Court File No. 27376

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

REGINA

Appellant
(Crown)

- and -

JOHN ROBIN SHARPE

Respondent
(Accused)

FACTUM OF THE INTERVENERS

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PART I - STATEMENT OF FACTS

Nature of the Appeal

1. The Crown appeals from the judgment of the British Columbia Court of Appeal dated June 30, 1999. By a 2:1 majority, the B.C. Court of Appeal upheld Shaw J.'s ruling that the prohibition against the possession of child pornography in s. 163.1(4) of the *Criminal Code* was an unconstitutional violation of the accused's freedom of expression rights that was not saved under s. 1 of the *Canadian Charter of Rights and Freedoms*. As a result, two of four counts against the accused were dismissed.

2. The strange result of these decisions is that while this court has determined in *Irwin Toy Ltd. v. Quebec (Attorney General)* that prohibitions against advertising directed at young children represent reasonable limits on freedom of expression under s. 1 because of the vulnerability of children, criminal legislation that seeks to protect children from more invidious harm is constitutionally invalid because it fails to give adequate protection to the constitutional rights of sexual deviants. *This cannot be correct*

3. This result follows in part from the very different approach adopted by this court in dealing with marginal forms of expression in contrast to the approach adopted by the U.S. Supreme Court. The U.S. has no equivalent to s. 1 of the *Charter*, with the result that certain forms of "expression" such as child pornography have been found to fall outside of the U.S. free speech guarantee.

4. By contrast, the expansive protection this court has afforded almost all forms of "expression" under s. 2(b) of the *Charter* has forced the debate over child pornography to s. 1. This court has formulated a very stringent series of tests under s. 1 which apply equally to all *Charter* violations. Under these tests, both child pornography and political speech enjoy the substantial protection of s. 1, so long as they constitute expression under s. 2(b).

5. The B.C. Supreme Court and the B.C. Court of Appeal applied the stringent tests formulated by this court in *Oakes and Dagenais* to s. 163.1(4) and in each case found that these stringent tests were not met.

R. v. Oakes, [1986] 1 S.C.R. 103. *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

6. The trial judge struck down s. 163.1(4) notwithstanding the evidence of a police detective who testified to a "veritable explosion of the availability of child pornography" due to the internet and that search warrants obtained in relation to possession charges have assisted the police in finding child molesters. Shaw J. struck down the prohibition against possession notwithstanding his findings that:

(a) the prohibition against possession of child pornography combats practices and phenomena that put children at risk;
(b) sexually explicit images are used by pedophiles in the "grooming" process, leading to sex between children and adults;
(c) sexually explicit pornography involving children poses a danger to children because of its use by pedophiles in the seduction process;
(d) children are abused in the making of child pornography and the abuse is preserved in films and photographs;
(e) highly erotic pornography incites some pedophiles to commit offences;
(f) pornography involving children can be a factor in reinforcing a pedophile's distorted sense that pedophilia is proper; and
(g) the dissemination of written material that counsels or advocates sexual offences against children poses a risk of harm to children (paras. 11 and 23) [A.R., XII, 2029, 2033-2034].

7. Given that the Crown conceded before Shaw J., without argument, that s. 163.1(4) of the *Criminal Code* infringed the respondent's right to freedom of expression under s. 2(b) of the *Charter*, the issue was not specifically addressed at first instance or on appeal.

8. The B.C. Court of Appeal embarked on an analysis confined to whether s. 163(4) of the *Criminal Code* was a reasonable limit on freedom of expression under s. 1. Despite their disagreement in the result of the s. 1 analysis, McEachern C.J.B.C. and Rowles J.A. agreed on the following important matters:

   (a) s. 163.1 as a whole is directed at a pressing and substantial objective (Rowles J.A. paras. 148 and 205; McEachern C.J.B.C. para. 271) [A.R., XII, 2151, 2182 and 2214];

   (b) s. 163.1(4) is rationally connected to the legislative objective (Rowles, J.A. para. 158; McEachern C.J.B.C. para. 275) [A.R., XII, 2156, 2215];

