

**LAW, LIMITS AND LESSONS UNBOUND:  
PERSPECTIVES FROM KEY STAKEHOLDERS  
RESPONDING TO TRANSNATIONAL CHILD SEX  
TOURISM IN A WORLD WITHOUT BORDERS**

by

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## **ABSTRACT**

Canadian policy initiative Bill C-27 expanded Canadian jurisdiction concerning international child exploitation. This thesis places the current Canadian legal framework in the socio-historical context of child rights and the persistence of child sex tourism internationally. Related issues include: possible *Charter* challenges to a jurisdictional extension; barriers to enforcement outside of national borders; and changes to the present national policy. Qualitative data were gathered via semi-structured interviews with ten specialists from law enforcement, policy and NGO sectors. Constructivist grounded theory was supplemented by a legal analysis. It is argued that while this policy change confirms that child sex tourism has grown as an issue of importance, the initiative is legalistic and hampered by linguistic, cultural, and territorial barriers to international inter-agency cooperation.

**Keywords:** child sex tourism; extra-territoriality; transnational crime; jurisdiction.

**Subject Terms:** Sex tourism – Law and legislation – Canada; Constitutional law – Canada; Rights of the child; International cooperation; Law; child sexual abuse.

*To Nana,*

*Although you could not witness the completion of this thesis, I know in my heart  
that I have made you proud...*

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## **CHAPTER 1: Introduction**

On May 26, 1997, Bill C-27<sup>1</sup> made a significant change to the jurisdiction of Canadian law. As part of a national policy initiative to respond to international child exploitation, Bill C-27 expanded Canadian jurisdiction outlined in section 7 of the *Criminal Code of Canada*.<sup>2</sup> Section 7(4.1) of the *Criminal Code* now reads:

Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.<sup>3</sup>

Prior to 1997, justice system had no avenues by which to investigate and prosecute transnational child sexual exploitation. Owing partly to variations in ages of sexual consent, Canadian citizens were able to travel to other countries to participate in exploitive activities that would be illegal on Canadian soil.<sup>4</sup> The scope of the present legislation is sufficiently broad that acts that are illegal in other countries are also capable of being prosecuted in Canada, provided they are prohibited by Canadian law and listed in s. 7 of the *Criminal Code*. To be clear, the provisions also serve to protect Canadian children travelling overseas who

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<sup>1</sup>Bill C-27, s. 1 (1996-1997) (2nd Session, 35th Parliament). At: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2329459&Language=e&Mode=1&File=16>.

<sup>2</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [*Criminal Code*].

<sup>3</sup> *Criminal Code*, *supra* note 2 at s. 7(4.1).

<sup>4</sup> M. Ferens, *An Evaluation of Canada's Child Sex Tourism Legislation Under International Law* (2004) [unpublished, MA Thesis, University of Manitoba School of Law].

may be victims of exploitation by another Canadian; these victims are now protected by the law of their home country.<sup>5</sup>

Acclaimed as a step in the right direction by law enforcement, and NGOs alike, the expansion of jurisdiction through this law enhances the potential for Canada's protection of children against sexual offences. It also places Canada in the company of at least 44 countries with extra-territorial<sup>6</sup> law to address child exploitation. As a signatory of the *United Nations Convention on the Rights of the Child*,<sup>7</sup> Canada was compelled to expand criminal jurisdiction in this manner. Nevertheless, recent media describes the provisions as "one of the most under enforced provisions of the Criminal Code" resulting in Canada becoming an "international embarrassment."<sup>8</sup> Svensson, in a critical account of the application of ET law, suggests that the international pressure exerted on individual states, in addition to the media attention devoted to the problem of CST,<sup>9</sup> has made ET legislation essential in preserving international status and in maintaining an attractive image.<sup>10</sup> In terms of the actual *use* of ET legislation, however, frequency of application differs significantly across signatories; Canada has convicted only one individual under the law – Donald Bakker<sup>11</sup>, while the United States

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<sup>5</sup> In *R. v. B. (O.)*, [1997] O.J. No. 1850 (Ont CA), Canada did not exercise jurisdiction in transnational sexual assault case. The young victim was assaulted by her grandfather while both parties travelled through the United States. Jurisdiction was also not asserted by the United States, and thus, no accountability was ensured in the case. Such a case would likely be treated very differently under the new legislation.

<sup>6</sup> Referred to hereafter as ET.

<sup>7</sup> "Convention on the Rights of the Child" UN General Assembly (1989; entered into force 1990) online: <<http://www.ohchr.org/english/law/pdf/crc.pdf>> [CRC].

<sup>8</sup> B. Perrin, quoted in C. Bains, "Canada Lax on Child-Sex Tourism Laws, Critics Say" *The Canadian Press*. (April 2, 2008) online: [http://www.ecpat.net/EI/Resource\\_Centre/Newsclippings/index.asp?news\\_id=157](http://www.ecpat.net/EI/Resource_Centre/Newsclippings/index.asp?news_id=157).

<sup>9</sup> Referred to hereafter as CST.

<sup>10</sup> N.L. Svensson, "Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws" (2007) 28 *Int'l & Comp L Rev* 641-664.

<sup>11</sup> *R. v. Bakker*, [2005] BCJ No. 1577 (BC Prov Ct).

has charged around twenty individuals, and Japan nobody at all.<sup>12</sup> Differences in the format of ET legislation, including: who can be prosecuted, for which crimes, and differences in the ages of the children are also present.<sup>13</sup>

The problem of inconsistent application is not unique to ET law, but rather, is characteristic of the barriers that exist within many types of transnational practices. Bachman emphasizes this issue by suggesting that although international bodies criticize nations for failing to uphold human rights standards, the consequence is rather minor; signatory nations failing to comply face little more than public embarrassment, which may be of little concern to some nations.<sup>14</sup> Essentially, he draws a comparison to road signs, where there is a failure to deliver consequences upon non-compliance. Bachman's consideration of transnational barriers, using international child labour standards as a reference point, shows that child rights issues in general are problematic. The institutional barriers mentioned above, resulting in lack of enforcement, are paired with political and conceptual obstacles in Bachman's analysis. He suggests that, while there are measures in place to alleviate some of the concerns,<sup>15</sup> the barriers will never completely disappear. All hope is not lost; however, when he adds that consensus and universal recognition for child rights are contributing towards growing consequences for violating countries.<sup>16</sup>

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<sup>12</sup> Svensson, *supra* note 10.

<sup>13</sup> E J. Klain, "Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses" (1999) National Center For Missing & Exploited Children, online: [http://www.Missingkids.com/en\\_us/publications/nc73.pdf](http://www.Missingkids.com/en_us/publications/nc73.pdf).

<sup>14</sup> S.L. Bachman, "Translating Standards into Practice: Confronting Transnational Barriers" in B.H. Weston, ed., *Child Labor and Human Rights* (Boulder, Co: Lynne, 2005).

<sup>15</sup> For instance, the meetings held every two years by the Committee on the Rights of the Child.

<sup>16</sup> Signified on one front by the almost universal ratification of the ILO Convention banning the "worst forms of child labour."

On July 23, 2002 Bill C-15A<sup>17</sup> came into force, removing the requirement for Canada to seek the consent of foreign countries before moving ahead with CST investigations and charges.<sup>18</sup> Predominantly, this policy change represents action to improve the policy response on the domestic front, by enabling law enforcement through dissolving formal legal barriers to investigation and prosecution. While this recognizes the ineffectiveness of prior legal responses and attempts to mobilize a more complete response, it remains focused on developing the legal response, rather than re-evaluating the underlying epistemological and ontological assumptions of this approach. While other countries have also attempted to make their ET legislation more readily applicable, the literature suggests more systemic obstacles exist within the host countries<sup>19</sup>. “Prosecutors must overcome linguistic, cultural, and territorial barriers to obtain witnesses and other physical evidence necessary to effectively prosecute.”<sup>20</sup> Investigations of child sexual offences are already particularly difficult, and when coupled with problems associated with distance and the fact that host countries vary dramatically in their legal systems, effective prosecution may become precarious.

It is important to note that enforcement of CST laws is difficult, not only due to a widespread concern among governments to maintain a positive image, but also due to the existence of problematic evidentiary burdens inherent in conducting investigations across

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<sup>17</sup> Canada Library of Parliament. Bill C-15A, An Act to Amend the Criminal Code and to Amend other Acts. (Royal Assent: 4 June 2002, Statutes of Canada 2002, c. 13). Online: [http://www.parl.gc.ca/common/Bills\\_ls.asp?Parl=37&Ses=1&ls=C15A](http://www.parl.gc.ca/common/Bills_ls.asp?Parl=37&Ses=1&ls=C15A).

<sup>18</sup> R. Prober, “ECPAT Newsletter” (2002, October), online: <http://www.beyondborders.org/Publications/nwslr103b.pdf>.

<sup>19</sup> The term ‘host country’ refers to the country where the child exploitation occurred.

<sup>20</sup> Svensson, *supra* note 10 at p. 650.

national borders. Complexity is not solely a result of the sheer vastness of geographic areas involved, but also cultural and language barriers are present.<sup>21</sup> Since international policing is a crucial part of effective enforcement of CST laws, communication and facilitation between officials in various host countries is essential.<sup>22</sup> The most basic evidentiary elements such as securing witnesses, establishing *mens rea*, and documenting the age of the victim, become nearly impossible across national boundaries. Efforts toward addressing these issues have taken place through police attempting to build relationships within host countries and residing for prolonged periods of time in these foreign jurisdictions.

