R. *v*. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2

**Her Majesty the Queen** *Appellant*

*v.*

**John Robin Sharpe** *Respondent*

and

**The Attorney General of Canada,**

**the Attorney General for Ontario,**

**the Attorney General of Quebec,**

**the Attorney General of Nova Scotia,**

**the Attorney General for New Brunswick,**

**the Attorney General of Manitoba,**

**the Attorney General for Alberta, the**

**Canadian Police Association (CPA),**

**the Canadian Association of Chiefs of**

**Police (CACP), Canadians Against**

**Violence (CAVEAT), the Criminal**

**Lawyers’ Association, the Evangelical**

**Fellowship of Canada, Focus on the**

**Family (Canada) Association, the British**

**Columbia Civil Liberties Association, the**

**Canadian Civil Liberties Association,**

**Beyond Borders, Canadians Addressing**

**Sexual Exploitation (CASE), End Child**

**Prostitution, Child Pornography and**

**Trafficking in Children for Sexual Purposes (ECPAT)**

**and the International Bureau for Children’s Rights** *Interveners*

**Indexed as:  R. *v*. Sharpe**

**Neutral citation: 2001 SCC 2.**

File No.:  27376.

2000:  January 18, 19; 2001: January 26.

Present:  McLachlin C.J. and L’Heureux‑Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for British Columbia

*Constitutional law – Charter of Rights – Freedom of expression – Child pornography – Whether possession of expressive material protected by right to freedom of expression – Canadian Charter of Rights and Freedoms, s. 2(b).*

*Constitutional law – Charter of Rights – Right to liberty – Whether Criminal Code prohibition of possession of child pornography infringing right to liberty – Canadian Charter of Rights and Freedoms, s. 7 – Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4).*

*Constitutional law – Charter of Rights – Freedom of expression – Child pornography – Crown conceding that Criminal Code prohibition of possession of child pornography infringing freedom of expression – Whether infringement justifiable – Canadian Charter of Rights and Freedoms, s. 1 – Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4).*

*Criminal law – Child pornography – Criminal Code prohibiting possession of child pornography – Scope of definition of “child pornography” – Defences available – Criminal Code, R.S.C. 1985, c. C-46, s. 163.1.*

The accused was charged with two counts of possession of child pornography under s. 163.1(4) of the *Criminal Code* and two counts of possession of child pornography for the purposes of distribution or sale under s. 163.1(3). “Child pornography”,as defined in s. 163.1(1) of the *Code*, includes visual representations that show a person who is or is depicted asunder the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years. “Child pornography” also includes visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under the *Code*. Prior to his trial, the accused brought a preliminary motion challenging the constitutionality of s. 163.1(4) of the *Code*, alleging a violation of his constitutional guarantee of freedom of expression. The Crown conceded that s. 163.1(4) infringed s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* but argued that the infringement was justifiable under s. 1 of the *Charter*. Both the trial judge and the majority of the British Columbia Court of Appeal ruled that the prohibition of the simple possession of child pornography as defined under s. 163.1 of the *Code* was not justifiable in a free and democratic society.

*Held*: The appeal should be allowed and the charges remitted for trial.

*Per* McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and LeBel JJ.: In order to assess the constitutionality of s. 163.1(4), it is important to ascertain the nature and scope of any infringement. Until it is known what the law catches, it cannot be determined that the law catches too much. Consequently, the law must be construed, and interpretations that may minimize the alleged overbreadth must be explored. In light of Parliament’s purpose of criminalizing possession of material that poses a reasoned risk of harm to children, the word “person” in the definition of child pornography should be construed as including visual works of the imagination as well as depictions of actual people. The word “person” also includes the person possessing the expressive material. The term “depicted” refers to material that a reasonable observer would perceive as representing a person under the age of 18 years and engaged in explicit sexual activity. The expression “explicit sexual activity” refers to acts at the extreme end of the spectrum of sexual activity – acts involving nudity or intimate sexual activity represented in a graphic and unambiguous fashion. Thus, representations of casual intimacy, such as depictions of kissing or hugging, are not covered by the offence. An objective approach must be applied to the terms “dominant characteristic” and “for a sexual purpose”. The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its “dominant characteristic” as the depiction of the child’s sexual organ or anal region in a manner that is reasonably perceived as intended to cause sexual stimulation to some viewers. Innocent photographs of a baby in the bath and other representations of non-sexual nudity are not covered by the offence. As for written material or visual representations that advocate or counsel sexual activity with a person under the age of 18 years that would be an offence under the *Criminal Code*, the requirement that the material “advocates” or “counsels” signifies that, when viewed objectively, the material must be seen as actively inducing or encouraging the described offences with children.

Parliament has created a number of defences in ss. 163.1(6) and (7) of the *Code* which should be liberally construed as they further the values protected by the guarantee of free expression. These defences may be raised by the accused by pointing to facts capable of supporting the defence, at which point the Crown must disprove the defence beyond a reasonable doubt. The defence of “artistic merit” provided for in s. 163.1(6) must be established objectively and should be interpreted as including any expression that may reasonably be viewed as art. Section 163.1(6) creates a further defence for material that serves an “educational, scientific or medical purpose”. This refers to the purpose the material, viewed objectively, may serve, not the purpose for which the possessor actually holds it. Finally, Parliament has made available a “public good” defence. As with the medical, educational or scientific purpose defences, the defence of public good should be liberally construed.

The possession of child pornography is a form of expression protectedby s. 2(*b*) of the *Charter*. The right to possess expressive material is integrally related to the development of thought, opinion, belief and expression as it allows us to understand the thought of others or consolidate our own thought. The possession of expressive material falls within the continuum of intellectual and expressive freedom protected by s. 2(*b*). The accused accepts that harm to children justifies criminalizing possession of some forms of child pornography. The fundamental question therefore is whether s. 163.1(4) of the *Code* goes too far and criminalizes possession of an unjustifiable range of material.

The accused also alleges that s. 163.1(4) violates his right to liberty under s. 7 of the *Charter*, arguing that exposure to potential imprisonment as a result of an excessively sweeping law is contrary to the principles of fundamental justice. It is not necessary to consider this argument separately as it wholly replicates the overbreadth concerns that are the central obstacle to the justification of the s. 2(*b*) breach. The s. 1 analysis generally, and the minimal impairment consideration in particular, is the appropriate forum for addressing over broad restrictions on free expression.

In adopting s. 163.1(4), Parliament was pursuing the pressing and substantial objective of criminalizing the possession of child pornography that poses a reasoned risk of harm to children. The means chosen by Parliament are rationally connected to this objective. Parliament is not required to adduce scientific proof based on concrete evidence that the possession of child pornography causes harm to children. Rather, a reasoned apprehension of harm will suffice. Applying this test, the evidence establishes several connections between the possession of child pornography and harm to children: (1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders to offend; (3) it is used for grooming and seducing victims; and (4) children are abused in the production of child pornography involving real children. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves. With respect to minimal impairment, when properly interpreted, the law catches much less material unrelated to harm to children than has been suggested. However, the law does capture the possession of two categories of material that one would not normally think of as “child pornography” and that raise little or no risk of harm to children: (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused exclusively for private use. The bulk of the material falling within these two classes engages important values underlying the s. 2(*b*) guarantee while posing no reasoned risk of harm to children. In its main impact, s. 163.1(4) is proportionate and constitutional. Nonetheless, the law’s application to materials in the two problematic classes, while peripheral to its objective, poses significant problems at the final stage of the proportionality analysis. In these applications the restriction imposed by s. 163.1(4) regulates expression where it borders on thought. The cost of prohibiting such materials to the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children. To this extent, the law cannot be considered proportionate in its effects, and the infringement of s. 2(*b*) contemplated by the legislation is not demonstrably justifiable under s. 1.

The appropriate remedy in this case is to read into the law an exclusion of the two problematic applications of s. 163.1. The applications of the law that pose constitutional problems are exactly those whose relation to the objective of the legislation is most remote. Carving out those applications by incorporating the proposed exceptions will not undermine the force of the law; rather, it will preserve the force of the statute while also recognizing the purposes of the *Charter*. The defects of the section are not so great that their exclusion amounts to impermissible redrafting and carving them out will not create an exception-riddled provision bearing little resemblance to the provision envisioned by Parliament. While excluding the offending applications will not subvert Parliament’s object, striking down the statute altogether would most assuredly do so. Accordingly, s. 163.1(4) should be upheld on the basis that the definition of “child pornography” in s. 163.1 should be read as though it contained an exception for: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. These two exceptions apply as well to the offence of “making” child pornography under s. 163.1(2) (but not to printing, publishing or possessing child pornography for the purpose of publication). The exceptions will not be available where a person harbours any intention other than mere private possession.

*Per* L’Heureux-Dubé*,* Gonthier and Bastarache JJ.: Under our society’s democratic principles, individual freedoms such as expression are not absolute, but may be limited in consideration of a broader spectrum of rights, including equality and security of the person. The Crown conceded that the right to free expression was infringed in all respects, unfortunately depriving the Court of the opportunity to fully explore the content and scope of s. 2(*b*) of the *Charter* as it applies to this case. At the same time, it is recognized that, at this stage, our jurisprudence leads to the conclusion that, although harmful, the content of child pornography cannot be the basis for excluding it from the scope of the s. 2(*b*) guarantee. No separate analysis under s. 7 of the *Charter* is required. The s. 7 liberty interest is encompassed in the right of free expression and proportionality falls to be considered under s. 1 of the *Charter*. The only issue is whether the infringement of freedom of expression is justifiable under s. 1. Section 1 recognizes that in a democracy competing rights and values exist. The underlying values of a free and democratic society guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. A principled and contextual approach to s. 1 ensures that courts are sensitive to the other values which may compete with a particular right and allows them to achieve a proper balance among these values. At each stage of the s. 1 analysis close attention must be paid to the factual and social context in which an impugned provision exists.

An appraisal of the contextual factors in this case leads to the conclusion that Parliament’s decision to prohibit child pornography is entitled to an increased level of deference. Child pornography, as defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. Although not empirically measurable, nor susceptible to proof in the traditional manner, the attitudinal harm inherent in child pornography can be inferred from degrading or dehumanizing representations or treatment. Expression that degrades or dehumanizes is harmful in and of itself as all members of society suffer when harmful attitudes are reinforced. The possibility that pornographic representations may be disseminated creates a heightened risk of attitudinal harm. The violation of the privacy rights of the persons depicted constitutes an additional risk of harm that flows from the possibility of dissemination. Child pornography is harmful whether it involves real children in its production or whether it is a product of the imagination. Section 163.1 was enacted to protect children, one of the most vulnerable groups in society. It is based on the clear evidence of direct harm caused by child pornography, as well as Parliament’s reasoned apprehension that child pornography also causes attitudinal harm. The lack of scientific precision in the social science evidence relating to attitudinal harm is not a valid reason for attenuating the Court’s deference to Parliament’s decision.

The importance of the protection of children is recognized in both Canadian criminal and civil law. The protection of children from harm is a universally accepted goal. International law is rife with instruments that emphasize the protection of children and a number of international bodies have recognized that possession of child pornography must be targeted to effectively address the harms caused by this type of material. Moreover, domestic legislation in a number of democratic countries criminalizes the simple possession of child pornography.

As a form of expression, child pornography warrants less protection since it is low value expression that is far removed from the core values underlying the protection of freedom of expression. Child pornography has a limited link to the value of self-fulfilment, but only in its most base aspect. Furthermore, in prohibiting the possession of child pornography, Parliament promulgated a law which seeks to foster and protect the equality rights of children, along with their security of the person and their privacy interests. The importance of these *Charter* rights cannot be ignored in the analysis of whether the law is demonstrably justified in a free and democratic society and warrants a more deferential application of the criteria set out in the *Oakes* test. Finally, Parliament has the right to make moral judgments in criminalizing certain forms of conduct. The Court should be particularly sensitive to the legitimate role of government in legislating with respect to our social values.

Section 163.1(4) of the *Code* constitutes a reasonable and justified limit upon freedom of expression. In proscribing the possession of child pornography, Parliament’s overarching objective was to protect children. Any provision which protects both children and society by attempting to eradicate the sexual exploitation of children clearly has a pressing and substantial purpose. Section 163.1(4) is also proportionate to the objective. First, prohibiting the possession of child pornography is rationally connected to the aim of preventing harm to children and society. The possession of child pornography contributes to the cognitive distortions of paedophiles, reinforcing their erroneous belief that sexual activity with children is acceptable. Child pornography fuels paedophiles’ fantasies, which constitute the motivating force behind their sexually deviant behaviour. Section 163.1(4) plays an important role in an integrated law enforcement scheme which protects children against the harms associated with child pornography. Paedophiles use child pornography for seducing children and for grooming them to commit sexual acts. Lastly, children are abused in the production of child pornography. The prohibition of the possession of child pornography is intended to reduce the market for this material. If consumption of child pornography is reduced, presumably production and the abuse of children will also be reduced.

Second, the prohibition of the possession of child pornography minimally impairs the right to free expression. Although s. 163.1(4) is directed only to the private possession of child pornography, children are particularly vulnerable in the private sphere, since a large portion of child pornography is produced privately and used privately by those who possess it. The harmful effect on the attitudes of those who possess child pornography similarly occurs in private. Consequently, prohibiting the simple possession of child pornography has an additional reductive effect on the harm it causes. The prohibition of the possession of child pornography also captures visual and written works of the imagination which do not involve the participation of any actual children or youth in their production; in enacting s. 163.1(4), Parliament sought to prevent not only the harm that flows from the use of children in pornography, but also the harm that flows from the very existence of images and words which degrade and dehumanize children and to send the message that children are not appropriate sexual partners. The focus of the inquiry must be on the harm of the message of the representations and not on their manner of creation, or on the intent or identity of their creator. Given the low value of the speech at issue in this case and the fact that it undermines the *Charter* rights of children, Parliament was justified in concluding that visual works of the imagination would harm children.

The inclusion of written material in the offence of possession of child pornography does not amount to thought control. The legislation seeks to prohibit material that Parliament believed was harmful. The inclusion of written material which advocates and counsels the commission of offences against children is consistent with this aim, since, by its very nature, it is harmful, regardless of its authorship. Evidence suggests that the cognitive distortions of paedophiles are reinforced by such material and that written pornography fuels the sexual fantasies of paedophiles and could incite them to offend. Although the prohibition in s. 163.1(4) extends to teenagers between the ages of 14 and 17 who keep pornographic videotapes or pictures of themselves, this effect of the provision is a reasonable limit on teenagers’ freedom of expression. A review of adolescent child pornography cases reveals that there is a great risk that they will be exploited in its creation. Hence, while adolescents between the ages of 14 and 17 may legally engage in sexual activity, Parliament had a strong basis for concluding that the age limit in the definition of child pornography should be set at 18. It is not necessary that the provision contain a defence to protect teenagers who are in possession of erotic videos or pictures of themselves. Such a defence would undermine Parliament’s objective of protecting all children, since some adolescents under the age of 18 groom other children into engaging in sexual conduct. There is also no guarantee, even when a teenager is in possession of a pornographic picture or videotape depicting himself or herself, that it was created in a consensual environment. The creation of permanent records of teenagers’ sexual activities has consequences which children of that age may not have sufficient maturity to understand. The Court should defer to Parliament’s decision to restrict teenagers’ freedom in this area. The provision does not amount to a total ban on the possession of child pornography. The provision reflects an attempt by Parliament to weigh the competing rights and values at stake and achieve a proper balance. The definitional limits act as safeguards to ensure that only material that is antithetical to Parliament’s objectives in proscribing child pornography will be targeted, and the legislation incorporates defences of artistic merit, educational, scientific or medical purpose, and a defence of the public good.

Third, when the effects of the provision are examined in their overall context, the benefits of the legislation far outweigh any deleterious effects on the right to freedom of expression and the interests of privacy. Section 163.1(4) helps to prevent the harm to children which results from the production of child pornography; deters the use of child pornography in the grooming of children; curbs the collection of child pornography by paedophiles; and helps to ensure that an effective law enforcement scheme can be implemented. In sum, the legislation benefits society as a whole as it sends a clear message that deters the development of antisocial attitudes. The law does not trench significantly on speech possessing social value since there is a very tenuous connection between the possession of child pornography and the right to free expression. At most, the law has a detrimental cost to those who find base fulfilment in the possession of child pornography. The privacy of those who possess child pornography is protected by the right against unreasonable search and seizure as guaranteed by s. 8 of the *Charter*. The law intrudes into the private sphere because doing so is necessary to achieve its salutary objectives. The privacy interest restricted by the law is closely related to the specific harmful effects of child pornography. Moreover, the provision’s beneficial effects in protecting the privacy interests of children are proportional to the detrimental effects on the privacy of those who possess child pornography.

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APPEAL from a judgment of the British Columbia Court of Appeal (1999), 136 C.C.C. (3d) 97, 127 B.C.A.C. 76, 207 W.A.C. 76, 175 D.L.R. (4th) 1, 25 C.R. (5th) 215, 69 B.C.L.R. (3d) 234, [2000] 1 W.W.R. 241, [1999] B.C.J. No. 1555 (QL), 1999 BCCA 416, dismissing a Crown appeal from a decision of the British Columbia Supreme Court (1999), 22 C.R. (5th) 129, 169 D.L.R. (4th) 536, [1999] B.C.J. No. 54 (QL), declaring void s. 163.1(4) of the *Criminal Code*. Appeal allowed.

*John M. Gordon* and *Kate Ker*, for the appellant.

*Gil D. McKinnon*, *Q.C.*, *Richard C. C. Peck*, *Q.C.*, and *Nikos Harris* for the respondent.

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*James M. Flaherty*, *Christine Bartlett-Hughes* and *Laurie Lacelle*, for the intervener the Attorney General for Ontario.

*Joanne Marceau* and *Jacques Gauvin*, for the intervener the Attorney General of Quebec.

*Daniel A. MacRury*, for the intervener the Attorney General of Nova Scotia.

*Mary Elizabeth Beaton*, for the intervener the Attorney General for New Brunswick.

*Shawn Greenberg* and *Holly Penner*, for the intervener the Attorney General of Manitoba.

*Joshua B. Hawkes*, for the intervener the Attorney General for Alberta.

*Timothy S. B. Danson*, for the interveners the Canadian Police Association (CPA), the Canadian Association of Chiefs of Police (CACP) and Canadians Against Violence (CAVEAT).

*Frank Addario* and *Michael Lacy*, for the intervener the Criminal Lawyers’ Association.

*Robert W. Staley*, *Meredith Hayward* and *Janet Epp Buckingham*, for the interveners the Evangelical Fellowship of Canada and the Focus on the Family (Canada) Association.

*John D. McAlpine*, *Q.C*., *Bruce Ryder* and *Andrew D. Gay*, for the intervener the British Columbia Civil Liberties Association.

*Patricia D. S. Jackson* and *Tycho M. J. Manson*, for the intervener the Canadian Civil Liberties Association.

*David Matas*, *Mark Eric Hecht* and *Jean-François Noël*, for the interveners Beyond Borders,Canadians Addressing Sexual Exploitation (CASE), End Child Prostitution, Child Pornography and Trafficking in Children for Sexual Purposes (ECPAT) and the International Bureau for Children’s Rights.

The judgment of McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and LeBel JJ. was delivered by

 The Chief Justice –

I. Introduction

1. Is Canada’s law banning the possession of child pornography constitutional or, conversely, does it unjustifiably intrude on the constitutional right of Canadians to free expression? That is the central question posed by this appeal.
2. I conclude that the law is constitutional, except for two peripheral applications relating to expressive material privately created and kept by the accused, for which two exceptions can be read into the legislation. The law otherwise strikes a constitutional balance between freedom of expression and prevention of harm to children. As a consequence, I would uphold the law and remit Mr. Sharpe for trial on all charges.
3. The respondent, Mr. Sharpe, was charged on a four-count indictment after two seizures of material. The first seizure was made by Canada Customs. It consisted of computer discs containing a text entitled “Sam Paloc’s Boyabuse -- Flogging, Fun and Fortitude: A Collection of Kiddiekink Classics”. Two charges were laid with respect to this material -- one for illegal possession under s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46,and one for possession for the purposes of distribution or sale under s. 163.1(3) of the *Code.* The second seizure was at Mr. Sharpe’s home pursuant to a search warrant the validity of which will be contested at trial. Police officers seized a collection of books, manuscripts, stories and photographs the Crown says constitute child pornography. Again, two charges were laid – one of simple possession and one of possession for the purposes of distribution or sale.
4. Mr. Sharpe brought a preliminary motion challenging the constitutionality of s. 163.1(4) of the *Criminal Code*. Hedoes not challenge the constitutionality of the offence of possession for the purposes of distribution and sale, which will go to trial regardless of how this appeal is resolved. Mr. Sharpe contends that the prohibition of possession, without more, violates the guarantee of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms.* The trial judge ruled that the prohibition was unconstitutional, as did the majority of the British Columbia Court of Appeal. The Crown appeals that order to this Court.
5. The Crown concedes that s. 163.1(4)’s prohibition on the possession of child pornography infringes the guarantee of freedom of expression in s. 2(*b*) of the *Charter*. The issue is whether this limitation of freedom of expression is justifiable under s. 1 of the *Charter*, given the harm possession of child pornography can cause to children. Mr. Sharpe accepts that harm to children justifies criminalizing possession of some forms of child pornography. The fundamental question therefore is whether s. 163.1(4) of the *Criminal Code* goes too far and criminalizes possession of an unjustifiable range of material.