   (c) child pornography causes direct and indirect harm to children and to society generally (Rowles J.A. paras. 157 and 158; McEachern C.J.B.C. paras. 265, 267, 269, 279, 287 and 291) [A.R., XII, 2156, 2211-2213, 2217, 2221, 2223];

   (d) child pornography constitutes low value speech or expression (Rowles J.A. para. 152; McEachern C.J.B.C. para. 290) [A.R., XII, 2153, 2222]; and

   (e) it would be difficult if not impossible to draft the provision in order to distinguish between innocent and nefarious possessors of child pornography (Rowles J.A. para. 196; McEachern C.J.B.C. para. 290) [A.R., XII, 2177, 2219-2223].

9. McEachern C.J.B.C. also found that the offence of simple possession of child pornography acts to suppress the market for such materials (para. 260) [A.R., XII, 2208].

Nature of the Intervention

10. By order of Binnie J. dated November 4, 1999, the Evangelical Fellowship of Canada ("EFC") and Focus on the Family (Canada) Association ("Focus") were granted leave to intervene with the right to file a joint factum and present oral argument on the constitutional questions stated by Lamer C.J.C. on August 26, 1999.

11. EFC is a national association of Protestant denominations, churches, church-related organizations and educational institutions. EFC represents 32 denominations, numerous religious organizations and educational institutions. It is estimated that there are approximately 3 million Protestant evangelicals in Canada. Focus provides information, advice and support to Canadian families, publishes a magazine with a circulation of over 145,000 Canadian households and has daily and weekly radio broadcasts that are carried by approximately 80 originating radio stations in Canada.

12. EFC and Focus contend that a reconsideration of the scope of s. 2(b) in relation to child pornography is warranted. It is submitted that an order that strikes down all legislation regulating possession of child pornography as overly broad because it does not permit pedophiles to engage in private masturbation while viewing "mildly erotic" child pornography is inconsistent with fundamental values that underlie Canadian society. If ss. 2(b) and 1 of the *Charter* are properly interpreted and applied in light of these values, the decisions below cannot stand.

Response to the Factual Summary in the Factum of the Appellant

13. The interveners EFC and Focus agree generally with the factual summary contained in paragraphs 1 through 22 of the appellant's factum.

PART II - ISSUES ON APPEAL TO BE ADDRESSED BY EFC AND FOCUS

14. The following constitutional questions, as stated by Lamer C.J.C. on August 26, 1999, will be addressed by EFC and Focus:

(1) Does s. 163.1(4) of the *Criminal Code* violate s. 2(b) of the *Charter*?

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

PART III – ARGUMENT

Issue 1: S. 163.1(4) of the *Criminal Code* Does Not Violate s. 2(b) of the *Charter*

15. Section 2 (b) of the *Charter* reads:
"Everyone has the following fundamental freedoms:
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;"

16. Freedom of expression is an important right for all Canadians. This court has characterized the right as having three underlying values: the seeking and attaining of truth, fostering and encouraging participation in social and political decision making, and the cultivation of diversity in forms of individual self-fulfillment. Against this backdrop the term "expression" has been interpreted expansively to include hate propaganda, commercial advertising, picketing and solicitation by prostitutes.

*Irwin Toy v. Quebec (*Attorney General), [1989] 1 S.C.R. 927. Reference ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1023. *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825. *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. KMart Canada Ltd*., [1999] S.C.J. No. 44.

Is Child Pornography "Expression"? The American Approach

17. It is instructive to examine how the U.S. has dealt with free speech arguments related to child pornography. The American *Bill of Rights* has no equivalent to s. 1 of the *Charter*. Rather, the balancing of competing interests takes place in the context of the individual right. EFC and Focus submit that this is the correct way to approach child pornography, that is, it deserves no constitutional protection as it does nothing to further the "marketplace of ideas" or the search for truth.

