

PART I -- THE FACTS

A INTRODUCTION

1. The applicant, Canadians Against Violence Everywhere Advocating Its Termination, now known as Canadians Against Violence, (CAVEAT), seeks leave to intervene in the herein appeal and be permitted to file a 30-page factum and be allocated 15 minutes for oral argument.

Reference: Notice of Motion to Intervene, Tab 1.

2. In the Court below, the British Columbia Court of Appeal granted CAVEAT: (i) leave to intervene; (ii) leave to file a joint factum, without page restrictions; (iii) leave to file fresh evidence; and (iv) leave to make oral submissions.

Reference: Affidavit of Priscilla de Villiers, Tab 2, pp. 2-3, paras. 5-7.

3. This Honourable Court has recognized in the past the helpful contribution CAVEAT can make to the effective adjudication of appeals involving constitutional issues such as the ones at bar. CAVEAT was granted intervener status by this Court In the Matter of Section 27.1 of the Judicature Act, R.S.A. 1980, Chapter J-1; and In the Matter of a Reference by the Attorney General of Alberta, in council to the Court of Appeal of Alberta for hearing and consideration of the question set out in order-in-council 461/96 respecting the Firearms Act, S.C. 1995, Chapter 39.

B POSITION TO BE TAKEN BY CAVEAT ON THE APPEAL SHOULD LEAVE BE GRANTED

4. The position of CAVEAT is as follows:

(i) While CAVEAT takes no position with respect to the constitutional validity of the impugned subsection, it does advocate for a strong and comprehensive child pornography law which includes the criminalization of private possession of child pornography.

(ii) Child pornography, whether it uses actual children or takes the form of written materials, drawings or sketches, shows and

promotes unequal power relationships between men and children, devalues and degrades children as a class, portrays children as a class of objects for the sexual exploitation and entertainment of adults, and otherwise violates first principles of equality. These fundamental principles were completely absent or given virtually no weight in the section one analysis of the British Columbia Court of Appeal.

(iii) Likewise, child pornography in any form, violates core value privacy rights of children, objectifying children, stripping a very vulnerable segment of society of their human dignity, self respect, control over their lives and body, and consequently, depriving children of their essential humanity. These fundamental principles were completely absent or given virtually no weight in the section one analysis of the British Columbia Court of Appeal.

(iv) As stated by this Court in Vickery, protecting the innocent is a social value of “superordinate importance” which must be protected to the “greatest extent possible”. By making erroneous distinctions between different forms of child pornography and focussing on unrealistic and untested hypotheticals, such fundamental principles were severely compromised and diminished, if not rendered nugatory.

The distinction made by the British Columbia Court of Appeal between child pornography involving actual children and child pornography which takes the form of written material, drawings or sketches, is erroneous and contrary to the expert evidence, empirical research and the social science literature.

(vi) The factual underpinnings and assumptions informing the numerous hypotheticals advanced by the respondent and the British Columbia Civil

Liberties Association and accepted by the British Columbia Court of Appeal

in reaching its conclusion of constitutional invalidity, are unrealistic, overly abstract, extremely questionable, untested, and in some cases, erroneous.

(vii) Community standards with respect to protecting children is like no other. It is a very distinct and special category of unanimous public concern. Community standards in this regard requires a heightened level of judicial vigilance.

(viii) Subsection 163.1(4) does not infringe sections 2(b) or 7 of the Charter and therefore, resort to section one of the Charter is unnecessary.

(ix) If subsection 163.1(4) does infringe sections 2(b) or 7 of the Charter, it is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purposes of section one of the Charter.

PART II -- THE LAW

C THE TEST, GENERAL PRINCIPLES AND PERSPECTIVE

5. CAVEAT adopts the submissions of the CPA set out on pages 4-7 of its factum, concerning the applicable test and principles for a motion such as this. As such, those arguments will not be repeated herein.

6. It is submitted that CAVEAT, as an intervener before the British Columbia Court of Appeal, continues to have an interest and will continue to make submissions which will be useful and different from those of the other parties.

7. The victims perspective is a unique and distinct perspective for three principal reasons. Firstly, the cold reality of victimization is so profound, that one's level of awareness, understanding, interest and focus becomes substantially augmented, if not acute. There is simply no substitute for the often extremely violent experience suffered by victims and the panopoly of issues arising therefrom. Secondly, CAVEAT's mandate requires extensive public consultation and community work thereby giving it an important and valuable insight into community standards and the level of tolerance existing within the community, particularly as it relates to children. Thirdly, CAVEAT is very involved in the legislative process, has an extensive history of involvement in the issues at bar, which give it an expertise and special knowledge which can shed a fresh light and perspective. Taking the aforesaid factors together, CAVEAT has a very serious

interest in the outcome of this appeal and will be very much affected by the result.