II. Provisions of the Legislation and the *Charter*

1. In 1993, Parliament enacted s. 163.1 of the *Criminal Code*, creating a number of offences relating to child pornography. The provision supplemented laws making it an offence to make, print, publish, distribute, or circulate obscene material (s. 163), and to corrupt children (s. 172). With the enactment of s. 163.1, the *Criminal Code* contains a comprehensive scheme to attack child pornography at every stage – production, publication, importation, distribution, sale and possession. Subsections (2) and (3) of s. 163.1 criminalize possession of child pornography for the purpose of publication and possession for the purpose of distribution or sale. Section 163.1(4) extends the prohibition to possession *simpliciter*:

**163.1** . . .

(4)Every person who possesses any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) an offence punishable on summary conviction.

1. The scope of this offence depends on the definition of “child pornography”

in subs. (1):

(1) In this section, “child pornography” means

(*a*) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

(*b*) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

1. The offence is subject to a number of defences, set out in subs. (6) and (7):

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

(7) Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3) or (4).

1. Subsection (7) imports the “public good” defence from the obscenity provisions of the *Criminal Code*:

**163.** . . .

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposesof this section, the motives of an accused are irrelevant.

1. Section 2(*b*) of the *Charter* guarantees freedom of expression as follows:

**2.** Everyone has the following fundamental freedoms:

. . .

(*b*)freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

1. Section 7 of the *Charter* guarantees a right to liberty as follows:

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

1. Section 1 of the *Charter* affirms the entitlement of everyone to the fundamental rights guaranteed by the *Charter*,subject to justifiable limits:

**1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

III. Judicial Decisions

1. *British Columbia Supreme Court* (1999), 22 C.R. (5th) 129
2. In the British Columbia Supreme Court, Shaw J. courageously ruled that s. 163.1(4) is unconstitutional. He held that the objective of the law is to combat material that puts children at risk of harm. He reviewed evidence that child pornography arguably creates this risk through its use for grooming or seduction; by the use of children in its manufacture; by confirming or augmenting cognitive distortions of paedophiles; and by inciting paedophiles to commit offences against children. However, although this Court in *R. v. Butler*,[1992] 1 S.C.R. 452, did not require conclusive proof that obscene materials cause harm, Shaw J. apparently required such proof and found little scientific evidence linking the possession of child pornography to these risks. As a result, he considered the salutary effects of the law to be limited. As for the law’s deleterious effects, he found that “the invasion of freedom of expression and personal privacy is profound” (para. 49) and held that they were “not outweighed by the limited beneficial effects of the prohibition” (para. 50). Shaw J. concluded that the law was inconsistent with the *Charter* and could not be justified under s. 1, rendering it invalid under s. 52(1) of the *Constitution Act, 1982*.
3. *British Columbia Court of Appeal* (1999), 136 C.C.C. (3d) 97
4. The Court of Appeal, by a margin of 2 to 1, upheld the trial judge’s conclusion. Southin J.A. found the law invalid for two reasons. First, she held that “legislation which makes simple possession of expressive materials a crime can never be a reasonable limit in a free and democratic society. Such legislation bears the hallmark of tyranny” (para. 95). On this approach, any prohibition of private possession of child pornography, as opposed to manufacture, distribution or possession for these purposes, would always, of necessity, unjustifiably restrict freedom of expression. In the alternative, Southin J.A. found that the law failed the proportionality test of s. 1. Like the trial judge, Southin J.A. held that the most compelling evidence of necessity is required to justify a prohibition on mere possession, and that the legislation catches too much lawful conduct unrelated to harm to children, notably in relation to teenage sexuality.
5. Rowles J.A. held the law invalid on the ground that it is unjustifiably overbroad. Sympathetic to Parliament’s goal, she argued eloquently for the need to protect children from sexual abuse. She noted that child pornography does not lie close to the core of protected expression, and found that Parliament had a reasonable basis for concluding that criminalizing possession of child pornography would reduce the risk of harm to children. Rowles J.A. held, however, that the law failed because it caught much more material than necessary to achieve the objective, mainly relating to teenage sexuality, an intrusion on free expression aggravated by its impact on privacy. “By providing a sentence of incarceration for the possession of recorded thoughts and expression, including one’s own thoughts and expression, the legislation trenches deeply upon the core values enshrined in the *Charter* and essential to a free and democratic society” (para. 213). In the result the law raises “the spectre that legitimate and non-harmful expression will be chilled as individuals are forced, in the words of the trial judge, to become their own censors” (para. 213). On the other side of the balance, the only “value added” by criminalizing possession of child pornography, in addition to the other offences, was a modest contribution to law enforcement (para. 214).
6. McEachern C.J.B.C. would have upheld the law. Since Mr. Sharpe conceded that possession of some pornographic material should be prohibited, the only issue was where to draw the line between permissible and impermissible material. McEachern C.J.B.C. considered Shaw J. to have erred in not considering the suppression of the market for child pornography, and hence the prevention of the abuse of children in the course of producing child pornography, to be a salutary effect of the prohibition. He found the definition of child pornography in the section carefully drafted and rationally connected to the objectives of the legislation. In his view, limitations in the law offered considerable protection against problematic prosecution. Acknowledging that the law catches some teenage sexual material unrelated to the harm, he doubted Parliament could have drafted it in a way that avoided such difficulties. The hypothetical examples of unrelated material were remote and likely to arise infrequently. McEachern C.J.B.C. concluded that “any balancing of the risk of harm to children against the risk of harm to ‘innocent’ possessors of child pornography as defined must be resolved in favour of children” (para. 292).
7. The decisions in the British Columbia courts reveal four distinctive arguments. At the far end of the spectrum is Southin J.A.’s argument that prohibition of private possession of child pornography can never constitute a justifiable infringement on free expression. Next is the position of the trial judge, adopted by Southin J.A. in the alternative, that the benefits of the law are limited and do not outweigh its negative effects on freedom of expression and privacy. The third argument, put forward by Rowles J.A., is that the law is unjustifiably overbroad. The fourth argument, adopted by McEachern C.J.B.C., is that the only issue is overbreadth and that on balance the law’s infringement on freedom of expression is justified.

IV. Issues

1. Two issues arise: whether the prohibition of possession of child pornography in s. 163.1(4) limits a *Charter* right and, if so, whether the infringement is justified. On the first issue the Crown concedes that the law intrudes upon the guarantee of free expression in s. 2(*b*) of the *Charter*. The respondent also alleges a violation of his right to liberty under s. 7 of the *Charter*, arguing that exposure to potential imprisonment as a result of an excessively sweeping law is contrary to the principles of fundamental justice. Since this argument wholly replicates the overbreadth concerns that are the central obstacle to the justification of the s. 2(*b*) breach, it is not necessary to consider it separately. The weight of authority commends the s. 1analysis generally, and the minimal impairment consideration in particular, as the appropriate forum for addressing allegations of overly broad restrictions on free expression: *Butler*, *supra*; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Keegstra*,[1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Zundel*, [1992] 2 S.C.R. 731.
2. The basic issue thus reduces to whether the limit imposed by the law on free expression can be justified under s. 1 of the *Charter*. If aspects of the law cannot be justified, the further question arises of whether a remedy short of striking down the entire law as unconstitutional is appropriate.
3. Reflecting these issues, the constitutional questions have been stated as follows:

1. Does s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, violate s. 2(*b*)of the *Canadian Charter of Rights and Freedoms*?

2. If s. 163.1(4) of the *Criminal Code* infringes s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, 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*?

3. Does s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, violate s. 7of the *Canadian Charter of Rights and Freedoms*?

4. If s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, infringes s. 7 of the *Canadian Charter of Rights and Freedoms*, 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*?

V. Analysis

A. *The Values at Stake*

1. Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only “good” and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.
2. Nevertheless, freedom of expression is not absolute. Our Constitution recognizes that Parliament or a provincial legislature can sometimes limit some forms of expression. Overarching considerations, like the prevention of hate that divides society as in *Keegstra*, *supra*, or the prevention of harm that threatens vulnerable members of our society as in *Butler*, *supra*, may justify prohibitions on some kinds of expression in some circumstances. Because of the importance of the guarantee of free expression, however, any attempt to restrict the right must be subjected to the most careful scrutiny.
3. The values underlying the right to free expression include individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927,at p. 976; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 765. While some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society. As stated in *Irwin Toy*, *supra*, at p. 968, the guarantee “ensure[s] that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection”, the Court continued, “is . . . ‘fundamental’ because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual”. As stated by Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319 (1937), free expression is “the matrix, the indispensable condition, of nearly every other form of freedom” (p. 327).
4. The law challenged in this appeal engages mainly the justification of self-fulfilment. Child pornography does not generally contribute to the search for truth or to Canadian social and political discourse. Some question whether it engages even the value of self-fulfilment, beyond the base aspect of sexual exploitation. The concern in this appeal, however, is that the law may incidentally catch forms of expression that more seriously implicate self-fulfilment and that do not pose a risk of harm to children.
5. As to the contention that prohibiting possession of expressive material does not raise free expression concerns, I cannot agree. The right conferred by s. 2(*b*) of the *Charter* embraces a continuum of intellectual and expressive freedom -- “freedom of thought, belief, opinion and expression”. The right to possess expressive material is integrally related to the development of thought, belief, opinion and expression. The possession of such material allows us to understand the thought of others or consolidate our own thought. Without the right to possess expressive material, freedom of thought, belief, opinion and expression would be compromised. Thus the possession of expressive materials falls within the continuum of rights protected by s. 2(*b*)of the *Charter.*
6. The private nature of the proscribed material may heighten the seriousness of a limit on free expression. Privacy, while not expressly protected by the *Charter*, is an important value underlying the s. 8 guarantees against unreasonable search and seizure and the s. 7 liberty guarantee: see *Hunter v. Southam* *Inc*., [1984] 2 S.C.R. 145; *R. v. Mills*, [1999] 3 S.C.R. 668. Indeed, as freedom from state intrusion and conformist social pressures is integral to individual flourishing and diversity, this Court has observed that “privacy is at the heart of liberty in a modern state”: *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427; see also *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 50. Privacy may also enhance freedom of expression claims under s. 2(*b*) of the *Charter*,for example in the case of hate literature: *Keegstra*, *supra*, at pp. 772-73; *Taylor*, *supra*, at pp. 936-37. The enhancement in the case of hate literature occurs in part because private material may do less harm than public, and in part because the freedoms of conscience, thought and belief are particularly engaged in the private setting: *Taylor*, *supra.*  However, the private nature of much child pornography cuts two ways. It engages the fundamental right to freedom of thought. But at the same time, the clandestine nature of incitement, attitudinal change, grooming and seduction associated with child pornography contributes to the harm it may cause children, rather than reduces it.
7. In summary, prohibiting the possession of child pornography restricts the rights protected by s. 2(*b*)and the s. 7 liberty guarantee. While the prurient nature of most of the materials defined as “child pornography” may attenuate its constitutional worth, it does not negate it, since the guarantee of free expression extends even to offensive speech.
8. This brings us to the countervailing interest at stake in this appeal: society’s interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions or incite potential offences. Some of these links are disputed and must be considered in greater detail in the course of the s. 1 justification analysis. The point at this stage is simply to describe the concerns that, according to the government, justify limiting free expression by banning the possession of child pornography.
9. These then are the values at stake in this appeal. On the one hand stands the right of free expression – a right fundamental to the liberty of each Canadian and our democratic society. On the other stands the conviction that the possession of child pornography must be forbidden to prevent harm to children.
10. Mr. Sharpe does not suggest that the prevention of harm to children can never justify limiting free expression. Where the two values stand in stark opposition, prevention of harm to children must prevail. He suggests rather that the limitation s. 163.1(4) imposes on free expression must fail because the law catches material that poses no risk of harm to children and because the links between possession of child pornography and harm to children are weak.

1. In order to deal with these concerns, we must determine what material the law, properly construed, catches, and on that basis answer the question of whether those restrictions on free speech are in fact justified by the goal of preventing harm to children.

B. *The Nature and Scope of the Infringement of the Charter*

1. While the Crown concedes that s. 163.1(4) limits freedom of expression, this does not eliminate the need to consider the nature and scope of the infringement in determining whether or not it is justified. Until we know what the law catches, we cannot say whether it catches too much. This Court has consistently approached claims of overbreadth on this basis. It is not enough to accept the allegations of the parties as to what the law prohibits. The law must be construed, and interpretations that may minimize the alleged overbreadth must be explored: see *Keegstra*, *supra*, *Butler*, *supra*,and *Mills*, *supra*. So we must begin by asking what s. 163.1(4) truly catches as distinguished from some of the broader interpretations alleged by the respondent and some of the interveners in support. The interpretation of the section is a necessary pre-condition to the determination of constitutionality, although it is understood, of course, that courts in future cases may refine the analysis in light of the facts and considerations that emerge with experience.
2. Much has been written about the interpretation of legislation (see, e.g., R. Sullivan, *Statutory Interpretation* (1997); R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994); P.‑A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000)). However, E. A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” Recent cases which have cited the above passage with approval include: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Hydro‑Québec*, [1997] 3 S.C.R. 213, at para. 144; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 30; *Verdun v. Toronto‑Dominion Bank*, [1996] 3 S.C.R. 550, at para. 22; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 10. Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the *Charter*: see Sullivan, *Driedger on the Construction of Statutes*, *supra*, at pp. 322-27. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted: see *Slaight Communications Inc. v. Davidson*,[1989] 1 S.C.R. 1038, at p. 1078; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1010; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66.
3. Parliament’s main purpose in passing the child pornography law was to prevent harm to children by banning the production, distribution and possession of child pornography, and by sending a message to Canadians “that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners”: *House of Commons Debates*, 3rd Sess., 34th Parl., vol. XVI, June 3, 1993, at p. 20328. However, Parliament did not cast its net over all material that might conceivably pose any risk to children or produce any negative attitudinal changes. Mindful of the importance of freedom of expression in our society and the dangers of vague, overbroad legislation in the criminal sphere, Parliament set its targets principally on clear forms of “child pornography”: depictions of explicit sex with children, depictions of sexual organs and anal areas of children and material advocating sexual crimes with children. Through qualifications and defences Parliament indicated that it did not seek to catch all material that might harm children, but only material that poses a reasoned risk of harm to children and, even then, only where the countervailing right of free expression or the public good does not outweigh that risk of harm. With this aim in mind, I turn to s. 163.1.
4. Section 163.1(1) defines child pornography in terms of two categories: (1) visual representations (s. 163.1(1)(*a*)); and (2) written and visual advocacy and counselling material (s. 163.1(1)(*b*)). Visual representations include “a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means”. This is broad enough to include drawings, paintings, prints, computer graphics, and sculpture: in short, any non-textual representation that can be perceived visually.
5. A visual representation can constitute child pornography in three ways:

1. By showing a person who is, or is depicted as, being under the age of 18 years and is engaged in, or is depicted as engaged in, explicit sexual activity (s. 163.1(1)(*a*)(i));

2. By having, as its dominant characteristic, the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years (s. 163.1(1)(*a*)(ii)); or

3. By advocating or counselling sexual activity with a person under the age of 18 years that would be an offence under the *Criminal Code* (s. 163.1(1)(*b*)).

Written material can constitute child pornography in only the last of these ways (s. 163.1(1)(*b*)). The ambit of these provisions depends on the meaning of the terms used.

1. “Person”

1. In order to constitute child pornography, a visual representation must show, depict, advocate or counsel sexual activity with a “person”. Two issues arise here: (1) does “person” apply only to actual, as opposed to imaginary persons; and (2) does it include the person who possesses the material?
2. The first issue is important because it governs whether the prohibition on possession is confined to representations of actual persons, or whether it extends to drawings from the imagination, cartoons, or computer generated composites. The available evidence suggests that explicit sexual materials can be harmful whether or not they depict actual children. Moreover, with the quality of contemporary technology, it can be very difficult to distinguish a “real” person from a computer creation or composite. Interpreting “person” in accordance with Parliament’s purpose of criminalizing possession of material that poses a reasoned risk of harm to children, it seems that it should include visual works of the imagination as well as depictions of actual people. Notwithstanding the fact that “person” in the charging section and in s. 163.1(1)(*b*) refers to a flesh-and-blood person, I conclude that “person” in s. 163.1(1)(*a*) includes both actual and imaginary human beings.
3. This definition of child pornography catches depictions of imaginary human beings privately created and kept by the creator. Thus, the prohibition extends to visual expressions of thought and imagination, even in the exceedingly private realm of solitary creation and enjoyment. As will be seen, the private and creative nature of this expression, combined with the unlikelihood of its causing harm to children, creates problems for the law’s constitutionality.
4. The second issue is whether “person”, as the term is used in s. 163.1(1)(*a*), includes the person who possesses the material. That is, does the definition of “child pornography” catch “auto-depictions” – for example, sexually explicit photographs a person has taken of him- or herself alone? Given that Parliament has not qualified or limited the definition of “person” in s. 163.1(1)(*a*), I conclude that Parliament intended to catch such auto-depictions, even where the person making the depiction, although under 18, does not appear to be a child, and intends to keep the depiction entirely in his or her own possession. This too creates constitutional problems, as we will see.
5. The legislation defines children to include all those under the age of 18. This doubtless reflects Parliament’s concern that older teenagers may look or be made to look like children. However, this age limit extends the reach of the law to material beyond the ordinary conception of child pornography. For example, it raises the possibility that teenagers, perhaps even married teenagers, could be charged and imprisoned for taking and keeping photos or videos of themselves engaged in lawful sexual acts, even if those materials were intended exclusively for their own personal use. This prohibition engages the value of self-fulfilment and may be difficult to link to a reasoned risk of harm to children, again raising particularly troubling constitutional concerns.

2. “Depicted”

1. Section 163.1(1)(*a*)(i) brings within the definition of child pornography a visual representation of a person “who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity” (emphasis added). Does “depicted” mean: (a) intended by the maker to depict; (b) perceived by the possessor as depicting; or (c) seen as being depicted by a reasonable observer?
2. The first and second interpretations are inconsistent with Parliament’s objective of preventing harm to children through sexual abuse. The danger associated with the representation does not depend on what was in the mind of the maker or the possessor, but in the capacity of the representation to be used for purposes like seduction. It is the meaning which is conveyed by the material which is critical, not necessarily the meaning that the author intended to convey. Moreover, it would be virtually impossible to prove what was in the mind of the producer or possessor. On the second alternative, the same material could be child pornography in the possession of one person and innocent material in the hands of another. Yet the statute makes it an offence for anyone to possess such material, not just those who see it as depicting children. The only workable approach is to read “depicted” in the sense of what would be conveyed to a reasonable observer. The test must be objective, based on the depiction rather than what was in the mind of the author or possessor. The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?

3. “Explicit Sexual Activity”

1. Section 163.1(1)(*a*)(i) catches visual representations of “explicit sexual activity”. Sexual activity spans a large spectrum, ranging from the flirtatious glance at one end, through touching of body parts incidentally related to sex, like hair, lips and breasts, to sexual intercourse and touching of the genitals and the anal region. The question is where on this spectrum Parliament intended to place the boundary between material that may be lawfully possessed and material that may not be lawfully possessed. A number of indications suggest that Parliament intended to draw the line at the extreme end of the spectrum concerned with depictions of intimate sexual activity represented in a graphic and unambiguous manner.
2. The first indication is Parliament’s use of the word “explicit” to describe the activity depicted. Parliament could have simply referred to “sexual activity”. Instead, it chose “explicit sexual activity”. “Explicit” must be given meaning. According to the *Canadian Oxford Dictionary* (1998), “explicit” in the context of sexual acts means “describing or representing nudity or intimate sexual activity”. Similarly, “explicit” according to the *New Oxford Dictionary of English* (1998) means “describing or representing sexual activity in a graphic fashion”. This suggests that the law catches only depictions of sexual intercourse and other non-trivial sexual acts.

1. This restricted meaning is supported by the fact that in creating other offences, like sexual assault, Parliament uses the word “sexual” without any modifiers. To constitute sexual assault, the sexual aspect of the contact must be clear. The addition of the modifier “explicit” in s. 163.1 suggests that this at least is required.
2. A restrained interpretation of “explicit sexual activity” is also supported by reading s. 163.1(1)(*a*)(i) and s. 163.1(1)(*a*)(ii) together. They are designed to cover two types of depiction: (i) the depiction of explicit sexual activity; and (ii) the static depictionof the sexual organs or anal regions of children. Subparagraph (ii) clearly indicates that Parliament’s concern was with visual representations near the extreme end of the spectrum. While it is possible in the abstract to argue that Parliament intended a much broader sweep for subpara. (i) than for (ii), it seems more likely that Parliament was seeking to catch in subpara. (i) the activity-related counterpart to subpara. (ii).
3. Finally, Parliament’s goal of preventing harm to children related to child pornography supports a restrained interpretation of “explicit sexual activity”. The evidence suggests that harm to children produced by child pornography arises from depictions of explicit sexual acts with children at the extreme end of the spectrum. The literature on harm focuses mainly on depictions of sexual activity involving nudity and portrayal of the sexual organs and anal region. It is reasonable to conclude that this sort of material was uppermost in Parliament’s mind when it adopted this law.
4. I conclude that “explicit sexual activity” refers to acts which viewed objectively fall at the extreme end of the spectrum of sexual activity – acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion, with persons under or depicted as under 18 years of age. The law does not catch possession of visual material depicting only casual sexual contact, like touching, kissing, or hugging, since these are not depictions of nudity or intimate sexual activity. Certainly, a photo of teenagers kissing at summer camp will not be caught. At its furthest reach, the section might catch a video of a caress of an adolescent girl’s naked breast, but only if the activity is graphically depicted and unmistakably sexual. (For a discussion of such concerns see B. Blugerman and L. May, “The New Child Pornography Law: Difficulties of Bill C-128" (1995), 4 *M.C.L.R.* 17.)

