

**IN THE SUPREME COURT OF CANADA  
(On Appeal from the Alberta Court of Appeal)**

BETWEEN:

CRIAG BARTHOLOMEW LEGARE

Appellant  
(Respondent)

- and -

HER MAJESTY THE QUEEN (ALTA.) (CRIMINAL) (BY LEAVE)

Respondent  
(Appellant)

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**FACTUM OF THE INTERVENER,  
BEYOND BORDERS INC.**

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**PART I: STATEMENT OF FACTS**

1. The Interveners accept the statement of facts made by the Respondent.

**PART II: QUESTION IN ISSUE**

2. The Interveners accept the question in issue made by the Respondent.

## PART III: STATEMENT OF ARGUMENT

### A. Use of International Child Law as Interpretative Tool for Domestic Law

3. At its core the issue in this case is one of legislative interpretation. Specifically, the question put before the Supreme Court of Canada is whether or not the Trial Judge erred in interpreting section 172.1(1)(c) of the *Criminal Code* to include the present intention to “lure” a child. The Court of Appeal found that the Trial Judge did in fact err and stated that it need only be proven that an accused engaged in communicating over the Internet in a manner wherein the accused’s purpose was to facilitate a designated offence, however far off or unlikely. The Respondent of the Court of Appeal matter disagrees with this decision.
4. The Appellant and Respondent both explore the issue of statutory interpretation in their materials. Reference is made to the Federal *Interpretation Act* and jurisprudence from the Supreme Court of Canada that reviews the treatment of statutory interpretation since, approximately, 1992.
5. The Interveners contend that this Honourable Court has an obligation to interpret domestic legislation in a manner that is consistent with international law. Specifically, in this instance the legislation must be interpreted through the lens of international child law.
6. The necessity to interpret the *Charter* in conformity with international human rights law has been affirmed by the Supreme Court of Canada on previous occasions.<sup>1</sup> The use of international child law as an interpretative tool for domestic law has also been explored by the Supreme Court of Canada, both within a *Charter* challenge<sup>2</sup> and outside of the traditional *Charter* analysis.<sup>3</sup>
7. International jurisprudence supports the notion of interpretation of domestic law in keeping with a State’s international requirements. Canada is a party to the

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<sup>1</sup> *Slaight Communications Inc. v. Davidson*, [1989] S.C.R. 1038

<sup>2</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2

<sup>3</sup> *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

*Convention on the Rights of the Child, 1989* and the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002*. The *Vienna Convention on the Law of Treaties, 1969*<sup>4</sup> expressly forbids State parties from invoking the provisions of its internal law as justification for its failure to perform the requirements articulated in a treaty.<sup>5</sup>

8. The Interveners submit that when determining the language of a *Criminal Code* provision that *prima facie* intends to protect Canadian children, this Honourable Court must heed to obligations beyond the *Charter*. In this instance, the “luring the child” offence must be understood in a way in which the child would be the most protected.

#### **B. International Child Law and Internet Luring**

9. International law is not confined to conventions and treaties. The *Statute for the International Court of Justice, 1945*<sup>6</sup> explains that the International Court of Justice, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various

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<sup>4</sup> The *Vienna Convention on the Law of Treaties* is in force since 27 January 1980 and has 108 parties (as of 15 December 2008). The opinion of the International Court of Justice, together with the relatively high number of parties to the Convention, suggests that the instrument states the current general international law of treaties. This is also confirmed by the fact that its substantive provisions were by consensus copied into the *Vienna Convention on the Law of Treaties, 1986* between States and international organizations or between international organizations.

<sup>5</sup> *Ibid*, Article 27.

<sup>6</sup> The *Statute of the International Court of Justice, 1948* is annexed to the *Charter of the United Nations*, of which it forms an integral part. The main object of the Statute is to organize the composition and the functioning of the Court. The Statute can be amended only in the same way as the Charter, i.e., by a two-thirds majority vote in the General Assembly and ratification by two-thirds of the States (Art 69). Should the Court consider it desirable for its Statute to be amended, it must submit a proposal to this effect to the General Assembly by means of a written communication addressed to the Secretary-General of the United Nations (Art 70). However, there has hitherto been no amendment of the Statute of the Court.

nations, as subsidiary means for the determination of rules of law.<sup>7</sup> These four tools have been cited as comprising the core of international law.<sup>8</sup>

10. The Interveners submit that all categories of international child law noted above support the notion that the most favourable interpretation of the *Criminal Code's* luring provisions be applied towards the protection of children.

#### **a) Conventions and Treaties**

11. The *Convention on the Rights of the Child, 1989* outlines State obligations to protect children from sexual exploitation. This positive obligation includes taking all appropriate legislative measures to protect children from sexual abuse<sup>9</sup>, and from the **inducement or coercion of a child to engage in any unlawful sexual activity**.<sup>10</sup> The *Optional Protocol to the Convention on the sale of children, child prostitution and child pornography, 2002* further requires State parties to strengthen laws to prevent the offences referred to in the Protocol<sup>11</sup>, which includes offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child. Canada has signed and ratified both of these instruments.