Reference: Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335; Norcan Ltd. v. Lebrock [1969] S.C.R. 665; Norberg v. Wynrib [1992] 2 S.C.R. 224 (Feb. 14/91); Also see: Canadian Council of Churches v. Minister of Employment and Immigration [1992] 1 S.C.R. 236 at 256; Rothmans, Benson & Hedges Inc. v. Canada [1990] 1 F.C. 74 at 81 (F.C.T.D.) Aff'd [1990] 1 F.C. 90 (F.C.A.); R. v. N.T.C. Smokehouse Ltd. [1993] S.C.C. 420, p. 4; Howard v. HMQ (Ont.), (March 10/93) (#22999); R. v. Seaboyer [1986] O.J. No. 128, (Ont. C.A.); R. v. Finta, 1 O.R. (3d) 183 at 186 (Ont. C.A.); Also see: Peel v. A. & P. Ltd. et al, (1990) 74 O.R. (2d) 164 (Ont. C.A.); R. v. O'Connor (1983) 82 C.C.C. (3d) 495, at 504-505 (B.C.C.A.); Canadian Labour Congress v. Bhindi (1985) 17 D.L.R. (4th) 193 at pp. 203-208 (B.C.C.A.); Also see: Janzen v. British Columbia [1993] B.C.J. No. 2682.

D] HOW A CHARTER SECTION 15 ANALYSIS IS TO BE BALANCE INTO THE SECTION ONE ANALYSIS

8. The legalization of possession of child pornography, whether it uses actual children or takes the form of written materials, drawings or sketches, will have the corresponding effect of violating core value equality rights of children. Paedophiles choose their victims and their materials by reason of a child's age and sex, both enumerated grounds under section 15 of the Charter. It is the violation of children's equality rights that is "profound" and not the minuscule (if any), violation of a paedophile's section 2(b) and 7 Charter rights. The pre-requisite of a paedophile to enjoy his 2(b) and 7 Charter rights is to hurt, harm, degrade, devalue and violate the rights of children. This in turn puts the community at

large very much on edge, fearful and vulnerable. This is offensive to any purposive approach to constitutional analysis.

9. The purpose of section 15 of the Charter is to promote equality by preventing the violation of human dignity and equality through imposed limitations, disadvantages or burdens, including the stereotypical imposition of presumed group characteristics rather

than the promotion of a society of individual merit, capacity, and circumstances. It is submitted that the effect of the majority ruling of the British Columbia Court of Appeal and in particular, by drawing artificial distinctions between different forms of child pornography and unduly relying upon abstract and untested hypotheticals, is to make children feel less capable or less worthy of recognition or value as human beings or as members of Canadian society, less deserving of equal concern, respect and consideration. As such, a violation of section 15 of the Charter has been stated.

Reference: *Vriend v. Alberta* (1988), 50 C.R.R. (2d) 1 (S.C.C.); *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624; *Miron v. Trudel* [1995] 2 S.C.R. 418 per Gonthier J. at 704, per L'Heureux Dube J. at 727 and per McLachlin J. at p. 741; Also see *Egan v. Canada* [1995] 2 S.C.R. 513; *Thibodeau v. Canada* [1995] 2 S.C.R. 627; *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241, 41 C.R.R. (2d) 240 (S.C.C.); *R. v. Swain* (1991), 63 C.C.C. (3d) 481 at 518-520 (S.C.C.).

10. Constitutional equality centres on eliminating disadvantage of historically subordinated groups. This means that the Charter is not neutral with respect to practices which promote inequality, but rather constitutionally mandates that equality be promoted and inequality be diminished. This important perspective is absent from the judgment of the Court below. Otherwise, the Court would not have made a distinction between different forms of child pornography.

Reference: *Andrews v. The Law Society of British Columbia* [1981] 1 S.C.R. 143.

11. Child pornography, whether it uses actual children or takes the form of written materials, drawings or sketches, shows and promotes unequal power relationships between men and children. The inequality is heightened by dialogue, written or spoken, in which expressly unequal roles are taken and graphic aggression, combined with explicit sexual activity, is presented. The decision of the British Columbia Court of Appeal gave no consideration to how its ruling imposes a unique burden on children on the basis of their age and sex. Had it been otherwise, a far more critical analysis would have informed the discussion concerning the use of the various hypotheticals.

12. Child pornography, whether involving actual children or not, nevertheless contains graphic violence, degradation and subordination of children. Social stigma, embarrassment, guilt, helplessness and despair will be special burdens imposed on children by any Court ruling legalizing possession of child pornography, regardless of its form. This cannot be separated from encouraging and/or promoting the creation and distribution of child pornography.

13. Children are particularly vulnerable to violence and sexual abuse. Child abuse is required to make child pornography. By legalizing possession of child pornography, its creation, production, circulation and distribution is encouraged and consequently, increases the disadvantage of children, exposes children to further risk of harm, and thus, discriminates against them.

Reference: The Women's Safety Project cited in *Changing the Landscape: Ending Violence - Achieving Equality* (The Final Report of the Canadian Panel on Violence Against Women) Minister of Supply and Services Canada, 1993 at p. 9.