4. “Dominant Characteristic” and “Sexual Purpose”

1. The objective approach should also be applied to the term “dominant characteristic” in s. 163.1(1)(*a*)(ii), which targets possession of visual material whose “dominant characteristic” is “the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years”. The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its “dominant characteristic” as the depiction of the child’s sexual organ or anal region. The same applies to the phrase “for a sexual purpose”, which I would interpret in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers.
2. Family photos of naked children, viewed objectively, generally do not have as their “dominant characteristic” the depiction of a sexual organ or anal region “for a sexual purpose”. Placing a photo in an album of sexual photos and adding a sexual caption could change its meaning such that its dominant characteristic or purpose becomes unmistakably sexual in the view of a reasonable objective observer: see *R. v. Hurtubise*, [1997] B.C.J. No. 40 (QL) (S.C.), at paras. 16-17. Absent evidence indicating a dominant prurient purpose, a photo of a child in the bath will not be caught. To secure a conviction the Crown must prove beyond a reasonable doubt that the “dominant characteristic” of the picture is a depiction of the sexual organ or anal region “for a sexual purpose”. If there is a reasonable doubt, the accused must be acquitted.

5. “Sexual Organ”

1. Section 163.1(1)(*a*)(ii) catches static depictions for a sexual purpose of the “sexual organ” or “anal region” of a person under 18 years, provided this is the dominant characteristic of the representation. This raises the question of the meaning of “sexual organ”.
2. Prudence suggests leaving the precise content of “sexual organ” to future case-law. However, no one suggests that s. 163.1(1)(*a*)(ii) was designed to catch depictions of eyes or lips. Parliament’s purpose of targeting possession of material associated with a reasoned risk of harm to children suggests a restrained interpretation of “sexual organ” in subpara. (ii), similar to that discussed above with respect to subpara. (i).

6. Written Material: “Advocates or counsels”

1. The second category of child pornography caught by s. 163.1(1) is “any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act”.
2. This section is more limited than the definition of visual pornography in s. 163.1(1)(*a*), which captures sexual “representation[s]” of children. Section 163.1(1)(*b*) is confined to material relating to activity that would be a crime under the *Criminal Code*. Moreover, it is confined to material that “counsels” or “advocates” such crimes. On its face, it appears to be aimed at combating written and visual material that actively promotes the commission of sexual offences with children.
3. At stake is not whether the maker or possessor of the material intended to advocate or counsel the crime, but whether the material, viewed objectively, advocates or counsels the crime. “Advocate” is not defined in the *Criminal Code*. “Counsel” is dealt with only in connection with the counseling of an offence: s. 22 of the *Criminal Code*,where it is stated to include “procure, solicit or incite”. “Counsel” can mean simply to advise; however in criminal law it has been given the stronger meaning of actively inducing: see *R. v. Dionne* (1987), 38 C.C.C. (3d) 171 (N.B.C.A.), at p. 180, *per* Ayles J.A. While s. 22 refers to a person’s actions and s. 163.1(1)(*b*) refers to material, it seems reasonable to conclude that in order to meet the requirement of “advocates” or “counsels”, the material, viewed objectively, must be seen as “actively inducing” or encouraging the described offences with children. Again, Parliament’s purpose of capturing material causing a reasoned risk of harm to children may offer guidance. The mere description of the criminal act is not caught. Rather, the prohibition is against material that, viewed objectively, sends the message that sex with children can and should be pursued.
4. Without suggesting that the distinction is easy to apply in practice, a purposive approach appears to exclude many of the alleged examples of the law’s overbreadth. For instance, works aimed at description and exploration of various aspects of life that incidentally touch on illegal acts with children are unlikely to be caught. While Nabokov’s *Lolita*,Boccaccio’s *Decameron*, and Plato’s *Symposium* portray or discuss sexual activities with children, on an objective view they cannot be said to advocate or counsel such conduct in the sense of actively inducing or encouraging it. Nor would the section catch political advocacy for lowering the age of consent because such advocacy would not promote the commission of an offence but the amendment of the law. Likewise, an anthropological work discussing the sexual practices of adolescents in other cultures and describing such adolescents as well-adjusted and healthy would not be caught because it would be merely descriptive as opposed to advocating or counselling illegal acts. I note that in any event these examples would likely fall within the artistic merit, medical, educational, scientific, or public good defences, discussed below.
5. It must also be remembered that it is only the advocating or counselling of sexual activity with a person under the age of 18 that would be an offence under the *Criminal Code* that is captured by this part of the definition of child pornography. Many of the sexual offences in the *Code* apply only to sexual activity involving an individual under the age of 14. For instance, the offences of sexual interference (s. 151) and invitation to sexual touching (s. 152) apply only when individuals 13 or under are involved, unless the person doing the touching or inviting is in a position of trust or authority (s. 153). Advocating the consensual sexual touching of a 16-year-old is not an offence under s. 151 and therefore would not be caught by this part of the child pornography definition. However, advocating such touching by, for example, a teacher or hockey coach, is an offence and would be caught. Similarly, inviting a 14-year-old to consensually sexually touch another person is not an offence under s. 152 and would also not be caught (subject to the same position of trust or authority exception). Finally, advocating consensual vaginal intercourse with a 15-year-old is not an offence, as the age of consent is 14. Written materials or visual representations that advocate or counsel such acts of intercourse are therefore also not caught by s. 163.1(1)(*b*).
6. However, it must be observed that the provision is broad enough to capture written works created by the author alone, solely for his or her own eyes. For example, the law could arguably extend to a teenager’s favourable diary account of a sexual encounter. The interpretations of “advocates or counsels” and the fact that the description must be of an unlawful act reduce the likelihood of this happening. Nevertheless, the possibility remains that a teenager’s private account of a sexual encounter could be caught. This example, like that of a drawing made and kept exclusively by the accused, engages the value of private self-fulfilment and appears to pose little real risk of harm to children, rendering it constitutionally problematic.

7. The Defences

1. In addition to limiting the ambit of the definition of child pornography, Parliament created a number of defences. In so doing, Parliament recognized that the law could unduly impinge on some of the values protected by the guarantee of free expression, like artistic creativity, education, medical research, or other public purposes, and sought to provide protection for activities furthering these values. The defences should be liberally construed with this purpose in mind.

(a) *The Defence of Artistic Merit*

1. Section 163.1(6) provides a defence for a representation or written material that constitutes child pornography if it has “artistic merit”. Three issues arise regarding the ambit of this defence: (1) the meaning of “artistic merit”; (2) whether artistic works must conform to “community standards” in order to gain the protection of the defence; and (3) the procedure for considering the defence. When construing the defence of artistic merit, we must keep in mind the admonition of Sopinka J. in *Butler*, *supra*, at p. 486: “Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.” Simply put, the defence must be construed broadly.
2. The first question is what the defence covers. It seems clear the defence must be established objectively, since Parliament cannot have intended a bare assertion of artistic merit to provide a defence. This leaves two possibilities. First, “artistic merit” may refer to the quality of the work in the opinion of objective observers. It is not uncommon in everyday discourse to say of a work of art that, although it is genuinely art, it possesses little or no “artistic merit”. If “artistic merit” is used in this sense, then the task of the court would be to determine how good the work of art was. Art students learning their craft, inept artists and artists breaking conventions to establish new idioms might well find their work classified as lacking “artistic merit” and hence lose the benefit of the defence. On the assumption that this was the meaning of “artistic merit”, it was argued that the defence is too limited and arbitrary to protect artistic expression adequately.
3. The second meaning that can be ascribed to “artistic merit” is “possessing the quality of art”, or “artistic character”. On this meaning, a person who produces art of any kind is protected, however crude or immature the result of the effort in the eyes of the objective beholder. This interpretation seems more consistent with what Parliament intended. It is hard to conceive of Parliament wishing to make criminality depend on the worth of the accused’s art. It would be discriminatory and irrational to permit a good artist to escape criminality, while criminalizing less fashionable, less able or less conventional artists. Such an interpretation would run counter to the need to give the defence a broad and generous meaning. I conclude that “artistic merit” should be interpreted as including any expression that may reasonably be viewed as art. Any objectively established artistic value, however small, suffices to support the defence. Simply put, artists, so long as they are producing art, should not fear prosecution under s. 163.1(4).
4. What may reasonably be viewed as art is admittedly a difficult question – one that philosophers have pondered through the ages. Although it is generally accepted that “art” includes the production, according to aesthetic principles, of works of the imagination, imitation or design (*New Shorter Oxford English Dictionary on Historical Principles* (1993), vol. 1, p. 120), the question of whether a particular drawing, film or text is art must be left to the trial judge to determine on the basis of a variety of factors. The subjective intention of the creator will be relevant, although it is unlikely to be conclusive. The form and content of the work may provide evidence as to whether it is art. Its connections with artistic conventions, traditions or styles may also be a factor. The opinion of experts on the subject may be helpful. Other factors, like the mode of production, display and distribution, may shed light on whether the depiction or writing possesses artistic value. It may be, as the case law develops, that the factors to be considered will be refined.
5. This brings me to the issue of whether the defence incorporates a community tolerance standard. In *Ontario (Attorney General) v. Langer* (1995), 123 D.L.R. (4th) 289 (Ont. Ct. (Gen. Div.)), McCombs J. interpreted s. 163.1(6) as importing a requirement that material, to have artistic merit, must comport with community standards in the sense of not posing a risk of harm to children. I am not persuaded that we should read a community standards qualification into the defence. To do so would involve reading in a qualification that Parliament has not stated. Further, reading in the qualification of conformity with community standards would run counter to the logic of the defence, namely that artistic merit outweighs any harm that might result from the sexual representations of children in the work. Most material caught by the definition of child pornography could pose a potential risk of harm to children. To restrict the artistic merit defence to material posing no risk of harm to children would defeat the purpose of the defence. Parliament clearly intended that some pornographic and possibly harmful works would escape prosecution on the basis of this defence; otherwise there is no need for it.
6. The third issue is how the artistic merit defence functions procedurally. The test, as mentioned, is objective. The wording of the section suggests that it functions in the same manner as other defences such as self defence, provocation or necessity. The accused raises the defence by pointing to facts capable of supporting it (generally something more than a bare assertion that the creator subjectively intended to create art), at which point the Crown must disprove the defence beyond a reasonable doubt: see *Langer*, *supra.*
7. I add this footnote. The statutory defence of artistic merit to a charge of possession of child pornography is conceptually different from the defence of artistic merit to a charge of obscenity under s. 163 of the *Criminal Code*. With respect to s. 163, the meaning of obscenity and the defence of artistic merit are largely judicial creations. It turns on whether the sexual portrayal is the dominant purpose of the work, on the one hand, or essential to a wider artistic purpose, on the other (the internal necessities test). It also asks whether the sexual aspect of the work, viewed in context, would meet community standards of tolerance. The definition of child pornography, by contrast, stands independent of the defence of artistic merit, making the language of “internal necessity” and the logic of “either obscenity or art” inapposite. For this reason, and with the greatest respect for the contrary view expressed by McCombs J. in *Langer*, *supra*, I do not find it incongruous to interpret the defence of artistic merit to the child pornography offences differently from that developed under the obscenity provisions.

(b) *The Defence of “Educational, Scientific or Medical Purpose”*

1. Section 163.1(6) creates a defence for material that serves a medical,educational or scientific purpose. This refers to the purpose the material, viewed objectively, may serve, not the purpose for which the possessor actually holds it. How the material was produced or is possessed is obviously relevant to this determination. While arguably few medical, educational and scientific works would fall within s. 163.1(1), Parliament has made it clear that if they do, possession of them is legal. The procedural aspects of the defence of artistic merit would apply to this defence.
2. The defence of possession for medical, education and scientific purposes, like the other defences, should be interpreted liberally in accordance with Parliament’s intent. On such an approach, possession of materials for therapeutic purposes might meet the requirements of the defence. This defence will apply in appropriate circumstances to sketches and stories penned in the process of self-analysis or a couple’s record of their sexual conduct held for the purpose of furthering that relationship: J. Ross, “*R.* v. *Sharpe* and Private Possession of Child Pornography” (2000), 11 *Constitutional Forum* 50, at p. 57.

(c) *The Defence of “Public Good”*

1. “Public good” has been interpreted as “necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest”: J. F. Stephen, *A Digest of the Criminal Law* (9th ed. 1950), at p. 173, adopted in *R. v. American News Co.* (1957), 118 C.C.C. 152 (Ont. C.A.), at pp. 161-62, and *R. v. Delorme* (1973), 15 C.C.C. (2d) 350 (Que. C.A.), at pp. 358-59. The public good defence has received little interpretation in the obscenity context, and a precise definition of its ambit is beyond the scope of this appeal. Once again, a purposive interpretation would appear to be appropriate. Examples of possession of child pornography which could serve the public good include possession of child pornography by people in the justice system for purposes associated with prosecution, by researchers studying the effects of exposure to child pornography, and by those in possession of works addressing the political or philosophical aspects of child pornography. Again, the same procedure would apply as for the defence of artistic merit.
2. It might be argued that the public good is served by possession of materials that promote expressive or psychological well-being or enhance one’s sexual identity in ways that do not involve harm to others. In some cases this might eliminate some of the more problematic applications of s. 163.1(4). For example, it might in certain cases foreclose the law’s application to visual works created and privately held by one person alone, or to private recordings by adolescents of their lawful sexual activity. Nevertheless, the public good defence might not answer all concerns as to the law’s breadth. Absent evidence of public good in the particular case, a person might still be convicted for possession of material that directly engages the value of self-fulfilment and presents little or no risk of harm to children. Thus, while the public good defence might prevent troubling applications of the law in certain cases, it would not do so in all.

8. Summary of Material Caught by Section 163.1(4)

1. Section 163.1(4) of the *Criminal Code* evinces a clear and unequivocal intention to protect children from the abuse and exploitation associated with child pornography. It criminalizes the possession of a substantial range of materials posing a risk of harm to children. Written material and visual representations advocating the commission of criminal offences against children is caught. Visual material depicting children engaged in explicit sexual activity is caught, as is material featuring, as a dominant characteristic, the sexual organ or anal region of a child for a sexual purpose. The reach of the proscription is further broadened by extending it to the depiction of both real and imaginary persons. As a result, the law appears to catch a substantial amount of material that endangers the welfare of children.
2. At the same time, the legislation recognizes the importance of free expression and the danger of a sweeping criminal prohibition. It catches visual representations only where the sexual activity depicted is explicit, thus excluding kissing, hugging and other forms of casual intimacy. It targets visual materials only where they feature a sexual organ or anal region as a “dominant characteristic” for a “sexual purpose”, precluding the application of the law to innocent baby-in-the-bath photos and other scenarios of non-sexual nudity. Writings are caught only where they actively advocate or counsel illegal sexual activity with persons under the age of 18. Complementing these limits inherent in the s. 163.1(1) definition are an array of defences aimed at enhancing the protection of free expression by excluding materials with redeeming social benefits. Works of art, even of dubious artistic value, are not caught at all. Materials created for an “educational, scientific or medical purpose”, liberally construed, are also exempted. Finally, a public good defence, the precise scope of which remains to be determined, further protects the possession of materials serving a necessary or advantageous social function.
3. These exclusions support the earlier suggestion that Parliament’s goal was to prohibit possession of child pornography that poses a reasoned risk of harm to children. The primary definition of “child pornography” does not embrace every kind of material that might conceivably pose a risk of harm to children, but appears rather to target blatantly pornographic material. Additionally, the defences exempt classes of material raising special free expression concerns. In this way, Parliament has attempted to meet the dual concerns of protecting children and protecting free expression.

1. Yet problems remain. The interpretation of the legislation suggested above reveals that the law may catch some material that particularly engages the value of self-fulfilment and poses little or no risk of harm to children. This material may be grouped in two classes. The first class consists of self-created, privately held expressive materials. Private journals, diaries, writings, drawings and other works of the imagination, created by oneself exclusively for oneself, may all trigger the s. 163.1(4) offence. The law, in its prohibition on the possession of such materials, reaches into a realm of exceedingly private expression, where s. 2(*b*)values may be particularly implicated and state intervention may be markedly more intrusive. Further, the risk of harm arising from the private creation and possession of such materials, while not eliminated altogether, is low.
2. The second class of material concerns privately created visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use. Sexually explicit photographs taken by a teenager of him- or herself, and kept entirely in private, would fall within this class of materials. Another example would be a teenaged couple’s private photographs of themselves engaged in lawful sexual activity. Possession of such materials may implicate the values of self-fulfilment and self-actualization, and therefore, like the material in the first category, reside near the heart of the s. 2(*b*) guarantee. And like the material in the first category, this material poses little risk of harm to children. It is privately created and intended only for personal use. It depicts only lawful sexual activity. Indeed, because the law reaches depictions of persons who are or appear to be under 18, the person or persons depicted may not even appear to be children.
3. These examples suggest that s. 163.1(4), at the margins of its application, prohibits deeply private forms of expression, in pursuit of materials that may pose no more than a nominal risk of harm to children. It is these potential applications that present the most significant concerns at the stage of justification.
4. *Is the Limitation on Free Expression Imposed by Section 163.1(4) Justified Under Section 1 of the Charter?*
5. Crown counsel has conceded that criminalizing possession of child pornography limits the right of free expression. The question we must answer is whether that limitation is reasonable and demonstrably justified in a free and democratic society. To justify the intrusion on free expression, the government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the law meets the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. The goal must be pressing and substantial, and the law enacted to achieve that goal must be proportionate in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment to freedom of expression.
6. Before we turn to these issues, we must consider the argument that prohibitions on private possession of child pornography can never be justified. Such laws, Southin J.A. asserted, constitute “the hallmark of tyranny” (para. 95). They represent such a fundamental intrusion on basic liberties that they can never be justified in a free and democratic society.
7. Section 1 of the *Charter* belies the suggestion that any *Charter* right is so absolute that limits on it can never be justified. The argument posits that some rights are so basic that they can never be limited as a matter of principle, precluding any evaluation under s. 1. This is both undesirable and unnecessary. It is undesirable because it raises the risk that laws that can be justified may be struck down on the basis of how they are characterized. It is unnecessary because s. 1 provides a basis for fair evaluation that upholds only those laws that do not unjustifiably erode basic liberties.
8. I conclude that the argument that limitations on possession of child pornography can never be justified as a matter of principle must be dismissed. We must conduct a detailed analysis of whether the law’s intrusion on freedom of speech can be justified under s. 1 of the *Charter*.

1. Is the Legislative Objective Pressing and Substantial?

1. I earlier concluded that Parliament’s objective in passing s. 163.1(4) was to criminalize possession of child pornography that poses a reasoned risk of harm to children. This objective is pressing and substantial. Over and above the specific objectives of the law in reducing the direct exploitation of children, the law in a larger attitudinal sense asserts the value of children as a defence against the erosion of societal attitudes toward them. While the government in this case did not present attitudinal harm to society at large as a justification for the law’s intrusion on the right of free expression, this may be seen as a good incidental to the law’s main purpose – the prevention of harm to children.

2. Is There Proportionality Between the Limitation on the Right and the Benefits of the Law?

1. Parliament can prohibit possession of child pornography. The issue in this case is whether it has done so in a reasonable and proportionate manner having regard to the right of free expression.

