

IN THE SUPREME COURT OF CANADA

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

JOHN ROBIN SHARPE

Respondent

AFFIDAVIT OF PRISCILLA de VILLIERS

I, PRISCILLA de VILLIERS, of the City of Burlington, in the Province of Ontario, MAKE OATH AND SAY:

A] INTRODUCTION

1. I am President of CAVEAT (Canadians Against Violence Everywhere Advocating its Termination, now known as Canadians Against Violence), a national not-for-profit charitable organization which has been active since 1992 in public education and in seeking changes to the judicial system with a view to advancing the rights of victims of violence. As such, I have knowledge of the matters to which I hereinafter depose.

2. The decision of the British Columbia Court of Appeal in the herein matter has enormous implications for our organization as it directly affects victims of crime right across Canada. CAVEAT works closely with child abuse victims, their families and friends, as well as the community at large. In this sense, we are at ground level and very much a grass roots organization. We have a unique insight and perspective concerning not only the harmful effects of child pornography from a front-line perspective, but further, we have a unique insight and perspective as to the nature of the injury and

harm caused by child pornography, whether the pornography in question uses actual children in its making or whether it takes the form of written material, sketches or drawings.

3. Legalizing possession of child pornography and drawing distinctions between different forms of child pornography irrespective of its content, turns back enormous progress and achievements made by CAVEAT and other organizations in the area of child pornography, privacy and equality rights. This issue goes to the very core of CAVEAT's mandate as a national victims rights organization.

4. In seeking intervener status, CAVEAT wishes only to address the issues touching upon constitutional questions stated. We are not interested in the issue of Mr. Sharpe's innocence or guilt on the merits. That is a matter strictly for the trial Court. The constitutional issues however have far reaching implications for all Canadians and the right of Parliament to enact criminal laws to protect the public against dangerous and harmful activity.

B) STATUS OF CAVEAT BEFORE THE BRITISH COLUMBIA COURT OF APPEAL

5. By Order dated March 22, 1999, the Honourable Madam Justice Southin granted CAVEAT leave to intervene in the herein appeal before the British Columbia Court of Appeal together with the Canadian Police Association (CPA) and the Canadian Resource Centre for Victims of Crime. While our interests and perspectives were different, they were nevertheless compatible. Since we were represented by the same counsel, we brought a joint intervener application. We were the only interveners before the British Columbia Court of Appeal given leave to file a joint factum without page restrictions. We believe that our different and distinctive perspective is better presented by way of a separate intervener application, factum, and oral submission, should leave be granted.

6. The successful fresh evidence motion brought by CAVEAT, the CPA, and the Canadian Resource Centre for Victims of Crime before the British Columbia Court of Appeal, and in particular, the Affidavit of Detective Inspector Matthews, the details of which are set out in

the affidavit of Grant Obst, reproduced at Tab 2 of the CPA's Intervener Application, had two distinctive parts to it. One related to the enforcement of child pornography legislation and the unique nature of the child pornography industry, and the other related to the use of child pornography and its impact on victims and the larger community. While CAVEAT is acutely interested and concerned with both of these areas, our particular area of expertise and experience is with respect to the latter issues. That is, the use and impact of all forms of child pornography on children and society at large and the issue of community standards.

7. In addition to being granted leave to make oral submissions with respect to the fresh evidence motion, CAVEAT was also granted leave to make oral submissions on the merits.

C] OVERVIEW PERSPECTIVE

8. CAVEAT does not take a position with respect to the constitutional validity of the impugned subsection. We do however forcefully advocate for a strong and comprehensive child pornography law which includes the criminalization of private possession of child pornography.

9. Whether the impugned law goes beyond what is necessary to achieve the legislative objective or is otherwise overbroad is not the type of concern which triggered a decision by CAVEAT's Board of Directors to seek intervener standing before this Honourable Court.

10. Our interest is to ensure that the full panoply of the victims' perspective is properly weighted in the Court's analysis so that even if the law were found to be constitutionally overbroad, Parliament would still be entitled to legislate a new child pornography law that fully protects victims.

11. While CAVEAT is a national victims rights organization, our mandate, of necessity, requires us to engage in extensive national public consultation. As a consequence, we can assist this Honourable Court on the issue of community standards and the community standard of tolerance test.

