SUBMISSIONS TO: The Honourable Ann McLellan
Minister of Justice for Canada

RE: The Law of Obscenity and Child Pornography

FROM: Canadian Civil Liberties Association

DELEGATION: A. Alan Borovoy
(General Counsel)
Patricia D. S. Jackson
(Board Member)

Edmonton, Alberta

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Introduction

The Canadian Civil Liberties Association is a national organization with several thousand individual members, seven affiliated chapters across the country, and some 20 associated group members which themselves represent several thousands of people. A wide variety of persons and occupations is represented in the ranks of our membership - lawyers, academics, homemakers, trade unionists, journalists, media performers, minority group leaders, etc.

One of our organization's key objectives is to promote the freedom and dignity of the individual against unreasonable encroachments. It is not hard to appreciate the relationship between this objective and the subject of pornography/obscenity. On the one hand, certain obscene and pornographic material may be seen as an affront to the dignity of (principally) women and children. Indeed, there are situations in which it might threaten actual physical harm. On the other hand, the use of the law to curtail such material can be seen as an encroachment on the fundamental freedom of expression. Indeed, there are situations in which it might threaten legitimate art, literature, and even political advocacy.

The recent case involving John Robin Sharpe of British Columbia has re-ignited the public controversy over this issue. In striking down the statutory prohibition against the mere possession of "child pornography", the British Columbia courts have provoked a wave of anger across the country. While the legal and constitutional issues will be the subject of appeal in the courts, we believe that Parliament has an important role to play - not by reflexively invoking the "notwithstanding" clause of the Charter - but by reflectively reconsidering the wisdom of the entire law on this subject.

In the opinion of the Canadian Civil Liberties Association, it would be unwise to leave the development of the obscenity and pornography law entirely in the hands of the courts. Quite often, as a result of the way a case presents itself, the courts deal with only certain

aspects of an issue and - despite apparent problems - they leave the rest of the law intact. In the *Sharpe* case, the British Columbia Court of Appeal criticized some aspects of the "child pornography" definitions but, because of the way the case was brought, it struck down only the possession section. There is no reason to expect a wider ruling from the Supreme Court of Canada. Thus, the legitimate activities of other Canadians could continue to be threatened by the flawed definitions as they relate to the creation and dissemination of certain material. On the other hand, some declarations of unconstitutionality could conceivably imperil a total enactment, thus risking the desirable, along with the undesirable, provisions.

Indeed, when the courts have dealt more extensively with some of these issues, they have left the law in a regrettable state: in the course of acquitting an accused artist in Toronto, the Ontario Court of Justice upheld the constitutionality of the child pornography section and, in the 1992 *Butler* case, the Supreme Court of Canada upheld the constitutionality of the general obscenity law. Yet, it is the opinion of the Canadian Civil Liberties Association that the law of child pornography and obscenity suffers from overbreadth in some respects and vagueness in others.

The Confusion Over the Sharpe Case

To a great extent, confusion appears responsible for the widespread outrage triggered by this decision of the British Columbia courts. Large numbers of people are angry that John Robin Sharpe should be allowed to keep his material that reportedly depicts and describes minors in sexually compromising situations. And large numbers of people resent the court's declaration that the prohibition against possessing such child pornography is unconstitutional.

Contrary to the impressions that many people have, however, Canada's child porn law is not confined to situations like the *Sharpe* case. It extends to material far beyond these circumstances. Not only does the definition of "child pornography" embrace material that "shows a person who is ... under the age of eighteen years ... engaged in ... explicit sexual activity", but it also includes material that "shows a person ... *depicted as being* under the age of eighteen ... *depicted as engaged in* explicit sexual activity".[emphasis added] In short, the current law makes it an offence to create, distribute, and even possess material depicting youngsters in sexual situations including even material that is fictional and drawn entirely from the imagination of artists.

Such "action shots" are not the only pictures that are criminalized by the child porn law. The section also purports to ban any "visual representation ... 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". The prohibitions are wider yet. They cover any picture or even any "written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence" under the Criminal Code.