(a) *Rational Connection*

1. As the first step in showing proportionality, the Crown must demonstrate that the law is likely to confer a benefit or is “rationally connected” to Parliament’s goal. This means that it must show that possession of child pornography, as opposed to its manufacture, distribution or use, causes harm to children.
2. This raises a question pivotal to this appeal: what standard of proof must the Crown achieve in demonstrating harm – scientific proof based on concrete evidence or a reasoned apprehension of harm? The trial judge insisted on scientific proof based on concrete evidence. With respect, this sets the bar too high. In *Butler*, *supra*, considering the obscenity prohibition of the *Criminal Code*, this Court rejected the need for concrete evidence and held that a “reasoned apprehension of harm” sufficed (p. 504). A similar standard must be employed in this case.
3. The Crown argues that prohibiting possession of child pornography is linked to reducing the sexual abuse of children in five ways: (1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders; (3) prohibiting its possession assists law enforcement efforts to reduce the production, distribution and use that result in direct harm to children; (4) it is used for grooming and seducing victims; and (5) some child pornography is produced using real children.
4. The first alleged harm concerns cognitive distortions. The Crown argues that child pornography may change possessors’ attitudes in ways that makes them more likely to sexually abuse children. People may come to see sexual relations with children as normal and even beneficial. Moral inhibitions may be weakened. People who would not otherwise abuse children may consequently do so. Banning the possession of child pornography, asserts the Crown, will reduce these cognitive distortions.
5. The trial judge discounted this harm due to the limited scientific evidence linking cognitive distortions to increased rates of offending. Applying the reasoned apprehension of harm test yields a different conclusion. While the scientific evidence is not strong, I am satisfied that the evidence in this case supports the existence of a connection here: exposure to child pornography may reduce paedophiles’ defences and inhibitions against sexual abuse of children. Banalizing the awful and numbing the conscience, exposure to child pornography may make the abnormal seem normal and the immoral seem acceptable.
6. The second alleged harm is that possession of child pornography fuels fantasies, making paedophiles more likely to offend. The trial judge found that studies showed a link between highly erotic child pornography and offences. However, other studies suggested that both erotic and milder pornography might provide substitute satisfaction and reduce offences. Putting the studies together, the trial judge concluded that he could not say that the net effect was to increase harm to children (para. 23). Absent evidence as to whether the benefit from sublimation equals the harm of incitement or otherwise, this conclusion seems tenuous. More fundamentally, the trial judge proceeded on the basis that scientific proof was required. The lack of unanimity in scientific opinion is not fatal. Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of. Some studies suggest that child pornography, like other forms of pornography, will fuel fantasies and may incite offences in the case of certain individuals. This reasoned apprehension of harm demonstrates a rational connection between the law and the reduction of harm to children through child pornography.

1. The third alleged harm -- that criminalizing the possession of child pornography aids in prosecuting the distribution and use of child pornography -- was not expressly considered by the trial judge. Detective Waters testified that as a result of possession charges, the police have been able to uncover persons involved in producing and distributing child pornography. The Criminal Lawyers’ Association argues that it is dangerous to justify violations of rights on the sole basis that they will assist in the detection and prosecution of other criminal offences. Such reasoning, it argues, could be used to justify many other violations of fundamental rights. Given the evidence linking possession with harm to children on other grounds, it is not necessary to resolve the question of whether an offence abridging a *Charter* right can ever be justified solely on the basis that it assists in prosecuting other offences. It is sufficient to note that the fact the offence of possession aids prosecution of those who produce and distribute child pornography is a positive side-effect of the law.
2. The trial judge was satisfied that the evidence relating to the fourth alleged harm, the use of child pornography to “groom” or seduce victims, showed a rational connection. The evidence is clear and uncontradicted. “Sexually explicit pornography involving children poses a danger to children because of its use by pedophiles in the seduction process” (para. 23). The ability to possess child pornography makes it available for the grooming and seduction of children by the possessor and others. Mr. Sharpe does not deny that some child pornography can play an important role in the seduction of children. Criminalizing the possession of child pornography is likely to help reduce the grooming and seduction of children.
3. The fifth and final harm -- the abuse of children in the production of pornography -- is equally conclusive. Children are used and abused in the making of much of the child pornography caught by the law. Production of child pornography is fueled by the market for it, and the market in turn is fueled by those who seek to possess it. Criminalizing possession may reduce the market for child pornography and the abuse of children it often involves. The link between the production of child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact. The child is traumatized by being used as a sexual object in the course of making the pornography. The child may be sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives. Not infrequently, it initiates a downward spiral into the sex trade. Even when it does not, the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.
4. It is argued that even if possession of child pornography is linked to harm to children, that harm is fully addressed by laws against the production and distribution of child pornography. Criminalizing mere possession, according to this argument, adds greatly to the limitation on free expression but adds little benefit in terms of harm prevention. The key consideration is what the impugned section seeks to achieve beyond what is already accomplished by other legislation: *R. v. Martineau*, [1990] 2 S.C.R. 633. If other laws already achieve the goals, new laws limiting constitutional rights are unjustifiable. However, an effective measure should not be discounted simply because Parliament already has other measures in place. It may provide additional protection or reinforce existing protections. Parliament may combat an evil by enacting a number of different and complementary measures directed to different aspects of the targeted problem: see, e.g., *R. v. Whyte*, [1988] 2 S.C.R. 3. Here the evidence amply establishes that criminalizing the possession of child pornography not only provides additional protection against child exploitation -- exploitation associated with the production of child pornography for the market generated by possession and the availability of material for arousal, attitudinal change and grooming -- but also reinforces the laws criminalizing the production and distribution of child pornography.
5. I conclude that the social science evidence adduced in this case, buttressed by experience and common sense, amply meets the *Oakes* requirement of a rational connection between the purpose of the law and the means adopted to effect this purpose. Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.

(b) *Minimal Impairment*

1. This brings us to a critical question in this case: does the law impair the right of free expression only minimally? If the law is drafted in a way that unnecessarily catches material that has little or nothing to do with the prevention of harm to children, then the justification for overriding freedom of expression is absent. Section 163.1(4), as a criminal offence, carries the heavy consequences of prosecution, conviction and loss of liberty, and must therefore be carefully tailored as a “measured and appropriate response” to the harms it addresses: *Keegstra*, *supra*, at p. 771. At the same time, legislative drafting is a difficult art and Parliament cannot be held to a standard of perfection: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy*, *supra*; *R. v. Chaulk*, [1990] 3 S.C.R. 1303. It may be difficult to draft a law capable of catching the bulk of pornographic material that puts children at risk, without also catching some types of material that are unrelated to harm to children. This is what McEachern C.J.B.C. had in mind when he suggested that it is difficult to see how Parliament could have drafted the law in a way that eliminated the possibility of “unintended consequences” (para. 292).
2. This Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see *Edwards Books and Art Ltd.*, *supra*; *Chaulk*, *supra*; *Committee for the Commonwealth of Canada* *v. Canada*, [1991] 1 S.C.R. 139; *Butler*, *supra*; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *M. v. H.*, [1999] 2 S.C.R.3.
3. This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament’s goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament’s goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry -- one that takes into account the difficulty of drafting laws that accomplish Parliament’s goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see *Dagenais*, *supra*; *RJR-MacDonald*, *supra*; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Thomson Newspapers*, *supra*.
4. Against this background, I turn to the legislation here at issue. Mr. Sharpe argues that s. 163.1(4) fails the minimal impairment test because the legal definition of child pornography includes material posing no reasoned risk of harm to children. However, as discussed earlier, properly interpreted, the law catches much less material unrelated to harm to children than Mr. Sharpe suggests. Depictions of kissing, hugging and other activity short of “explicit” sexual activity, works of art even of limited technical value, and family photos of naked children absent proof of a dominant sexual purpose, all fall outside the scope of the law. Many of the other hypothetical examples relied on in the courts below as suggesting overbreadth either disappear entirely on a proper construction of the statutory definition of child pornography, or are narrowed to the extent that material is caught only where it is related to harm to children. If these were the only grounds for concern arising from s. 163.1(4), I would have little difficulty concluding the provision is carefully tailored to its objective. It should also be remembered that to effect a conviction under s. 163.1(4), as under any other criminal provision, the Crown must establish that the accused possessed the requisite *mens rea*; this requirement, too, limits the reach of the statute.
5. The fact remains, however, that the law may also capture the possession of material that one would not normally think of as “child pornography” and that raises little or no risk of harm to children: (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings, created by or depicting the accused, that do not depict unlawful sexual activity and are held by the accused exclusively for private use.
6. Possession of material in these categories is less closely tied to harm to children than the vast majority of material caught by the law. Children are not exploited in its production. The self-created nature of the material comprising the first category undermines the possibility that it could produce negative attitudinal changes. In the second category, those depicted may well not even look like children. This said, some material in these categories could conceivably cause harm to children. Self-created private expressive materials could conceivably abet negative attitudinal changes in the creator, although since the creation came from him or her in the first place one would not expect the effect to be significant. A self-created private depiction or writing in the possession of the maker could fall into the hands of someone who might use it in a way that harms children. Again, a person’s video or photo of him- or herself engaged in a lawful sexual act could present an image that looks like a child, which could possibly come into the hands of someone who would use it to harm children. So it cannot be denied that permitting the author of such materials to keep them in his or her custody poses some risk. However, the risk is small, incidental and more tenuous than that associated with the vast majority of material targeted by s. 163.1(4). Indeed, the above-cited examples lie at the edge of the problematic classes of material. The bulk of the material in these two problematic classes, while engaging important values underlying the s. 2(*b*)guarantee, poses no reasoned risk of harm to children.
7. The government’s argument on this point is, in effect, that it is necessary to prohibit possession of a large amount of harmless expressive material in order to combat the small risk that some material in this class may cause harm to children. This suggests that the law may be overbroad. However, final determination of this issue requires us to proceed to the third prong of the proportionality test – the weighing of the costs of the law to freedom of expression against the benefits it confers.

 (c) *Proportionality: the Final Balance*

1. This brings us to the third and final branch of the proportionality inquiry: whether the benefits the law may achieve in preventing harm to children outweigh the detrimental effects of the law on the right of free expression. The final proportionality assessment takes all the elements identified and measured under the heads of Parliament’s objective, rational connection and minimal impairment, and balances them to determine whether the state has proven on a balance of probabilities that its restriction on a fundamental *Charter* right is demonstrably justifiable in a free and democratic society.
2. In the vast majority of the law’s applications, the costs it imposes on freedom of expression are outweighed by the risk of harm to children. The Crown has met the burden of demonstrating that the possession of child pornography poses a reasoned apprehension of harm to children and that the goal of preventing such harm is pressing and substantial. Explicit sexual photographs and videotapes of children may promote cognitive distortions, fuel fantasies that incite offenders, enable grooming of victims, and may be produced using real children. Written material that advocates or counsels sexual offences with children can pose many of the same risks. Although we recently held in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, that it may be difficult to make the case of obscenity against written texts, materials that advocate or counsel sexual offences with children may qualify. The Crown has also met the burden of showing that the law will benefit society by reducing the possibility of cognitive distortions, the use of pornography in grooming victims, and the abuse of children in the manufacture and continuing existence of this material. Explicit sexual photographs of children, videotapes of pre-pubescent children, and written works advocating sexual offences with children – all these and more pose a reasoned risk of harm to children. Thus we may conclude that in its main impact, s. 163.1(4) is proportionate and constitutional.
3. I say this having given full consideration to the law’s chilling effect. It is argued that fear of prosecution under s. 163.1(4), and the attendant social stigma, will deter people from keeping legal material and thus chill legitimate expression. However, the interpretation of the law offered in this decision may go some distance to reducing the uncertainty that feeds the chilling effect. Families need not fear prosecution for taking pictures of bare-bottomed toddlers at the beach or children playing in the backyard, given the requirement that the dominant purpose be sexual. As case law develops, greater certainty may be expected, further reducing the law’s chilling effect. On the record before us, the chilling effect, while not insignificant, does not appear to represent a major cost as it relates to the vast majority of material captured under s. 163.1(4).
4. However, the prohibition also captures in its sweep materials that arguably pose little or no risk to children, and that deeply implicate the freedoms guaranteed under s. 2(*b*). The ban, for example, extends to a teenager’s sexually explicit recordings of him- or herself alone, or engaged in lawful sexual activity, held solely for personal use. It also reaches private materials, created by an individual exclusively for him- or herself, such as personal journals, writings, and drawings. It is in relation to these categories of materials that the costs of the prohibition are most pronounced. At the same time, it is here that the link between the proscribed materials and any risk of harm to children is most tenuous, for the reasons discussed earlier: children are not exploited or abused in their production; they are unlikely to induce attitudinal effects in their possessor; adolescents recording themselves alone or engaged in lawful sexual activity will generally not look like children; and the fact that this material is held privately renders the potential for its harmful use by others minimal. Consequently, the law’s application to these materials, while peripheral to its objective, poses the most significant problems at this final stage of the proportionality analysis.
5. As noted in discussing the values at stake in this appeal, privacy interests going to the liberty of the subject are also engaged by the legislation in question. However, these interests largely overlap with the s. 2(*b*) values and are properly considered in the final balancing stage under s. 1.
6. I turn first to consider the law’s application to self-created works of the imagination, written or visual, intended solely for private use by the creator. The intensely private, expressive nature of these materials deeply implicates s. 2(*b*) freedoms, engaging the values of self-fulfilment and self-actualization and engaging the inherent dignity of the individual: *Ford*, *supra*, at p. 765; see also my comments in *Keegstra*, *supra*, at p. 804. Personal journals and writings, drawings and other forms of visual expression may well be of importance to self-fulfilment. Indeed, for young people grappling with issues of sexual identity and self-awareness, private expression of a sexual nature may be crucial to personal growth and sexual maturation. The fact that many might not favour such forms of expression does not lessen the need to insist on strict justification for their prohibition. As stated in *Irwin Toy*, *supra*, at p. 976, “the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment”.
7. The restriction imposed by s. 163.1(4) regulates expression where it borders on thought. Indeed, it is a fine line that separates a state attempt to control the private possession of self-created expressive materials from a state attempt to control thought or opinion. The distinction between thought and expression can be unclear. We talk of “thinking aloud” because that is often what we do: in many cases, our thoughts become choate only through their expression. To ban the possession of our own private musings thus falls perilously close to criminalizing the mere articulation of thought.
8. The same concerns arise in relation to auto-depictions; that is, visual recordings made by a person of him- or herself alone, held privately and intended only for personal use. Again, such materials may be of significance to adolescent self-fulfilment, self-actualization and sexual exploration and identity. Similar considerations apply where the creator of the recordings is not the sole subject; that is, where lawful sexual acts are documented in a visual recording, such as photographs or a videotape, and held privately by the participants exclusively for their own private use. Such materials could conceivably reinforce healthy sexual relationships and self-actualization. For example, two adolescents might arguably deepen a loving and respectful relationship through erotic pictures of themselves engaged in sexual activity. The cost of including such materials to the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children.
9. I conclude that in broad impact and general application, the limits s. 163.1(4) imposes on free expression are justified by the protection the law affords children from exploitation and abuse. I cannot, however, arrive at the same conclusion in regard to the two problematic categories of materials described above. The legislation prohibits a person from articulating thoughts in writing or visual images, even if the result is intended only for his or her own eyes. It further prohibits a teenager from possessing, again exclusively for personal use, sexually explicit photographs or videotapes of him- or herself alone or engaged with a partner in lawful sexual activity. The inclusion of these peripheral materials in the law’s prohibition trenches heavily on freedom of expression while adding little to the protection the law provides children. To this extent, the law cannot be considered proportionate in its effects, and the infringement of s. 2(*b*) contemplated by the legislation is not demonstrably justifiable under s. 1.

D. *Remedy*

1. Confronted with a law that is substantially constitutional and peripherally problematic, the Court may consider a number of alternatives. One is to strike out the entire law. This was the choice of the trial judge and the majority of the British Columbia Court of Appeal. The difficulty with this remedy is that it nullifies a law that is valid in most of its applications. Until Parliament can pass another law, the evil targeted goes unremedied. Why, one might well ask, should a law that is substantially constitutional be struck down simply because the accused can point to a hypothetical application that is far removed from his own casewhich might not be constitutional?
2. Another alternative might be to hold that the law as it applies to the case at bar is valid, declining to find it unconstitutional on the basis of a hypothetical scenario that has not yet arisen. In the United States, courts have frequently declined to strike out laws on the basis of hypothetical situations not before the court, although less so in First Amendment (free expression) cases. While the Canadian jurisprudence on the question is young, thus far it suggests that laws may be struck out on the basis of hypothetical situations, provided they are “reasonable”.
3. Yet another alternative might be to uphold the law on the basis that it is constitutionally valid in the vast majority of its applications and stipulate that if and when unconstitutional applications arise, the accused may seek a constitutional exemption. Ross, who concludes that s. 163.1(4) is constitutional in most but not all of its applications, recommends this remedy: Ross, *supra*,at p. 58.
4. I find it unnecessary to canvas any of these suggestions further because in my view the appropriate remedy in this case is to read into the law an exclusion of the problematic applications of s. 163.1, following *Schachter v. Canada*, [1992] 2 S.C.R. 679. *Schachter* suggests that the problem of peripheral unconstitutional provisions or applications of a law may be addressed by striking down the legislation, severing of the offending sections (with or without a temporary suspension of invalidity), reading down, or reading in. The Court decides on the appropriate remedy on the basis of “twin guiding principles”: respect for the role of Parliament, and respect for the purposes of the *Charter* (p. 715). Applying these principles, I conclude that in the circumstances of the case reading in an exclusion is the appropriate remedy.
5. To assess the appropriateness of reading in as a remedy, we must identify a distinct provision that can be read into the existing legislation to preserve its constitutional balance. In this case, s. 163.1 might be read as incorporating an exception for the possession of:

1. Self-created expressive material: i.e.,any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and

2. Private recordings of lawful sexual activity: i.e.,any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.

The first category would protect written or visual expressions of thought, created through the efforts of a single individual, and held by that person for his or her eyes alone. The teenager’s confidential diary would fall within this category, as would any other written work or visual representation confined to a single person in its creation, possession and intended audience.

1. The second category would protect auto-depictions, such as photographs taken by a child or adolescent of him- or herself alone, kept in strict privacy and intended for personal use only. It would also extend to protect the recording of lawful sexual activity, provided certain conditions were met. The person possessing the recording must have personally recorded or participated in the sexual activity in question. That activity must not be unlawful, thus ensuring the consent of all parties, and precluding the exploitation or abuse of children. All parties must also have consented to the creation of the record. The recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein. Thus, for example, a teenage couple would not fall within the law’s purview for creating and keeping sexually explicit pictures featuring each other alone, or together engaged in lawful sexual activity, provided these pictures were created together and shared only with one another. The burden of proof in relation to these excepted categories would function in the same manner as that of the defences of “artistic merit”, “educational, scientific or medical purpose”, and “public good”. The accused would raise the exception by pointing to facts capable of bringing him or her within its protection, at which point the Crown would bear the burden of disproving its applicability beyond a reasonable doubt.
2. These two exceptions would necessarily apply as well to the offence of “making child pornography” under s. 163.1(2) (but not to printing, publishing or possessing for the purpose of publishing); otherwise an individual, although immune from prosecution for the possession of such materials, would remain vulnerable to prosecution for their creation.
3. I reiterate that the protection afforded by this exception would extend no further than to materials intended solely for private use. If materials where shown to be held with any intention other than for personal use, their possession would then fall outside the exception’s aegis and be subject to the full force of s. 163.1(4). Indeed, such possession might also run afoul of the manufacturing and distributing offences set out in ss. 163.1(2) and 163.1(3).
4. It is apparent that the availability of the second exception turns on whether Parliament had criminalized the depicted sexual activity. Parliament may affect the scope of the exception by narrowing or broadening the range of sexual activity that is criminalized. (More broadly, of course, Parliament, in its wisdom, may choose to redraft the statute to reflect the concerns that compel the Court to hold that the statute cannot constitutionally apply to the two stipulated exceptions.)
5. Thus described, the proposed exception relates only to materials that pose a negligible risk of harm to children, while deeply implicating s. 2(*b*) values and the s. 7 liberty interest by virtue of their intensely private nature and potential connection to self-fulfilment and self-actualization. With the contours of this exception in mind, I proceed to the question of whether reading in this exception is the appropriate remedy for the overbreadth of s. 163.1(4).
6. *Schachter*, *supra*,holds that reading in will be appropriate only where (1) the legislative objective is obvious and reading in would further that objective or constitute a lesser interference with that objective than would striking down the legislation; (2) the choice of means used by the legislature to further the legislation’s objective is not so unequivocal that reading in would constitute an unacceptable intrusion into the legislative domain; and (3) reading in would not require an intrusion into legislative budgetary decisions so substantial as to change the nature of the particular legislative enterprise. The third requirement is not of concern here. The first two inquiries -- conformity with legislative objective and avoidance of unacceptable law-making -- require more discussion.
7. The first question is whether the legislative objective of s. 163.1(4) is evident. In my view it is. The purpose of the legislation is to protect children from exploitation and abuse by prohibiting possession of material that presents a reasoned risk of harm to children. This question leads to a second: whether reading in will further that objective. In other words, will precluding the offending applications of the law better conform to Parliament’s objective than striking down the whole law? Again the answer is clearly yes. The applications of the law that pose constitutional problems are exactly those whose relation to the objective of the legislation is most remote. Carving out those applications by incorporating the proposed exception will not undermine the force of the law; rather, it will preserve the force of the statute while also recognizing the purposes of the *Charter*. The defects of the section are not so great that their exclusion amounts to impermissible redrafting, as was the case in *Osborne v. Canada (Treasury Board)*,[1991] 2 S.C.R. 69, and *R. v. Heywood*, [1994] 3 S.C.R. 761. The new exceptions resemble those that Parliament has already created and are consistent with its overall approach of catching mainstream child pornography reasonably linked to harm while excluding peripheral material that engages free speech values. Moreover, since the problematic applications lie on the periphery of the material targeted by Parliament, carving them out will not create an exception-riddled provision bearing little resemblance to the provision envisioned by Parliament. This suggests that excluding the offending applications of the law will not subvert Parliament’s object. On the other hand, striking down the statute altogether would assuredly undermine Parliament’s object, making it impossible to combat the lawfully targeted harms until it can pass new legislation.
8. I recognize that questions may arise in the application of the excepted categories. However, the same may be said for s. 163.1 as drafted. It will be for the courts to consider precise questions of interpretation if and when they arise, bearing in mind Parliament’s fundamental object: to ban possession of child pornography which raises a reasoned apprehension of harm to children.
9. The second prong of *Schachter*, *supra*, is directed to the possibility that reading in, though recognizing the objective of the legislation, may nonetheless undermine legislative intent by substituting one means of effecting that intent with another. As we noted in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the relevant question is “what the legislature would . . . have done if it had known that its chosen measures would be found unconstitutional” (para. 167). If it is not clear that the legislature would have enacted the legislation without the problematic provisions or aspects, then reading in a term may not provide the appropriate remedy. This concern has more relevance where the legislature has made a “deliberate choice of means” by which to reach its objective. Even in such a case, however, “a deliberate choice of means will not act as a bar to reading in save for those circumstances in which the means chosen can be shown to be of such centrality to the aims of the legislature and so integral to the scheme of the legislation, that the legislature would not have enacted the statute without them”: *Vriend*, *supra*, at para. 167.
10. In the present case it cannot be said that the legislature has made a deliberate choice of means in the sense that phrase was used in *Vriend*, *supra*. Clearly, s. 163.1(4) is a deliberate choice of means in the general sense that the provision was adopted to address the problem of child abuse and exploitation. I see no evidence, however, that Parliament saw the statute’s application to the two problematic categories of materials (i.e.,self-created expressive materials and private recordings that do not depict unlawful sexual activity) as an integral part of the legislative scheme. On the contrary, given that the risk to children posed by materials falling within these two categories is relatively remote, it seems reasonable to conclude that such materials are caught incidentally, not deliberately, and that Parliament would have excluded these two categories from the purview of the law had it been seized of the difficulty raised by their inclusion.
11. The legislative history of Bill C-128, which introduced s. 163.1(4), reinforces my view that reading in an exclusion of the problematic material would not unduly intrude on the legislative domain. As was noted during the Senate Committee’s proceedings, there had over the years been a great deal of debate, both within Parliament and in the country more generally, about the problem of child pornography and the appropriate way to address it (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 50, June 21, 1993, at p. 50:41 (statement of Richard Mosley, Chief Policy Counsel, Criminal and Social Policy, Department of Justice)).
12. After expressing concern over the potential for constitutional problems arising from Bill C-128, the Honorable Gérald-A. Beaudoin, Chairman of the Senate Committee, concluded:

There is, obviously, also the problem the courts will face. The Supreme Court of Canada has to interpret the Constitutionand the CriminalCode*.* If the legislation is very vague, greater power is given to the judges. This is a difficulty which, in cases involving obscenity and pornography, perhaps, cannot be avoided. In other words, to a certain extent it has to be left to the courts.