14. In *Butler*, which dealt with obscene pornographic material, but not child pornography, this Court held that Parliament was justified in concluding that this type of material poses a particular threat and is particularly harmful to women's equality rights. For the identical reasons, child pornography is harmful to children's equality rights. At page 497, this Court stated:

... if true equality ... is to be achieved, we cannot ignore the threat to equality resulting from exposure to [pornography] of certain types of violent and degrading materials. Materials portraying [children] as a class of objects for sexual exploitation and abuse have a negative impact on [their] sense of self-worth and acceptance (emphasis added).

15. There can be little doubt that child pornography deprives children of their innocence and their unique human character and identity. Depicting children as sexual playthings in any context, constitutes an egregious violation of equality principles. Further, a significant proportion of the population would be humiliated by the gross misrepresentation presented in child pornography.

Reference: R. v. Butler [1992] 1 S.C.R. 452, at pp. 500-501.

16. Child pornography in any format shows unequal power relationships between adult males and children. This inequality is heightened by dialogue whether spoken or written in which expressly unequal roles are taken. The graphic showing of this inequality and aggression is harmful. In the research literature on child sexual abuse, even a five-year age difference between the two parties involved in a sexual encounter automatically qualifies the incident as a case of sexual abuse, whether or not the younger party was a willing participant. This convention is based on researchers' recognition that an age difference of five years between a child and another child or an adult constitutes a significant power differential between the two, making it impossible for the younger party to freely consent to sex with the older party, regardless of their gender. The ability to force another to do things against their will is ipso facto of a power difference. In many cases, victims are rendered powerless by their lack of knowledge about what was happening to them.

Reference: N. Malamuth and E. Donnerstein (Eds.) *Pornography and Sexual Aggression* (1984); G. Cowan, C. Lee, D. Levy and Snyder "Dominance and Inequality in X-Rated Videocassettes" *12 Psychology of Women Quarterly* 299 (1988); P. Dietz and A. Sears, "Pornography and Obscenity Sold in Adult Book Stores: A Study of 5,132 Books, Magazines and Films in 4 American Cities" *12 Mich. J.L. Reform*, 7 (1987-88); *In Harms Way - The Pornography Civil Rights Hearings*, Edited by Catharine A. MacKinnon and Andrea Dworkin, Harvard University Press, Cambridge, Mass. 1997; *Soft Porn Plays Hardball - It's Tragic Effects on Women and Children and the Family*, Judith A. Reisman, Ph.D., Huntington House Publishers, 1991; Finkelhor, David (1979) *Sexually Victimized Children*, New York: Free Press; Also see Russell, D.E.H., *Against Pornography: The Evidence of Harm*, Berkely, California: Russell Publication, 1994; Russell, D.E.H. (Ed) *Making Violence Sexy: Feminist Views on Pornography*, New York: Teachers College Press, 1993 and Buckingham, England: Open University Press, 1993.

17. Pornography, both verbal and visual, is produced by formula wherein one sees hierarchical roles, dehumanization and degradation, violence and unequal power wherein children are being sexually used. More specifically, children are used for sex in an unequal role where one sees sexual manipulation, coercion and abuse. Repeated

exposure to pornography has been documented to increase sex-calloused attitudes by men towards children and women, and promote the trivialization of the abuse. These attitudes in turn can directly influence aggressive behaviour by men towards children and women.

Reference: D. Zoman and J. Bryant (Eds.), *Pornography: Research Advances and Policy Considerations* 1989; N. Malamuth "Factors Associated with Rape and Predictors of Laboratory Aggression Against Women", 45 *Journal of Personality and Social Psychology* 432 (1983); N. Malamuth, N.E. Donnerstein "The Effects of Aggressive Erotic Stimuli" in L. Berkowitz (Ed.) *Advances in Experimental Social Psychology* (Volume 15) (1982).

18. Degrading and dehumanizing non-violent material has been shown to lower inhibitions on aggression by men against children and women, increase acceptance of children and women's servitude, increase reportedly willingness to rape, and increase the belief in male dominance in intimate relations, among its effects. These effects are inconsistent with promoting sex equality.

Reference: D. Zoman and J. Bryant, "Effects of Massive Exposure to Pornography", N. Malamuth and N. Donnerstein at 115; J. Check and N. Malamuth, "Pornography and Sexual Aggression: The Social Learning Theory Analysis" 9 *Communication Year Book* 181 (1986); D. Zoman and J.B. Weaver, "Pornography and Men's Sexual Callousness Towards Women", Zelman and Bryant at 45; Dianna E.H. Russell, "Pornography and Rape: A Casual Model" 9 *Political Psychology* 41 (1988); J. Check and T. Guloeien, "Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Non-Violent Dehumanizing Pornography, and Erotica", Zoman and Bryant; J.G. Buchman, "Affects of Non-Violent Adult Erotica on Sexual Child Abuse Attitudes" *A Journal of Family Issues* 518 (1980).

19. There is no controversy in the research community that exposure to pornography increases aggression against children and women in a laboratory setting, and increases attitudes which are related to violence against children and women in the real world.