18. In *New York v. Ferber*, the U.S. Supreme Court determined that a New York statute, that prohibits persons from knowingly promoting a sexual performance by a child under 16 by distributing material which depicts such a performance, did not violate the right to free speech. White J. wrote:

"the legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological,

emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment. (pp. 1123-24)

When a definable class of material, such as that covered by [the New York statute], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and it is permissible to consider these materials as without the protection of the First Amendment." (p. 1127)

New York v. Ferber, 73 L. Ed. 2d 1113 (U.S.S.C. 1982).

19. In *Osborne v. Ohio*, the U.S. Supreme Court found that criminalization of possession of child pornography did not violate the accused's right to free speech. Ohio's proscription of possession and viewing of child pornography was permitted under the First Amendment for two reasons. First, Ohio sought to serve a compelling state goal in protecting the victims of child pornography. Second, it was reasonable for the state to conclude that such proscriptions were necessary in order to decrease the production of child pornography.

Osborne v. Ohio, 109 L. Ed. 2d 98 (U.S.S.C. 1990).

20. More recently, in October, 1999 the U.S. Supreme Court denied certiorari in *Hilton v. United States*, in which the U.S. Court of Appeals (First Circuit) held that the provisions of the *Child Pornography Prevention Act* did not violate the First Amendment. The U.S. Court of Appeals stated that:

"considerations beyond preventing the direct abuse of actual children can qualify as compelling government objectives where child pornography is concerned. When child pornography is the target, government is justified in not only driving it from the marketplace through aggressive anti-trafficking laws, but forbidding the private possession or personal viewing of these products altogether. … In this sense, concerns about how adults may use child pornography vis-à-vis children and how children might behave after viewing it legitimately inform legislators' collective decision to ban this material".

U.S. v. Hilton, 167 F. 3d 61 (1st Cir. 1999), cert. denied, [1999] SCT-QL 157.

21. The U.S. authorities view child pornography as child abuse, whether real or "virtual" children are used in its production. Thus in *Ferber, Osborne and Hilton* the U.S. Supreme Court and U.S. Court of Appeals have permitted, consistent with free expression, criminalizing the entire chain of sale and distribution, including possession, as a means of eliminating this evil.

22. As the findings of fact made by Shaw J. and by the B.C. Court of Appeal closely reflect those in *Ferber, Osborne and Hilton*, it is reasonable to question how the outcome in this case can vary so substantially from child pornography decisions rendered by U.S. courts.

Is Child Pornography "Expression"?

The Canadian Approach

(a) Is the Material Protected "Expression"?

23. *Irwin Toy* established the test to determine whether an individual's freedom of expression has been infringed. First, the court must determine whether the activity or material in question is expression which is protected. Activity which either does not convey or attempt to convey a meaning, and thus has no content of expression, or which conveys a meaning but through a violent form of expression, is not protected.

Irwin Toy, supra, at pp. 969-970.

(b) The Purpose and Effect Test

24. If the activity or material is found to be expression, the court must determine whether the purpose of the legislation is aimed at controlling attempts to convey meaning, either by restricting the content of expression or by restricting a form of expression tied to content. Where it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee.

    Irwin Toy, supra, at p. 974.

25. If the government's purpose was not to restrict free expression, a person can still claim that the effect of legislation was to restrict expression. To pursue this claim the respondent must identify the meaning being conveyed and demonstrate how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment.

    Irwin Toy, supra, at p. 976.

Child Pornography Is Not Expression for the Purpose of Section 2(b)

26. Child pornography does not and should not fall within the protected sphere of expression for the purpose of s. 2(b).

27. The materials in this appeal (described at paragraphs 7 and 8 of the appellant's factum), and child pornography generally, do not attempt to convey a meaning and therefore have no content of expression. This court has acknowledged that some human activity is purely physical and does not convey or attempt to convey meaning. Child pornography falls within this category.

    Irwin Toy, supra, at p. 976.