12. I have read the Affidavit of Grant Obst, President of the CPA, which is reproduced at Tab 2 of the CPA's intervener application. I

agree with much of the contents of Mr. Obst's affidavit. In the Court below, we proceeded with a joint submission and in fact, developed the material and arguments together. Consequently, I will not repeat his evidence other than to say that a victims' perspective on the issues raised therein remain quite different and distinct from that of the police. To ensure that this distinct perspective is kept distinct, we have decided to proceed separately for the purpose of the herein leave application.

13. At pages 14 - 19, paragraphs 33 - 42 of Mr. Obst's affidavit, he addresses the criticism of the impugned law in that it extends to so-called works of the "imagination" such as written material, sketches or drawings. In doing so, it is argued by the respondent, as well as the British Columbia Civil Liberties Association, and accepted by the majority of the British Columbia Court of Appeal, that the impugned law is overly broad. Respectfully, from a victims' perspective, such a distinction lacks an air of reality.

14. Apart from working with victims of crime, it is part of CAVEAT's mandate to stay current with the social science literature and expert opinion concerning the harmful effects of child pornography. We are in a unique position to evaluate our practical experiences in the field with the literature. This gives us a unique perspective. The use of these so-called works of the "imagination" on children is real, tangible and far from imaginary. Indeed, our experience in working with victims is that what is depicted in the so-called works of the "imagination" is not imaginary at all, but rather, is a presentation of acts which have actually occurred or played a real and substantive part in an offender acting out.

15. We at CAVEAT are left with responding to the actual mess, harm and hurt caused by this material. We do not have time for the niceties of abstract academic discussion which, for us, is overwhelmed by an overriding reality of harm.

16. Precisely the same point can be made with respect to the use of the hypotheticals which were used to inform the overbreadth constitutional analysis which is discussed at pages 19 - 29, paragraphs 43 - 70 of Mr. Obst's affidavit. There is a serious absence of an air of reality presented by these hypotheticals.

17. While the police can speak to the issue of why the factual underpinnings of the hypotheticals have never and will never form

the subject matter of a criminal prosecution, CAVEAT can provide a unique victims' perspective with respect to the misrepresentations and unacceptable stereotypical biases presented by the hypotheticals.

18. Further, part and parcel of the aforesaid, is how children are degraded and devalued as a class by child pornography. Having regard to the fact that any weighing of competing interests under section one of the Charter must be consistent with Charter principles, CAVEAT can provide a unique and distinct victims' perspective based on principles derivative from sections 7 and 15 of the Charter and the corresponding community standards which inform these issues. A discussion of these issues is set forth in our factum which forms part of this record at Tab 7.

D] FACTS ABOUT CAVEAT

19. CAVEAT is a national victims rights organization with its head office located in Burlington, Ontario. We have regional volunteer representatives chaired by Chris Simmonds in Langley, British Columbia, and David Cassels in Edmonton, Alberta. CAVEAT is a member of and works with other victim rights organizations, such as the World Society of Victimology (Germany), and the National Organization for Victim Assistance (Washington, D.C.). We also work with organizations such as the National Victim Centre (Fort Worth, Texas), the National Justice Network (Ottawa), Plaidoyer des Victimes (Montreal), and Crime Prevention Ontario. We attend and participate in conferences and workshops around the world that focus on victims rights. This provides us with a very unique and informed insight, perspective and expertise.

20. CAVEAT's mandate is to work toward an informed, accountable and integrated justice system which protects the public against violence, recognizes the rights of victims of violence, and to provide as much protection for the rights of victims as possible. We provide a host of services for victims of crime which places us in direct and constant contact with victims of crime which includes victims of child and sexual abuse. Attached hereto and marked as Exhibits "A", "B" and "C" respectively, to this my affidavit and reproduced at Tabs 3, 4, and 5 of the herein application record, is a copy of my personal Curriculum Vitae, a document describing the activities of CAVEAT,

and CAVEAT's National Safety Net Conference Recommendations entitled "For the Protection of Our Children".

21. As President of CAVEAT, I have been a member of the 25-person National Crime Prevention Council, an expert body assembled by the federal government to study crime prevention in Canada. The perspective and expertise of CAVEAT is called upon on a regular basis by all levels of government and other interested organizations and groups. It is our mandate to address issues of a legislative, constitutional and policy character.