## ***RESEARCH OBJECTIVES AND RATIONALE***

This thesis demonstrates that despite the efforts made to adjust policy in Canada from the late 1990s until now, we have been unable to remedy the barriers and hurdles present in the transnational effort to combat child exploitation. These weaknesses are, in part, a result of the current issues facing policing across national boundaries which serves to magnify the isolation of the destitute environments in which these crimes often exist. Furthermore, the question of the constitutional validity pertaining to the legislation also constitutes an apparent weakness. Rather than expecting enforcement and legal issues to be eliminated, this thesis proposes that they should be recognized as inherent within any legal response and representative of natural limits to such action. These limits can only be addressed by using a policy approach that recognizes the entire context of CST as providing

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<sup>21</sup> A. Fraley, "Child Sex Tourism Legislation Under the Protect Act: Does It Really Protect?" (2005) 79 St. Johns Law Review 445-483, online: <http://149.68.13.140/Media/3/12ecf9fbc928453aab9730d4a278d697.pdf>.

<sup>22</sup> Interestingly and somewhat paradoxical, globalization has made for easier communication among offenders and sex tour operators, but it has not provided for the same enhancement between law enforcement.



valuable information for policy intervention; becoming complacent in the faults of the current state of affairs represents a lack of commitment by the government and people of Canada.

After drawing on a legal analysis of Canada's CST legislation and by referring to discussions with practitioners, it will be demonstrated that while genuine effort and concern underlies Canada's national policy, by failing to provide an integrative, holistic approach to the problem, the legislation binds the hands of law enforcement and human service providers. All is not lost, however, as this discussion sheds further light on what the future holds in this regard, and identifies current directions and a prediction of success, if strategic changes are implemented immediately.

## *CHAPTER OVERVIEWS*

Chapter 2 outlines both the present context of CST globally and maps the development of child rights from a Western perspective beginning in the 18<sup>th</sup> Century during the Industrial Revolution. Evolving from a fusion of the contemporary and historical contexts, the chapter identifies the global mechanisms of child protection reflected in the turn towards international conventions.

Chapter 3 offers a legal analysis of the current Canadian law. This includes a response to attention and criticism given to Canadian law, suggesting that the law itself might be weakened due to the constraints imposed by rights guaranteed to Canadians in the *Charter of Rights and Freedoms*.<sup>23</sup> It is essential for this thesis to set out specifically how an

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<sup>23</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [*Charter*].

argument might be framed in light of Canada's international commitments, the rules of statutory construction, an understanding of how a country can assert jurisdiction, and also with attention to the rights guaranteed by section 7 of the *Charter*.

Chapter 4 describes the methodology employed in this thesis. The chapter discusses the use of constructivist grounded theory as both a theoretical guide and an analytical tool. The sample is described at length with attention given to the justification for interviewing specialists in the field. Finally, the chapter also outlines the interview instrument used.

Chapter 5 presents the qualitative results. The chapter is organized by answering three research questions: can ET law be used in a practical sense, should ET law be used as a response to CST, and how can the current application of ET law improve? The themes identify a series of barriers unique to transnational investigations and the court processes applicable to CST. Also, a series of themes are outlined that relate to the sometimes divergent feelings about dedicating limited Canadian resources to a concern that seems to have few direct effects in Canada. Finally, the themes that look toward the future structure of ET investigations and trials and the overall response are identified.

Chapter 6 translates the descriptive research findings into policy relevant material. By paying special attention to the barriers in applying ET law in CST cases as acknowledged by participants, avenues for future work are pin-pointed. Rather than generating overarching theory, the core policy directions are highlighted. Finally, as this research represents one of the first of its kind in Canada, some promising directions for future research are posed in the form of a five-year plan.

## **CHAPTER 2: Literature Review**

### ***INTRODUCTION***

Despite the changing notions of childhood and child rights, and particularly in light of the new model of participatory action by children (marking the decrease in paternalistic regulation and legislation of children), one cannot conclude that exploitive practices have been reduced throughout the world. Owing partly to disagreements over definitions of *children* and *exploitation*, as well as the status of child rights around the globe, contemporary examples of child abuse in the international setting remain widespread. The ways by which CST is dealt with in Canada are deeply rooted as much in the history of child rights as in the understandings of where society is presently situated. Other factors affecting policy development in this area include: the limits to Canada's criminal law, the implications of globalization, and the difficulties inherent in a fight against transnational crime.

In order to understand the particular intricacies of the current domestic legal framework of action in response to child exploitation, the socio-historical setting must be identified. This chapter (1) explores the phenomenon of CST, (2) presents an overview of some of the major over-arching historical, social and legal changes surrounding the status of children by identifying five typologies underlying childhood, and (3) considers some of the contemporary mechanisms of child protection in comparison to the typologies with attention paid to their persistent weaknesses. By referencing the legislative policy by which

Canada responds to CST, this chapter provides insight into the broad question “how did we get here?”<sup>24</sup>

## *PERSISTANCE OF CHILD SEX TOURISM*

Providing an operational definition of CST remains challenging, as definitions accepted by stakeholders tend to vary widely and depend upon their interests. For example, CST, is regarded by Canada's Foreign Affairs Department, as “travel for the purpose of engaging in sexual conduct with children...in doing so, offenders take advantage of the poverty and powerlessness of foreign children, expecting to exploit weaknesses in law enforcement.”<sup>25</sup> However, the definition of CST as given by the United Nations, emphasizes the commercial aspect of CST, defining it as “tourism organized with the primary purpose of facilitating the effecting of a commercial-sexual relationship with a child.”<sup>26</sup>

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<sup>24</sup> There is a disturbing disconnect between the policy and practice of ET law, which is especially evident in North America. While very few charges of this nature have been laid, data presented by NGOs suggest that Western Europe and North America house some of the most prolific offenders. See N. Ives, “Background Paper for the North American Regional Consultation on the Commercial Sexual Exploitation of Children” (Philadelphia, Pennsylvania, December 2-3, 2001), online: <[http://www.csecworldcongress.org/en/yokohama/Background/Regional\\_analyses.htm](http://www.csecworldcongress.org/en/yokohama/Background/Regional_analyses.htm)>.

<sup>25</sup> “Child Sex Tourism: It’s a Crime” Foreign Affairs and International Trade Canada (2007), online: <[http://www.voyage.gc.ca/main/pubs/child\\_endure-en.asp](http://www.voyage.gc.ca/main/pubs/child_endure-en.asp)>. It should be noted that this definition is not the legal definition accepted by Canadian law as it puts undue emphasis on the “purpose” of travel. In fact, sexual conduct with children does not need to be the *purpose* of travel for the behaviour to violate the *Criminal Code*.

<sup>26</sup> *CRC*, *supra* note 7 at preamble. From a rights-based perspective, it could be argued that the apparent distinction made in the *CRC* between commercial CST and non-commercial CST is inappropriate and further disenfranchises children exploited for non-commercial purposes. The definition of a “commercial” relationship is vague within the social context of child exploitation. It is unclear whether the exchange must involve currency, or whether exploitation relying upon the exchange of other goods or simply upon the power disparities within CST would be included. Accordingly, Canadian law does not make this distinction.

Child sex tourism, as an economic force, arose alongside the general industry of sex tourism that can be traced to the Vietnam War<sup>27</sup> during which the US military presence created a substantial demand and market for sexual services.<sup>28</sup> In order to satiate this growing market, destination countries supported and regulated the sex trade industry; however, demand decreased once the US military left the area. The response by destination countries involved setting incentives to draw foreigners to their regions, with hopes of continuing the service with its lucrative spin off benefits for those regions. News of the availability of cheap sexual services in such areas was quickly communicated throughout the world by military clients. The environment promoting tourism for sexual purposes, juxtaposed with the lack of child protection laws, was an integral part of why the CST market became a lucrative one throughout Asia.<sup>29</sup>

Due to the clandestine nature of the crime, it remains difficult to address with certainty the frequency of victimization and the characteristics of the victims, and thus it is even more difficult to ascertain the underlying causes.<sup>30</sup> With that in mind, literature presented by World Vision,<sup>31</sup> indicates the presence of 1-2 million children victims worldwide. They report commonalities among the victims, including immense vulnerability due to low socio-economic position, and access to few or no resources. The major

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<sup>27</sup> While providing sexual services is not a phenomenon uniquely tied only to the US military presence in Vietnam, this can be said to represent the beginning of its mass commercialization.

<sup>28</sup> M. Mattar et al., "International Child Sex Tourism: Scope of the Problem and Comparative Case Studies" (The Protection Project, Washington, DC: Johns Hopkins University, 2007).

<sup>29</sup> While the market began in Thailand and the Philippines, demand eventually caused it to spread to other parts of Asia (Mattar et al., *supra* note 28).

<sup>30</sup> It is important to note here that evidence of this nature is often formed on speculation, and is subject to intense variation and criticism in this regard.

<sup>31</sup> World Vision is one of the foremost interest groups combating CST.

destination countries include most of South-East Asia, Central and South America and, increasingly, some countries within Eastern Europe.

Conversely, in a study conducted at Johns Hopkins University, it has been suggested that the combination of inequalities, poverty and economic reliance on tourism, alone are not enough to promote CST.<sup>32</sup> Rather, the factors that do foster CST are: weak or non-existent legal frameworks to manage prostitution, ineffective law enforcement, weak child protection policies, high populations of street children caused by civil unrest, war and genocide “combined with a historical legacy of foreign imperialism and the societal hierarchy such a system had fostered.”<sup>33</sup>

O’Connell-Davidson proposes that the use of children as commodities and the prevalence of CST are exacerbated in part by justificatory practices of foreigners who use an “othering” process; the offenders justify their own criminal behaviour on the principle that victims are not important or valued. A related concept prevalent in related research is that of the “racialized other”: race-based sexual fantasies are said to be held by North American and European male offenders, these stem from their desire to assert authority over the “non-white other” which plays a role in fostering the desirability of sex in a foreign destination with “foreigners.”<sup>34</sup> In terms of the moral boundaries prohibiting child abuse, some offenders think victimizing disenfranchised populations is empty of moral repercussions since the children are not cared for by anyone else, or are under the false

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<sup>32</sup> Mattar et al., *supra* note 28.