28. Post-*Charter* cases on freedom of expression have exempted from "expression" forms of expression that are violent or threaten violence. The scope of this exception has not been defined by this court. If this court concludes that child pornography does attempt to convey meaning, child pornography attempts to convey meaning through a form of expression which is violent or is akin to violence.

    RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at p. 588. Irwin Toy, supra, at p. 970. *R. v. Keegstra*, [1990] 3 S.C.R. 697 at p. 729.

29. In *Dolphin Delivery and Keegstra* this court held that expression communicated directly through physical violence is not protected. This is so because even though the conduct may express profound meaning, its harm outweighs its expressive value. Rapists and murderers cannot invoke freedom of expression as justification for the form of expression chosen. The justification of free expression should similarly be denied to child pornographers and child molesters.

30. Violence, as discussed in *Dolphin Delivery* and *Irwin Toy*, connotes actual or threatened physical interference with the activities of others. Child pornography counsels or advocates sexual relationships with children, records direct violence against children and serves to incite direct violence against children. Child pornography is a form of violence directed against children.

31. Shaw J., McEachern C.J.B.C. and Rowles J.A. all found as a fact that child pornography causes both direct and indirect harm to children. The respondent concedes that child pornography which uses real children in its production causes both direct and indirect harm

to children. Actual or threatened physical interference with children is sufficient to remove child pornography from the sphere of protected expression.

32. Where a photograph, sketch, sculpture, video or story merely serves to record the real or imagined details of an assault of or the abuse of a child, it cannot be said to come within s. 2(b). That a child may be abused, exploited or put at risk for abuse or exploitation as a result of the real or imagined activities portrayed in a picture, sketch, sculpture, video or story makes child pornography "expression" which threatens violence against children, and removes it from s. 2(b).

Legislative Purpose Not to Restrict Freedom of Expression

33. The legislative objective of s. 163.1(4) was not to restrict free expression. Its purpose was to protect children from both direct and indirect harm caused in the production, distribution and possession of child pornography, as accepted by Shaw J. and a majority of the B.C. Court of Appeals.

34. Although the legislative purpose was not to restrict free expression, the respondent may claim that the effect of the legislative scheme was to restrict expression. However, to pursue this claim, the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment must be identified. A legislative action not aimed at suppressing freedom of expression will constitute a violation of s. 2(b) only if the respondent can show that the pursuit of truth, participation in social and political decision making or individual self-fulfillment is implicated in the meaning of the expression.

Keegstra, supra, per McLachlin J. at p. 828.

35. Shaw J. and Southin and Rowles JJ.A. found that the respondent's right to individual self-fulfillment was infringed by s. 163.1(4) of the *Criminal Code*. The so-called "individual self-fulfillment" infringed is the respondent's deviant sexual arousal from exposure to child pornography. EFC and Focus submit that this is absurd. Child pornography does not fall within one of the three historical principles related to free expression. The respondent's right to "individual self-fulfillment" should not trump the rights of vulnerable children.

36. The U.S. approach to child pornography is instructive to the resolution of this appeal. An interpretation of s. 2(b) that excludes protection for child pornography and does not require resort to s. 1 is to be commended. Such a conclusion can be reached in a manner consistent with previous decisions of this court.

Issue 2: S. 163.1(4) Is A Reasonable Limit Under s. 1 of the *Charter*

37. EFC and Focus generally agree with the appellant's submissions concerning s. 1 of the *Charter*. Set out below are additional submissions relevant to s. 1 and its interpretation and application.

Interpretation of the *Charter*

38. This appeal raises profound social, moral and philosophical questions which engage the underlying principles of our constitution and legal system. The constitution has been described as a "mirror reflecting the national soul". It must recognize and protect the values of our nation.

Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (1997, Carswell) at p. 1.

39. The *Charter* is an expression of the basic rights and values held in common by our society. "This purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines.

Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at p. 650.

40. The criminal law is our nation's fundamental statement of public policy and applied morality. It is an expression of shared morality.