22. Over the years, CAVEAT has made numerous submissions to the federal government in regard to justice related issues. CAVEAT has worked closely and has been a member of a variety of federal government committees charged with studying and making recommendations with respect to correctional, high-risk offender and crime prevention issues. We are also a national advocacy and networking organization promoting awareness of issues concerning public safety. We engage in research and public education. CAVEAT publishes a bi-monthly national paper entitled "CAVEAT Report". Our British Columbia office also publishes a local report, entitled "B.C. Update". In addition, we maintain a website which reflects our activities, publications, positions on relevant issues relating to crime prevention, and criminal justice. Users of this site include Canadian students at every level, as well as international users.

23. In 1994, CAVEAT, along with the CPA, was granted intervener status in the LePage case by the trial judge to address the constitutional issues concerning the Criminal Code provisions dealing with persons found not criminally responsible by reason of their mental disorders. On appeal to the Court of Appeal of Ontario, it was agreed that CAVEAT would seek intervener standing which was granted. On further appeal to this Honourable Court, it was agreed that the CPA would seek intervener standing which was granted. We played a significant role in ensuring that a full and complete evidentiary record was created. As a victims' rights organization, both the trial Court and the Ontario Court of Appeal ruled that CAVEAT had a distinct expertise concerning the constitutional issues raised, had a significant interest in the outcome of the appeal, would be able to assist the court by presenting different approaches to the resolution of the appeal, and was uniquely situated to make an important contribution to the effective adjudication of the issues raised in the appeal. I think it is fair to say that even counsel for Mr.

LePage and the interveners lined up to support his position, acknowledged that our perspective was an important one for the effective adjudication of the constitutional issues. Likewise, we acknowledged the importance of the perspective raised by those interveners opposite, notwithstanding that we strongly disagreed with their position.

24. In addition, CAVEAT was granted intervener status by this Honourable Court, In the matter of Section 27.1 of the Judicature Act, R.S.A. 1980, Chapter J-I; 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. This reference deals with the constitutional validity of the new federal gun control legislation and is scheduled to be heard by this Honourable Court in December 1999.

25. Given the mandate, experience, and representations of CAVEAT, I verily believe that CAVEAT is uniquely situated to present a fresh, different and useful perspective, distinct from that offered by the other parties to the herein appeal on issues of important constitutional and public law. Further, because of this unique perspective, our response to the written and oral argument of other parties/interveners to these proceedings will be different. Of particular importance is CAVEAT's work with government, other victims' rights organizations around the world and our involvement in victims' rights conferences throughout Canada and around the world. It is submitted that CAVEAT is uniquely situated to offer special insight into the social science and medical literature as well as into the issue of community standards on issues of criminal violence and pornography.

26. As a result of the work in the field of victims rights, I have received various awards, including 1992 Woman of the Year in Public Affairs (Hamilton Status of Women), 1993 Distinguished Citizen of the Year (Hamilton), 1993 Newsmaker of the Year Award (Toronto Sun), 1993 Distinguished Citizen of the Year (Burlington), one of Canada's 1994 Top 50 Newsmakers (Chatelaine Magazine), 1995 Honorary Doctorate of Laws (McMaster University), 1995 Maclean's Honour Roll (Canada), and the 1996 Meritorious Service Medal (Government of Canada).

E] ADDITIONAL EXPERT EVIDENCE AND PERSPECTIVE

27. I have reviewed the trial transcripts in the herein proceedings with our counsel, as well as the decision of the British Columbia Court of Appeal, and the supporting factums of all participants. This in turn resulted in general discussion amongst our membership and detailed discussions and debate at our National Board of Directors level. We are deeply concerned about the lack of attention paid and weight given, if any, to the applicable community standards and the rights of victims, and in particular the child victims of pornography. This goes beyond an acknowledgement that child pornography is harmful to children and the community at large, and extends to the fact that children, and through them, the community at large, independently, have rights which must be protected. This is not just about the 2(b) Charter rights of the accused.

28. Further, there remains a deficiency in the record concerning the extensive social science research establishing a causal link between all forms of child pornography and harms to children and society at large. CAVEAT's perspective on this issue is different from that presented by the other parties to this appeal.

29. CAVEAT has played a significant role in assisting victims of pornography marshal expert evidence for Court proceedings, as well as being helpful in introducing for the Court's benefit the relevant social science literature concerning the harmful effects of pornography and the countervailing interests. The experience and expertise that CAVEAT has developed leads us to the following observations which we submit reflects an important and useful perspective necessary for the effective adjudication of the issues at bar:

(a) That all child pornography is harmful. Making a legal distinction between child pornography that uses actual children and child pornography that takes the form of written material, drawings or sketches, is simply untenable and cannot be supported at any level.