Reference: E. Donnerstein, "Pornography: Its Affects on Violence Against Women", Malamuth and Donnerstein at 53; N. Malamuth and J. Check, "The Effects of Mass Media Exposure on Acceptance of

Violence Against Women: A Field Experiment”, 15 J. of Research of Personality 436 (1981); E. Donnerstein and R. Berkowitz, “Victim Reaction in Aggressive Erotic Films as a Factor in Violence Against Women” 41 J. of Personality and Social Psychology (1981); N. Malamuth, “Factors Associated with Rape as Predictors of Laboratory Aggression Against Women” 45 Journal of Personality of Social Psychology, 432 (1983); N. Malamuth, “Predictions of Naturalistic Sexual Aggression” 50 Journal of Personality and Social Psychology, 953 (1986); N. Malamuth and J. Check, “Aggressive Pornography and Beliefs in Rapeness: Individual Differences” 19 Journal of Research in Personality 299 (1985); Check and Guloien, para. 19, supra; McManus, Introduction to Report of Attorney General’s Commission on Pornography (Rutledge Press Edition, 1986) at xviii, (Consensus of all researchers as released by Surgeon General Koop).

20. Any dissemination of child pornography has been recognized as constituting a harm to those used to make it, a danger to others who may be abused through its use, and an incentive for continued production, guaranteeing additional child abuse.

Reference: Sexual Offences Against Children in Canada, Report of the Committee on Sexual Offences Against Children and Youth (August 22, 1984) at 58.

21. For a substantial segment of the population, aggression enhances sexual arousal. Even non-rapist populations can experience sexual arousal from depictions of rape.

Reference: N. Malamuth, J. Check and J. Briere, “Sexual Arousal in Response to Aggression: Ideological, Aggressive, and Sexual Correlates” 50 Journal of Personality and Social Psychology, 330 (1986); N. Malamuth and J. Check, “Sexual Arousal to Rape Depictions: Individual Differences” 92 Journal of Abnormal Psychology 55 (1983).

22. Paedophiles who have a taste for violent pornography are the most likely to seek it out. They are also the most likely individuals to perpetrate the sex crimes depicted in the pornography sometimes referred to as “copy cat crimes”.

Reference: Ressler, Robert, Burgess, Ann, and Douglas, John (1988) *Sexual Homicide: Patterns and Motives*, Lexington M.A.: Lexington Books.

23. Pornographic depictions can generate sexual fantasies. Edna Einsiedel points out:

Current evidence suggests a high correlation between deviant fantasies and deviant behaviours ... Some treatment methods are also predicated on the link between fantasies and behaviour by attempting to alter fantasy patterns in order to change the deviant behaviours.

By failing to appreciate the significance of how so-called works of the “imagination” fuels the fantasies and deviant behaviour of paedophiles, the British Columbia Court of Appeal erred.

Reference: Einsiedel, Edna (1986) *Social Science Report Paper Prepared for the Attorney General’s Commission on Pornography*, Department of Justice, Washington D.C., at p. 60.

24. Child pornography undermines a paedophile’s internal inhibitions (to the extent that they exist), against acting out the desire to abuse children by: (i) objectifying children: as a result, they do not see children as human beings but as body parts. This makes it easier for a paedophile to abuse a child; (ii) myths: as Detective Waters and Dr. Collins testified, paedophiles believe sex with children is a good thing and even seek it out. If paedophiles believe children enjoy having sex with adults and find it sexually exciting, then this will undermine their inhibitions; (iii) acceptance of interpersonal violence: a paedophile’s internal inhibitions against acting out can be undermined if they consider sex and violence against children to be acceptable behaviour; (iv) trivializing sex between adults and children: simply put, the more exposure to what the Court of Appeal and the respondent characterize as “simple” or “mere” possession of pornography has the corresponding effect of trivializing what in fact is taking place; (v) callous attitudes toward the child’s sexuality: callous attitudes toward the child’s sexuality becomes enhanced; (vi) acceptance of domination: the child has no independent existence or rights; (vii) desensitizes paedophiles to consequences of their acts: possession of child pornography encourages desensitization of a paedophile to the consequences of his act.