"In truth the criminal law is fundamentally a moral system. It may be crude, it may have faults, it may be rough and ready, but basically it is a system of applied morality and justice. It serves to underline those values necessary, or else important, to society. When acts occur that seriously transgress essential values, like the sanctity of life, society must speak out and reaffirm those values. This is the true role of the criminal law."

Law Reform Commission of Canada, Report No. 3, "*Our Criminal Law*", (1976) at p. 16.

41. The *Charter* was not enacted in a vacuum. In Big M Drug Mart, this court recognized that the values enshrined in the *Charter* must be placed in their proper linguistic, philosophical and historical contexts. One way to place the values enshrined in the *Charter* in their proper context is to look to the preamble for guidance.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

The Preamble to the *Charter*

42. The preamble to the *Charter* reads as follows:

"Whereas Canada is founded upon principles which recognize the supremacy of God and the rule of law."

Constitution Act, 1982 [en. by Canada Act, 1982 (U.K.) c. 11, s.1].

43. The preamble to a constitutional enactment can play a role in clarifying and supplementing the substantive provisions of the constitutional document.

Re Manitoba Language Rights, [1985] 1 S.C.R. 721 at pp. 750-751. *R. v. Mercure*, [1988] 1 S.C.R. 234 at pp. 280-281. *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (C.A.) at p. 657. Driedger, *Construction of Statutes*, 3rd ed., (1994), at pp. 259-263.

44. In *Re Manitoba Language Rights*, this court expressly applied the preamble's affirmation that "Canada is founded upon principles that recognize … the rule of law" in holding Manitoba's statutes temporarily valid pending their translation and reenactment, although otherwise invalid. The application of this principle demonstrates the usefulness of the preamble in Charter interpretation.

Re Manitoba Language Rights, supra, at p. 750.

The Supremacy of God

45. The supremacy of God is recognized in the preamble to the *Charter*. *In Canadian Council of Churches v. Canada* (Minister of Employment), this court stated that the entrenchment of the rule of law in the preamble of the Charter is a recognition of the fact that it is a "cornerstone of our democratic form of government". Like the rule of law, the principles that recognize the supremacy of God are a fundamental aspect of Canadian society and the Canadian polity. This should be expressly recognized and applied by the courts in interpreting and shaping the fundamental rights and freedoms guaranteed by the *Charter*.

Canadian Council of Churches v. Canada (Minister of Employment), [1992] 1 S.C.R. 236, at pp. 250-251.

46. In *The New Shorter Oxford English Dictionary*, "recognize" is defined as follows: "testify to; confess or avow formally; testify to the genuineness of; acknowledge the existence, legality, or validity of, especially by formal approval or sanction; accord notice of attention to; treat as worthy of consideration, show appreciation of, reward."

The New Shorter Oxford English Dictionary, 1993, Vol. 2, p. 2503.

47. The principles which recognize the "rule of law" are more readily understood and applied than the principles that recognize the "supremacy of God". However, the complexity of understanding and applying the principles that follow from the recognition of the supremacy of God should not cause it to be discarded as vague or unhelpful. Both concepts point toward our philosophical and legal tradition, which upholds objective truth and moral standards.

Application of the Preamble

48. The recognition of the "supremacy of God" reflects the central role that religion has played in the development of Canadian society and in the development of societal values. Those principles and beliefs constitute part of the framework of our free and democratic society. The supremacy of God does not refer to one belief system, but rather to the core principles and beliefs found in religious traditions that have historically shaped Canada's principles and beliefs.

St. John-Stevas, Norman, *Life, Death and the Law* (Eyre & Spottiswoode: London, 1961) at p. 41.

49. EFC and Focus believe that religious principles and beliefs have found expression in social beliefs about the sanctity and protection of human life, including the protection of children, and the special duties that we, as adults, owe to children as a vulnerable group. Put differently, the social goal of protecting children in Canadian society has developed from the principles and beliefs of the religions that have shaped Canadian society. These principles have become an integral part of our civil and criminal law.