<sup>33</sup> Mattar et al., *supra* note 28 at p. 22.

<sup>34</sup> J. O’Connell Davidson, “Child Sex Tourism’: An Anomalous Form of Movement?” (2004) 12(1) *Journal of Contemporary European Studies*, 31-46 [O’Connell Davidson, “Child Sex Tourism”]. For more on justifications of delinquency and techniques of neutralization, see the work of Sykes & Matza, specifically, G.M. Sykes, & D. Matza, “Techniques of Neutralization: A Theory of Delinquency” (1957) 22 *American Sociological Review*, 664.

impression that the children freely “choose” to prostitute themselves.<sup>35</sup> Still other offenders view themselves as philanthropists in disadvantaged communities, providing economic support and employment to adults while assaulting their children.<sup>36</sup>

Grounded examples<sup>37</sup> of globalization, in the form of structural disadvantages and negative side-effects of modern changes, have also been identified as responsible for the link between the tourism and sex industries.<sup>38</sup> While such trends are evident worldwide, the policies of Cuba, a country with a massive foreign exploitation problem, provide a good example. Throughout the early 1990s, changes to development policy and legislation designed to align the country with trends towards globalization, indirectly built and sustained the infrastructure upon which the sex tourism market now rests. Some of the biggest changes included: allowing citizens to exchange American dollars into Cuban currency at banks, de-regulating and legalizing various practices related to renting rooms, and allowing stores to take American currency. While the changes fostered a growth in tourism, they also made it easier for sex workers to use foreign currency and to run commercial sex operations.<sup>39</sup>

The literature supports the claim that instances of CST are increasing despite condemnation by the public, and legal responses designed to track and punish offenders.<sup>40</sup>

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<sup>35</sup> Mattar et al., *supra* note 28.

<sup>36</sup> Fraley, *supra* note 21; O’Connell Davidson, “Child Sex Tourism”, *supra* note 34.

<sup>37</sup> It is important that grounded examples be included to avoid discussing globalization in abstraction. See Wonders and Michalowski (2001). “The Globalization of Sex Tourism” in A. Thio, T. C. Calhoun, & A. Conyers, ed., *Readings in Deviant Behavior* 5<sup>th</sup> ed. (Boston: Pearson, 2008) at 210.

<sup>38</sup> O’Connell-Davidson, “Child Sex Tourism”, *supra* note 34; Wonders and Michalowski, *ibid.*

<sup>39</sup> Wonders & Michalowski, *supra* note 37.

<sup>40</sup> J. Seabrook, *No Hiding Place: Child Sex Tourism and the Role of Extra-Territorial Legislation*. (New York: St. Martin’s Press, 2000); Svensson, *supra* note 10.

While there are a number of reasons for this prevalence, perhaps the most relevant are: the increased ease of international travel; the advent of the Internet as a tool to facilitate “sex tours”,<sup>41</sup> overseas communication, and distribution of child pornography; and the increase in exposure of CST as both a human rights and a child protection issue.<sup>42</sup> In addition to technological advances, there are a variety of political and social changes that have led to the increase in sexual exploitation of children, particularly disenfranchisement of uprooted, orphaned, and abandoned children due to armed conflict and HIV/AIDS.<sup>43</sup>

The role mass communication and the “online community” play in the facilitation of CST is vast; greater simplicity establishing communication between people overseas fosters commercial relationships, having the potential to result in child exploitation. Combating CST has become increasingly important, due in part to the increased ease of international travel, and the expansion of the Internet.<sup>44</sup> Online resources provide venues for cross-national communication, creating relationships to facilitate sex tours and to procure children for sexual exploitation. Because selling children for sex is extremely lucrative, the industry has also become more “professional, commercial and global” within the past decade.<sup>45</sup> In fact, globalization, identified as one of the over-arching reasons for the unprecedented growth in the number of incidents of sex tourism,<sup>46</sup> can be also applied to the activity as it specifically involves children.

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<sup>41</sup> Fraley, *supra* note 21.

<sup>42</sup> Ives, *supra* note 24.

<sup>43</sup> G. Landsdown, “Children’s Rights: A Second Chance,” (2001), online: International Save the Children Alliance Communications Working Group <[www.savethechildren.net](http://www.savethechildren.net)>.

<sup>44</sup> Mattar et al., *supra* note 28.

<sup>45</sup> Landsdown, *supra* note 43 at 46.



Finally, the literature identifies a few main issues regarding law enforcement that help to understand why CST has continued to grow. Inadequate laws, ineffective law enforcement, lack of resources, corruption, and immature legal systems<sup>47</sup> in addition to the vulnerability of "...women and children, and a highly commercialized sex industry"<sup>48</sup> are consistently pinpointed as the main factors that give CST offenders impunity. O'Connell-Davidson claims that since CST is a result of the structural disadvantages forced upon "other" nations by dominant economic forces accordingly, it cannot be resolved by laws alone.<sup>49</sup> For example, vulnerable people are forced into prostitution, not because individual predators tour to their country, but rather because they are economically disadvantaged due to systemic global inequalities. This focus points to the broader problem of inequities and the need for social change around the world when addressing CST, and indicates that appropriate responses will also need to be broad in nature.<sup>50</sup> The economic reliance of victims and their families on CST needs to be addressed; if an identifiable source of income is removed, however desperate it may be, further poverty is inevitable.

Although recognition of CST has been raised nationally and internationally, there remains an outcry to do something *more* in response to the millions of children being victimized this way. This chapter proceeds by highlighting some of the significant

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<sup>46</sup> Sex tourism in general is described as various varieties of "leisure travel that have as part of their purpose the purpose of sexual services" Wonders & Michalowski, *supra* note 37.

<sup>47</sup> Svensson, *supra* note 10 at 641.

<sup>48</sup> Svensson, *supra* note 10 at 643.

<sup>49</sup> O'Connell-Davidson, "Child Sex Tourism", *supra* note 34.

<sup>50</sup> Fraley, *supra* note 21.

developments in child rights, both internationally and domestically, and will ultimately discuss some of the impediments to child rights protection.

## ***TYOLOGIES UNDERLYING “CHILDHOOD”***

In order to conceptualize the way Western society has acted toward child rights, five chronological typologies are presented<sup>51</sup>. A useful place to begin consideration of how children are viewed, is the immediate pre-industrial era. This is not an arbitrary starting point for analysis, as it has been long established in research concerning the development of rights for children as a key moment in cultural evolution<sup>52</sup>, and it provides a useful comparison to the following period when rights were initially acknowledged.

The typologies can be meaningfully identified as follows: (1) widespread view of childhood as a short-term period in one’s development followed quickly by adulthood; (2) a nationally-held view of children as vulnerable beings in need of; (3) children as subjects of rights deserving international protection; (4) children as participants in rights identification, and as important voices in the national and international policy setting agenda and; (5) children as universally recognized entities in need of protection, regardless of geographic location (coincidental to a commitment to transnational crime control).

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<sup>51</sup> Although the typologies have been characterized as paradigm shifts by past research, it is useful to understand all shifts in thinking as existing simultaneously in the current setting. However, as a result of varied histories, different cultures reflect differing conceptions of childhood.

<sup>52</sup> A. W. Calhoun, *A Social History of the American Family: The Colonial Period*, Vol. 1. (New York: Barnes & Noble, 1945). Also, see: H. Cunningham, & S. Stromquist, “Child Labor and the Rights of Children: Historical Patterns of Declines and Persistence” in B. H. Weston ed., *Child Labor and Human Rights*. (Boulder, Co: Lynne, 1945).

### *Absence of an Extended Childhood*

The notion of childhood as a lengthy period of growth and learning, and deserving of child rights was largely foreign prior to the mid 1800s. Children were understood as being the property of their parents, and there was no belief in the innocence of children. In fact, “up until the eighteenth century, they were more likely to be seen as innately evil, inheritors of original sin in need of correction.”<sup>53</sup> Calhoun<sup>54</sup> suggests that the introduction of Protestantism in Europe helped spawn the potential for labour as a positive way for children to spend their time. The idea of children as moral beings indicated their need for shaping at a young age; it was understood that labour and corporal punishment marked failsafe shaping procedures. As instrumental components to success in agriculture, children participated in various activities on the farm and usually worked close to home.

The development of industries, such as coal mining, in the 17<sup>th</sup> Century, produced a remarkable increase in the need for factory labourers; the desperate need could not easily be satisfied by adult workers alone. The trend for children to move off the family farms as a result of this steadily growing industrial environment fit nicely with the prevailing notion of children as workers. The environment children became socialized into changed swiftly during industrialization, and led to changes in understandings of both children themselves and the nature of the family unit. In order for families to live in costly urban areas, where they might take advantage of high employment rates, it was necessary to recognize children as instrumental income earners helping secure a family’s position in society. As a result,

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<sup>53</sup> D. Green, *Hidden Lives: Voices of Children in Latin America and the Caribbean* (London: Cassell, 1998).

<sup>54</sup> Calhoun, *supra* note 52.

families began to raise greater numbers of children. Employment of children by strangers became a significant turning point in the way children were viewed.<sup>55</sup> While the industrialized city remained stable in Europe and North America, so too did child-labour; in fact, it was not until the industrialized society began to change, that the desirability of children as workers began to alter.

While the reason for the change in child labour is contentious,<sup>56</sup> Cruickshank<sup>57</sup> finds evidence that the primary reason for the decrease in child labour was increased efficiency within the factories resulting from developing technology. Once production became mechanized, fewer workers (children) were needed to produce the same outcomes. The result was an urban environment with many unemployed children creating a massive strain on society; the question quickly arose “what to do with idle hands?”