Reference: Russell, Diana (1975) *The Politics of Rape* New York: Stein and Day at pp. 245, 249-250; Burt, Martha (1980) *Cultural Myths and Supports for Rape*. *Journal of Personality and Social Psychology* 38 (2), at 217-230; Scully, Diana (1985) *The Role of Violent Pornography in Justifying Rape*. Paper Prepared for the Attorney General's Commission on Pornography Hearings, Houston, T.X.; Brownmiller, Susan (1975) *Against Our Will; Men, Women and Rape* New York: Simon and Schuster; Check, James and Malamuth, Neil (1985), *An Empirical Assessment of Some Feminists Hypothesis About Rape* *International Journal of Womens' Studies* 8, at p. 419; Briere, John, Malamuth, Neil, and Check, James (1985) *Sexuality and Rape - Supportive Beliefs* *International Journal of Womens' Studies* 8, at pp. 400-401; Maxwell, Kristen, and Check, James (1992, June) *Adolescents' Rape Myth Attitudes and Acceptance of Forced Sexual Intercourse*. Paper Presented at the Canadian Psychological Association Meetings, Quebec; Donnerstein, Edward (1985) *Unpublished Transcript of Testimony to the Attorney General's Commission on Pornography Hearings, Houston T.X.*, p. 341; Zillmann, Dolf, and Bryant, Jennings (1984) *Effects of Massive Exposure to Pornography*. In Neil Malamuth and Edward Donnerstein (Eds.) *Pornography and Sexual Aggression* New York: Academic Press at pp. 117, 121, 122, 134, and pp. 145-146; Donnerstein, Edward and Linz, Daniel (1985) *Presentation Paper to the Attorney General's Commission on Pornography, Houston T.X.* p. 34A; Donnerstein, Edward (1983) *Unpublished Transcript of Testimony to the Public Hearings on Ordinances to Add Pornography as Discrimination Against Women*. Committee on Government Operations, City Council, Minneapolis, M.N., pp. 4-12.

25. As Detective Waters and Dr. Collins testified, and as fully documented by the U.S. Attorney General's Commission on Pornography, paedophiles use child pornography to undermine a child's resistance, to persuade the child to engage in certain acts, to legitimize the acts, and undermine their resistance, refusal or disclosure of these acts.

Reference: Attorney General's Commission on Pornography: *Final Report* (1986) Volumes I - II, at p. 786, Washington, D.C.: U.S. Department of Justice; *Every Woman* (1988) *Pornography and Sexual Violence: Evidence of the Link*, London: Every Woman; Russell, Diana (Ed.) (1993a) *Making Violence Sexy: Feminist Views on Pornography*, New York: Teachers College Press; Mosher, Donald (1971) *Sex*

Callousness Towards Women Technical Reports of the Commission on Obscenity and Pornography 8, Washington, D.C., U.S. Government Printing Office; Senn, Charlene (1992 June) Women's Contact with Male Consumers: One Link Between Pornography and Womens' Experiences of Male Violence. Paper Presented at the Canadian Psychological Association Meetings, Quebec; Sexual Offences Against Children, Vol. I, p. 101; Child Pornography Prevention Act of 1995, p. 13.

26. Two examples from the Attorney General's Commission on Pornography demonstrate how easy it is to see how a child's vulnerability to sexual abuse can be increased as a result of being shown pornography:

I was sexually abused by my foster father from the time I was 7 until I was 13. He had stacks and stacks of Playboys. He would take me to his bedroom or his workshop, show me the pictures and say "this is what big girls do. If you want to be a big girl, you have to do this, but you can never tell anyone". Then I would have to pose like the woman in the pictures. I also remember being shown a Playboy cartoon of a man having sex with a child. (Attorney General's Commission on Pornography: Final Report, supra, p. 783.)

He encouraged me by showing me pornographic magazines which they kept in the bathroom and told me it was not wrong because they were doing it in the magazines and that made it okay. He told me all fathers do it to their daughters and said even pastors do it to their daughters. The

magazines were to help me learn more about sex. ((Attorney General's Commission on Pornography: Final Report, supra, p. 786).

Reference: Also see Zillmann, Dolf, and Bryant, Jennings, supra, (1984) Effects of Massive Exposure to Pornography. In Neil Malamuth and Edward Donnerstein (Eds.) Pornography and Sexual Aggression New York: Academic Press at pp. 132, 133.

27. Abel and his colleagues reported that 56% of the rapists and 42% of the child molesters implicated pornography in the commission of their offences. It is clear that a high percentage of non-

incarcerated rapists and child molesters have said that they have been incited by pornography to commit crimes. Edna Einsiedel, in her review of the social science research for the 1985 Attorney General's Commission on Pornography, concluded that these studies "are suggestive that the implication of pornography in the commission of sex crimes among rapists and child molesters".

Reference: Abel, Gene, Mittelman, Mary, and Becker, Judith (1985) *Sexual Offenders: Results of Assessment and Recommendations for Treatment*. In Mark Ben-Aron, Stephen Hucker and Christopher Webster (Eds.) *Clinical Criminology: The Assessment and Treatment of Criminal Behaviour* (pp. 191-205) Toronto: Clark Institute of Psychiatry: University of Toronto; Einsiedel, Edna, (1986) *Social Science Report*. Paper Prepared for the Attorney General's Commission on Pornography, Department of Justice, Washington, D.C., at p. 63.

28. Child pornography is a direct product of the sexual abuse and exploitation of children which results in serious, often life-long, even life-threatening, consequences for the physical, psychological and social health and development of the child.

Reference: *Sexual Offences Against Children*, vol.1, pp. 100, *Can We End the Shame?*, (1990/1991), 23 *Vanderbilt Journal of Transnational Law*, pp. 439; *Commercial Sexual Exploitation of Children*, World Congress against Commercial Sexual Exploitation of Children, pp. 7.