50. Most major religions regard children as treasures, or as sacred trusts, which warrant vigorous protection from all harm, including the physical, emotional and sexual abuse which, as was accepted by Shaw J., Rowles J.A. and McEachern C.J.B.C., results from the production, dissemination and possession of child pornography.

Cook, Phillip H. and Harold G. Coward, *Religious Dimensions of Child and Family Life: Reflections on the UN Convention on the Rights of the Child* (Centre for Studies of Religion and Society, 1996) at pp. 1, 7, 15. Cooper, John, *The Child in Jewish History*, (1996, Jason Aronson Inc.) pp. 144-145. Hastings, James, ed., *Encyclopaedia of Religion and Ethics*, 1924, Vol. 3, pp. 524-526, 542 and 544. Mercer, Joyce Ann, "Legal and Theological Justice for Abused Adolescent Girls" (1996) Journal of Law and Religion 9 at p. 465. Waugh, Earle H., Sharon McIrwin Abu-Laban and Regula Burckhardt Qureshi, eds., *Muslim Families in North America* (1991, The University of Alberta Press) p. 11.

51. It is well recognized in Canadian law that children have special status reflecting their vulnerability and accordingly enjoy special protections. For example:

(a) parents are required to supply the "necessaries of life" to children under age 16, including medical treatment, clothing and food (s. 215(1) of the *Criminal Code*;

(b) parents are prohibited by s. 218 of the *Criminal Code* from abandoning or endangering children under the age of 10;

(c) the *Criminal Code* protects children under 14 from exploitative and destructive sexual contact with adults by criminalizing sexual interference (s. 151), sexual exploitation (s. 153) and invitations to sexual touching (s. 152), even where there is "consent";

(d) s. 161 of the *Criminal Code* gives courts the power to make prohibition orders for up to life for those convicted of sexual offences against children under 14 from having contact with children or holding a job that might put the offender into a position of trust or authority in relation to children;

(e) the educational development of children is advanced by provincial compulsory education enactments (i.e.; *School Act*, R.S.B.C. 1996, c. 412; *Education Act*, R.S.O. 1990, Chap. E. 2);

(f) provincial superior courts have authority in the application of their *parens patriae* jurisdiction to intervene and act in a child's best interests;

(g) child protection legislation authorizes the state to remove children from their homes where their physical and/or emotional well-being is in jeopardy (i.e., *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46; *Child and Family Services Act*, R.S.O. 1990, Chap. C. 11);

(h) courts will intervene and make important medical decisions for children where their life and health are jeopardized *(T.D.D. (Re)*, [1999] S.J. No. 144); and

(i) federal and provincial legislation governing the consequences of breakdown in family relationships requires that the interests of children be protected and that provision be made for their care.

52. The duty adults owe to children and the sanctity of children's lives also has been recognized by the Canadian government in its ratification of the *United Nations Convention of the Rights of the Child* on December 13, 1991.

53. The majority of this court recognized the importance of protecting children from the harm associated with pornography involving children. Sopinka J. in *R. v. Butler* stated:

> "explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex *unless it employs children in its production*". (emphasis added)
>
> *R. v. Butler*, [1992] 1 S.C.R. 452 at p. 471.

54. In essence, Sopinka J. held that any depiction of sex involving children would be obscene under s. 163(8) of the *Criminal Code*. This decision confirms that the sexualization of children for the gratification of adult sexual desires is inconsistent with the goal of religions and society generally, which is to protect children from harm.

55. The Committee on Sexual Offences Against Children and Youths put it this way:

> "Canadians are deeply concerned about the need to provide better protection for sexually abused and exploited children and youths. This strongly held concern is national in scope. It cuts across all social, religious and political boundaries. It encompasses all forms of sexual abuse of the child, whether this involves sexual assault, juvenile prostitution or the making of child pornography."
>
> Report of the Committee on Sexual Offences Against Children and Youths, "*Sexual Offences Against Children in Canada*", (1984) at p. 2.