(*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 51, June 22, 1993, at p. 51:54)

As Senator Beaudoin predicted, it has fallen to the Courts to interpret s. 163.1(4) and judge its ultimate validity in accordance with that interpretation. The British Columbia Courts found the law constitutionally wanting and struck it down in its entirety. I too, find it to be constitutionally imperfect. However, the defects lie at the periphery of the law’s application. In my view, the appropriate remedy is to uphold the law in its broad application, while holding that it must not be applied to two categories of material, as described above: self-created, privately held expressive materials and private recordings that do not depict unlawful sexual activity.

E. *Summary*

1. I would summarize my conclusions with respect to s. 163.1(4) in general terms as follows:

1. The offence prohibits the possession of photographs, film, videos and other visual representations that show or depict a person under the age of 18 engaged in explicit sexual activity. Visual representations of any activity that falls short of this threshold are not caught. Thus, representations of casual intimacy, such as depictions of kissing or hugging, are not covered by the offence.

2. The offence prohibits the possession of visual representations that feature, as a dominant characteristic, the depiction of a sexual organ or the anal region of a person under the age of 18 for a sexual purpose. Innocent photographs of a baby in the bath and other representations of non-sexual nudity are not covered by the offence.

3. The offence prohibits the possession of written or visual material that actively induces or encourages unlawful sexual activity with persons under the age of 18. Written description that falls short of this threshold is not covered by the offence.

4. Courts should take an objective approach to determining whether material falls within the definition of child pornography. The question is whether a reasonable person would conclude, for example, that the impugned material portrays “explicit” sexual activity, or that the material “advocates or counsels” sexual offences with persons under 18. Courts should also take an objective approach in determining the availability of any statutory defence.

5. The various statutory defences (i.e., artistic merit; educational, scientific or medical purpose; and public good) must be interpreted liberally to protect freedom of expression, as well as possession for socially redeeming purposes.

6. The guarantees provided in ss. 2(*b*)and 7 of the *Charter* require the recognition of two exceptions to s. 163.1(4), where the prohibition’s intrusion into free expression and privacy is most pronounced and its benefits most attenuated:

(a) The first exception protects the possession of expressive material created through the efforts of a single person and held by that person alone, exclusively for his or her own personal use. This exception protects deeply private expression, such as personal journals and drawings, intended solely for the eyes of their creator.

(b) The second exception protects a person’s possession of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those persons depicted.

7. These two exceptions apply equally to the offence of “making” child pornography under s. 163.1(2).

8. Neither exception affords protection to a person harbouring any other intention than private possession; any intention to distribute, publish, print, share or in any other way disseminate these materials will subject a person to the full force of s. 163.1.

VI. Conclusion

1. I would uphold s. 163.1(4) on the basis that the definition of “child pornography” in s. 163.1 should be read as though it contained an exception for: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. The constitutional questions should be answered accordingly.
2. I would therefore allow the appeal and remit the respondent for trial on all charges.

The following are the reasons delivered by

1. L’Heureux-Dubé, Gonthier and Bastarache JJ. -- In this appeal, we are asked to assess the constitutionality of s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46.The Court must determine whether Parliament may legitimately criminalize the possession of the material it has defined as child pornography. Specifically, we must decide whether s. 163.1(4) is an unjustified infringement of the right to free expression found in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The Court is also asked to determine whether s. 163.1(4) infringes s. 7 of the *Charter*. In our view, the s. 7 liberty interest is encompassed in the right of free expression and proportionality falls to be considered under s. 1. Accordingly, no separate s. 7 analysis is required.
2. A discussion of these constitutional questions must take place within the broad political, social and historical context in which they arise; see *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at p. 438; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 647; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1352; see also S. M. Sugunasiri, “Contextualism: The Supreme Court’s New Standard of Judicial Analysis and Accountability” (1999), 22 *Dalhousie L.J.* 126, at pp. 133-34. The impugned provision of the *Criminal Code* must also be interpreted in light of *Charter* values reflected in s. 1 as elaborated in cases such as *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136, and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 64. See *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.
3. In the context of this case, the twin considerations of social justice and equality warrant society’s active protection of its vulnerable members. Democratic and constitutional principles dictate that every member of society be treated with dignity and respect and accorded full participation in society. In this sense, government legislation that protects the vulnerable plays a vital role. Given our democratic values, it is clear that the *Charter* must not be used to reverse advances made by vulnerable groups or to defeat measures intended to protect the disadvantaged and comparatively powerless members of society. The constitutional protection of a form of expression that undermines our fundamental values must be carefully scrutinized. On this point, it is helpful to refer to *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, where Dickson C.J. stated, at p. 779:

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

This principle has been emphasized, *inter alia*, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 993; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R 1038, at p. 1051; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 86. These reasons explain why we cannot agree with McLachlin C.J. that the scope of the prohibition against the possession of child pornography is overbroad, and why the legislation is justified under s. 1 in its entirety.

1. The respondent’s argument that s. 163.1(4) is unconstitutional rests on his claim that the prohibition of the possession of child pornography unjustifiably infringes the right to free expression. Section 163.1(4) states:

Every person who possesses any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) an offence punishable on summary conviction.

Section 163.1(1) defines “child pornography” as:

(*a*) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or

(*b*) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

These provisions must be read in conjunction with s. 163(3), which provides a “public good” defence:

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

They must also be read in light of the broad defences found in s. 163.1(6):

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

1. In this way, “child pornography” was defined by Parliament to encompass a broad range of material that it determined was harmful to children. It includes both representations that involve real children in their production as well as products of the imagination, such as drawings and written material. Importantly, the provisions do not distinguish between representations created by electronic or mechanical means. Both are captured. The definition is designed to cover representations involving persons either under the age of 18 or depicted as being under the age of 18. Nevertheless, Parliament has limited the protection from the harm of child pornography to a certain degree, striking the balance it deemed appropriate between the rights and values at stake.
2. The facts that give rise to this appeal are as follows: Mr. Sharpe was charged with two counts of possession of child pornography for the purpose of distribution or sale, as well as two counts of possession *simpliciter* of child pornography contrary to s. 163.1(4). Prior to the start of his trial in the Supreme Court of British Columbia, the accused challenged the constitutionality of a number of provisions of the *Criminal Code*, including s. 163.1(4).
3. The nature of the materials in the respondent’s possession is typical of the material that may be caught by the impugned provision. Detective Noreen Waters of the Coordinated Law Enforcement Unit (Pornography Portfolio), City of Vancouver Police Department and the chief police investigator in this matter, testified at the *voir dire* that a large quantity of photographs, books and manuscripts as well as 10 computer disks containing a series of stories were seized from the respondent. The photographs were of boys. The great majority of them appear to be under the age of 18, and some appear to be pre-pubescent. With very few exceptions, the boys are naked or mostly naked, and are posed in a manner that prominently displays their genitals. Some photos are of a boy with an erection, and some depict a boy apparently masturbating. A few photos show two boys embracing or kissing. One photo shows two boys performing fellatio on each other.
4. Also entered into evidence was a collection of 17 stories written by the respondent. At trial, Detective Waters commented as follows on these stories:

They’re extremely violent stories, the majority of them, with sexual acts involving very young children, in most cases, under the age of 10 engaged in sadomasochistic and violent sex acts with either adults and children, other children, both male and female.

They’re extremely disturbing with just the descriptions of the sexual acts with the children particularly in relation to circumcision. And the theme is often that the child enjoys the beatings and the sexual violence and that they are wanting it and actually seeking it out.

1. After reviewing the testimony of Detective Waters and that of Dr. Peter Collins, an expert in forensic psychiatry, sexual deviance and paedophilia, the trial judge ruled that the prohibition of the simple possession of child pornography in s. 163.1(4) violated the right to free expression guaranteed by s. 2(*b*). He concluded that the violation was not saved by s. 1. Accordingly, the two charges of possession *simpliciter* of child pornography were dismissed: (1999), 22 C.R. (5th) 129. The trial with respect to the charges of possession for the purpose of distribution or sale was adjourned pending the appeal of the trial judge’s ruling. The majority of the British Columbia Court of Appeal (Southin and Rowles JJ.A., McEachern C.J.B.C. dissenting) upheld the trial judge’s ruling: (1999), 136 C.C.C. (3d) 97. The Attorney General of British Columbia is now appealing.
2. The right to free expression is at the heart of this appeal. So is child pornography. Under our society’s democratic principles, individual freedoms such as expression are not absolute, but may be limited in consideration of a broader spectrum of rights, including equality and security of the person; see *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 61; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877*.*  The context here is one of competing rights; we must keep this in mind when determining whether s. 163.1(4) is an unjustified violation of the respondent’s right to free expression.

I. Freedom of Expression

A. *The Nature and Scope of the Guarantee to Free Expression in Section 2(b) of the*

 *Charter*

1. Even before the advent of the *Charter*, Canadian courts recognized that the right to free expression was a fundamental part of democratic values, and a necessary element in ensuring the participation of individuals and groups in society; see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573,at pp. 583-86. After the right to free expression was entrenched in the *Charter*, courts acknowledged that its value extended beyond the simple need for participation in a democratic society; see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712,at p. 764; *Edmonton Journal*, *supra*; *Irwin Toy*, *supra*; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Keegstra*, [1990] 3 S.C.R. 697. In *Irwin Toy*, *supra*,at p. 976, the majority identified three values which form the foundation of the right to free expression: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making should be fostered and encouraged; and (3) diversity in the forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom the meaning is conveyed.
2. The core values emphasized in *Irwin Toy*, *supra*, and in later cases such as *Keegstra*, *supra*, identify the purpose of the right to free expression in a free and democratic society. The importance of the right rests, in part, in expression’s role in affirming individual ideas and communicating views. However, it must be remembered that the individual right to free expression is exercised within a broad societal context. As stated in *Irwin Toy*, *supra*, at p. 976, the self-realization of those whose activities or representations convey meaning is linked to the self-realization of those to whom the meaning is conveyed. In this sense, the values identified as central to free expression take into account the fact that individual and societal goals are not mutually exclusive.
3. The Supreme Court of Canada has dealt with the right to free expression in a number of cases, including *Dolphin Delivery*, *supra*; *Ford*, *supra*; *B.C.G.E.U. v. British Columbia (Attorney General)*,[1988] 2 S.C.R. 214; *Edmonton Journal*, *supra*; *Irwin Toy*, *supra*; *Taylor*, *supra*; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Keegstra*, *supra*; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Butler*, *supra*; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Ross v. New Brunswick School District No. 15*, *supra*; *R. v. Lucas*, [1998] 1 S.C.R. 439; and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. From the outset, the Court defined “expression” broadly to mean any activity or representation that conveys meaning or attempts to convey meaning in a non-violent form; see, for example, *Reference re ss. 193 and 195.1(1)(c) of Criminal Code*, *supra*,at p. 1180; *Rocket*, *supra*,at p. 244; and *Keegstra*, *supra*, at pp. 729 and 826.
4. The right to free expression extends, for example, to commercial expression. In *Ford*, *supra*, at p. 767, the Court underscored the basis for the protection of commercial expression as follows:

Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.

See also *Irwin Toy*, *supra*,and *RJR-MacDonald*, *supra*. Similarly, the Court has recognized that picketing has a communicative element and is therefore protected by s. 2(*b*): see *Dolphin Delivery*, *supra*, at p. 588; *B.C.G.E.U.*, *supra*; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083.

1. The Court has also had occasion to deal with the issue of hate propaganda. In *Irwin Toy*, *supra*, the majority affirmed the doctrine of content neutrality, stating that s. 2(*b*) protects all messages, “however unpopular, distasteful or contrary to the mainstream” (p. 968); see also *Keegstra*, *supra*,at p. 729. In *R. v. Zundel*, [1992] 2 S.C.R. 731, the Court, applying this principle, unanimously concluded that the content-neutral approach to s. 2(*b*) meant that even deliberate falsehoods are a protected form of expression.
2. The Court was asked to address the subject of pornography in *Butler*, *supra*, finding that pornography, including obscenity, was protected expression. Since there are no content-based restrictions on s. 2(*b*), it followed that pornographic material, no matter how offensive, was covered by the s. 2(*b*) guarantee.
3. From these cases, it is clear that in characterizing the right to free expression under s. 2(*b*), the Court has developed a two-pronged test. Initially, courts must determine whether the activity in question is expression for the purposes of s. 2(*b*). It is incumbent upon the person alleging a violation to prove that the activity conveys or attempts to convey meaning. The Court has stressed that the content of the expression is irrelevant; provided that there is an attempt to convey meaning, s. 2(*b*) is engaged; see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*; *Butler*, *supra*; *Zundel*, *supra*,at p. 753. The exception to this general principle is that s. 2(*b*) does not protect activity which conveys a meaning but does so in a violent form. The Court has indeed recognized that expression consists of both content and form, two distinct expressive elements that are inextricably connected; see *Keegstra*, *supra*, at p. 729; *Irwin Toy*, *supra*, at p. 968.
4. Once it is established that the activity in question conveys or attempts to convey meaning in a non-violent form, courts must turn to the second stage of the analysis. This involves a determination of whether the law or government action actually restricts expression. Determining whether expression is restricted is distinct from the first step of deciding whether any particular activity constitutes expression; see *Ford*, *supra*. While individual self-fulfilment, the attainment of truth, and participation in a democratic society are important considerations in the s. 1 analysis, the ambit of the interests protected is not dependent on them; see *Zundel*, *supra*, at pp. 752-53, where McLachlin J. (as she then was) confirmed that any content which conveys meaning is protected if it does not take a violent form.

B. *Is the Simple Possession of Child Pornography Protected by Section 2(b) of the*

 *Charter?*

1. With the above principles as a backdrop, the first step in answering the constitutional questions posed in this case is to determine whether the possession of child pornography is protected by s. 2(*b*), which guarantees the right to “freedom of thought, belief, opinion and expression”.
2. It is clear that s. 163.1(4) restricts expression if the possession of child pornography can be considered expression. While the Crown has conceded this latter question, it is important to recognize that the right to free expression in s. 2(*b*) has always been considered to protect only those activities which are communicative; see e.g., P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 40-8; J. Watson, “Case Comment: *R. v. Sharpe*” (1999), 10 *N.J.C.L.* 251, at p. 256. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, at p. 1206, Wilson J. commented:

With respect to s. 193 of the *Code*, I do not see how the provision can be said to infringe the guarantee of freedom of expression either on its own or in combination with s. 195.1(1)(*c*). In my view, only s. 195.1(1)(*c*) limits freedom of expression. Section 193 deals with keeping or being associated with a common bawdy‑house and places no constraints on communicative activity in relation to a common bawdy‑house. I do not believe that “expression” as used in s. 2(*b*) of the *Charter* is so broad as to capture activities such as keeping a common bawdy‑house. [Emphasis added.]

1. From our jurisprudence, it is unclear whether the requirement that an activity convey or attempt to convey meaning excludes all activities which are not *prima facie* communicative from the scope of the right to free expression in s. 2(*b*). For example, this Court speculated that the parking of a car is not protected expression since it is not a *prima facie* communicative activity; see *Irwin Toy*, *supra*, at p. 969. While it may be true that s. 2(*b*) guarantees the right to possess “material [that] allows us to understand the thought of others”, the scope of the right (in the spectrum developed by McLachlin C.J., at para. 25) to create and possess self-authored works, especially those not intended for others, in order to “consolidate our own thought” is far from clear. Thus, in our view, it is unfortunate that the Crown conceded that the right to free expression was violated in this appeal in all respects, thereby depriving the Court of the opportunity to fully explore the content and scope of s. 2(*b*) as it applies in this case. At the same time, we recognize that, at this stage, our jurisprudence leads to the conclusion that, although harmful, the content of child pornography cannot be the basis for excluding it from the scope of the s. 2(*b*) guarantee.

II. Section 1

A. *Contextual Approach to Section 1*

1. Methodology

1. To decide whether the limits on the accused’s right to free expression imposed by s. 163.1(4) of the *Criminal Code* are justified under s. 1, we must determine whether the limits on the right constitute “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Since the advent of the landmark decision in *Oakes*, *supra*, we have made this determination in two stages. At the first stage, the Court examines whether the objective or purpose behind the limit is of sufficient importance to justify overriding a *Charter* right. The second stage considers whether the legislative means chosen are rationally connected to the legislative objective, whether those means minimally impair the *Charter* guarantee that has been infringed, and finally whether the salutary effects of the impugned provision are proportional to its deleterious effects.
2. While the guidelines set out in *Oakes* provide a useful analytical framework for the practical application of s. 1, it is important not to lose sight of the underlying purpose of that section, namely to balance individual rights and our communal values. Where courts are asked to consider whether a violation is justified under s. 1, they must be sensitive to the competing rights and values that exist in our democracy. As Dickson C.J. advised in *Oakes*, *supra*, at p. 136:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

In *Slaight Communications*, *supra*, at p. 1056, a majority of this Court recognized that the underlying values of a free and democratic society guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights.

1. In keeping with the underlying purpose of s. 1 and the democratic values which it seeks to encourage, this Court has eschewed a formalistic and rigid application of the framework set out in *Oakes* in favour of a principled and contextual approach. As Wilson J. recognized in *Edmonton Journal*, *supra*, at pp.1355-56, a particular right or freedom may have a different value depending on the legislative context. An examination of the factual and social context in which an infringement of that right occurs allows the court to evaluate what truly is at stake in a particular case. In addition, the contextual approach ensures that courts are sensitive to the other values which may compete with a particular right and allows them to achieve a proper balance among these values. Section 1 determinations, therefore, are not to be made in a vacuum, nor are they to focus exclusively on the right or freedom infringed.
2. More recently, this Court has emphasized that close attention must be paid to the factual and social context in which an impugned provision exists at each stage of the s. 1 analysis. In *Thomson Newspapers*, *supra*, Bastarache J., for the majority of this Court, stated as follows, at para. 87:

The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

This approach is consistent with the approach taken by the majority of this Court in *Keegstra*, *supra*, at p. 760; *Butler*, *supra*, at p. 499; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 63; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 36; *Lucas*, *supra*; and was followed in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989.

1. A principled approach to the question of whether a limitation is reasonable and demonstrably justified in a free and democratic society must therefore take into account all of the interests and values which are at play in the given factual context and these considerations must underlie each stage of the s. 1 analysis. A failure to consider the beneficial aspects of the law, the values and rights which it seeks to protect and foster, and the actual nature of the right infringed in the particular case until the final stage of the proportionality analysis risks doing violence to the balance between individual rights and community goals which s. 1 seeks to achieve. Before turning to the direct application of the *Oakes* test, it is necessary to consider the contextual factors introduced in *Thomson Newspapers*, *supra*.