29. Child pornography constitutes a permanent record of a child's exploitation. The harm and humiliation caused to a child is exacerbated by the circulation, distribution and sale of such materials. The awareness that it is circulating can cause emotional and psychological harm to the victim for a lifetime. After the child engages in sexual activity the paedophile can use the pornography to blackmail the child by threatening to show them to parents, police, etc.

Reference: *Sexual Offences Against Children*, vol.1, pp.101, *Can We End the Shame* (1990/1991), 23 *Vanderbilt Journal of Transnational Law*, pp. 439.

30. The importation, circulation, distribution and sale of child pornography provides economic motive for its continued production.

This in turn guarantees additional abuse as the availability to child pornography constitutes a message to consumers that children are available for pornographic purposes.

Reference: Sexual Offences Against Children, vol.1, pp.101.

31. Child pornography stimulates the sexual appetites and encourages the activities of child molesters and paedophiles who use it to feed their sexual fantasies. Child pornography has served as a stimulus to committing sexual assaults against children. Surveys have shown that child pornography is associated with sexual assaults, with attendant physical injuries sustained. In addition, there is an association between exposure of children to pornography and their introduction to other health risks including drugs and alcohol, street life, delinquency, domestic and extra-familial violence. Further, children who are involved in the production of pornographic materials are usually involved in prostitution, are frequently moved within and between nations for this victimization, and are exploited to meet the pathological needs of paedophiles.

Reference: Associated Harms, Chapter 55, pp.1271, 1283; Child Pornography Protection Act of 1995, pp. 12; Commercial Sexual Exploitation of Children, World Congress against Commercial Sexual Exploitation of Children, pp. 7 & 12.

32. Material which depicts children in a sexual way for the entertainment of adults interferes with their developing sexuality so as to distort it and encourage the children used to have aberrant views about human sexual relations. Post-traumatic stress disorder is among the psychosocial consequences of child sexual abuse, violence and pornography. Impairment of attachment, self-esteem, and interpersonal relationships, failure to acquire competence in peer relations, adoption of highly sexualized or highly aggressive behaviour, are other dysfunctional ways victims have of dealing with the anxiety that results from child

pornography. Further, the sexual experience of children portrayed in pornography is accompanied by a sense of betrayal, guilt, feelings of worthlessness and rage.

Reference: Pornography and Prostitution in Canada, Report of the Special Committee on Pornography and Prostitution, vol. 2,

Chapter 42, pp.571; Commercial Sexual Exploitation of Children, World Congress against Commercial Sexual Exploitation of Children, pp. 23 & 25.

33. Child pornography can have intergenerational effects. Studies show that a number of sexually exploited children are at high risk of becoming sexual exploiters of children as adults, thereby perpetuating the abuse.

Reference: Child Pornography Prevention Act of 1995, pp. 12; Commercial Sexual Exploitation of Children, World Congress against Commercial Sexual Exploitation of Children, pp. 25 & 27.

34. Child pornography leads to social harm as it conveys the negative message to members of the public that it is acceptable to cause physical harm and undermine human dignity in the context of sexual relations. Further, the sexual exploitation of children can have significant public health consequences. The involvement of children in the commercial sex world could possibly increase the rate of the transmission of HIV.

Reference: The Criminal Code, Chapter 20, pp.265; Commercial Sexual Exploitation of Children, World Congress against Commercial Sexual Exploitation of Children, pp. 7.

35. It is therefore submitted, that not only is there overwhelming evidence upon which Parliament could “reasonably conclude that there is an appreciable risk of harm to society” by failing to criminalize possession of all forms of child pornography, but further, that a failure to do so would condone the sexualization of a child for the purpose of adult entertainment, a proposition antithetical to first principles of equality. This equality analysis appears nowhere in the judgments below.

E] HOW A CHARTER SECTION 7 ANALYSIS IS TO BE BALANCED INTO THE SECTION ONE ANALYSIS

36. Child pornography clearly violates core value privacy rights of children and, like equality rights, it is the violation of these privacy rights that are “profound” and not any minuscule violation of the paedophiles privacy rights which are far removed from the core value.

Reference: Pornography and Prostitution in Canada, Report of the Special Committee on Pornography and Prostitution, Volume 2, Chapter 41, p. 561.

37. It is submitted that the section 7 Charter case law establishes: (i) that privacy rights are accorded constitutional protection under section 7 of the Charter; (ii) that the privacy interests protected by section 7 are broader than the privacy interests protected by sections 8 - 14 of the Charter; (iii) that the right to individual liberty and security of the person is inextricably tied to the concept of human dignity; (iv) that liberty and security of the person is a condition of human self respect, and therefore, a denial of such self respect and control over one's life and body constitutes a deprivation of a person's essential humanity; (v) that government action that directly impacts upon a person's physical and mental integrity resulting in stigmatization, loss of privacy, stress, anxiety, disruption of family, social life and work, legal costs and uncertainty, all violate the security of the person; (vi) that exposure alone to such a threat is enough to violate these interests; and (vii) when considering the issue of privacy, that the Court must consider the relative power of those whose activities are restricted and those for whose benefit the restriction is made.