From the public clamour that greeted the decision in the *Sharpe* case, it was impossible to discern the breadth of the child porn law. Public comments treated the issue as though the law involved nothing more than the kind of material in Mr. Sharpe's possession.

The Defects of the Child Porn Law

In its current form, the law appears capable of imperiling legitimate art. Consider, for example, the classic painting that shows a pre-pubescent Cupid fondling the nipple of the goddess Venus. To what extent might it be said that this "shows a person ... depicted as being under the age of eighteen ... depicted as engaged in explicit sexual activity"? Consider also the more modern sculpture by George Segal which shows the Biblical Lot in a drunken state being straddled by his apparently under-aged daughter with another daughter looking on. Might it not be said that this also fits within the foregoing definition?

This is not necessarily to predict that such works would be stigmatized as "child pornography". It is conceivable that the statutory defence of "artistic merit" could be successfully applied to such old or prestigious works. Unfortunately, however, there is no way to establish this in advance. Thus, those who create and exhibit art involving such content have no alternative but to take their chances. Moreover, what would become of serious attempts at such art that might ultimately be found lacking in "artistic merit"? In such circumstances, criminalization would still be inappropriate. After all, artistic taste is largely in the eye of the beholder. In any event, how could a blunt instrument like the criminal law define the distinction between serious efforts and those which are not?

Thus, modern artists considering the question of whether to create works of art as novel in our day as the classic Cupid and Venus painting was in its day must be prepared to confront the emotional and financial ordeal of criminal proceedings. The resulting notoriety, taken with possible emotional or financial ruin, may make even victory pyrrhic. Worse still, if the court's judgment of artistic merit does not accord with that of the artist, the result may be imprisonment. Any consideration of whether to produce such works could well suggest that the risks are too great.

This is not just academic. Within the last five years, Toronto artist Eli Langer was charged for having created "child pornography" because of a number of drawings he had on exhibit

at one of the city's galleries. The drawings depicted youngsters in sexual situations. There was no question of his having used human models in his work. His "crime", therefore, was simply to depict fictional, under-aged persons in sexual encounters. Why should *that* be against the law? Surely, art must be able to portray evil as well as virtue.

Fortunately, the Crown withdrew the criminal charge against Langer but only after he had lived under that cloud for several months. Even at that, the Crown initiated forfeiture proceedings to confiscate his art. Fortunately, the Court cleared Mr. Langer's art, ruling that it had "artistic merit". At the same time, however, the Court upheld the child porn law as constitutionally valid. Thus, the decision could not help tomorrow's artists. If they decided to deal with similar subjects, they would have no way of knowing whether *their* work would be cleared.

Thus, legitimate artists who deal with such subject matter risk criminal charges and/or forfeiture proceedings. This is hardly a situation compatible with artistic freedom. Yet artistic freedom is one of the pillars of the democratic system. Small wonder that dictators have accorded such priority to controlling the creative arts.

What possible justification is there to criminalize *any* fictionalized depictions? Some commentators have expressed the fear that exposure to such material could predispose certain people to imitate the depicted behaviour in real life. But, even if *everything* currently defined as "child pornography" were to disappear from the face of the earth, there is no reason to believe that children would be made significantly safer from pedophiles. What would we expect pedophiles to do? Take up stamp collecting? In any event, it is not sensible to attempt to sanitize our whole society in this way because of the alleged impact on a few disordered souls.

Moreover, to whatever extent the prospects for imitation became a basis for censorship, where would it stop? How many of history's atrocities, for example, have been influenced by exposure to the Bible? There is also reason to believe that certain "copy cat" crimes

have been influenced by exposure to the evening television news. Yet almost no one would censor the Bible or the television news. Invariably, it is argued that the Bible and the news have redeeming merit. But so has a lot of material that falls within the current definition of "child pornography".

Similarly, it has been contended that pedophiles use pictorial depictions of children's sexual activity to lower the resistance of their intended prey. Presumably, such pictures help to create the impression that what the pedophile wants is normal for children. But pedophiles have been known to resort to candy as well. It is not possible or desirable to outlaw whatever might be used or abused in such a situation. Indeed, there is no limit to the aids that can be invoked to persuade - or bribe - children to satisfy adult desires. In view of the substantial dichotomy between the ingenuity of many pedophiles and the naivete of many children, it is hard to believe that the current child porn section is important to the safety of our society's children. What it can accomplish, however, is the intimidation of legitimate art.