In order to busy the children, what were once Sunday schools for working children, transformed to become closer to today’s notion of conventional schools (those operating on a daily basis). The concept of regulated, mandatory education became more acceptable and widespread, and notions of childhood began to change once again; the labour reform and child welfare acts of the nineteenth century legalized new notions of childhood, and became part of the regular understanding of an *extended childhood*. Rose agrees that legislation placing

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<sup>55</sup> M. Cruickshank, *Children and Industry: Child Health and Welfare in North-West Textile Towns During the Nineteenth Century* (Manchester: Manchester University Press, 1981).

<sup>56</sup> There are three dominant ways of thinking throughout Europe for the dramatic shifts in understanding childhood: (1) the State, attempting to foster healthy, positive development in children played a large part in creating a “new childhood” by introducing legislation regulating the activities of children (eg: compulsory education); (2) the absence of labour sparked considerations of what to do with many unemployed children in urban areas and; (3) the culturally imbedded notions of childhood within society coincidentally changed from characterizing child labour as an evil, concurrent with changing market forces producing less need for child labour. See M. Rahikanen, *Centuries of Child Labor: European Experiences for the Seventeenth to the Twentieth Century* (Britain: MPG, 2004).

<sup>57</sup> M. Cruickshank, *supra* note 55.

caps on the workday and setting minimum wage standards did not arise out of altruism, but rather was a response to the technological shift and resulting decreased need for workers.<sup>58</sup>

### *Changing Notions of Childhood, Recognition of Rights and Protection*

The late 20<sup>th</sup> century has been described as a period when concerns about child labour were thrust to the forefront, and when the topics of rights and child labour intersected.<sup>59</sup> It marked a period when the rights of children became entrenched, symbolizing a new concept of children within an accompanying effort to reduce exploitation of young people. Entrenchment of rights affected a series of areas in which children were represented, including the workforce and the criminal justice system. The changes were first experienced on a national front, as the enactment of the *British Factory Act* implies, as well as on the international front, with input from the League of Nations, United Nations, and the International Labour Organization creating new recommendations to globally reduce child exploitation.<sup>60</sup>

The *British Factory Act*,<sup>61</sup> considered one of the earliest legislative enactments on the rights of children, marks the beginning of a trend that led to a change in the public's general attitude toward children.<sup>62</sup> At the time, there existed a complex relationship between child rights and child labour, in that most rights focused on the working conditions experienced by children. While the *Factory Act* served only to limit the working hours of children to eight

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<sup>58</sup> L. Rose, *The Erosion of Childhood* (NY: Routledge, 1991).

<sup>59</sup> Cunningham & Stromquist, *supra* note 52.

<sup>60</sup> Cunningham & Stromquist, *supra* note 52.

<sup>61</sup> *Factory Act* (UK), 3 & 4 Will. IV. C. 103.

<sup>62</sup> Green, *supra* note 53 at 183.

hours per day for those children between nine and thirteen years of age, the child protection orientation it initiated is still being debated today. Interestingly, and perhaps obviously, the changing notions of children, and the recognition of children's rights, are most commonly seen in Westernized countries; the realities of poorer countries, that often prevent the promotion of child protection, come into conflict with the "elites", and the international laws that they propose.<sup>63</sup> In Canada, for example, the progress of juvenile justice reform, closely mirrored the development of child rights. In 1908, during the child saving movement when children were seen as vulnerable beings in need of state protection, the *Juvenile Delinquents Act*<sup>64</sup> was passed.<sup>65</sup> The document emphasized the new-found ideals of protection and support; the youth justice system was required to view delinquents as misguided and helpless.<sup>66</sup>

Subsequent international initiatives include: the first *Declaration of Child Rights* adopted by the League of Nations (1924), and *The United Nations Declaration on the Rights of the Child* (1959). The underlying theme uniting these documents was the vision of children as helpless, and in need of care and protection; the phrase "children should be seen and not heard" remained vitally important.<sup>67</sup> Although children were granted special rights to aid in their development, the legislation was paternalistic, favouring the perspectives of adults in

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<sup>63</sup> Green, *supra* note 53.

<sup>64</sup> The *Juvenile Delinquents Act*, Statutes of Canada, 1908, chapter 40.

<sup>65</sup> M. Denov, "Children's Rights or Rhetoric? Assessing Canada's Youth Criminal Justice Act and its Compliance with the UN Convention on the Rights of the Child" (2004) 12:1 *Humanities, Social Sciences & Law*.

<sup>66</sup> *Ibid.*

<sup>67</sup> Denov *supra* note 62 at 185.

deciding what rights should be granted, and in how children's activities (such as labour) should be regulated.

The first International Labour Organization (ILO) Convention to address child labour was drafted in 1919 and provided recommendations applying internationally, that set the minimum age of admission of children into the workforce at fourteen years.<sup>68</sup> The document, criticized as being created from a Western perspective, focused on the experiences of children in wealthy countries, yet it was levied on countries around the world.<sup>69</sup> The changes it brought about in the generally shared notions of childhood are relevant, not only to the understanding of children as labourers, but also to the broader increase in public awareness of child exploitation.<sup>70</sup>

Three main historical trends are said to have increased public attention and general concern about child welfare within the Western world.<sup>71</sup> First-Wave Feminism (1848-1960)<sup>72</sup> has been identified as an integral part of the three inter-related causes of child rights development. The other contributing elements included the publicity engendered by child welfare organizations and the effects of the "information explosion." Each factor led to an increase in knowledge production about sexual abuse through the media, and eliminated the

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<sup>68</sup> H. Cullen, "Child Labor Standards: From Treaties to Labels" in B. H. Weston ed., *Child Labor and Human Rights* (Boulder: Lynne, 2005).

<sup>69</sup> Cullen, *supra* note 68.

<sup>70</sup> L. Kelly, R. Wingfield, S. Burton, & L. Regan, *Splintered Lives: Sexual Exploitation in the Context of Children's Rights and Child Protection* (Essex: Barnardo's, 1995).

<sup>71</sup> D. Finkelhor, *Sexually Victimized Children* (New York: Free Press, 1979).

<sup>72</sup> Kelly et al., *supra* note 70.

monopoly on interest and advocacy previously held by specialists; as a result, shared understandings of child exploitation became incorporated into common currency.<sup>73</sup>

The child rights climate underwent more changes upon the ratification of the *Geneva Declaration on the Rights of the Child* (1924), which universally declared that:

The child must be given the means requisite for its normal development, both materially and spiritually.

The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.

The child must be the first to receive relief in times of distress.

The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.

The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

Although children were granted special rights, the underlying principles of the declaration were criticized as paternalistic and tied too firmly to a welfare model, whereby children were assumed not to have insight into what was best for themselves.<sup>74</sup>

### *Children as Internationally Recognized Rights-Bearers*

The third trend, or typology, arose following WWII, when paternalism began to give way to a view that children were entitled to self-determination.<sup>75</sup> Libel characterizes this shift in terms of a subject-oriented theory of children in post-modernist and post-industrialist times.<sup>76</sup> Children are no longer “objects of education” or “recipients of care”, but rather

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<sup>73</sup> *Ibid.*

<sup>74</sup> Denov, *supra* note 65.

<sup>75</sup> Denov, *supra* note 65.

<sup>76</sup> M. Libel, *A Will of Their Own: Cross-Cultural Perspectives on Working Children* (New York: St. Martin's Press, 2004).



active individuals in society; no longer seen to be under the complete influence and control of their society's adults, but rather, they are understood as beings with agency.<sup>77</sup> Like the other major paradigm shifts identified above, the reasons for this change are as varied as they are debated. Libel gives credit to the view that, as soon as children have been conceived of as consumers, their status within society adapts in response. Thus, the fact that children are granted independence, serves to illuminate their participation in the market indicating broader thematic changes within society, and also demonstrates an "accelerated childhood."<sup>78</sup>

Non-governmental organizations have stressed the importance of moving beyond the traditional "child welfare" model, which highlights child dependency and protection by adults, in favour of moving to a model where children are contributors and specialists in developing programs to promote and protect themselves.<sup>79</sup> The 1990s brought significant changes for the state of child labour. An issue that had remained quiet in the domain of international law for over two decades (from the ILO 1973) was revitalized by the introduction of the *CRC*.<sup>80</sup> The *CRC* is said to be the outcome of a new approach to child rights. Along the same vein, in Canada, the paternalistic and welfare-model philosophies underlying the *JDA* were facing scrutiny; the *JDA* was criticized for offering a lack of due process<sup>81</sup> to youth.<sup>82</sup>

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<sup>77</sup> Landsdown, *supra* note 43.

<sup>78</sup> Landsdown, *supra* note 43 at 280.

<sup>79</sup> Landsdown, *supra* note 43 at 68.

<sup>80</sup> Cullen, *supra* note 68.

<sup>81</sup> Increasingly a concern since the inception of the *Charter of Rights and Freedoms* in 1982 (Denov, *supra* note 65).

The introduction of the *Young Offenders Act (YOA)* in 1984 marked a point in time when Canadian views seemingly diverged significantly from the international climate in relation to child rights. On the international front additional attention was being given to child rights, while in Canada less emphasis was placed on child rights, and more on responsibility and punishment.<sup>83</sup> The principles of the *YOA* were considered by many to be in marked opposition to those of the *CRC*.<sup>84</sup>

### *Children as Participants*

NGOs such as *Save the Children*<sup>85</sup> have had an important influence on the changes in the ways children are viewed. NGOs have been particularly instrumental in developing the notion of children as participants, because of their often high public profile. Landsdown, writing for *Save the Children*, suggests that if children are not given an opportunity to share their realities, “action or intervention on the part of adults will be based on what will often be inaccurate assumptions about what is happening to children...”<sup>86</sup> The suggestion is that legislation affecting children on both the national and international front will produce largely ineffective policies and programs because they have not been informed by those they directly

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<sup>82</sup> Other critics of the *JDA* were arguing that it lacked provisions to sufficiently protect the public from delinquents (Denov, *supra* note 65).