2. Context

1. An examination of the social, legislative and factual context of an impugned provision and the nature of the right that it has infringed is important in determining the degree of deference owed to the legislature in applying the various steps in the s. 1 analysis. What type of proof should the Court require of the government to justify its choice of means? How much evidence must the government provide of the harm which it has sought to address? In *Thomson Newspapers*, *supra*, Bastarache J. identified some of the contextual factors that are relevant to the determination of these questions (at para. 90). Amongst these factors are: the nature of the harm at issue and consequent inability to measure it scientifically or the efficaciousness of a remedy (as in *Butler*, *supra*, at p. 502); the vulnerability of the group which the legislature seeks to protect (as in *Irwin Toy*, *supra*, at p. 995; *Ross v. New Brunswick School District No. 15*, *supra*, at para. 88); that group’s own subjective fears and apprehension of harm (as in *Keegstra*, *supra*, at p. 857); and the nature of the expressive activity affected. The additional factor we consider is the enhancement of other *Charter* values, which recognizes the right of Parliament to give effect to moral values. While these five factors do not serve as criteria which the government must satisfy, they are relevant to the determination of whether an impugned provision is demonstrably justified.

(a) *Nature of the Harm and Inability to Measure It*

1. The very existence of child pornography, as it is defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. The harm of child pornography is inherent because degrading, dehumanizing, and objectifying depictions of children, by their very existence, undermine the *Charter* rights of children and other members of society. Child pornography eroticises the inferior social, economic, and sexual status of children. It preys on preexisting inequalities.
2. The *Report on Pornography* by the Standing Committee on Justice and Legal Affairs (1978) (MacGuigan Report), spoke of the effects of pornography as follows (at p. 18:4):

The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.

1. In a similar manner, child pornography creates a type of attitudinal harm which is manifested in the reinforcement of deleterious tendencies within society. The attitudinal harm inherent in child pornography is not empirically measurable, nor susceptible to proof in the traditional manner but can be inferred from degrading or dehumanizing representations or treatment; see *Thomson Newspapers*, *supra*, at para. 92, and *R. v. Mara*, [1997] 2 S.C.R. 630. In the past this Court has not held Parliament to a strict standard of proof in showing a link between the expressive activity in question and the harm which it seeks to prevent, but has afforded Parliament a margin of appreciation to pursue legislative objectives based on less than conclusive social science evidence; see *Irwin Toy*, *supra*, at p. 990; *Keegstra*, *supra*, at p. 776; *Butler*, *supra*, at p. 504.
2. In *Butler*, *supra*, this Court recognized that some forms of pornography create attitudinal harm. *Butler* concerned an accused who was charged with various counts related to selling, possessing for the purposes of distribution and exposing obscene materials that did not involve children. While considering the meaning of obscenity within the context of s. 163(8) of the *Criminal Code*, Sopinka J., writing for the majority, stated, at p. 479, that degrading and dehumanizing material

would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole.

1. Since “child pornography” is fully defined in s. 163.1(1), the community standards test developed for determining whether adult pornography is obscene has no role in determining whether pornography involving children falls within the child pornography prohibition. However, *Butler* is important since it recognizes that harmful material involving explicit sex and children may be constitutionally proscribed; see *Butler*, *supra*, at p. 485, *per* Sopinka J.; at p. 516, *per* Gonthier J. Section 163.1(1) targets material similar to the type found to be harmful in *Butler*. The impugned provision recognizes that the possession of child pornography has a particularly deleterious effect on society since the persons depicted and most directly harmed are children.
2. Implicit in the Court’s reasons in *Butler* is the recognition that expression that degrades or dehumanizes is harmful in and of itself. The Court broadened the traditional individualistic notion of harm, and recognized that all members of society suffer when harmful attitudes are reinforced. This broader notion of harm was also emphasized in *Keegstra*, *supra*, at pp. 747-48, where Dickson C.J. explained the attitudinal harm of hate propaganda as follows:

. . . the alteration of views held by the recipients of hate propaganda may occur subtlely, and is not always attendant upon conscious acceptance of the communicated ideas. Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient’s mind as an idea that holds some truth, an incipient effect not to be entirely discounted . . . .

1. In addition to the types of harm discussed above, child pornography creates a risk of harm that flows from the possibility of its dissemination. If disseminated, child pornography involving real people immediately violates the privacy rights of those depicted, causing them additional humiliation. While attitudinal harm is not dependent on dissemination, the risk that pornographic representations may be disseminated creates a heightened risk of attitudinal harm.
2. Child pornography is especially valuable to paedophiles. Dr. Collins defined paedophilia in these terms: “Paedophilia is a form of paraphilia. Paraphilia very simply is the clinical term denoting sexual deviance. . . . [Paedophilia] is the erotic attraction or the sexual attraction to pre-pubescent children”. Paedophiles tend to use child pornography in two primary ways. First, representations of children as sexual objects or engaged in sexual activity are used to reinforce the opinion that children are appropriate sexual partners; these cognitive distortions are then used to justify paedophilic acts. Second, many paedophiles show child pornography to children in order to lower their inhibitions towards engaging in sexual activity and to persuade them that paedophilic activity is normal; see Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children* (1984) (“Badgley Report”), vol. 2, at p. 1209.
3. It should be emphasized that some of the material in the respondent’s possession was on computer disk and capable of instantaneous distribution, creating a risk that this material might in fact be disseminated. The widespread availability of computers and the Internet has resulted in new ways of creating images, and has facilitated the storage, reproduction, and distribution of child pornography. Detective Waters likened this increased distribution to a tidal wave. As stated in Criminal Intelligence Service Canada’s *Annual Report on Organized Crime in Canada* (2000), at p. 13: “The distribution of child pornography is growing proportionately with the continuing expansion of Internet use. Chat rooms available throughout the Internet global community further facilitate and compound this problem. The use of the Internet has helped pornographers to present and promote their point of view.” Criminalizing the possession of child pornography may reduce the market for child pornography and decrease the exploitative use of children in its production.
4. In short, the lack of scientific precision in the social science evidence relating to attitudinal harm available to Parliament is not a valid reason for calling into question Parliament’s decision to act. It has been estimated that over 60,000 Canadians have been depicted at a young age in sexually explicit material; see Badgley Report, *supra*, vol. 2, at p. 1198. It goes without saying that child pornography which sexually exploits children in its production is harmful. Moreover, we have seen that the harms of child pornography extend far beyond direct, physical exploitation. It is harmful whether it involves real children in its production or whether it is a product of the imagination. In either case, child pornography fosters and communicates the same harmful, dehumanizing and degrading message.
5. The basis for s. 163.1 was the clear evidence of direct harm that child pornography causes, as well as Parliament’s reasoned apprehension (based on the available social science evidence) that child pornography also causes attitudinal harm. The decision to act was consistent with the Fraser Committee’s call for measures prohibiting child pornography (*Report of the Special Committee on Pornography and Prostitution* (1985) (“Fraser Report”)). As we will see in the next section, s. 163.1 is consistent with action taken by other countries, and the international community, which have recognized and addressed the need to protect children.

(b) *The Vulnerability of Children and Their Subjective Fears*

1. Section 163.1 was enacted to protect children. Because of their physical, mental, and emotional immaturity, children are one of the most vulnerable groups in society, particularly with regard to sexual violence. Child pornography plays a role in the abuse of children, exploiting the extreme vulnerability of children. Pornography that depicts real children is particularly noxious because it creates a permanent record of abuse and exploitation. An analysis of the vulnerability of the group and their subjective fears supports Parliament’s decision to prohibit child pornography.

(i) Actions Taken to Protect Children in Canada

1. Canadian society has always recognized that children are deserving of a heightened form of protection. This protection rests on the best interests of the child. The vulnerability of children is a product of the innate power imbalance that exists between adults and children. As a result of this vulnerability, children are often targets of violence and exploitation. It has been estimated that in almost 80 percent of sex crimes committed, the victims are girls, boys and young men and women under the age of 20; see N. Bala and M. Bailey, “Canada: Recognizing the Interests of Children” (1992-93), 31 *U. Louisville J. Fam. L.* 283, at p. 292. Fully two-thirds of sexual assault victims in 1993 were children, and one-third of all victims were under the age of 10; see J. V. Roberts, “Sexual Assault in Canada: Recent Statistical Trends” (1996), 21 *Queen’s L.J.* 395, at p. 420. Indeed, it is thought that one in four girls and one in 10 boys will be victims of sexual assault before they reach the age of 18; see R. Bessner, “Khan: Important Strides Made by the Supreme Court Respecting Children’s Evidence” (1990), 79 C.R. (3d) 15, at p. 16.
2. The need to protect children from harm has been an ongoing concern for Canada. In 1991, Canada ratified the United Nations’ *Convention on the Rights of the Child*,Can. T.S. 1992 No. 3, an international instrument that affirms the need to protect children from various forms of harm, including discrimination (art. 2), violence (art. 19), separation from parents except where necessary for the child’s best interest (art. 9), interference with privacy, family and home (art. 16), work that threatens health, education or development (art. 32), harmful drugs and involvement in their production or distribution (art. 33), abduction, trafficking or sale (art. 35), torture (art. 37), and sexual exploitation (art. 34). Canada’s support for the Convention demonstrates this country’s strong commitment to protecting children’s rights.
3. In addition to ratifying the Convention, Canadian legislators have adopted other measures aimed at protecting children. Hence s. 163.1(4) is part of a broader scheme of *Criminal Code* offences which recognize the vulnerability of children and attempt to protect them from exploitation. For example, some *Criminal Code* provisions prevent an accused from relying on the consent of complainants under a certain age. For many offences the age of consent is 14, and for others it is 18; see *Criminal Code*, ss. 150.1, 151, 152, 153(1), 159, 160(3), 170, 171, 172, 271, 272, 273. In particular, s. 150.1 recognizes that children under the age of 14 are extremely vulnerable to sexual exploitation, and thus prevents those charged of doing so from raising the defence of consent. Similarly, s. 212(4) prevents any person from receiving the sexual services of a person under the age of 18 for consideration. Other sections are designed to address children’s special vulnerability. Section 215 imposes a legal duty on parents or guardians to provide the necessaries of life to children under 16 years of age. Finally, there exists a special framework for dealing with children as young offenders. Under the *Young Offenders Act*, R.S.C. 1985, c. Y-1, children are offered procedural safeguards, and are subject to attenuated penalties.
4. In the civil law context, child protection legislation provides for apprehension of a child when, for example, there is a risk that the child may be harmed; see *Child Welfare Act*, S.A. 1984, c. C-8.1, ss. 17, 18; *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, ss. 16 to 19 and 25 to 33; *The Child and Family Services Act*, S.M. 1985-86, c. 8, ss. 21 to 26, 38(7), 53; *Family Services Act*, S.N.B. 1980, c. F-2.2, ss. 1, 31(5), 32, 33, 51(1), 62(3); *Child Welfare Act*, R.S.N. 1990, c. C-12, ss. 13, 14, 15; *Child and Family Services Act*, S.N.W.T. 1997, c. 13, ss. 10, 11(1), 33; *Children and Family Services Act*, S.N.S. 1990, c. 5, ss. 26(2), (3), 27, 28, 29, 33(1), (3), 34; *Child and Family Services Act*, R.S.O. 1990, c. C.11, ss. 40(2), (3), (5), (7) to (10), 41 to 44; *Family and Child Services Act*, R.S.P.E.I. 1988, c. F-2, ss. 1(1)(c), 15(1), (1.1), 16(1), 17(1)(b), 19(b); *Youth Protection Act*, R.S.Q., c. P-34.1, ss. 2, 3 and 46; *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, ss. 2(1)(p), 7, 8, 13, 17, 18(1); *Children’s Act*, R.S.Y. 1986, c. 22, s. 119.
5. Canadian courts have shown an increased awareness of the rights and interests of children. Our Court has repeatedly articulated the importance of protecting children and youth from various forms of harm; see, for example, *R. v. Hess*, [1990] 2 S.C.R. 906, at p. 948, *per* McLachlin J.; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Irwin Toy*, *supra*; *Young v. Young*, [1993] 4 S.C.R. 3; *L. (D.O.)*, *supra*, at p. 439, *per* L’Heureux‑Dubé J. The common law, based on the *parens patriae* jurisdiction, has recognized the power of state institutions to intervene to protect children who are at risk; see, for example, *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 88. Further, in cases such as *Young v. Young*, *supra*, at pp. 84-85,this Court has reaffirmed that any decision affecting a child must be made in his or her best interests, which include, but are not limited to, ensuring that the child is protected from harm, whether caused by others or self-inflicted, and, importantly, seeking to foster the healthy development of the child to adulthood.

(ii) Actions Taken Internationally to Protect Children

1. The protection of children from harm is a universally accepted goal. While this Court has recognized that, generally, international norms are not binding without legislative implementation, they are relevant sources for interpreting rights domestically; see *Reference re Public Service* *Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at pp. 349-50; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

. . . the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

1. In *Slaight Communications*, *supra*, at pp. 1056-57, this Court explained that a balancing of competing interests must be informed by Canada’s international obligations. The fact that a value has the status of an international human right is indicative of the high degree of importance with which it must be considered; see also *Keegstra*, *supra*,at p. 750.
2. Both legislators abroad and the international community have acknowledged the vulnerability of children and the resulting need to protect them. It is therefore not surprising that the *Convention on the Rights of the Child* has been ratified or acceded to by 191 states as of January 19, 2001, making it the most universally accepted human rights instrument in history.
3. Indeed, international law is rife with instruments that emphasize the protection of children. Article 25(2) of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc A/810, at p. 71 (1948), recognizes that “childhood [is] entitled to special care and assistance”. The United Nations *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV) (1959), in its preamble, states that the child “needs special safeguards and care”. In 1992, the United Nations Commission on Human Rights adopted the *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, 55th Mtg., 1992/74. Additional instruments such as the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 10(3), and the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 24, also emphasize the protection of children. The recent *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, A/RES/54/263 (2000), which prohibits, *inter alia*, child pornography, has already been signed by 69 states; see <http://www.unhchr.ch/html/menu3/b/treaty18\_asp.htm> (accessed January 23, 2001).
4. Section 163.1 of Canada’s *Criminal Code* reflects a growing trend towards the criminalization of the possession of child pornography. A number of international bodies have recognized that possession must be targeted to effectively address the harms of child pornography; see *Sale of Children, Child Prostitution and Child Pornography: Note by the Secretary-General*, U.N. Doc. A/49/478 (1994), at paras. 196-97; *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, *supra*, at para. 53; *Draft Joint Action to combat child pornography on the Internet*, [1999] O.J.C. 219/68, art. 1; *International traffic in child pornography*, ICPO-Interpol AGN/65/RES/9 (1996).
5. Domestic legislation in a number of countries criminalizes the possession of child pornography, regardless of whether the possessor has an intent to disseminate; see, for example, Australia: *Classification (Publications, Films and Computer Games) Act 1995* (Cth.), and state and territorial legislation in the Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia, which classify and prohibit various forms of child pornography;Belgium: art. 383*bis* of the *Criminal Code*, which proscribes private possession of figures, things, films, photos, slides or other visual representations of sexual acts or positions involving persons under 16 that are characterized as pornographic;England:  *Protection of Children Act 1978* (U.K.), 1978, c. 37, ss. 1 and 7; *Criminal Justice Act 1988* (U.K.), 1988, c. 33, s. 160, and *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, ss. 84 to 86), which target private possession of photographs and pseudo-photographs of persons under 16 or who appear to be under 16; Ireland: *Child Trafficking and Pornography Act, 1998*, ss. 2 and 6, which defines child as a person under the age of 17, bans the private possession of (1) any visual representation that shows a person who is or is depicted as a child engaged in or witnessing explicit sexual activity and any visual representation whose dominant characteristic is the depiction of the genital or anal region of a child for sexual purposes; (2) any audio representation of a person who is or is represented as being a child and who is engaged in or is represented as being engaged in explicit sexual activity; (3) any visual or audio representation that advocates, encourages or counsels any sexual activity with children which is an offence; and (4) any visual representation or description of or information relating to a child that indicates or implies that the child is available to be used for the purposes of sexual exploitation; New Zealand: *Films, Videos, and Publications Classification Act 1993*, ss. 2, 3 and 131, which proscribes private possession of publications that describe, depict, express or otherwise deal with matters such as sex, horror, crime, cruelty, or violence such that the availability of the publication is likely to be injurious to the public good in that it promotes, supports or tends to promote or support the exploiting of children or young persons, for sexual purposes; and the United States: 18 U.S.C. §§ 2252(a)(4)(B) and 2256 (1994 & Supp. IV 1998), which targets photographs, film, video or pictures, computer or computer-generated images or pictures of sexually explicit conduct involving a person who is under 18 or who appears to be under 18. This statute has been interpreted as including only those visual images which are easily mistaken for that of a real child; see, for example, *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), at p. 72. Therefore, drawings, sculptures and paintings are not proscribed.

(c) *The Nature of the Expressive Activity Affected*

1. The nature of the expressive activity at issue is another important contextual factor that has emerged from the Court’s s. 2(*b*) jurisprudence. The Court has emphasized that under s. 1, the level of protection to which expression is entitled will vary with the nature of the expression. The more distant the expression from the core values underlying the right, the more likely action restricting it can be justified; see *Keegstra*, *supra*, at p. 765; *Lucas*, *supra*,at para. 34. Defamatory libel, hate speech and pornography are far removed from the core values of freedom of expression and have been characterized as low value expression, which merits an attenuated level of constitutional protection; see *Lucas*, *supra*, at para. 93; *Butler*, *supra*, at p. 500; *Keegstra*, *supra*, at p. 765. These forms of expression receive an attenuated level of constitutional protection not because a lower standard of justification is applied to the government, but because the low value of the expression is more easily outweighed by the objective of the infringing legislation: see *Thomson Newspapers*, *supra*, at para. 91.
2. We will now address the nature of the expression in light of the three core values of freedom of expression: (1) the search for truth; (2) participation in political decision-making; and (3) diversity in forms of self-fulfilment and human flourishing.
3. It is clear that the possession of child pornography contributes nothing to the search for truth. The impugned provision prohibits the possession of material which visually depicts children engaged in sexual activity or which has as its dominant characteristic the depiction, for a sexual purpose, of the sexual organ or the anal region of a child. The written material prohibited is that which advocates or counsels the commission of sexual offences against children. The message conveyed by child pornography perpetuates lies about children’s humanity. It promotes the false view that children are appropriate sexual partners and that they are sexual objects to be used for the sexual gratification of adults. It encourages and condones their sexual abuse. These messages contribute nothing to the search for truth and are in fact detrimental to that search.
4. It is equally clear that there is no link between the possession of “child pornography” (as defined in s. 163.1(1)) and participation in the political process. While children may not be accorded equal participation in our political process, they are deserving of equal treatment as members of our community. In *Keegstra*, *supra*, at p. 764, Dickson C.J. recognized that messages of degradation, which undermine the dignity and equality of members of identifiable groups, subvert the democratic aspirations of the expression guarantee by undermining the participation of those groups in the political process. In *Thomson Newspapers*, *supra*, at para. 92, Bastarache J. found that the same could be said of pornographic expression. He recognized that in *Irwin Toy*, *supra*, the interests of advertisers meant that there was a likelihood that their speech would manipulate children and would play on their vulnerability. In each of these cases, the type of speech involved systematically undermined the position of some members of society. Child pornography similarly undermines the position of children in society. In this sense, it is antithetical to the democratic values underlying the guarantee of freedom of expression.
5. The expression at issue in this case is linked to the value of self-fulfilment, but only in a limited sense since s. 163.1(4) of the *Criminal Code* in no way impedes positive self-fulfilment. In *Butler*, *supra*, the Attorney General for Ontario argued that the only value underlying pornography as a form of expression was self-fulfilment in its most base aspect, that of pure physical arousal (pp. 499-500). We find this argument particularly apposite in relation to child pornography. Child pornography is used to fuel the fantasies of paedophiles and is also used to facilitate their exploitation of children. It hinders children’s own self-fulfilment and autonomous development by eroticising their inferior social, economic and sexual status. It reinforces the message that their victimization is acceptable. In our view, that message denies children their autonomy and dignity. In relation to adult pornography, Sopinka J. found in *Butler* that such expression does not stand on an equal footing with other kinds of expression which directly engage the “core” of the freedom of expression values (p. 500). We agree with this statement and find it equally applicable in the context of child pornography.
6. The possession of child pornography has no social value; it has only a tenuous connection to the value of self-fulfilment underlying the right to free expression. As such, it warrants only attenuated protection. Hence, increased deference should be accorded to Parliament’s decision to prohibit it.