What about the other part of the definition that addresses the depiction of sexual organs and anal regions of persons under the age of eighteen years? This provision contains at least two problematic concepts. It talks about "the dominant characteristic" of the material at issue and it requires that the depictions be "for a sexual purpose". To what extent, however, are such perceptions irreparably subjective? How does one establish whether the showing of certain body parts has a "sexual" or some other purpose? And how does one establish whether such purpose is the "dominant" or a less important "characteristic" of the material?

Many parents take and keep photographs of their nude babies. We know that this practice is widespread in our society and it is done for all kinds of loving and sentimental reasons that are devoid of a "sexual purpose". But, from the pictures themselves, it may be impossible to tell. Moreover, our art galleries and museums contain all kinds of pictures and sculptures that depict the nude bodies of young people. Who is to decide and, on

what basis, whether any of these pictures or sculptures are showing the body parts "for a sexual purpose"? Thus, the section can be a mandate for arbitrary action.

As noted, in the last part of the definition, "child pornography" includes even "written material that advocates or counsels sexual activity with a person under the age of eighteen years" that would be a criminal offence. In principle, it is difficult to object to a prohibition against *counselling* any criminal offences. But the Criminal Code already makes this unlawful. What does this provision contribute that isn't already covered?

On the other hand, the prohibition against *advocacy* does raise issues of principle. While the notion of *counselling* is aimed at law-breaking that is relatively imminent, *advocacy* itself does not necessarily have such characteristics. Indeed, one might advocate a change in the law so that ever younger people might more freely enjoy certain sexual activity. Some have argued, for example, that the age of consent should be lowered. The citizens of a democracy must be free to debate the wisdom of such proposals. So long as no one is being incited or counselled to break the law as it stands, mere advocacy should not be criminalized. (In saying this, we reject as unsupportable the B.C. trial court's opinion that the section cannot be interpreted so as to muzzle the advocacy of legislative reform.)

Consider also how the prohibition against advocacy could affect the ability to publish accurate history. In ancient Greece, for example, there was more tolerance for physical love between men and boys. Thus, in Plato's *The Symposium*, there is a speech by Aristophanes in which he describes such males as "the most hopeful of the nation's youth, for theirs is the most virile constitution". To what extent could a contemporary publisher of such material be vulnerable under the child porn section?

This provision could even threaten works of scholarship. Consider, for example, those anthropologists who have written sensitively and even sympathetically about the sexual practices of adolescents in other cultures. By describing such young people as well-adjusted and healthy, could anthropologists be held to be advocating this sexual behaviour?

Certain legitimate literature might also wind up criminalized. Consider, for example, the modern classic *Lolita* which depicts as something beautiful the romantic affair between an adult male and a girl under the age of eighteen. And what might happen to such classics of adult literature as *Satyricon* by Petronius and *Decameron* by Boccaccio? These books contain ribald humour which arguably could be taken as encouraging sexual activity with very small children.

Some educators are currently advocating the promotion and availability of condoms for under-aged adolescents who are tempted to engage in sexual activity. Whether or not such a policy is wise, it certainly shouldn't be made unlawful. Yet the advocacy of condoms might also be seen as the advocacy of the sexual activity itself.

While there are defences for educational purpose, artistic merit, and medical purpose, those who engage in any of the foregoing activity cannot know *in advance* whether such defences could be successfully invoked on their behalf. Thus, they would engage in such activity at their peril. Why take the chance? There is simply no reason to criminalize mere advocacy. Moreover, since the *oral* advocacy of such sexual activity is not unlawful, it makes no sense to criminalize the same advocacy simply because it is *written*.