#### **b) International Custom**

12. International custom can be evidenced by global standards created by international organizations.<sup>12</sup> In 2006, the United Nations Secretary General released his report on violence against children. The report specifically addresses luring by explaining that the Internet can be used for online solicitation or “grooming” (i.e., securing children’s trust in order to draw them into a situation where they may be harmed). Among its recommended standards, the report dictates that States strengthen their efforts to combat the use of information technologies, including the Internet, in the

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<sup>7</sup> *Ibid*, Article 38(1)

<sup>8</sup> H.J. Steiner & P. Alston. *International Human Rights in Context: Law, Politics & Morals* (Oxford University Press, New York, 2000).

<sup>9</sup> *Convention on the Rights of the Child*, Article 19.

<sup>10</sup> *Ibid.*, Article 34.

<sup>11</sup> *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, Article 9.

<sup>12</sup> *Supra*, note 8.

sexual exploitation of children and other forms of violence.<sup>13</sup> The Canadian government has embraced the study and its recommendations at several high level forums.<sup>14</sup>

13. In preparation for the violence against children study, a report was commissioned by ECPAT International (End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes) on violence against children in virtual spaces. The final report entitled, “Violence against Children in Cyberspace” urges national governments to devise and implement legislation and to harmonize its laws to protect children from all cyber crimes including online grooming, luring or stalking. The Canadian government does support the work of ECPAT International through its engagement with the national affiliate Beyond Borders (ECPAT in Canada) and in that way supports the dissemination of the “Violence against Children in Cyberspace” report.

14. International custom can also be achieved through conventions and treaties to which States may not necessarily be a ratified party.<sup>15</sup> The Council of Europe’s *Convention on Cybercrime, 2001* is one such instrument. Although the text specifically references child pornography<sup>16</sup>, the spirit of the articles is in keeping with the *Convention on the Rights of the Child*, as articulated in its Preamble. Canada is a signatory to this Convention.

### **c) General Principles of Law**

15. With respect to children’s rights, general principles of law support the notion that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Although this language is

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<sup>13</sup> UN Secretary General. *Report of the independent expert for the United Nations Study on Violence against Children (A/61/299)*.

<sup>14</sup> Department of Foreign Affairs and International Trade. “Statement by Canada Special Event on Study on Violence against Children” March 19, 2007.

<sup>15</sup> *Supra*, note 11.

<sup>16</sup> *Convention on Cybercrime*, Article 9.

included verbatim in the *Convention on the Rights of the Child, 1989*<sup>17</sup>, it is also pervasive in domestic legal instruments in the majority of the world States.<sup>18</sup>

16. In interpreting domestic law, this Honourable Court should adhere to the general principles of international law, namely the best interest of the child. In this way, the child can be afforded the maximum protection of the Canadian criminal justice system. This would be in keeping not only with the Canadian government's own policies of adopting the best interest of the child approach to domestic policy but in Parliamentary intent when drafting *Criminal Code* provisions aimed at protecting the most vulnerable members of our society.

#### **d) Judicial Decisions**

17. Judicial decisions can also be canvassed in order to ascertain the international legal trend, re: protecting children from Internet luring. Although this is a relatively newly conceived offence, Europol, the European Police Office, has noted that European Courts do not generally confine luring to instances where children are actually harmed.<sup>19</sup> The act of communicating with a child for the purpose of facilitating a crime may be sufficient in order for an offence to be committed.
18. When interpreting the Canadian legislation, judicial decisions from other jurisdictions are beneficial to assist with the analysis. International trends support the notion that the communication is criminal behaviour regardless of the intent of the accuser to actually commit a sexual crime against a child.

#### **C. Conclusion**

19. This Honourable Court must interpret domestic law consistently with its international counterpart. International child law is clear that protecting children from Internet luring and similar offences is a necessary component of its criminal law regime towards child protection generally.

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<sup>17</sup> *Supra*, note 9 at Article 3.

<sup>18</sup> G. Van Bueren. *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht, 1995).

<sup>19</sup> Europol. *Annual Report 2008* (European Police Office, The Hague, 2009).

20. The language in s.172.1(1)(c) of the *Criminal Code* must be read in a manner that supports Canada's international obligations to protect its children. Specifically, the *mens rea* required in order to be convicted of the offence should simply be communicating over the Internet in a manner wherein the accused's purpose is to **facilitate** a designated offence. It should not need to be further demonstrated that the accused had a present intention to meet the child and commit one of the enumerated sexual offences.

21. The Interveners are requesting the opportunity to make brief submissions to this Honourable Court to explore this in more depth and respond to questions from the learned Justices.

**PART IV: RELIEF REQUESTED**

The Intervener requests the order requested by the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS \_\_\_ DAY OF AUGUST, 2009.

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Mark Erik Hecht  
Counsel for the Intervener Beyond Borders