Reference: Thomson Newspapers Ltd. et al v. Director of Investigation and Research et al (1986) 57 O.R. (2d) 257 at 261 affirmed 72 O.R. (2d) 415 (S.C.C.); Re: Singh v. Minister of Employment and Immigration 17 D.L.R. (4th) 422 at 456, 458-9, 464 (S.C.C.); Re: s. 94(2) of Motor Vehicle Act 24 D.L.R. (4th) 536 at 546, 547, 549, 550, 570, 571; Edmonton Journal v. Attorney General for Alberta et al 64 D.L.R. (4th) 577 at 600 and 601 (S.C.C.); R. v. Beare (1989) 45 C.C.C. (3d) 57 at 77 (S.C.C.); R. v. Dyment (1988) 45 C.C.C. (3d) 244; Re: Vickery and Prothonotary of the Supreme Court of Nova Scotia (1991) 64 C.C.C. (3d) 65 at 89, 90-92; R. v. Morgentaler [1988] 1 S.C.R. 30 at 51, 53, 55, 56, 60, 89, 91, 162, 164, 165, 166, 167, 171, 173; Operation Dismantle Inc. et al v. The Queen et al 18 D.L.R. (4th) 481 at 487 and 492 (S.C.C.); Hunter v. Southam Inc. [1984] 2 S.C.R. 145; Slight Communications Inc. v. Davidson [1989] 1 S.C.R. 1038; Attorney General of Quebec v. Irwin Toy Limited [1989] 1 S.C.R. 927; R. v. Nguyen; R. v. Hess [1990] 2 S.C.R. 906, 59 C.C.C. (3d) 161 at 193.

38. Further, there is a fundamental principle of law that the innocent must be protected from unnecessary harm. Where a paedophile claims a freedom of expression right to possess child pornography, which of itself is harmful, degrading and invasive, the prevention of harm to the innocent party or group should prevail and override any deviant interest held by the paedophile.

Reference: *Re: Vickery and Prothonotary of the Supreme Court of Nova Scotia*, supra, at 89, 90-92.

39. The section 2(b) Charter interests of a paedophile cannot operate to the extent of harming the innocent, particularly where there is a need to protect social values of superordinate importance, such as protecting our children. This Court has held that the protection of the innocent was a social value of “superordinate importance”. Respecting the privacy interests of children is essential to maintain the integrity of the administration of justice and therefore must be accommodated and protected to the “greatest extent possible”.

Reference: *Re: Vickery and Prothonotary of the Supreme Court of Nova Scotia* supra at 94-95; *CBC v. New Brunswick (Attorney General)* 110 C.C.C. (3d) 193 at 209 (S.C.C.); *Attorney General of Nova Scotia v. MacIntyre* 65 C.C.C. (2d) 129 at pp. 145-147 (S.C.C.); Also see *O'Connor v. The Queen* (1996) 103 C.C.C. (3d) 1 (S.C.C.); *R. v. Beharriel* (1996) 103 C.C.C. (3d) 93 (S.C.C.); *R. v. Barbosa* 92 C.C.C. (3d) 131 at 141, 143, 144; *R. v. Osolin* (1993) 86 C.C.C. (3d) 481 at pp. 492, 500, 521; *R. v. Dymont* supra at pp. 255 and 256; *R. v. Plant* (1993) 84 C.C.C. (3d) 203 at pp. 211 and 214.

40. It would appear that the respondent’s principal section 7 submission relates to overbreadth. On pages 30 - 32 of his factum before the British Columbia Court of Appeal, the respondent sets out a series of hypothetical examples to illustrate how the impugned subsection is overbroad. Respectfully, these hypotheticals create intellectual confusion and represent false arguments.

41. The evidence confirms how drawings and cartoons depicting children engaged in explicit sexual activity fuels a paedophiles fantasies. The evidence also confirms how a paedophile will use such material to exploit a child. In this respect, cartoons showing explicit

sexual activity can be even more dangerous since a child being seduced by a child abuser is more apt to respond to a cartoon format. Further, for the respondent to state that such works do not “in their production, abuse or exploit children”, because they are “works of the imagination” is dangerously misleading and misses the point that the evil the law is seeking to address is the sexualization of children and the targeting of them as a class for adult sexual exploitation. The effect and use of such material by consumers is very real and not imaginary. Further, it completely ignores and is entirely non-responsive to the submissions above concerning the competing interests under sections 7 and 15 of the Charter. Simply put, the distinction the respondent wishes to make (and accepted by the British Columbia Court of Appeal), between different forms of child pornography, is without foundation and entirely unsupported by the empirical research.