<sup>83</sup> It is wise to note that claims as to the underlying philosophies of the *YOA* are open to debate; this view, while widely acknowledged, is not uncontested as many specialists in the area would argue that the *YOA* is a justice-oriented document allowing for greater access to due process among young people, thus enhancing their rights (R. Corrado, & A. Markwart, “The Need to Reform the *YOA* in Response to Violent Young Offenders: Confusion, Reality or Myth?” (1994, July) 36(3) *Canadian J. of Criminology*, 343-378).

<sup>84</sup> Denov, *supra* note 65.

<sup>85</sup> A grassroots child rights and development organization, supported by CIDA with national affiliates in Canada and the United States.

<sup>86</sup> Landsdown, *supra* note 43 at 71.

affect. Responsible and accountable governance is found to be lacking if policies fail to reflect the subjects of legislation and policy in its design.

Child participation can be considered a by-product of participation of NGOs and other international actors in the law and policy sectors. The appropriateness of child participation, characteristic of the later part of the 20<sup>th</sup> century and central to the development of the *CRC*, remains highly debated.<sup>87</sup> Regardless of the controversial nature of child participation, the 20<sup>th</sup> century can be characterized as the beginning of a time when the views of children were taken into account. Green suggests that:

the view of the UN Convention is that children's views should be taken into account in all decisions that affect their lives, 'in a manner consistent with the evolving capacities of the child'. This gradual transformation from helplessness to reason takes place at different ages for different children, but it seems clear that most children, at least in the North and middle-class Latin America, are kept in dependence long after they need to be.<sup>88</sup>

Levesque sums up the consequences of the participation of children as follows: an increased legal voice of children where children will participate in legal activities previously reserved for adults. One predicted change is a rejection of paternalistic protections on children created by adults in favour of policies informed by children themselves.<sup>89</sup>

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<sup>87</sup> Those who suggest that the views of children are unnecessary argue on two fronts: children lack rationality, and due to lack of life experience also lack wisdom. These shortcomings make it impossible for them to comprehend central ideas about how they should be governed and about which rights should be protected. See Green, *supra* note 53 for more.

<sup>88</sup> Green, *supra* note 53.

<sup>89</sup> *Ibid.*

### *Children as Universally Recognized Rights Holders*

The most recently introduced typology demonstrates responsibility toward children throughout the world.<sup>90</sup> Boundaries between countries are beginning to soften on a variety of fronts (especially crime control and rights protection) in a world influenced by globalization. The fact that countries are no longer only concerned about children within their own borders coincides with a new approach in international law; laws are no longer limited to governing relationships between nations, but now govern legal relationships between individuals (within the same or different countries) on a greater international dimension, and without the restrictions historically attached to borders.<sup>91</sup> Not only is the reach of international law now entering domestic policy, but it is also influencing micro-familial relationships within countries. Levesque identifies three ways in which this new scope of international law influences and shapes the development of children's rights: international law as standard-bearer; the ability of international bodies to intervene in national events; and international law as an aid to information sharing across nations.<sup>92</sup>

It is also important to stress the link between the typology of self-determination of children and the notions of children as citizens of the entire world as:

the idea of children's rights, particularly the right of children to choose or to participate in choices made on their behalf, is consistent with recent research demonstrating the diversity of children's lives, especially as revealed in the inapplicability of Northern ideas of childhood dependency to the lives of many working children in the Global South.<sup>93</sup>

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<sup>90</sup> This is not to indicate that children not within the Western world were completely forgotten previously (ie: ILO Conventions), but that there has been a change in how space and boundaries are understood in relation to children.

<sup>91</sup> R.J.R. Levesque, "Combating Child Sexual Maltreatment: Advances and Obstacles in International Progress" (1995) 17:4 *Law & Policy*.

<sup>92</sup> *Ibid.*

Although it may be the case that as child rights are concerned, attentions turned more widely to transnational regulation and recognition of child rights in the 21<sup>st</sup> century, the history of transnational crime control in general, stretches back far beyond recent memory. It is not a new legal phenomenon for one country to use its influence to bring about change on the international setting; in fact, slavery, piracy and drug trafficking are a few of the historical domains of transnational law. While the issues eliciting transnational concern have evolved, Felson and Kalaitzidis identify changes in politics, moral attitudes and economic practices accompanied by changes and developments in international law as the most persistent reasons for transnational interest.<sup>94</sup> For instance, in the cases of slavery and piracy, the practices came to be seen as a disadvantage for nations and a cost to economic productivity. By pairing the traditional reasons for an interest in transnational regulation with the massive changes we now see in the technological environment “heighten[ed] cross-border linkages are [making] national frontiers seem more permeable than ever.”<sup>95</sup>

In an environment consistent with transnational interests entering the priorities of international law, the interests of children and the exploitive practices that effect them are also seen in a transnational context. Adding exponentially to this trend is the “internationalization of transnational crime”, a title given to the attention paid by the United Nations to “strengthen[ing] its lead role in obtaining global cooperation and collaboration toward alleviating poverty and hunger, promoting development, addressing human rights

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<sup>93</sup> Cullen, *supra* note 68.

<sup>94</sup> D. Felson & A. Kalaitzidis, “A Historical Overview of Transnational Crime” in P. Reichel ed., *Handbook of Transnational Crime and Justice* (London: Sage Publications, 2003) at 12.

<sup>95</sup> *Ibid.*

issues, and organizing other quality-of-life initiatives”, goals which had become threatened by transnational crime.<sup>96</sup>

## ***CONTEMPORARY INTERNATIONAL MECHANISMS OF PROTECTION***

The following section deals with the contemporary policy and legislative responses towards CST, as a reflection of the later typologies. In understanding how the legal responses fit into the typologies, areas for improvement emerge.

### *United Nations Convention on the Rights of the Child*

The international legal response to CST was advanced with the adoption of the *CRC* in 1989, which, offering recommendations explicitly for states, is the “most widely ratified of all human rights documents”,<sup>97</sup> and will be instrumental in the future development of child rights.<sup>98</sup> The impetus for such a global regulatory document is based in the long history of child exploitation, specifically child labour and can be understood as arising through a confluence of socio-historical themes and trends. The *CRC* is the first international accord for the express purpose of preventing sexual abuse and exploitation of children. Article 34 of the *CRC* states that:

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<sup>96</sup> Felson & Kalaitzidis, *supra* note 91 at 14.

<sup>97</sup> M. Freeman, & G. Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at 92.

<sup>98</sup> Levesque, *supra* note 91.

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

the inducement or coercion of a child to engage in any unlawful sexual activity;

the exploitative use of children in prostitution or other unlawful sexual practices;

the exploitative use of children in pornographic performances materials.<sup>99</sup>

While human rights, in general, were formally established in 1948 by the *United Nations Declaration of Human Rights*, the *CRC* was the first document that recognized the unique rights of *children* requiring special protections within the global community. Perhaps in harmony with a reliance on the views, ideas and participation of children, the Western World began to view all the world's children as the subjects of international law. The *CRC* recognizes that children "should grow up in a family environment, in an atmosphere of happiness, love and understanding",<sup>100</sup> adding that international cooperation is one of the most important factors leading to the fulfillment of this goal, particularly in developing countries where children could see improved living standards. A theme present on the international setting, and consistent with viewing children in the absence of boundaries, is a paradigm shift marking a commitment to transnational crime control.

While the UN has acted as a vehicle to promote awareness of child rights in general, and CST in particular, to its credit it has mechanisms in place to encourage compliance with its recommendations, enforcement remains limited. This has prompted calls for an international law enforcement agency which is able to address these barriers.<sup>101</sup> Some authors suggest that the *CRC* can best be conceptualized as an expression of the "3 Ps":

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<sup>99</sup> *CRC*, *supra* note 7, art. 34.

<sup>100</sup> *CRC*, *supra* note 7, preamble.

<sup>101</sup> L. Kelly & L. Regan "Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in Women for Sexual Exploitation in the UK" (2000) paper 125 Police Research Series.

protection, provision and participation.<sup>102</sup> The first two Ps are expressed more thoroughly in the *CRC* in that the document contains many provisions designed to protect children from drugs, exploitation and neglect, and also to provide education and health care. However, only one article explicitly states a child's right to freedom of thought and expression. In this sense, the *CRC* does not fully involve children as active role players on the child rights scene.

The type and amount of participation granted to children under the *CRC* and within children's projects requires attention. Franklin<sup>103</sup> refers to the "ladder of participation" in her analysis of the participatory roles granted to children. The lowest rung represents a situation monopolized by adults where children's voices are absent; the next rung is marked by "manipulation, decoration and tokenism" where participation of children, while minimally present, is just a façade. Nearer to the top of the ladder, children are active participants, and finally, children lead the key decision-making roles at the apex. While the *CRC* is recognized by some to be the closest we have ever come to the top rung, its critics would place it closer to the middle of the ladder. Green, for instance, notes that the level of participation implicit in the *CRC* is not specified, but rather is left vague. The *CRC* has high ideals reflecting a utopia, but it lacks provisions for practical implementation.<sup>104</sup>

Despite the weaknesses and criticisms that attack the very core of the *CRC*, many advocates of the Convention and its even critics stress the *CRC* as "an enormous advance" over the previous situation.<sup>105</sup> The failure of the *CRC* to respond to imminent matters of critical import has not taken away from the reality that it has made great strides toward the

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<sup>102</sup> Green, *supra* note 52.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*



recognition of children's rights serving as a political motivator. Introducing and securing child rights and the possible repercussions that flow upon establishing violations reflect a dramatic improvement over the previous regime "establish[ing] a benchmark of child rights that is rapidly approaching the status of the world's first universal law."<sup>106</sup> While the goal of the *CRC* is inarguably to increase participation among children regarding their status in society, the *CRC* has laid the groundwork ensuring this goal is more closely within reach than prior to the *CRC*.<sup>107</sup> The achievements made by the *CRC* are diverse and include international policy development, and also the participation of important international figures in conferences designed to promote further implementation of the principles.<sup>108</sup>

*Subsequent Congresses (Stockholm; Yokohama)*

In 1996, the *First World Congress against the Commercial Sexual Exploitation of Children* was held in Stockholm, Sweden resulting in a *Declaration and Agenda for Action*. The *Agenda* called upon signatories to make an even greater commitment to reducing child exploitation including "condemn[ing] and penaliz[ing] all those offenders involved, whether local or foreign..."<sup>109</sup> In order to carry out the obligations under the *Agenda*, extra-territorial legislation was to be developed by each country. In 2002, the *Second World Congress* in Japan

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<sup>106</sup> Green, *supra* note 53 at 202.