(d) *Enhancement of Other Charter Values*

1. This Court has previously considered the *Charter* rights of other members of society as a contextual factor relevant to determining the proper level of deference. For example, in *Keegstra*, *supra*, the impugned legislation prohibited the willful promotion of hatred against any identifiable group. Dickson C.J. found that s. 15 and s. 27 of the *Charter* were relevant to determining the importance of the government’s objective of eradicating hate propaganda. At p. 756, he quoted with approval the following statement of one of the interveners in the case:

Government sponsored hatred on group grounds would violate section 15 of the *Charter*. Parliament promotes equality and moves against inequality when it prohibits the wilful public promotion of group hatred on these grounds. It follows that government action against group hate, because it promotes social equality as guaranteed by the *Charter*, deserves special constitutional consideration under section 15.

In *Taylor*, *supra*, Dickson C.J. further emphasized the role of other *Charter* rights in the application of s. 1, stating that in applying *Oakes*, the Court must “give full recognition to other provisions of the *Charter*, in particular ss. 15 and 27” (pp. 916-17). In our view, the positive influence of a government measure on other *Charter* rights, and in turn the negative effect of an expressive activity on the rights of other members of the community, are important factors to be considered in the application of the s. 1 analysis. This approach ensures that the analysis of whether an impugned provision is reasonably justified in a free and democratic society is undertaken in a manner which promotes our democratic values.

1. In the Fraser Report, *supra*, the Committee described its concerns with child pornography as follows (vol. 2, at p. 571):

. . . we are concerned with depictions that can be seen to undermine the values which we believe are fundamental to our society. It is our view that material which uses and depicts children in a sexual way for the entertainment of adults, undermines the rights of children by diminishing the respect to which they are entitled.

This description of the effects of child pornography on children’s rights strikes a sombre chord. The written material and images captured by s. 163.1(1) (which depict children engaged in explicit sexual activity or which depict their sexual organs for a sexual purpose), degrade and dehumanize them. They portray children as mere sexual objects available for the gratification of adults. They play on children’s inequality. Hence, this material is in direct conflict with the guarantee of equality in s. 15. In *Butler*, *supra*, Sopinka J. stated as follows, at p. 497:

. . . if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on ‘the individual’s sense of self-worth and acceptance’.

Similarly, Parliament’s attempt to prohibit the possession of child pornography can be seen as promoting children’s right to equality.

1. Child pornography also undermines children’s right to life, liberty and security of the person as guaranteed by s. 7. Their psychological and physical security is placed at risk by their use in pornographic representations. Those children who are used in the production of child pornography are physically abused in its production. Moreover, child pornography threatens the physical and psychological security of all children, since it can be encountered by any child. Regardless of its authorship, be it of the child or others, it plays on children’s weaknesses and may lead to attitudinal harm; see Fraser Report, *supra*, vol. 2, at pp. 570-71. We recognize that privacy is an important value underlying the right to be free from unreasonable search and seizure and the right to liberty. However, the privacy of those who possess child pornography is not the only interest at stake in this appeal. The privacy interests of those children who pose for child pornography are engaged by the fact that a permanent record of their sexual exploitation is produced. This privacy interest is also triggered when material which is created by teenagers in a “consensual environment” is disseminated.
2. In enacting s. 163.1(4) and prohibiting the possession of child pornography, Parliament promulgated a law which seeks to foster and protect the equality rights of children, along with their security of the person and their privacy interests. The importance of these *Charter* rights cannot be ignored in the analysis of whether the law is demonstrably justified in a free and democratic society and warrants a more deferential application of the criteria set out in *Oakes*.
3. In enacting s. 163.1(4), Parliament set social policy having regard to moral values, as it is entitled to do. It is accepted that, while the criminal law is not confined to prohibiting immoral acts, Parliament does have the right to make moral judgments in criminalizing certain forms of conduct. In *Butler*, *supra*, Sopinka J. found as follows, at p. 493:

. . . I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society.

The Court should be particularly sensitive to the legitimate role of government in legislating with respect to our social values. Like all legislative decisions, however, such moral decisions and judgments must be assessed in light of *Charter* values.

1. The appraisal of each of the contextual factors demonstrates that in this case increased deference to Parliament is warranted. With that in mind, we now apply the *Oakes* test to s. 163.1(4).

B. *Application of the Oakes Test*

1. Is the Objective Pressing and Substantial?

1. Parliament’s overarching objective in proscribing the possession of child pornography was to protect children. This is set out in the following statement, made by the Parliamentary Secretary to the Minister of Justice as he introduced what is now s. 163.1 for second reading in the House of Commons:

. . . children matter. They are the most vulnerable members of our society. They are vulnerable to emotional, sexual, and physical abuse. Our children must have the opportunity to grow up in safe, nurturing communities protected from such abuse.

The purpose of a law specifically addressing child pornography is to deal with the sexual exploitation of children and to make a statement regarding the inappropriate use and portrayal of children in media and art which have sexual aspects.

Our message is that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners. [Emphasis added.]

(*House of Commons Debates*, 3rd Sess., 34th Parl., vol. XVI, June 3, 1993, at p. 20328)

1. Parliament has recognized that children are the most vulnerable members of our society and that they are especially vulnerable to sexual abuse. Any provision which protects both children and society by attempting to eradicate the sexual exploitation of children clearly has a pressing and substantial purpose.
2. The pressing need for this legislation is supported by the presence of legislation which prohibits the possession of child pornography in most free and democratic societies. As noted, laws in Australia, Belgium, England, Ireland, New Zealand and the United States criminalize the possession of child pornography, regardless of whether the possessor has an intent to disseminate; see also *Butler*, *supra*, at p. 497, for adult pornography.
3. As discussed above, this legislation is consistent with Canada’s international commitment to protect children. In particular, it addresses our responsibilities under art. 34 of the *Convention on the Rights of the Child*:

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

(*a*) The inducement or coercion of a child to engage in any unlawful sexual activity;

(*b*) The exploitative use of children in prostitution or other unlawful sexual practices;

(*c*) The exploitative use of children in pornographic performances and materials.

Article 34 reflects the international community’s strongly held belief that the protection of children from the harms of child pornography is essential to their rights.

1. Having established the pressing and substantial nature of the objective of Parliament’s prohibition of the possession of child pornography, we now consider whether the means chosen are proportional.

2. Proportionality

(a) *Rational Connection*

1. It is particularly important to bear in mind at this stage the contextual factors previously examined which collectively warrant increased deference to Parliament’s chosen means. As mentioned earlier, in the determination of whether the means are rationally connected to the objective, Parliament is not held to a strict standard of proof. The standard is whether Parliament had a reasoned apprehension of harm. We must simply ask whether Parliament had a reasonable basis, on the evidence tendered, for believing that the prohibition of child pornography, as defined in s. 163.1(1) of the *Criminal Code*, would reduce the harm to children and society; see *Irwin Toy*, *supra*, at p. 994; *Butler*, *supra*, at p. 502. Parliament need not have had conclusive evidence before enacting the provision.
2. The Crown has provided five links between prohibiting the possession of child pornography and preventing harm to children and society which convincingly establish that s. 163.1(4) is rationally connected to its objective. Moreover, the expert evidence led at trial supports the reasonableness of Parliament’s decision to act.
3. Dr. Collins testified at trial to the first type of harm identified by the Crown, namely that the possession of child pornography contributes to the cognitive distortions of paedophiles. He testified that it is generally accepted amongst the vast majority of forensic psychiatrists that possession of child pornography reinforces some paedophiles’ cognitive distortions. He described these “offence-facilitating beliefs” as the rationalizations and justifications that paedophiles have for their deviant behaviour. Cognitive distortions contribute to the paedophile’s belief that sexual activity with children is acceptable, and that children enjoy sex with adults. Dr. Collins concluded that child pornography, cognitive distortions and the validation of the belief that sexual activity with children is acceptable are inextricably linked.
4. The testimony of Dr. Collins illustrates that there is indeed a link between the possession of child pornography and harmful attitudes about the willingness of children to engage in sexual activity with adults. The statement of Ms. Monica Rainey from Citizens Against Child Exploitation before the Standing Committee on Justice and the Solicitor General explains the potentially distortional effect of child pornography:

It is ludicrous to believe that child pornography has no effect on those who watch it. If that were true, why do we have advertisers selling billions of dollars of advertising for 90-second commercials? If 90 seconds work in advertising, we are fools to believe that 90 minutes of viewing adult sex with children will have no negative influence on those who are already addicted to children.

(House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, Issue No. 105, June 10, 1993, at p. 105:21)

However, there is a dearth of empirical research which addresses whether these types of attitudes actually cause sexual abuse. The difficulty in obtaining empirical proof of a link between the possession of pornography and criminal behaviour was described in the Badgley Report, *supra*, vol. 2, which cited the U.K. Report of the Committee on Obscenity and Film Censorship (1979), as follows, at p. 1273:

Since criminal and anti-social behaviour cannot itself, for both practical and ethical reasons, be experimentally produced or controlled, the observations must be made on some surrogate or related behaviour . . . The fundamental issue in this field concerns *the relations that hold between reactions aroused in a subject by a represented, artificial, or fantasy scene, and his behaviour in reality* . . . We can only express surprise at the confidence that some investigators have shown in supposing that they can investigate *this* problem through experimental set-ups in which reality is necessarily replaced by fantasy. [Emphasis added in Badgley Report.]

This difficulty, however, should not serve as a bar to prohibiting the possession of child pornography. In this regard, the comments of Burger C.J. in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), at pp. 60-61, on obscene material are apposite:

Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist.

In our view, based on the evidence, Parliament’s apprehension that child pornography reinforces the cognitive distortion that children are appropriate sexual partners was reasonable.

1. With respect to the second link, Dr. Collins testified to the theory that child pornography fuels paedophiles’ fantasies. He identified fantasies as the motivating force behind all sexually deviant behaviour, described paedophiles as “notorious for being collectors” of pornography, noted that the most explicit child pornography was the most coveted, and testified that in his own experience a correlation between greater access to child pornography and increased child sexual abuse does exist.
2. In assessing whether Parliament had a reasonable basis for concluding that the possession of child pornography would harm children by fuelling the fantasies of paedophiles, it is important to bear in mind that these fantasies are based on children’s degradation and dehumanization. The derivation of sexual pleasure from the possession of child pornography undermines children’s rights and does violence to the values which are essential to a free and democratic society. In our view, Parliament had a reasonable basis for believing that the prohibition of the possession of child pornography would foster and protect children’s *Charter* rights.
3. The third link arises from the important role of s. 163.1(4) as part of an integrated law enforcement scheme which protects children against the harms associated with child pornography. In addition to Detective Waters’ testimony that the police have found distributors and producers of child pornography through laying simple possession charges, Detective Inspector Matthews of the Child Pornography Unit of the Criminal Investigation Bureau of the Ontario Provincial Police, noted in his affidavit submitted to the British Columbia Court of Appeal that virtually all of the child pornography being created and distributed today is communicated by computer through the Internet. It is largely traded privately between paedophiles for the sole purpose of increasing their private collections. Therefore, paedophiles can acquire large collections of child pornography without being detected. Because of the secrecy involved in the trade of child pornography, the distribution provisions of s. 163.1 of the *Criminal Code* are insufficient to control its proliferation. Detective Inspector Matthews noted that with possession as an offence, law enforcement agencies now have the justification to seize the images and text of child pornography stored on computers and diskettes. This ensures that the material cannot be used in a manner which is harmful to children, and that it is not distributed further.
4. One of the most compelling links between the possession of child pornography and associated harms to children is the use of child pornography by paedophiles to groom children into committing sexual acts. Detective Inspector Matthews testified as follows before the Standing Committee on Justice and the Solicitor General about the use of child pornography as a grooming tool:

It’s often used as a tool by pedophiles to seduce children. They use it as a tool to lower their inhibitions. They do that by exposing the children to photographs. They’ll usually start out with photographs of partial nudity and then they’ll work their way up to total nudity and children being involved in actual sex acts.

Another dangerous part is that when they photograph these children, especially if they’re in the neighbourhood, the children may very well recognize their peers, so there’s that added pressure that if it’s all right for an adult to photograph their peers in the nude and take advantage of them and exploit them, then perhaps it’s all right for them to do that with them.

(*Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, *supra*, at pp. 105:4-105:5)

See also Badgley Report, *supra*. The potential of child pornography as a grooming tool is often evident from the manner in which the material is presented. For example, in the *voir dire*, Detective Waters described a comic book called *Cherubino* which depicts a child with an adult male as a team of crime fighters. Each crime fighting episode ends with a sexual encounter. The pornography is thus produced in a form which is appealing to children, encouraging them to believe that such behaviour is normal.

1. The Badgley Committee found that paedophiles sought out materials depicting children engaged in sexual conduct to use them to persuade other children to engage in similar conduct. In the Committee’s view, this fact demonstrated the need for express legal sanctions against the possession of child pornography (vol. 1, at p. 101). The Committee’s research indicated (vol. 2, at pp. 1282-83) that

the occurrence of unwanted exposure to pornography may have been experienced by a sizeable number of Canadians, many of whom were children and youths when the incidents took place. In many of these incidents, the persons committing these acts were well known to children or were responsible for their welfare. One in 63 persons (1.6 percent of persons in the National Population Survey) reported having been exposed to pornography and also having been sexually assaulted at the time or following the exposure.

. . . In the Committee’s judgment, the incidents reported likely constitute an under-estimate of the occurrence of situations involving exposure to pornography followed by a sexual assault.

Twenty of the 33 persons who reported that they had been shown pornography and sexually assaulted by the same person were children when the incidents occurred (vol. 2, at p. 1279).

1. The use of child pornography to groom children is also evident in those cases which have considered s. 163.1 of the *Criminal Code*. For example, in *R. v. K.L.V.*, [1999] A.J. No. 350 (QL) (Q.B.), a man showed two children a photo of a young girl with her dress pulled up over her head, exposing her genitals. In *R. v. Jewell* (1995), 100 C.C.C. (3d) 270 (Ont. C.A.), one of the accused, Gramlick, had produced 33 videotapes of sexual activity among children and adults. Before participating in the filming, the children were shown commercial videos of child pornography and the accused’s own homemade videotapes “to stimulate them sexually and to reassure them that their conduct was normal” (p. 274).
2. Thus, the evidence demonstrates that child pornography is used in the seduction process and links the prohibition against possession with the prevention of harm to children.
3. As discussed by McLachlin C.J., the final link identified by the Crown, the abuse of children in the production of pornography, is conclusive (at para. 92). The prohibition of the possession of child pornography is intended to reduce the market for it. If consumption is reduced, presumably production will also be reduced. This fact was recognized by the United States Supreme Court in *Osborne v. Ohio*, 495 U.S. 103 (1990), at pp. 109-10. Parliament had additional evidence before it that the prohibition of private possession of child pornography would protect children from the harm of being used in its production. The hearings before the Fraser Committee revealed that the private preparation of child pornography was the major mode of resorting to the material. It urged Parliament to recognize that much, if not most, of the exploitation of children in pornography would occur in private (vol. 2, at p. 584). Similarly, the Badgley Committee found that privately produced material was a major source of child pornography (vol. 2, at p. 1197).
4. Both the Badgley Committee and the Fraser Committee found that the then existing *Criminal Code* framework relating to obscene publications was inadequate to deal with the circumstances attending the making and distribution of child pornography. The Badgley Committee found as follows (vol. 1, at p. 101):

The general definition of obscenity does not reflect the state’s particular and more compelling interest in prosecuting and punishing those who promote the sexual abuse of children in this manner. The definition of “obscene publication” in section 159(8) of the *Criminal Code* pertains to the overall content of the publication, rather than to the circumstances of its production. In reference to child pornography, it is the circumstances of its production, namely, the sexual exploitation of young persons, which is a fundamental basis for proscription. [Emphasis deleted.]

To fill the gap in the *Criminal Code* the committee recommended that the private possession of any visual representation of a person under 18 participating in explicit sexual conduct (including the lewd exhibition of the genitals) be prohibited (vol. 1, at pp. 102-103). The Fraser Committee expressed the concern that the existing law of obscenity would not capture child pornography prepared in private for private use, because of the application of a more forgiving community standard for materials used privately (vol. 2, at p. 584). It also recommended that the private possession of child pornography be prohibited. These recommendations contribute to the conclusion that Parliament had a rational basis for deciding that prohibiting the private possession of child pornography was essential to the protection of children from the abuse inherent in its production.

(b) *Minimal Impairment*

1. In conducting an analysis of whether s. 163.1(4), in combination with the definition of “child pornography” set out in s. 163.1(1), minimally impairs the right to free expression, the Court must be particularly sensitive to the contextual factors which we have previously discussed.
2. As Cory J. recognized in *Lucas*, *supra*, at para. 57, the negligible value of the expression restricted is an important factor in the minimal impairment analysis, which requires the Court to assess whether Parliament has struck a reasonable balance between the individual right which has been infringed and the community goals and values which Parliament seeks to protect. Without a true understanding of the type of expression which is being impaired, there is a risk that its connection to the s. 2(*b*) guarantee and our democratic values will be misrepresented. There is a risk that the balance will be skewed in favour of abstract notions of the value of expression in a democracy when the activity at issue does not serve those values. As we have seen, child pornography is in many ways antithetical to the values underlying the s. 2(*b*) guarantee. It has only a tenuous connection to the value of self-fulfilment, and only at its most base and prurient level. With respect, we see no evidence to support the notion that sexually explicit videos of teenagers “reinforce healthy sexual relationships and self-actualization”, as suggested by McLachlin C.J., at para. 109, rather than being harmful self-indulgence supporting unhealthy attitudes towards oneself and others, as alluded to in the Fraser Report (see below, at para. 231). On the other hand, we have noted the harm to children that can be caused by such material by reinforcing cognitive distortions (see paras. 165 and 223) and creating instruments susceptible of being used for grooming. Moreover, there is no valid reason to presume that teenage authors of sexually explicit videos cannot themselves be paedophiles.
3. Furthermore, the Court must not lose sight of the other rights and democratic values which Parliament has sought to protect in enacting s. 163.1(4) of the *Criminal Code*. The prohibition of the possession of child pornography is consistent with the democratic values which are essential in our community, and also with the *Charter* rights of children. It is legislation which promotes respect for the inherent dignity of children by curbing the existence of materials which degrade them. This in turn helps to protect children’s equality and security rights.
4. Parliament need not show that the provision is perfectly tailored to its objective; see *RJR-MacDonald*, *supra*,at p. 342; *Ross v. New Brunswick School District No. 15*, *supra*, at para. 108. Nor need Parliament show that there was no other reasonable measure which could achieve its objective and interfere less with the freedom of expression guarantee. Given the contextual factors which are at play in this particular case, and the deference to Parliament’s choice of means that they warrant, we agree with the following statement of Dickson C.J. in *Keegstra*, *supra*, at pp. 784-85:

. . . s. 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

1. In the court below, Rowles J.A. began her analysis of the impugned provision by highlighting the fact that it solely targeted the private possession of child pornography. She found that because s. 163.1(4) is directed only to the private possession of material, as opposed to the dissemination of material to others, it substantially reduced the likelihood that the imposition of criminal sanctions would prevent any potential harm to children. Similarly, McLachlin C.J. finds that photographs and videos of teenagers taken of themselves for their own personal use should not be proscribed (paras. 41 and 76-77) because of the privacy interest and diminished risk of harm to children. With respect, we cannot agree. In reaching this conclusion, McLachlin C.J. and Rowles J.A. fail to recognize that children are particularly vulnerable in the private sphere, a fact that was recently recognized by the Ontario Court of Appeal in *R. v. E. (B.)* (1999), 139 C.C.C. (3d) 100. *E. (B.)* involved a constitutional challenge to s. 172 of the *Criminal Code*, which prohibits, *inter alia*, participation in sexual immorality in the home of a child thereby endangering the morals of the child. The court found that the provision infringed the accused’s right to freedom of expression, but that the infringement was justified under s. 1. In conducting his s. 1 analysis, Doherty J.A. made the following statement, at p. 125:

In concluding that the objective outweighs the harm done to the right protected by s. 2(*b*), I have considered that s. 172 reaches inside the home. That reach is a significant aggravating feature when considering the harm done by the section to the right of freedom of expression. That same feature, however, is essential if the section is to serve its purpose. Unfortunately, it is in the home where children are most susceptible to the kinds of conduct at which s. 172 is aimed.

Doherty J.A.’s observation is particularly apposite in the context of this case. As we have discussed above, the evidence is clear that a large portion of child pornography is produced privately, and used privately by those who possess it. The harmful effect on the attitudes of those who possess it similarly occurs in private. With respect to grooming, our knowledge of the sexual abuse of children has evolved to recognize that sexual assaults occur in private as often, if not more often, as in public places. We cannot agree that prohibiting the simple possession of child pornography will not have an additional reductive effect on the harm that child pornography causes. While the possession prohibition infringes privacy more than those provisions which prohibit the distribution and production of child pornography, its intrusiveness is necessary to achieve Parliament’s goal. We firmly disagree with McLachlin C.J., at para. 75, where she states that self-created privately held expressive materials should be exempted from the prohibition against possession of child pornography. Whether the material is produced by the actor himself or a third party is irrelevant. Otherwise, two identical videos will be treated differently on the basis of authorship and intent, both of which are extremely difficult to prove and have no bearing on the apprehension of harm that comes from the actual content of the material.

