http://www.ijm.org/NETCOMMUNITY/Page.aspx?pid=706&srcid=178>>

104 CBCNews, "Vancouver Sex Crimes Officers Could be Stationed in Cambodia" *CBC News* (18 August 2006), online:

CBC News <<http://www.cbc.ca/canada/british-columbia/story/2006/08/18/bc-sex-crime.html>>

105 *Ibid.*

It is interesting that a municipal police department needs to take it upon themselves to better fulfill a commitment that the federal government made in the Convention on the Rights of the Child. Presumably, Vancouver is not the only place in Canada that has people exploiting children for a sexual purpose in countries like Cambodia. Instead of sending Vancouver police, the federal government should send RCMP officers to investigate. This would classify as an appropriate bilateral measure where RCMP officers could learn to work with officials from Cambodia to stop sex tourism and gather evidence to prosecute Canadians.

C. Appropriate Multilateral Measures

Some people may argue that Cambodia is not the only place where Canadians are committing sex crimes against Children, but it is unrealistic to have officers posted in every vulnerable country in the world. However, this is a situation where Canada's commitment to take appropriate multilateral measures is relevant. Canada needs to work with countries like the United States and Australia make sure that areas of the world are covered with personnel who are committed to stopping sex crimes against children. These personnel will also need to know the basics of the evidentiary requirements in Canada to assist in the prosecution of Canadians who commit these crimes.

D. Efforts to Gather Evidence Abroad

The United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography was created to expand on some of the provisions in the Convention of the Rights of the Child, including a clarification of Article 34. This protocol came into force in January of 2002. Canada has also ratified this optional protocol.

Some of the highlights of this protocol include¹⁰⁶:

Article 3: Each state party will ensure that at a minimum ensure that the sexual exploitation of children will be covered under its criminal law.

Article 6: Each state party will commit to assisting in the evidence gathering process for prosecution of crimes against children.

While Canada has been successful in addressing the sexual exploitation of children in its criminal law, Canada has certainly failed under Article 6 of the optional protocol.

The meaning of this article is open to interpretation. For example, one might believe that this article only requires Canada to assist in evidence gathering when sex crimes take place under Canadian jurisdiction. But many western nations have responded much differently by actively gathering evidence in areas outside their traditional jurisdiction for the purpose of prosecuting crimes that have taken place abroad.

Canada needs to come along side other nations and follow their example by posting law officers to work with other nations and contribute to the global evidence gathering efforts. If sex tourism hot-spots already have officers who are qualified and capable of gathering evidence for Canadian courts, then Canada should focus its efforts on creating a database and training program for greater co-operation.

E. Other International Conventions and Their Limitations

Other conventions include the Worst Forms of Child Labour Convention, 1999, which says in Article 3¹⁰⁷:

¹⁰⁶ “ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography” *Office of the United Nations High Commissioner for Human Rights* (18 January 2002) online:

<<http://www.ohchr.org/english/law/crc-sale.htm>>

¹⁰⁷ “Worst forms of Child Labour Convention” *General Conference of the International Labour Organization* (17 June

For the purposes of this Convention, the term "the worst forms of child labour" comprises...
 (b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;....

Canada also agreed to other conventions, including the August 1996 World Congress Against Commercial Sexual Exploitation of Children, the 1993 United Nations Declaration on the Elimination of Violence Against Women, and the 1995 platform for action of the Fourth World Conference on Women.¹⁰⁸ All three of these conventions call on nations to take action to help stop the child sex tourism problem.

There was widespread support for the conventions from most countries throughout the 1990s¹⁰⁹. ECPAT's efforts were welcomed all over the world, and countries adopted the notion that, "what was not tolerated at home should not be tolerated abroad".¹¹⁰ Western nations began the process of creating laws to punish their own nationals for committing sex crimes against children abroad. Before these laws were enacted, there was very little that could be done to bring justice to the child sex tourist. At one time, many countries didn't pay attention to the injustice taking place, and didn't understand their own countries connection to problem¹¹¹. The effectiveness of the movement for action is largely due to the virtual world wide consensus that the exploitation of children for sex is inherently wrong.

Canada can continue to agree to United Nations conventions for the next fifty years. But mere promises are not enough to save the children being victimized every day by sex tourism crimes. Canada must pay attention and take action to assist in the international efforts to stop the exploitation

1999) online: <<http://www.ohchr.org/english/law/childlabour.htm>>

108 Yvan Roy. Standing committee on Justice and Legal Affairs, *Evidence*, (1 October, 1996) Meeting No. 46.

109 Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at ix.

110 Jeremy Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extraterritorial Legislation*. (New York: Zed Books, 2000) at xi

111 Julia O'Connell Davidson. *Children in the Global Sex Trade*. (Cambridge: Polity Press, 2005) at 129.

of children abroad. At the very least, there must be efforts to stop Canadians from committing these crimes.

Conclusion

Rich Western nations like Canada must take action to stop the flow of child sex tourists to poor countries. Children's lives all over the world are being impacted and presumably destroyed as they are raped by child sex tourists. From a purely moral and ethical standpoint, everything that can be done must be done to save these children.

Given the complexity of the child sex and exploitation issue, the approach of using laws and enforcement measures is too simplistic for permanent long term results. But a planned and reasoned approach to specifically deal with the sexual exploitation of children abroad using extraterritorial legislation can nevertheless be considered a necessary step to achieve an ultimate objective. At the very least, Canada is obligated to take appropriate measures to prevent Canadian citizens from contributing to the problem. Every dollar that a Canadian child sex tourist spends on the sexual exploitation of a child is a dollar directly funding the continuance of this type of activity.

Canada's sex tourism law is on the right track, and provides plenty of opportunity for the prosecution of Canadian child sex tourists. But in the first 10 years of this Law coming into force, only one conviction has taken place. And the conviction was by no means a sure thing. Had it not been for the accused brazenly creating video taped evidence of his crimes and admitting to the charges, a conviction would have been hard to come by. There are many barriers to prosecuting Canadians for child sex crimes committed abroad.

Nevertheless, prosecutors must start taking more risks in using s. 7(4.1) of the CC to prosecute.

The fact that there is virtually no precedent for the law being used to apply to a fact pattern that may arise should not be a deterrent to prosecution. A more aggressive approach and commitment to the prosecution of these crimes will at the very least compel some child sex tourists to plead guilty rather than risk a trial and a harsher sentence. In the alternative, the prosecution will provide a 'test case' that can be used to determine the strength and weaknesses of the CC provisions for future reference and perhaps changes.

An excellent starting point would be to assign law enforcement officials to web-sites like 'Travel and the Single Male' to determine if there are any Canadians actively promoting child sex tourism and can be charged under s. 212 of the CC. Next, Canada needs to begin to coordinate their efforts with other Western nations for evidence gathering and information sharing purposes abroad. Finally, Canada needs to figure out what appropriate measures can be taken to empower countries where child sex tourism takes place crack down on the injustice. Using the legal system from the country where the crime took place is preferable to trying to rely on Canada's CC because of the barriers to prosecution.

The child sex tourism problem is overwhelming, but perhaps not hopeless. Section 7(4.1) of the CC is an important step the right direction. Through further efforts by Canada and International leaders, perhaps child sex tourism can become an unusual occurrence rather than the norm. There is no quick, easy, or simple solution. But whatever efforts are made, let them not be something that we do today and then forget about for the next ten years. Child sex tourism demands our constant attention until real progress is made. The rights of children all over the world depend on this.