<sup>107</sup> Green, *supra* note 53.

<sup>108</sup> Levesque, *supra* note 91.

<sup>109</sup> "Stockholm Declaration and Agenda for Action." 1<sup>st</sup> World Congress Against Commercial Sexual Exploitation of Children. Stockholm, Sweden, 27-31 August 1996, online: <[http://www.csecworldcongress.org/PDF/en/Stockholm/Outome\\_documents/Stockholm%20Declaration%201996\\_EN.pdf](http://www.csecworldcongress.org/PDF/en/Stockholm/Outome_documents/Stockholm%20Declaration%201996_EN.pdf)>.

saw a re-affirmation of these principles,<sup>110</sup> causing more pressure on various national fronts to develop strategic responses.<sup>111</sup>

### *The UN-CRC Optional Protocol*

The next major international document reflecting the commitment of individual states was the *United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.<sup>112</sup> The preamble to the *CRC-OP-SC* expresses deep concern “at the widespread and continuing practice of sex tourism to which children are especially vulnerable...” and a belief that an elimination of the many forms of child exploitation can be achieved through,

“...adopting a holistic approach, addressing the contributing factors including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning [sic] families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking in children.”<sup>113</sup>

The *CRC-OP-SC* is especially related to the issue of CST and even more explicitly states that ET legislation is an appropriate measure to help curb the problem at a national level. Article 3(1) states that, “each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized

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<sup>110</sup> Ferens, *supra* note 4.

<sup>111</sup> We are quickly approaching the *Third World Congress* in November 2008 to be held in Rio de Janeiro Brazil to continue these discussions. See <[http://www.ecpat.net/World\\_Congress/congress/overview.php](http://www.ecpat.net/World_Congress/congress/overview.php)> for more on the objectives, key themes and preparatory discussions about the conference.

<sup>112</sup> UN General Assembly Resolution. (2002). *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children*. Available: <http://www.ohchr.org/english/law/crc-sale.htm> [*CRC-OP-SC*].

<sup>113</sup> *Ibid.*

basis.” The acts included are: sexual exploitation of the child, by offering, delivering or accepting a child for the purpose of sexual exploitation. Article 9 makes mention of the responsibility of states to include public awareness and education programs as part of a strategy by which to reduce child exploitation.<sup>114</sup>

Article 10, is of critical importance to CST requiring special provisions be taken for victims,

10.2 “States Parties shall promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation” and;

10.3 “States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.”

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<sup>114</sup> Freeman & Van Ert, *supra* note 97. It should be noted that, like the *CRC*, while the *CRC-OP-SC* sets out specific guidelines for states, such agreements do not amount to law in the same sense as domestic law. This matter has often been the subject of contention, however, states generally recognize conventions as legally binding once ratified. International agreements are also significantly more difficult to enforce than their domestic counterparts owing to the rare use of coercive techniques to guarantee compliance. See S.A. Williams & A.L.C. de Mestral, *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada* (Toronto: Butterworths, 1987).

## **CHAPTER 3: Challenging Bill C-27**

### ***INTRODUCTION***

One of the greatest, and perhaps most readily identifiable impacts of the *CRC*, is the introduction of national laws made in order to implement the document.<sup>115</sup> By becoming signatories to the *CRC* and the *CRC-OP-SC*, sending countries demonstrate their willingness to engage in harm reduction for these vulnerable populations; signatory states are obliged to operate bilaterally and multilaterally in order to protect children anywhere in the world. As a (partial) policy response to its commitments upon signing the *CRC* and the *CRC-OP-SC*, Canada extended the jurisdictional application of a series of sexual offences within the *Criminal Code* to cover transnational child sexual offences. In 1997, Bill C-27<sup>116</sup> created s. 7(4.1) of the *Criminal Code*<sup>117</sup> extending the application of specific provisions (child exploitation offences) extra-territorially.<sup>118</sup> This means that Canadians who commit these offences outside of Canada can be prosecuted for them within Canada. Since passing Bill C-27, there has only been one Canadian convicted, while at least two more await trials, and there remains a massive systemic problem whereby many Canadians are believed to be CST offenders, yet have escaped detection or prosecution.<sup>119</sup>

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<sup>115</sup> Green, *supra* note 53.

<sup>116</sup> Bill C-27, *supra* note 1 at s. 1.

<sup>117</sup> *Criminal Code of Canada*, *supra* note 2.

<sup>118</sup> Ferens, *supra* note 4.

<sup>119</sup> While this has not been tested in Canada, it is thought that one could argue that this application of ET law infringes on the rights and freedoms guaranteed by the *Charter*.

Additionally, in light of the problematic issues concerning child witnesses and in an attempt to reduce some of the burdens on victims, special provisions involving less intimidating methods of testifying became available in 1997,<sup>120</sup> and within the past three years, the RCMP's Integrated Child Exploitation (ICE) unit, a specialized enforcement resource that did not previously exist, has directed resources to investigating CST. Changes to Canada's legislation have also eliminated the requirements of double criminality; it is no longer necessary for the act to be illegal in both the host country as well as the sending country. Canada no longer requires a formal request from the host country to lay a charge (although some informal cooperation is usually required to facilitate an investigation on foreign soil). These modifications of criminal procedures, and the concentration of police resources on this issue, are intended to make the prosecution of sex tourists more straightforward. The goal was to provide a "more cost-effective and victim-sensitive means of obtaining evidence in child sex tourism cases."<sup>121</sup>

In a further drive to make prosecuting CST easier, and to increase awareness of the legislative changes, Canada's federal government distributed a guide for local law enforcement professionals and for consular offices around the world on the new legislation.<sup>122</sup> Subsequently, in 2002, Bill C-15A<sup>123</sup> relaxed investigative procedures even further with an aim to increase successful investigations of child exploitation, particularly

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<sup>120</sup> Bill C-27, *supra* note 1 at s. 7

<sup>121</sup> DOJ Canada, "Government Initiatives Protecting Children Against Exploitation" (2001), online: <[http://www.justice.gc.ca/en/news/nr/2001/doc\\_25853.html](http://www.justice.gc.ca/en/news/nr/2001/doc_25853.html)>.

<sup>122</sup> *Ibid.*

<sup>123</sup> Bill C-15A, *supra* note 17.

those occurring overseas, by allowing prosecutions to go forward on the consent of our federal Attorney General alone.<sup>124</sup>

In light of the reach of Canadian law established by Bill C-27, and extended through Bill C-15A, critics implied that the provisions contravened the *Charter of Rights and Freedoms*,<sup>125</sup> raising concerns that the legislative provisions might be struck down if subjected to a *Charter* challenge. In 2000, it was thought that this issue might be resolved in court<sup>126</sup> when Donald Bakker was charged with solicitation of a child under 18, sexual interference, and possession of child pornography, making him the first Canadian to be charged under the CST legislation. Speculation held that Bakker's lawyer was intending to argue that the legislation contravened the basic principles of international law.<sup>127</sup>

This chapter takes a closer look at the legal balancing act to be undertaken by Canada in light of the current child rights typology, the influence of international and transnational criminal law, and Canada's own procedural policies. When juxtaposed with typical transnational law enforcement, the laws that serve to protect children represent dramatic challenges to Canada's criminal procedure in practice, which Canada's constitutional framework calls into question. The convergence of these issues in a contemporary Canadian setting provides an example of a change in traditional jurisdictional standards and represents a drive to uphold international goals by adapting pre-existing national procedures to meet the new demands. In order to adequately address the research questions posed, it was imperative to partake in a critical legal analysis anticipating possible challenges to the CST

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<sup>124</sup> The original legislation required a request to prosecute from the country where the offense occurred in addition to the consent of the federal Attorney General.

<sup>125</sup> *Charter*, *supra* note 23.

<sup>126</sup> Ferens, *supra* note 4.

<sup>127</sup> Ferens, *supra* note 4.

law, particularly the changes governing the law of jurisdiction made by Bill C-27. For the purposes of this legal analysis, information was gathered from relevant legal and academic literature, as well as through precedent-setting Canadian case law.

## *TWO CHALLENGING LEGAL ISSUES*

The following commentary indicates that there are two specific fronts on which the law is problematic: (1) as a violation of the principles of international law, and (2) as a potential breach of s. 7 of the *Charter*. It is important to note the very different ways each issue can be resolved. In contrast to the *Charter*-based concerns, the non-*Charter* issues pertain to statutory construction and the international reach of domestic law. While Canada does not necessarily need to construct its domestic laws in accordance with the principles of international law,<sup>128</sup> it is in the best interest of Canada to take a principled approach when creating law that is to be administered on an international basis.

The second issue, that of the possible s. 7 infringement, is perhaps more nuanced in its application; there are a variety of ways a law may appear to violate this section, and if upon examination it is deemed that one of the purposes or effects of the law is indeed a violation of the *Charter*, the *Oakes* approach to s. 1 of the *Charter* is used to determine if the right infringement is indeed a reasonable limit on that right.<sup>129</sup> In *Morgentaler*, Dickson C.J., concurring in the Supreme Court decision, suggested that the advent of the *Charter* means that “Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic

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<sup>128</sup> It should be noted that failing to do so would create a poor impression of the country and may be particularly problematic with regard to international relations.