The Defects of the Obscenity Law

The defects in the general law of obscenity are no less than those in the particular law of child pornography. The Criminal Code definition of "obscenity" talks about the "undue exploitation of sex" and also the "undue exploitation of sex" in combination with crime, horror, cruelty, and violence. The Code fails to indicate, however, what constitutes an "undue" or even a "due" exploitation of sex. In a line of decisions culminating with the *Butler* case, the Supreme Court of Canada tried to pour content into this vague terminology. The judges declared that material is "undue" if it violates national community

standards. And the test for that is whether Canadians would not tolerate other Canadians looking at the material in question.

Unfortunately, the judicial test contributes only a marginal amount of clarity for those who deal in material with sexual content. Consider, for example, the dilemma faced by convenience store owners who receive a quantity of magazines that have sexual content. How are they supposed to know whether the material complies with national standards of tolerance? Must they commission a nation-wide Gallup poll?

In an effort to be more helpful, the Court elucidated some kinds of material that, in its view, would infringe Canadian levels of tolerance. The judges said, for example, that the portrayal of sex coupled with violence "will almost always" be obscene and so will much material that is "degrading or dehumanizing". It's hard to fathom how the judges would consider these elucidations helpful: the first is too broad and the second is too vague.

The portrayal of sex coupled with violence is a key feature of much legitimate art and literature. Consider, for example, the following: the Rape of Leda by the god Zeus from Greek mythology; the medieval paintings that depict the rape of the Sabine women; the famous rape scene from Ingmar Berman's classic film, *The Virgin Spring*; and even the sexual assault committed by the hero on the heroine in Ayn Rand's novel, *The Fountainhead.* Again, legitimate art cannot be confined to the portrayal of virtue. Art must be able to depict more than hearts, flowers, and telephone books. The depiction of evil is crucial to the historic role played by art in our society. In this respect, the Court's elucidation could leave our society artistically impoverished.

While the notion of sex coupled with violence is excessively broad, the terms "degrading" and "dehumanizing" are hopelessly vague. Material that is degrading to some will be enriching to others. Nor does it help for the Court to add the qualifier that Canadians generally must consider that exposure to such material would involve a substantial risk of harm. Again, how are those convenience store owners supposed to discern the limits of their fellow citizens' tolerance?

The combination of Parliamentary enactment and judicial determination has bequeathed this country an obscenity law that, at worst, is unwarrantedly repressive and, at best, is utterly incomprehensible.

The Inadequacy of the Defences

Faced with arguments like the foregoing, supporters of our obscenity and child pornography legislation invariably invoke the defences. The child porn section talks about "artistic merit or an educational, scientific or medical purpose". In the *Butler* case, the Supreme Court declared that similar defences are available for the obscenity sections. In any event, such considerations have long been mitigating factors in obscenity prosecutions.

As indicated, the problem is that those who create or distribute material with sexual content have no way of knowing *in advance* whether they can successfully invoke any of these defences. And, even if they were disposed to trust the courts to make such judgments, they may not feel the same confidence about the police or the customs officials. Judges and juries, of course, are required to hear all parties before they make their decisions. Constables and customs officials have no such obligations. Thus, the police may investigate, arrest, and even prosecute before those who are accused have effective recourse to these defences. Customs officials can seize and detain material for long periods before the owners can challenge their decisions.

Few people are prepared to undergo such tribulations in order to vindicate their right to create and disseminate material. An acquittal or the recovery of property can rarely provide adequate compensation for those who are forced to endure the ordeal of these legal processes. Thus, while it's better to have such defences than not to have them, they

cannot suffice to address the fear of criminal charges and property seizures. The only practical way, then, for legitimate artists, writers, and distributors to acquire the security they need is to avoid material with highly sexual content. In short, they must renounce their artistic freedom.

Again, this is not just academic theorizing. Consider some of the actual experiences within Canada.

- In the early 1990s, customs officials confiscated the manuscript of a novel, even though it was written by a psychologist reportedly to illuminate the behaviour of pedophiles.
- In the late 1980s, a police department in Alberta seized material belonging to a feminist organization, even though the material was part of an *anti*-pornography campaign.
- In the mid-1980s, Toronto police targeted a painting that depicted the rape of a Mayan woman by Guatemalan soldiers, even though the painting was reportedly a political statement sympathetic to Guatemalan women.
- In the mid-1980s, customs officials confiscated *Erotic Poems,* even though the material was from a Greek anthology of sixth century B.C.
- In the mid-1980s, customs officials seized a film on male masturbation, even though the fim was headed for the University of Manitoba medical school.
- In the mid-1970s, police laid charges over the movie, *Last Tango in Paris*, even though the movie was widely acclaimed in film circles.
- In the mid-1970s, there was a prosecution involving the book, *Show Me*, even though the book was designed to teach children about sex.