1. Rowles J.A. found that the impugned provision, in combination with the definition of child pornography, did not minimally impair the right to freedom of expression because it captured visual and written works of the imagination which do not involve the participation of any actual children or youth in their production. The prohibition of the possession of those materials, in her view, could only be justified on the basis of the indirect harms caused by their simple possession. She found that there was a lack of social science evidence regarding the effects of these works of the imagination and that the court should be reluctant to draw an inference of harm given the profound violation of freedom of expression and privacy which results from making the private possession of works of a person’s own imagination a criminal offence.
2. With respect, we cannot agree with her analysis. As explained earlier in these reasons, the harm which Parliament sought to prevent in enacting s. 163.1(4) of the *Criminal Code* extends beyond the harm which flows from the use of children in pornography. Parliament also sought to prevent the harm which flows from the very existence of images and words which degrade and dehumanize children and to send the message that children are not appropriate sexual partners. All of the contextual factors at play in this particular case indicate that Parliament’s choice of means in protecting children should be respected. Therefore, we disagree with Rowles J.A. that a court should be reluctant to draw an inference of harm simply because of the intrusion of the legislation into the private sphere. Parliament was justified in having a reasonable apprehension that works of the imagination would be harmful to children and society.
3. With respect to visual representations which depict children engaged in explicit sexual activity, and visual representations where the dominant characteristic is the depiction, for a sexual purpose, of a sexual organ or the anal region of a child, the focus must be on the harm of their message and not on the intent or identity of their creator. McLachlin C.J. is of the view that Parliament’s concern with “explicit sexual activity” is limited to “visual representations near the extreme end of the spectrum” (para. 47). She implies that “nudity or intimate sexual activity” (para. 49) is required for material to be caught by the law. In our view, this approach is not consistent with an interpretation which focusses on the purpose of the legislation, which is to prevent the harms that arise from the possession of child pornography. To ensure that Parliament’s purpose is fulfilled, when deciding on the correct interpretation of the terms in s. 163.1(1), it is of overriding import to consider the content of the material which will fall just outside the scope of the prohibition. For example, this consideration motivated the decision in *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), which refused to create “an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered” (p. 752).
4. Visual images which do not use children in their creation can also convey a message of degradation and dehumanization. For example, in *R. v. Pointon*, Man. Prov. Ct., October 23, 1997), the accused had in his possession hundreds of types of hand-drawn pornography and written text. The majority of the drawings in his possession portrayed children under the age of 10 engaged in various types of explicit sexual activity with each other and with adults. Amongst the pictures was one entitled “The Family Secret” which depicted two young girls, one in the act of fellatio with an adult male. The caption below the picture read: “What started as a simple weekend at the cabin with daddy became incest”. This case suggests that drawings, sketches and other works of the imagination are valuable to paedophiles in their collections.
5. Parliament was justified in concluding that such works of the imagination would harm children. The majority held in *Irwin Toy*, *supra*, at p. 999, that “[t]his Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.” Similarly, in *Thomson Newspapers*, *supra*,Bastarache J. made the following observation with respect to materials which degrade and dehumanize vulnerable groups, at para. 116:

Canadians presume that expressions which degrade individuals based on their gender, ethnicity, or other personal factors may lead to harm being visited upon them because this is within most people’s everyday experience. In part, this is because of what we know and perhaps have experienced in our own lives about degrading representations of our personal identity. In part, it is because we know that groups which have historically been disadvantaged in economic or social terms are vulnerable to such expression. In part, it is because our values encourage us to be solicitous of vulnerable groups and to err on the side of caution where their welfare is at stake. In part, it is based on the short logical leap that degrading representations, and exhortation of certain views which degrade the humanity of others, can beget that behaviour.

Given the low value of the speech at issue in this case, and the fact that it undermines the *Charter* rights of children, Parliament was justified in its concern to include visual works of the imagination in its definition of child pornography.

1. Rowles J.A. found that the inclusion of written material was particularly troublesome in the context of the possession offence and found that the law was too broad in capturing written works of the imagination. In her view, the inclusion of material that is only a record of the author’s private thoughts (and not shown to anyone), came very close to criminalizing objectionable thoughts. In our view, the inclusion of written materials in the offence of possession does not amount to thought control. The legislation seeks to prohibit material that Parliament believed was harmful. The inclusion of written material which advocates and counsels the commission of offences against children is consistent with this aim, since, by its very nature, it is harmful, regardless of its authorship.
2. In examining whether the prohibition of the possession of written child pornography minimally impairs the right to free expression, we must bear in mind that only material which advocates or counsels the commission of an offence against a child is included in the definition set out in s. 163.1(1)(*b*). We disagree with McLachlin C.J., at para. 59 of her reasons, where she finds that s. 163.1(1)(*b*) is overbroad with regard to some materials on the basis of their authorship and the intent of the possessor. The intent of the author or possessor of the material is not relevant to determining whether it advocates or counsels the commission of a crime. Section 163.1(1)(*b*) covers all written material which seeks to persuade the commission of offences against children. The focus of the inquiry must be on the content of the material itself and not on the circumstances in which it was created, nor on the form of the material, for example whether it be a novel, a poem or a diary. Any material which, upon examining the message which it conveys in the context of the piece as a whole, seeks to persuade the commission of sexual offences against children will be caught by the law. Thus, depending on the context, individual chronicles of sexual activity may well fall within the scope of the definition.
3. There is evidence to support Parliament’s choice to include written material which advocates or counsels the commission of sexual offences against children. Dr. Collins testified that the cognitive distortions of paedophiles were reinforced by written materials which advocate sexual activity with children. Having such views expressed in written form would validate their beliefs about children. In his opinion, written pornography would also fuel the sexual fantasies of paedophiles, and in some cases could incite them to offend.
4. Similarly there was a great deal of testimony before the Standing Committee on Justice and the Solicitor General of the need to prohibit the possession of written materials which advocate or counsel the commission of sexual offences against children. Detective Waters testified about the publications and bulletins put forth by such groups as the North American Man-Boy Love Association (NAMBLA). The organization and its publications advocate adult males having sex with young boys. It is self-described as the “most outspoken and affluent U.S. pedophile group that is affiliated to pedophile groups world-wide”. Detective Waters testified that a number of members of the group had been arrested for sexual offences involving children. She noted that in the December 1992 *Bulletin*, on p. 4, NAMBLA commented that their New Zealand affiliate AMBLA was having problems due to the introduction of strict laws relating to the possession of child pornography and that later, AMBLA folded due to these laws (March 1993 *Bulletin*, at p. 3). The inclusion of the private possession of written materials which advocate or counsel the commission of offences against children, therefore, is not redundant and furthers the objective of preventing harm to children and society in a manner that the prohibition of their production and distribution alone could not.
5. We turn now to the second ground upon which Rowles J.A. found that s. 163.1(4) did not minimally impair the s. 2(*b*) guarantee, namely that the provision applies to teenagers between the ages of 14 and 17 who keep videotapes or pictures of themselves engaged in explicit sexual activity or who keep pictures of themselves, the dominant purpose of which is the depiction of their sexual organs or anal regions for a sexual purpose. In our view, when viewed in its context, this effect of the provision is a reasonable limit on teenagers’ freedom of expression.
6. The definition of “child” as “a person under the age of eighteen years” is justified in light of the objective of the prohibition of child pornography. While adolescents between the ages of 14 and 17 may legally engage in sexual activity, Parliament has prohibited such conduct in certain contexts. Section 153 of the *Criminal Code* prohibits sexual contact between adolescents and those who are in a position of trust towards them. Section 212(4) makes it illegal to obtain for consideration, or to communicate for the purpose of obtaining for consideration, the sexual services of a person under the age of 18. The common purpose underlying both of these sections is the prevention of the sexual exploitation of adolescents. Parliament’s definition of “children” is also consistent with the definition of a child in the *Convention on the Rights of the Child*. Article 1 defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. This international convention requires that Canadian children under the age of 18 be protected as a class. A review of adolescent child pornography cases reveals that there is also a great risk that they are exploited in its creation.
7. In *R. v. Geisel*, Man. Prov. Ct., February 2, 2000, the accused was found in possession of 22 photographs of teenaged girls in various states of undress. In some of the photographs one of the teenaged girls was engaged in sexual activity with a teenaged boy. The accused had befriended the girls and had allowed one of them to stay at his house when she ran away from home. The girls would visit the accused and he would take photographs. Before taking the photographs the accused would provide the girls with alcohol which he described to them as “liquid cocaine” because it was so strong. In *Jewell*, *supra*, the accused Gramlick produced his own pornographic videotapes involving 12 children whose ages ranged from 11 to 17. Five of the boys were under the age of 14 and were filmed engaging in sexual acts with each other and with adult men, including a prostitute. The boys used in the pornography “were generally described as being from impoverished and broken homes” (p. 274). They were enticed into performing by rewards of money, cigarettes and gifts. The other accused, Jewell, videotaped his sexual activities with 12 boys, the youngest of whom was 10 years old. Some of them had no knowledge that they were being filmed. Again, money, cigarettes and alcohol were used as bribes. “In some instances, [Jewell] posed as a friendly father figure, who disguised his house as a place of refuge when the young boys left their homes. He took some of the boys on trips unavailable to them in their own homes, to places like Disneyworld in Florida and Canada’s Wonderland. There was evidence that he shared these boys with Gramlick and other associates” (p. 276).
8. A recent case before this Court further reveals the exploitation that can occur once pornographic representations of adolescents exist. In *R. v. Davis*, [1999] 3 S.C.R. 759, the accused was charged with sexually assaulting several complainants. One of the complainants was 15-16 years old at the time. The accused had posed as a photographer who could launch the complainant’s modelling career. He took nude photographs of the complainant and afterwards refused to show them to her. Eventually she asked for the negatives of the pictures. The accused told her that if she wanted the negatives she would have to perform sexual acts with him, and that if she refused, he would send the photographs to her mother.
9. These cases illustrate the very real harm which can be visited upon adolescents between the ages of 14 and 17. In each one, however, the exploitation involved in the production of the pornographic videotapes and pictures would not be evident from viewing them. It is impossible, from looking at a picture, to determine that the adolescent depicted therein has not been exploited. Hence, Parliament had a strong basis for concluding that the age limit in the definition of child pornography should be set at 18 in order to protect all children from the harm of being used in the production of child pornography. The provision recognizes, as do ss. 153 and 212(4) of the *Criminal Code*, that while adolescents may be capable of consenting to sexual activity, their consent is vitiated in circumstances where there is a possibility that they may be exploited.
10. Rowles J.A. suggested that s. 163.1(4) could be tailored more effectively to protect teenagers who are in possession of erotic pictures or videotapes of themselves. She noted that the Australian State of Victoria had provided a defence to the possession of child pornography when the minor, or one of the minors depicted in the film or photograph is the defendant. In our view, such a defence would undermine Parliament’s objective of protecting all children. Some adolescents under the age of 18 sexually exploit other children. Rix Rogers, in *Reaching for Solutions* (1990) (the Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada), at pp. 18-19, referred to survey findings showing that 30 percent of sex offenders in Canada are under the age of 18. Similarly, the Fraser Committee found as follows (vol. 1, at p. 25):

[There is] the real possibility that young persons of 16 or 17 . . . may be involved in taking advantage of still younger children, by introducing them to prostitution, to performing in pornographic displays for filming, and so on. Such exploitation might be of the older child’s own motion, or it might be engineered by adults who perceive the advantage in having as fronts those who are free from serious criminal responsibility.

(See also R. J. R. Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (1999), at p. 214, citing studies including a 1996 paper in the *Journal of the American Academy of Child and Adolescent Psychiatry* estimating that “adolescents commit over 50 percent of sexual offenses perpetrated against children under twelve years of age”.) Thus, there is no guarantee, even when a teenager is in possession of a pornographic picture or videotape depicting himself or herself, that it was created in a consensual environment or that the photograph or videotape will not be used by the teenager to groom other children into engaging in sexual conduct. The latter point demonstrates that this material has the potential to exploit children even in the hands of those who are depicted in it.

1. Thus, we cannot agree with the approach to this issue taken by McLachlin C.J. The inclusion of teenage pornography in s. 163.1(4) is consistent with the legislative purpose of providing for the effective protection of children by reducing the potential for harm caused by pornographic material. McLachlin C.J. is not persuaded that auto-depictions of teenage sexual activity are harmful. With respect, Parliament was justified in restricting teenagers from creating a permanent record of their sexual activity. While adolescents between the ages of 14 and 17 may legally engage in sexual activity, the creation of a permanent record of such activity has consequences which children of that age may not have sufficient maturity to understand, as illustrated in *Davis*, *supra*. Furthermore, the Fraser Committee recognized that children, because of their vulnerability, are not always accorded the same autonomy as adults. It states (vol. 2, at p. 561):

We do not, for example, consider that the principles of individual liberty and responsibility can be applied to children to the same extent as they can to adults. Children may well have valid claims to autonomy in wide ranges of conduct. However, the liberty to engage in behaviour which is regarded as harmful will be withheld from children with more frequency than it is withheld from adults. Various justifications may be offered for this. The child may be too young or inexperienced to appreciate the harmfulness of the behaviour, or its nature or extent. In addition, quite apart from the characteristics and maturity of the individual child, adult society may be protective of the state of childhood, which is seen as a time, firstly, for the enjoyment of innocence and, then, gradually, for development out of innocence. The exposure to certain kinds of influence or behaviour may be seen as a disruption of the valuable process of gradual maturation.

. . . In the case of pornography . . . we think that there is strong justification for treating children as vulnerable, and effecting some decrease in their liberty.

Parliament made a legitimate policy decision in determining that the possession of adolescent self-depictions of sexual activity should be prohibited. Depictions of teenagers have the potential to be created in conditions which are exploitative and can be used to exploit other children. The Court should defer to Parliament’s decision to restrict teenagers’ freedom in this area. The worry that s. 163.1 interferes unduly with the freedom of expression of teenagers must also be addressed in light of the *Young Offenders Act*, another set of provisions designed to address children’s special needs. Under this Act, any teenager convicted for possession of child pornography would have the benefit of a more lenient sentence and measures aimed at rehabilitation and social reintegration (see s. 20); he or she would also avoid the permanence of a criminal record.

1. In considering whether s. 163.1(4), in conjunction with the definition of child pornography, minimally impairs the guarantee of freedom of expression, it is important to bear in mind that the provision does not amount to a total ban on the possession of child pornography. The provision reflects an attempt by Parliament to weigh the competing rights and values at stake and achieve a proper balance. First, the definitional limits act as safeguards to ensure that only material that is antithetical to Parliament’s objectives in proscribing child pornography will be targeted. Second, the legislation incorporates defences of artistic merit, educational, scientific or medical purpose, and a defence of the public good. With regard to the defence of artistic merit, McLachlin C.J. writes that “[a]ny objectively established artistic value, however small” (para. 63), provides a complete defence. In our view, the boundaries of the artistic merit defence do not need to be decided in this appeal, especially since the defence also applies to the prohibitions against the publication, distribution and sale of child pornography that are also found in s. 163.1. However, we would consider anomalous interpreting artistic merit to provide a complete defence in a case in which the same material would fail the artistic merit test under the obscenity provisions of the *Criminal Code*. We must give effect to Parliament’s deliberate decision to avoid the term artistic “purpose”, which it adopted for the educational, scientific and medical defences. Artistic merit must be determined with regard to composition and emphasis according to the criteria described in para. 64 of McLachlin C.J.’s reasons and through careful attention to artistic conventions, expert opinions and modes of production, display and distribution. Simply calling oneself an artist is not an absolute shield to conviction.
2. In light of the analysis above, we conclude that Parliament has enacted a law which is appropriately tailored to the harm it seeks to prevent. Therefore, we conclude that the impugned provision minimally impairs the rights guaranteed by s. 2(*b*).

(c) *Proportionality of Effects*

1. At this stage of the analysis we must examine whether the deleterious effects of the infringement are proportional to the salutary objective and effects of s. 163.1(4); see, e.g., *M. v. H.*, [1999] 2 S.C.R. 3, at para. 133; *Dagenais*, *supra*, at p. 889. In *Thomson Newspapers*, *supra*, at para. 125, Bastarache J. described this portion of the analysis as providing an opportunity to assess, in light of the practical and contextual details which are explored in the first two stages of the analysis, whether the benefits which accrue from the limitation are proportional to its deleterious effects, as measured by the values underlying the *Charter*.
2. We begin with an analysis of the salutary effects of the prohibition of the possession of child pornography. The greatest benefit to prohibiting the possession of child pornography is that it helps to prevent the harm to children which results from its production. By aiming to eradicate the legal market for such materials, the legislation acts as a powerful force to reduce the production of child pornography. By reaching into the private sphere, the legislation extends protection to those children who are used in privately created pornographic materials. Section 163.1(4) also deters the use of child pornography in the grooming of children. The prohibition makes it more difficult for paedophiles to use child pornography to lower children’s inhibitions towards sexual activity, and thus reduces the effectiveness of this abhorrent method of seduction. Similarly, the prohibition curbs the collection of child pornography by paedophiles. This protects children against sexual abuse by eliminating those materials which fuel paedophilic fantasies and incite paedophiles to commit sexual assaults. The prohibition of the possession of child pornography also helps to ensure that an effective law enforcement scheme can be implemented.
3. The legislation is beneficial to society as a whole. Section 163.1(4) sends a clear message to all Canadians that the degradation and dehumanization of children, and their use as sexual objects for the gratification of adults is inappropriate. This benefits society by deterring the development of antisocial attitudes and complements the legislation’s positive effect on children’s rights. As the Fraser Committee noted, materials which use and depict children in a sexual way for the entertainment of adults undermine the rights of children by diminishing the respect to which they are entitled. The prohibition of the possession of such materials sends the message that the use of children as sexual objects is unacceptable, and thereby promotes children’s position as equal members in society.
4. The impugned legislation is said to have a deleterious effect on both the right to free expression as guaranteed by s. 2(*b*) and on the value of privacy. We turn first to the effect of the provision on the freedom of expression. As we discussed above, the law does not trench significantly on speech possessing social value; there is a very tenuous connection between the possession of child pornography and the right to free expression. At most, the law has a detrimental cost to those who find base fulfilment in the possession of child pornography.
5. As we have stated, we do not find objections to the restriction of auto-depictions of adolescent sexuality compelling. In our view, the provision is consistent with the protection of children and does not serve as an unjustified impediment to the self-fulfilment of adolescents. As the Fraser Committee noted, restrictions on children’s liberties are sometimes necessary because of their vulnerability. The cases involving depictions of teenagers engaged in explicit sexual activity demonstrate that pornography depicting teenagers is sometimes produced under conditions of exploitation, rather than mutuality and consent. Any deleterious effect on the self-fulfilment of teenagers who produce permanent records of their own sexual activity in an environment of mutual consent is, therefore, far outweighed by the salutary effects on all children resulting from the prohibition of the possession of child pornography.
6. In most cases, the prohibition’s restriction on expression will affect adults who seek fulfilment through the possession of child pornography. These adults seek to fulfill themselves by deriving sexual pleasure from images and writings which objectify and degrade children. It is important to emphasize that the self-fulfilment denied by the law is closely connected to the harm to children. The benefits of the prohibition of the possession of child pornography far outweigh any deleterious effect on the right to free expression.
7. The legislation affects privacy interests because it extends its reach into the home. However, we must be careful not to exaggerate the severity of this deleterious effect. The privacy of those who possess child pornography is also protected by the right against unreasonable search and seizure as guaranteed by s. 8 of the *Charter*. Before any police investigation could take place within the home, a judicial officer would first have to make a determination that the law enforcement interests of the state were, in the particular situation, demonstrably superior to the affected individual’s interest in being left alone. The law intrudes into the private sphere because doing so is necessary to achieve its salutary objectives. Child pornography is produced in private, and child pornography is used privately to entice children into sexual activity. Thus, the privacy interest restricted by the law is closely related to the specific harmful effects of child pornography.
8. In examining the law’s effect on privacy interests, it is important not to lose sight of the beneficial effects of the provision in protecting the privacy interests of children. When children are depicted in pornographic representations, the camera captures their abuse and creates a permanent record of it. This constitutes an extreme violation of their privacy interests. By criminalizing the possession of such materials, Parliament has created an incentive to destroy those pornographic representations which already exist. In our view, this beneficial effect on the privacy interests of children is proportional to the detrimental effects on the privacy of those who possess child pornography.
9. When the effects of the provision are examined in their overall context, the benefits of the legislation far outweigh any harms to freedom of expression and the interests of privacy. The legislation hinders the self-fulfilment of a few, but this form of self-fulfilment is at a base and prurient level. Those who possess child pornography are self-fulfilled to the detriment of the rights of all children. The prohibition of the possession of such materials is thus consistent with our *Charter* values. It fosters and supports the dignity of children and sends the message that they are to be accorded equal respect with other members of the community. In our view, Parliament has enacted a law which is reasonable, and which is justified in a free and democratic society.

III. Disposition

1. We would allow the appeal and remit the charges for trial.

*Appeal allowed.*

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*Solicitors for the respondent: Gil D. McKinnon and Richard C. C. Peck, Vancouver.*

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*Solicitor for the intervener the Attorney General of Nova Scotia: The Public Prosecution Service (Appeals), Halifax.*

*Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.*

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*Solicitors for the interveners the Evangelical Fellowship of Canada and the Focus on the Family (Canada) Association: Bennett Jones, Toronto.*

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