<sup>129</sup> D. Stuart, *Charter Justice in Canadian Law*, 4<sup>th</sup> ed. (Thomson: Toronto, 2005).

values expressed in the *Canadian Charter of Rights and Freedoms*,<sup>130</sup> the caveat being that this monitoring function of the courts should not be confused with a policy-making role.

## ***1 – JURISDICTION & PRINCIPLES OF INTERNATIONAL LAW***

The inclusion of s. 7(4.1), in the *Criminal Code* as of May 2007, extended criminal jurisdiction to mean that “everyone who outside of Canada commits an act or omission that if committed in Canada would be an offence against s. 151, 152, 153, 155, or 159, ss 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person...is a Canadian citizen...”<sup>131</sup> To understand the meaning of this statutory provision, it is necessary to pursue the issue of criminal law jurisdiction.

According to international law, jurisdiction “reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.”<sup>132</sup> Each country or state, in the international legal system, maintains exclusive and total jurisdiction over its territory.<sup>133</sup> Coughlan, et al. refer to a “nebulous and nuanced” application of this principle of jurisdiction, particularly when two or more states in the situation hold “concurrent

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<sup>130</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at para. 3 [*Morgentaler*].

<sup>131</sup> The relevant sections referring to sexual exploitation and misconduct involving children.

<sup>132</sup> M. Shaw, *International Law*, 6<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2003) at 572.

<sup>133</sup> S. Coughlan, R. J. Currie, H. M. Kindred & T. Scassa, *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization* (Prepared for the Law Commission of Canada, June 23, 2006).



jurisdiction.”<sup>134</sup> Extraterritorial law has been a part of the Canadian Criminal law tradition long before passing Bill C-27; Canada has used the universality principle in the past to prosecute some serious crimes committed overseas, specifically torture, genocide, terrorism, piracy and war crimes, seeing as “these offences are deemed to be offensive to the international community at large and thus justify broad jurisdictional permissiveness.”<sup>135</sup>

Generally, the assertion of jurisdiction by a country can occur in any one of a variety of ways where one of: the location, the accused, the evidence, or the proceeds of the crime, has a connection to its territory.<sup>136</sup> Currie and Coughlan indicate that ET jurisdiction can be exercised on one of five bases: territorial principle, nationality principle, passive personality principle, protective principle and universal principle.<sup>137</sup> Jurisdictional matters in the courts have often been resolved in favour of a broad basis for jurisdiction. In *R. v. Greco*, in reference to probation orders, it was found that the principles of international law do not limit state jurisdiction on probationers; Canada can exercise jurisdiction on probationers whether at home or abroad and thus may compel them to be bound by probation orders even while outside of the country.<sup>138</sup> Enforcing such an order may be difficult due to extra-territoriality, but the assertion of jurisdiction would not be in question. In *R. v. Bigelow*, consulting the inter-provincial issue of jurisdiction, the Ontario Court of Appeal found that, in reference to inter-provincial jurisdiction, the test is “whether *any element* of the offence has

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<sup>134</sup> *Ibid*, at 5.

<sup>135</sup> Coughlan, et al., *supra* note 133 at 7.

<sup>136</sup> Coughlan, et al., *supra* note 133.

<sup>137</sup> R.J. Currie & S. Coughlan, “Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?” (February, 2007) 11:2 Canadian Crim L. Rev.

<sup>138</sup> *R. v. Greco*, [2001] O.J. No. 4147 (C.A.).

occurred in the province claiming jurisdiction.”<sup>139</sup> The elements referred to might be the foresight needed to plan the offence, the actual *actus reus* of the offence, or the effects of the offence may register in the territory exerting jurisdiction.

Quigley identifies the historical approach to statutory construction as generally concerned with constructing laws within the territorial boundaries of the country unless some other policy aim is clearly being sought.<sup>140</sup> The rationale, (which has admittedly undergone change) was that fairness to the accused could best be sought by conducting a trial where evidence and witnesses were proximate. In other words, the default interpretation of the law will be that it applies territorially unless written into the law is some clear delineation that a broader application is desired. Section 7(4) clearly indicates that it is to be applied extra-territorially, and thus, no issues seem to arise with this jurisdictional rationale. Second, if no jurisdiction is outlined, it will be assumed that it is to apply within the country and not beyond. In accordance with *R. v. Bigelow*<sup>141</sup>, the third rule in that case suggests that misconduct that occurs overseas having an effect within Canada should be deemed to be covered under Canadian law. And finally, unless another intention is clear within the statute, the law will be assumed to have been written in compliance with the principles of international law.

It is this last principle that hinges upon the principles of international law. While the courts are not bound to the principles of international law when applying domestic law, it is considerably more influential when it is known that a domestic ruling will have international

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<sup>139</sup> *R. v. Bigelow*, [1982] O.J. No. 3314 (C.A.) at para. 10, emphasis added.

<sup>140</sup> T. Quigley, *Procedure on Canadian Criminal Law*, 2<sup>nd</sup> ed. (Thomson: Toronto, 2005). For details on procedure in the American setting, see also: C. Doyle, “Extraterritorial Application of American Criminal Law” (CRS Report for Congress: September 10, 2007).

<sup>141</sup> *Bigelow*, *supra* note 139.

consequences or relevance.<sup>142</sup> The question to be determined is under what circumstances does international law support the actions of a country exerting ET jurisdiction? The answer is likely related to an understanding of whether other nations are served by the ruling, or perhaps what international interests are at stake, or further, what consequences would be suffered by other nations in such proceedings.<sup>143</sup>

The main principle of jurisdiction, the territorial principle, is supplemented in order to widen jurisdiction for certain crimes.<sup>144</sup> The nationality principle is important in cases where the person who committed the crime is a national.<sup>145</sup> The principle, used in understanding jurisdiction, indicates that the state may exert jurisdiction on its nationals for crimes committed in other territories.<sup>146</sup> Some of the most common examples cited for the extension of jurisdiction extra-territorially, based on the nationality principle, include a state's responsibility for its nationals when they are part of the military or employed in the public

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<sup>142</sup> While there is disagreement on whether international law is binding, it has been suggested that while international law is not binding, there is a presumption of conformity that is understood by the courts. For a more complete discussion see:

S. Beaulac, "On the Saying that 'International Law Binds Canadian Courts'" (Fall, 2003) Bulletin 29, Vol. 3 Canadian Council on International Law : On International Law Binding Canadian Courts, online: <[http://www.ccil-ccdi.ca/index.php?option=com\\_content&task=view&id=110&Itemid=76](http://www.ccil-ccdi.ca/index.php?option=com_content&task=view&id=110&Itemid=76)>.

<sup>143</sup> A 1935 Harvard Law study provides the most common delineation of international law interests in such cases. See: "Harvard Research in International Law", 29 Am J. Int'l law. 442 (Supp. 1935.) [Harvard Law].

<sup>144</sup> The basic legal jurisdiction discussed above is often followed by an analysis of the prescriptive, enforcement and judicial jurisdiction. Prescriptive jurisdiction refers to the actual ability to make law that would apply outside of a country's territorial limits, enforcement or investigative jurisdiction refers to the ability of law enforcement to investigate the offense and to put the intention of the legislation into play, judicial jurisdiction refers to the ability of the courts to try the offense given the nature of the overseas evidence. While addressing the territorial jurisdiction helps solve the problem of prescriptive jurisdiction via the principles of international law, we might also concern ourselves with whether such ET investigations can actually be conducted and whether the court is able to resolve issues given the oftentimes limited evidence. Harvard Law, *Ibid* at 139.

<sup>145</sup> The passive-personality principle comes into play when the victim is a national; this principle is much less common. Essentially, "aliens may be punished for criminal acts committed abroad which are harmful to nationals of the forum." See Williams & de Mestral, *supra* note 114.

<sup>146</sup> Williams & de Mestral, *supra* note 114.

service.<sup>147</sup> Additionally, there are specific offences such as treason and piracy which commonly present an occasion to assert ET jurisdiction based on the nationality principle.<sup>148</sup>

### *The “Real and Substantial Connection” Test*

Ferens poses concern, however, suggesting that CST can be differentiated from its transnational counterparts, and thus may not be justified using the same principles. In instances of CST, law is concerned with prosecuting offences that occurred not *partially* in foreign territory but *entirely* within the jurisdiction of a country that has its own justice system, thus differentiating it from the justifications used in *Bigelow*. Additionally, it has been argued that without bringing any of the criminal elements back to Canada, such offences are not of a direct concern to Canada and its nationals.<sup>149</sup>

While jurisdiction can be asserted extra-territorially, the principles of international law require there to be some “genuine link” demonstrated between the person and the crime<sup>150</sup>. In order to fulfill this requirement, La Forest J. established the “real and substantial

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<sup>147</sup> *National Defence Act*, R.S.C. 1985, c. N-5, as amended, sections 67, 130 and 132, *Criminal Code*, sections 7(4); 7(1)(a); 477.1(a) and (b); 477.1(d); 477.1(e); 7(2.3); 7(2.31) dealing with military personnel, federal public servants, aircraft; aircraft in flight landing in Canada, offences pertaining to Canada’s economic zone or continental shelf, in the course of a “hot pursuit” from Canada; offences by Canadians outside the territory of any state; during a space flight as a Canadian crew member; and during a space flight as a non-Canadian crew member respectively.

<sup>148</sup> Section 46(3) high treason; s. 74 and 75 piracy; s. 57 fraud related to passports; s. 58 fraudulent use of Canadian citizenship; s. 290 bigamy; s. 7(2) hijacking; s. 7(2.1) and (2.2) in regards to a ship at sea; s. 7(3) offences directed at “internationally protected persons”; s. 7(3.1) hostage taking; s. 7(3.2), (3.3) and (3.4) nuclear offences; s. 7(3.7) torture; *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ss. 6 and 8 genocide; s. 6 and 8 crimes against humanity; 6 and 8 war crimes; 7 and 8 breach of command responsibility in relation to genocide, a crime against humanity or a war crime; s. 7(4.1) sexual offences against children; and s. 465(3) and (4) conspiracy.