In the result, the authorities backed down or were overturned in most of these cases. Nevertheless, the affected parties were unlikely to be consoled. In order to defend their right to engage in perfectly legitimate activity, they had to face the financial and emotional burden of going to court. Thus, while defences such as artistic merit and educational purpose ultimately vindicated the activity at issue, an enormous price was paid. It was a

price few people are willing to pay. We have no way of measuring how many creative ideas and inspirations have been rendered stillborn by the mere *prospect* of debilitating encounters with law enforcement.

Narrowing the Scope of the Law

From all of this, it must be clear that the current law on obscenity and child pornography endangers legitimate art, literature, scholarship, and even some political advocacy. There is no good reason for a mature country to accept such legal enactments. No one has been able to demonstrate how the existence of fictionalized portrayals and mere advocacy causes current or imminent harm. And, to the extent that *long term* harm is apprehended, there would be enough time for measures other than censorship (such as education) to exert countervailing influences. In any event, democracies have traditionally rejected censorship as a way to counteract the long term harm that exposure to materials can cause. This will explain the reluctance to censor, for example, the Communist Manifesto. Thus, while it may be appropriate to adopt measures to keep certain material from children and from adults who do not wish to be exposed to it, fictionalized portrayals with sexual content and mere advocacy should be removed from any regime of legal proscription for consenting adults.

The only situations in which such restrictions could arguably be justified are those that involved the commission of serious offences against *actual* persons. Thus, it could be acceptable to outlaw a "snuff" film in which a real woman was actually raped, tortured, or murdered for the entertainment of any audiences. Similarly, of course, it would be permissible to curb material involving the unlawful abuse of real children for such purposes. To the extent that the existence of an accessible market could provide an incentive for the commission of such horrendous crimes, the proscription of the resulting material might provide a possible deterrent.

There are various ways in which this matter could be handled. Conceivably, for example, Parliament might criminalize material, the making of which involved any one of a number of named offences against actual persons. Alternatively, the enactment might talk about unlawful abuse for which an offender could receive — let us say — a sentence of ten years in prison. In any event, the existing obscenity and child pornography enactments must be repealed as too broad or too vague. To whatever extent this country retains legislation in this area, it should be clearly confined to those situations in which serious crimes are committed against *actual* persons.

If this were done, there might be a case for criminalizing some behaviour associated with the possession of such material. Instead of making possession itself an offence, however, the law might prohibit the purchase and attempted purchase of "child pornography" (properly defined). Since the most plausible rationale for the current criminalization of mere possession is based upon the felt need to reduce the economic market for such material, an offence relating to the purchase and attempted purchase of the material would be more appropriate. (Purchase here would include any economic exchange including the trading of other material.) Even at that, it would be necessary for the law to exempt certain purposes for making these purchases such as, for example, those relating to research, education, and journalism.

Thus the surviving offences would involve activities such as making, selling, giving, and buying material that is - or is held out to be - the product of a situation in which a real person was unlawfully abused. By adopting this approach, Parliament could ensure that the law of obscenity and child pornography would focus exclusively on its proper target - the unlawful abuse of real people. To the extent that the Criminal Code continues to reach beyond this point, it unwarrantedly infringes one of our society's paramount values - freedom of expression.

Summary of Recommendations

Accordingly, the Canadian Civil Liberties Association recommends the following:

Subject to the restriction of materials

(a) accessible to children or imposed upon unwilling adults
and
(b) involving what is - or is held out to be - the product of an actual unlawful abuse

Parliament should de-criminalize material currently defined as "obscene" and "child pornography".