56. The preamble to the *Charter* constitutionalizes principles that recognize the dignity of human life, including the dignity of childhood, because the preamble recognizes the shared cultural and religious heritage upon which Canadian society was founded. Rights like freedom of expression were recognized in this context and limitations on this right should reflect these principles and beliefs. The possession of child pornography is antithetical to these principles and to Canadian society's beliefs and goals relating to the protection of children. The public reaction to Shaw J.'s decision and the subsequent appellate decision serve to confirm this point.

57. Although she accepted that Canadian law is rooted in Canada's religious heritage, Southin J.A. refused to apply the principles which recognize the supremacy of God in deciding whether s. 163.1(4) of the *Criminal Code* is a reasonable limit on freedom of expression. Southin J.A. stated that she knew of no other case under the *Charter* which relied on these words in the preamble. In her opinion:

> "They [the words of the preamble] have become a dead letter and while I might have wished to the contrary, this Court has no authority to breathe life into them for the purpose of interpreting the various provisions of the *Charter*. ... The words of the preamble relied upon ... can only be resurrected by the Supreme Court of Canada" [A.R., XII, 2123-2124].

58. Southin J.A. erred in holding that the preamble is a "dead letter" and erred in failing to use the preamble as an interpretive guide to the *Charter*. EFC and Focus ask this court to recognize the value of the preamble as an aid to interpretation.

Additional Section 1 Analysis

59. As indicated above, EFC and Focus generally agree with the s. 1 analysis advanced by the appellant. However, EFC and Focus wish to make the following additional arguments regarding both the rational connection and minimal impairment portions of the proportionality test of the s. 1 analysis.

60. Deference to Parliament should be exercised with respect to s. 163.1(4) of the *Criminal Code*. McEachern C.J.B.C., at paragraphs 273, 274 and 278 of his reasons for judgment, commented that, in his opinion, the definition of child pornography and the age of consent (14 years) are policy decisions of Parliament. He stated that the court should not second guess Parliament's decision on what was necessary to achieve the important purpose of the legislation. Further, he stated that it cannot be assumed that the definition of child pornography was not carefully drafted and carefully considered by Parliament before it was adopted [A.R., XII, 2214-2217].

61. In this court's recent decision in R. v. Mills, at paragraph 58, McLachlin and Iacobucci JJ. commented:

> "Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups. …If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, than this court has an obligation to consider respectfully Parliament's attempt to respond to such voices."
>
> *R. v. Mills*, [1999] S.C.J. No. 68.

62. In *Mills*, this court went on to balance the privacy rights of sexual assault complainants against the accused's right to make full answer and defence, eventually concluding that the legislative scheme drafted by Parliament to regulate production of therapeutic records of

sexual assault complainants was constitutional. Similar deference should be afforded where, as here, Parliament is attempting to protect children, another vulnerable group.

63. Deference to Parliament would serve to address the anomoly underscored by this court's decision in *Irwin Toy*, in contrast to the decisions of the courts below. It is counterintuitive that restrictions on commercial advertising directed at children are lawful while restrictions on possession of child pornography are unlawful. Section 163.1(4) would be more readily upheld if courts show deference to the very difficult decisions made by Parliament. Almost every *Charter* restriction is vulnerable if it is subject to stringent tests applied without deference to Parliament, under microscopic examination, with the benefit of hindsight and without real regard for the important values underlying the legislative restriction.

PART IV - NATURE OF ORDER SOUGHT

64. The interveners EFC and Focus therefore submit that the constitutional questions ought to be answered in the following manner:

(1) Does s. 163.1(4) of the *Criminal Code* violate s. 2(b) of the *Charter*?
Answer: No.

(2) If s. 163.1(4) of the *Criminal Code* infringes s. 2(b) of the *Charter*, is s. 163.1(4) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*? Answer: It is not necessary to answer this question. If the court determines that it is necessary to answer this question, the answer is "yes".

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PART V - LIST OF AUTHORITIES

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