(b) That the harmful effects of child pornography regardless of whether actual children are used or not, includes everything from sexual violence and abuse, to the legitimization of sexual violence and abuse, the promotion of tolerance of sexual violence and abuse, instilling attitudes of domination and discrimination against children, and attitudinal denigration and subordination in general.

(c) That the appearance of simulated consent and pleasure in child pornography regardless of whether actual children are used or not, is particularly harmful in promoting sexual abuse myths and desensitizing its consumers to abuse and degradation.

(d) That non-violent child pornography of any kind which is degrading and dehumanizing lowers the inhibitions on aggression by adults against children.

(e) That there is a distinction to be made between child pornography (of the violent or dehumanizing variety) and erotica (which portrays explicit sex).

(f) That the legalization and legitimization of child pornography in any form, acts as a deterrence to the reporting of child sexual abuse, and in particular the reporting of that abuse which gives rise to particular pornographic products.

(g) The harmful effects of child pornography regardless of whether actual children are used or not, include inciting violence and sexual abuse, imitation, the perpetuation of sexual abuse (through the making of the pornography alone), enhancement of sexual fantasies, and negative social learning and conditioning.

(h) The effect of negative social learning and conditioning manifest itself in attitudes which objectify children, increase tolerance for violence, inequality and domination with respect to children, trivializing sexual abuse, desensitizing responses to abuse, diminishing inhibitions and fear of sanctions or disapproval by peers with respect to sexual abuse, and increasing sexual aggression.

(i) The formation of sexual predators is strongly linked to the development of deviant sexual arousal patterns caused by child pornography of any kind.

(j) Non-violent child pornography is not the same as erotica.

(k) Significant exposure to non-violent child pornography in any form, instills a desire for violent child pornography.

(l) Child pornography results in a pervasiveness of sexual violence toward children.

(m) There is a surprising level of tolerance toward violence in society and the degree to which it is institutionally entrenched can be enhanced if possession of child pornography is not proscribed.

(n) The harmful effects of child pornography and the significant role child pornography plays in linking physical and sexual violence against children is well documented.

(o) The embarrassment and humiliation suffered by victims of child abuse and sexual violence is extreme as is the fear of public exposure of this material, and the corresponding consequence of underreporting.

(p) Child pornography can become a key source for sexual learning and becomes a “how-to” manual for sexual assault.

) Community standards with respect to protecting children are different and far more vigilant than any other aspect of the criminal justice system.

30. It is equally critical, from CAVEAT’s perspective as it is from the police perspective, that the Court be cognizant of the works of the so-called “imagination” such as Boiled Angel #7, Boiled Angel #Ate, Chicken, and How to Have Sex with Kids, reproduced at Tabs 4, 5, 6 and 7 of the CPA’s application. This is the type of material which we come into contact with or are made aware of from child victims. It is barbaric, sadistic, grotesque, violent and generally degrades and devalues children and victims as a class. Given our real life experiences, and the shattering reality of these experiences, it is a matter of great worry and concern to see artificial judicial distinctions which are grounded in theory rather than reality. There is nothing imaginary about this material in terms of how it is used by offenders to groom their victims and to act out.

31. This in turn gives rise to serious concerns for victims who seek protection from the harmful effects of all forms of child pornography. While the respondent and the British Columbia Civil Liberties Association advance arguments under sections 2(b) and 7 of the Charter to support their attack on the constitutional validity of the impugned subsection, CAVEAT wishes to advance the countervailing

arguments concerning how victims rights under sections 7 and 15 are being violated, which we respectfully submit are issues of critical importance for an informed and balanced analysis under section one of the Charter. We also wish to address the issue of community standards which is very much a part of our mandate.

32. CAVEAT also takes issue with respect to the assumption that section 163.1(4) of the Criminal Code is facially in violation of section 2(b) of the Charter. We feel that a critical analysis of what child pornography is really about places it in the category of a violent form of expression or analogous to a violent form of expression, thereby excluded from section 2(b) Charter protection.

33. This Affidavit is sworn in support of the herein application and for no other or improper purpose.

SWORN BEFORE ME at the City)
of Burlington, in the Province of Ontario,)
this day of September, 1999.)
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_____)
PRISCILLA de VILLIERS)
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_____)
A Commissioner, Etc.)

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