Standing committee on Justice and Social Policy

1st session, 37th Parliament | 1re session, 37e législature

Mon 29 Nov 1999 / Lun 29 nov 1999

CONTENTS

Monday 29 November 1999

Canadian Civil Liberties Association
Mr Alan Borovoy
Mr Stephen McCammon

The committee met at 1537 in room 151.

SAFE STREETS ACT, 1999 / LOI DE 1999 SUR LA SÉCURITÉ DANS LES RUES

Consideration of Bill 8, An Act to promote safety in Ontario by prohibiting aggressive solicitation, solicitation of persons in certain places and disposal of dangerous things in certain places, and to amend the Highway Traffic Act to regulate certain activities on roadways / Projet de loi 8, Loi visant à promouvoir la sécurité en Ontario en interdisant la sollicitation agressive, la sollicitation de personnes dans certains lieux et le rejet de choses dangereuses dans certains lieux, et modifiant le Code de la route afin de réglementer certaines activités sur la chaussée.

The Chair (Mr Joseph N. Tascona): I will bring the standing committee on justice and social policy to order.

CANADIAN CIVIL LIBERTIES ASSOCIATION

The Chair: Our first presenter is the Canadian Civil Liberties Association, Alan Borovoy, general counsel. Mr Borovoy, if you could come forward.

The Chair: We're going to proceed with what we've got scheduled here. You're withdrawing your motion. Maybe we can proceed now.

Mr Borovoy, if you could maybe introduce yourself. If you do have a written presentation, I'd say to any of the presenters, we'd appreciate getting that to the clerk.

Mr Alan Borovoy: I'm Alan Borovoy, general counsel of the Canadian Civil Liberties Association. On my right and your left is our associate counsel, Stephen McCammon, and on the right side of me is Andy McDonald-Romano. I trust, Mr Chairman, that those introductions will not be deducted from my 10 minutes.

In view of the shortness of time, we have decided to limit our remarks to the panhandling part of the bill. This is not to say that the squeegeeing part is acceptable--it is not--but it is simply because the panhandling part lies more squarely within the mandate of the Canadian Civil Liberties Association.

The key civil liberty at issue is freedom of speech. In a democratic society this means the opportunity to appeal to members of the public to support our various causes and interests. It might mean asking for votes at election time, asking for signatures on a petition, asking for attendance at a meeting or asking for money for just about anything. Those with means, the more advantaged members of society, can use their wealth to extend their influence: They can importune decision-makers; they can advertise in the media. Those without means have to rely on what they can do by word of mouth, and it's for that reason that only the most compelling of social interests can justify infringing upon freedom of speech. It is hard to find such compelling interests in the bill that we're dealing with here.

Where it does address issues of genuine harm, it's probably already unlawful. It is likely unlawful, for example, to make threats, to threaten people with physical harm, to obstruct their movements or to follow them about in a persistent and harassing manner. I suggest that's already unlawful, though in principle we're not opposed to legislation of that kind. But as for the rest of it, why, for example, do we have this section saying you cannot solicit money from people at transit stops, telephone booths, taxi stands and the like?

In this connection, I'm reminded of a speech I heard many years ago when I was at law school. We had a speech from Thurgood Marshall, the first black justice of the United States Supreme Court. He was also the lawyer who had successfully argued the famous school desegregation case. He was telling us how time and again people he would talk to would invoke the spectre of intermarriage as though that were relevant to the issue before him and he said he had worked out a stock answer to it. He said, "If a black man proposes to your daughter, all she has to do is say no."

Similarly, may we suggest that if somebody solicits money from somebody at a taxi stand, a bus depot or wherever, all they have to do is say no. Remember, those who solicit will not be able to commit or threaten physical violence, they will not be able to obstruct their movements, and they will not be able to follow them about in a harassing fashion. So what are we worried about?

Moreover, I suggest that the definition of "soliciting" is so broad that it could catch almost any one of us. I don't think I've ever met anyone who hasn't run out of change at a telephone booth. Do we really want to make it unlawful for them to ask somebody for a quarter? I don't know if there are still any pay toilets in this province, but if there are, I would suggest that if anyone really needs to use the facilities and finds themselves without money, it would be in the public interest for him to ask for change.