42. With respect to the hypothetical examples concerning two children between the ages of 14 and 17, engaging in consensual sex, it should be noted at the outset that no evidence was called at trial that would allow counsel to explore, through cross-examination, why children would videotape or photograph their sexual activity, whether any in fact do, whether they understood the implications and potential use of such material, whether there truly was informed consent, and what use was, in fact, made of it. Had these hypotheticals been the subject matter of consideration at trial, the evidence may have established that the hypotheticals bear no connection to reality, allowing the academic and largely counter-factual nature of the hypotheticals to be considered against a functional analysis of the legislative objective and what exists in the real world. Apart from the fact that there has never been a child pornography prosecution in Canada involving the facts set out in such hypotheticals, there is no evidence before the Court that children between the ages of 14 and 17 engage in explicit sexual activity whilst the activity is being videotaped or photographed. CAVEAT does not accept the premise and the inferences the respondent wishes to draw from their hypotheticals. The truth is that children do not videotape themselves engaging in explicit sex -- adults do for their use and sale. It is respectfully submitted that the British Columbia Court of Appeal ought to have refrained from commenting on such hypotheticals in the absence of any evidentiary foundation. These are not the kinds of issues that should be determined in the abstract.

43. In any event, the examples used by the respondent simply miss the point. It is one thing for children between the ages of 14 and 17 to engage in explicit consensual sexual activity in the privacy of their own bedrooms. It is quite another to produce, distribute or possess videotape and/or photographs of the activity with the potential risk of it being used for exploitive or coercive reasons, including as blackmail. Once there is a permanent record created of children engaged in sexual activity, there is the danger that the partners themselves, in different circumstances, could use the material in an exploitive or coercive manner against each other, including one of the partners selling it. Further, there is always the risk of the material being exploited by adult third parties, with or without the consent of the children involved. The material could be stolen and sold. Even further, a decision made by a child should not be permanent. A 14-year-old may consent to engaging in explicit sexual activity and through ignorance and naivete, fail to understand the implications of a permanent record being made of it. However, when the child grows up, he or she may be harmed because such a record exists over which they have lost control. Facts of such circumstances could have been developed at trial, if this argument had been made timely.

44. More importantly, the overriding concern in these examples goes beyond the harm or potential harm to the individuals in it. The primary concern is the harm caused to children as a class because their dignity, identity and worth as children is removed and they are made into sex objects for adult exploiters. It is appropriate for Parliament to say, as a matter of public policy, that this harm is unacceptable and will not be permitted.

45. Moreover, the test of culpability is not subjective. It is objective. We are not engaged in a subjective test involving the views of the participants in the materials, but rather we are concerned with an objective analysis involving community standards and harms to a class and to society as a whole. Children are demonstrably harmed by child pornography: in its making, through its dissemination, and through its use. Whether the actual production involves criminal or non-criminal behaviour, just as in the assessment of obscenity, is not determinative of the question of its legality as sexual expression.

46. Further, there are all kinds of examples where an activity may be legal in one context but not in another. For example, a 14-year-

old can consent to have sex with an adult. However, if consideration is offered for the sexual services, it is proscribed (see section 212(4) of the Criminal Code).

47. Adults can consent to engaging in acts of violence, degradation, sado-masochism and bestiality in private, but they cannot publish or record this activity in any form. What is perfectly legitimate in the bedroom would be illegal and against public policy on a billboard.

48. Simply put, there is a point where public policy and community standards have a legitimate right to step in and proscribe conduct because there is a point where strictly private conduct ceases to be private and engages conduct that can either put people at risk, or go beyond community standards of tolerance.

49. It is further submitted that the overbreadth doctrine, if employed to invalidate the child pornography law on these examples, is itself overbroad. Overbreadth doctrine, as applied in the freedom of expression context, originated in the United States under the First Amendment to the United States Constitution, which recognizes no constitutional equality boundary as we do under the Charter in Canada. Moreover, even lacking recognition of sex equality constraints, U.S. First Amendment law permits criminalization of possession of child pornography on terms similar to those in section 163.1(4) of the Criminal Code, a

prohibition that has been upheld against First Amendment overbreadth attack virtually identical to that levelled here.*

Reference: *New York v. Ferber*, 448 U.S. 747, 73 L. Ed. (2d) 1113 (1982) (U.S.S.C.); *Osborne v. Ohio*, 495 U.S. 103, 109 L. Ed. (2d) (1990) (U.S.S.C.).

PART III -- RELIEF SOUGHT

50. It is respectfully requested that leave to intervene be granted on the following terms:

- (i) That CAVEAT granted leave to file a 30-page factum.
- (ii) That CAVEAT be allocated 15 minutes for oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

TIMOTHY S.B. DANSON

Counsel for the applicant,
Canadians Against Violence Everywhere Advocating Its Termination
(CAVEAT)

* Ferber and Osborne both rejected First Amendment overbreadth attacks on child pornography laws. Ferber going to production harms, Osborne going to consumption harms and possession.

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PARTS I &

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III THE LAW/RELIEF SOUGHT

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III THE LAW/RELIEF SOUGHT

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