Can this bill stretch to a point that it can catch buskers in some subways or perhaps even the Salvation Army? What advice are we going to give to those selling Remembrance Day poppies and Boy Scout apples? They better beware that their enthusiasm does not lead them afoul of this bill.

When this bill was first introduced, I described it to a member of the press as mean and silly. I am quite prepared to repeat those adjectives here today and to add one more consideration: We believe that this bill is capable of making Ontario the target of widespread ridicule. For all these reasons, we suggest that the best way to dispose of this bill is to dispose of this bill. All of which is, as always, respectfully submitted.

The Chair: Any comments from the people who are with you, Mr Borovoy?

Mr Borovoy: Only if I have time in rebuttal.

Mr Stephen McCammon: We'll leave the time for questions.

The Chair: OK, thank you. We have about four minutes. This will be split between each caucus, so we start with the Liberals.

Mr Michael Bryant (St Paul's): Mr Borovoy, have you considered whether or not the provision on solicitation in effect just duplicates the Canadian Criminal Code provisions on assault, or do you think it widens them and, if so, does that mean that not only would there be a charter challenge, which you've suggested, but also a challenge on the basis under the Constitution Act, 1867?

Mr Borovoy: Sections 91 and 92. I'm not certain how far it would be subject to a legal challenge that way. Suffice it to say that they are very close to the offences in the Criminal Code. Constitutional considerations aside, from the standpoint of social policy, I can't fathom what point there is in basically putting into provincial legislation what already exists in the Criminal Code as far as these items are concerned. And that is, as I say, the only place where the panhandling part of the bill addresses potentially really harmful conduct. The rest of it isn't harmful at all.

Mr Kormos: Mr Borovoy, you raised the spectre of a person at a phone booth running out of change, a person in a charge washroom running out of change. Of course, our firefighters on Labour Day weekends when they're out there with their buckets raising money for good causes across the province would fall into that category.

That's what struck me, because my colleagues from my caucus and I today went out and squeegeed cars here in the Queen's Park parking lot at lunchtime. We were white, male, middle age, unfortunately, and middle class. I'm wondering if you've thought about the fact that it isn't really conduct here that's being prohibited or targeted, be it in panhandling or indeed squeegeeing. Is it the conduct that's being targeted or is it certain classes of people that are in fact being targeted?

Mr Borovoy: As far as the squeegeeing part is concerned, here too any genuinely harmful conduct caused by a squeegee is likely already unlawful. You can't obstruct cars on the roadway. You can't handle people's property in ways they don't want you to. That's already unlawful. Why then should we have a law that punishes all the others for the misdeeds of a few? I would suggest the proper balance is then to enforce the law against those who are violating it and leave the others alone.

The Chair: Thanks very much. That's about all the time we have with respect to the presentation, Mr Borovoy.

Mr Borovoy: None from the other side of the House, Mr Chair?

The Chair: I wanted to be generous with the other side because they were late.

Mr Kormos: I move that the Conservative caucus have three minutes in which to pose questions in view of the excess amount of time we have available to us today.

The Chair: We don't have excess available time.

Mr Kormos: I just made a motion, Chair.

The Chair: Those in favour of the motion, say "aye."

Mr Martiniuk: Excuse me. We have so many people to hear. We must rise at 6 o'clock because those are the rules of the House, and I am concerned that individuals would like to preclude the last few presenters from presenting their views before this committee. I think we must take all steps to oppose this to ensure--

Mr Kormos: I think we're paid well enough that we can sit past 6 o'clock.

Mr Martiniuk: Excuse me. Is that what the rules say?

Mr Kormos: I think we're paid well enough that we can sit past 6 o'clock if need be.

Mr Martiniuk: Well, you've never obeyed the rules before, Mr Kormos, so I can see you don't want to do it now.

The Chair: We've got a motion on the floor. Those in favour of the motion?

Mr Kormos: Recorded vote.

AYES

Kormos, McLeod, Bryant.

NAYS

Beaubien, Molinari, Martiniuk.

The Chair: The motion is lost. Let's proceed.

Interruption.

The Chair: We'll have a five-minute recess.