<sup>149</sup> Ferens, *supra* note 4.

<sup>150</sup> J. Currie, *Public International Law* (Irwin Law: Canada, 2001) at 298.

connection” test in relation to jurisdiction in *Libman*.<sup>151</sup> In *Libman*, La Forest J. stated the primary basis for jurisdiction, following from an English legal background, is territorial; it is not usually in a state’s interest to regulate behaviour that takes place beyond its borders. However, while this is the norm, international law does permit a state to exercise jurisdiction on other grounds. In order to clarify what La Forest J. calls “doctrinal confusion”,<sup>152</sup> he characterizes the Canadian legal approach to jurisdiction as having embodied a more flexible approach, expanding the rigid territorial approach to encompass behaviour “where the impact of a crime was felt in Canada.”<sup>153</sup> What is needed for jurisdiction to be asserted is a “real and substantial link between an offense and this country.”<sup>154</sup> This will not offend comity<sup>155</sup> since it makes no sense for a person to be able to avoid the reach of the law by simply leaving the country. Interestingly, La Forest J. does not define the outer parameters of the test and suggests that they would naturally be defined by “the requirements of international comity.”<sup>156</sup>

Being able to assert jurisdiction on the basis of territoriality and nationality is a result of both sovereignty and independence. The real and substantial link for an offence committed beyond the territory of Canada can be described as follows:

“The fundamental bases for the exercise of jurisdiction by a State are rooted in two

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<sup>151</sup> *R. v. Libman*, [1985] S.J.C. No. 56.

<sup>152</sup> *Ibid*, at para. 17.

<sup>153</sup> *Libman*, *supra* note 151 at para. 59.

<sup>154</sup> *Libman*, *supra* note 151 at para. 74.

<sup>155</sup> The term comity is used to refer to reciprocity and respect for the legal processes of other states. See: A. Warner La Forest, “The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings” (2002) 28 *Queen's L.J.* 95 – 176.

<sup>156</sup> *Libman*, *supra* note 147 at para. 76.

aspects of the modern concept of the State itself: defined territory and a permanent population. In principle, a State has jurisdiction over all persons, property and activities in its territory; a State also has jurisdiction over its nationals *wherever they may be*<sup>157</sup> [emphasis added].

In *R. v. B. (O.)*, a transnational case arising in the United States, but involving Canadian citizens, Abella J.A.<sup>158</sup> determined that using the “real and substantial link” test identified in *R. v. Libman*<sup>159</sup> is favoured over the vaguer “any element” test described above.<sup>160</sup> She clarifies that in establishing a “real and substantial link” one must be cautious not to rely too heavily on the characteristics of the parties involved at the expense of paying attention to the offence itself. She suggests that

“other than in s. 7, the Criminal Code does not purport to assume original jurisdiction over criminal activity in foreign territories simply because the activity was carried on by Canadians in a Canadian vehicle. There must be more than Canadian residence or vehicular ownership; there must be a significant link between Canada and the formulation, initiation, or commission of the offence.”<sup>161</sup>

Without such a link, the claim of jurisdiction will not be upheld. In applying the test to CST, the connection can be rationalized by more than the status of the accused (and possibly victim), by reference to Canada being the territory where intent was formed, and the country where evidence in the form of child pornography is often stored in addition to the connection established by the policy goal of addressing transnational CST.

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<sup>157</sup> B.H. Oxman, “Jurisdiction of States” (1987) 10 *Encyclopaedia of Public International Law*, 279.

<sup>158</sup> As she then was.

<sup>159</sup> *Libman*, *supra* note 151.

<sup>160</sup> *B. (O.)*, *supra* note 5.

<sup>161</sup> *B. (O.)*, *supra* note 5 at para. 12.

## 2 – CONSTITUTIONALITY OF SECTION 7(4.1)

It is significantly harder to evaluate legislation than to evaluate the judicial application and interpretation of legislation. While there is no formal way to evaluate legislation before it has actually been applied, we can turn to the *Charter* to aid us in evaluating the constitutionality of legislation in practice, and thus, make more sense, and offer a stronger argument to reflect upon the actions of the courts. In order to assess the acceptability of s. 7(4.1) of the *Criminal Code*, this analysis begins with an examination of the *Charter* to see where CST legislation might conflict with the freedoms guaranteed therein. The sections integral to this analysis are s. 7 which guarantees legal rights, and s. 1 which guarantees all of the rights and freedoms subject to reasonable limitations.<sup>162</sup>

### *Interpreting Section 7 of the Charter*

It is important to set out s. 7 as it has been interpreted by the Supreme Court of Canada. Dickson C.J. and Lamer J in *Morgentaler*<sup>163</sup> suggested:

section 7 of the Charter requires that the courts review the substance of legislation once the legislation has been determined to infringe an individual's right to "life, liberty and security of the person." Those interests may only be impaired if the principles of fundamental justice are respected. It was sufficient here to investigate whether or not the impugned legislative provisions met the procedural standards of fundamental justice and the Court accordingly did not need to tread the fine line between substantive review and the adjudication of public policy.<sup>164</sup>

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<sup>162</sup> Section 1 of the *Charter* reads: "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." Section 7 of the *Charter* reads: "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."

<sup>163</sup> *R. v. Morgentaler*, [1988] S.C.J. No.1.

<sup>164</sup> *Ibid*, at preamble.

Thus, an actual deprivation must be identified, before an inquiry into whether the deprivation is (or is not) “in accordance with the principles of fundamental justice.”<sup>165</sup> Lamer C.J. additionally clarifies that when assessing the principles of fundamental justice, it is not appropriate to balance an individual deprivation against societal interests. The correct place to contemplate the value of societal interests and balance these against individual rights is under s. 1 of the *Charter* “where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society.”<sup>166</sup> The CST provisions clearly interfere with a person’s liberty; forcing someone to comply with Canadian penal law while they are overseas and subject to the law of that land, constitutes interference with their freedom of action, exposing them to possible penal consequences.<sup>167</sup>

### *Principles of Fundamental Justice*

Section 7 of the *Charter* does not establish absolute rights; rather State interference with life, liberty or security of the person is justified if it is in accordance with the principles of fundamental justice. Dickson C.J. and Lamer J in *Morgentaler*, suggest that “the basic tenets of our legal system” form the principles of fundamental justice and in *Reference re Motor Vehicle Act (British Columbia)*<sup>168</sup>, the phrase is shown not to be a right in and of itself, but rather is

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<sup>165</sup> *R. v. Swain*, [1991] S.C.J. No. 32 at para. 30, Lamer C.J.

<sup>166</sup> *Ibid* at para. 46.

<sup>167</sup> The test for determining whether a law violates a liberty interest. See: *Reference re Motor Vehicle Act (British Columbia)* S 94(2), [1985] S.C.J. No. 73 [*Motor Vehicle Reference*].

<sup>168</sup> *Ibid*.



a qualifier to the protected right not to be deprived of ‘life, liberty and security of the person’; its function is to set the parameters of that right...The words ‘principles of fundamental justice’, therefore, cannot be given any exhaustive content or simple enumerative definition but will take on concrete meaning as the courts address alleged violations of s. 7.<sup>169</sup>

Two principles of fundamental justice entrenched in the Canadian legal tradition and applicable to the CST legislation are: a law should be devoid of vagueness, and court procedures should be carried out with attention to due process. These principles may be paired with a doctrine of statutory construction that promotes for a purposive approach of the criminal law by the judiciary, and prompts ruling in favour of the accused upon finding ambiguity within the law. In light of these considerations, it is expected that the most effective challenge to Canada’s CST legislation will be based on the absence of due process and the presence of vagueness in the text of the legislation.

*Principles of Fundamental Justice: The Vagueness Doctrine*

The doctrine of vagueness is not directly identified in the *Charter*, however, as Ribeiro points out; its use can be triggered by an implicit reading of certain sections of the *Charter*.<sup>170</sup> He also argues that, although the doctrine might not be readily identified in the constitution, its supporting rationales have close ties to our legal tradition and the rule of law. The principle of legality – *nullum crimen nulla poena sine lege* – requiring that “penal laws be prospective only in reach” in order to avoid unfair surprise, strengthens the foundation for

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<sup>169</sup> *Ibid.*

<sup>170</sup> M. Ribeiro, *The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2005).

the doctrine of vagueness.<sup>171</sup> Ribeiro suggests that the doctrine of vagueness requires a balance between “legal certainty and flexibility.”<sup>172</sup> The first clear judgment outlining the nature of the vagueness doctrine arose in 1992 with the decision of *R. v. Nova Scotia Pharmaceutical Society*<sup>173</sup>; a challenge was brought (under s. 7 of the *Charter*) against 32(1)(c) of the *Combines Investigations Act*. In that case, Gonthier J. for the Supreme Court reasoned where the vagueness doctrine should be situated in the *Charter*. The doctrine of vagueness, raised under s. 7 of the *Charter* asserts that a principle of fundamental justice requires that laws not be too vague<sup>174</sup> and thus it was appropriate to discuss it within that context.

In sum, vagueness can be raised under s. 7 when a law implies a limitation on life, liberty and security of the person that would not occur but for the vagueness of the legislation. The precise factors to be considered in assessing vagueness are identified as follows: the need for flexibility and the interpretative role of the courts; the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate, and the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist.

A clear rationale for the inclusion of the doctrine of vagueness is to avoid the unfair surprise that would be experienced if an accused did not have fair notice of the law; if a law does not provide fair warning to a citizen as to the scope of the law, it is said that they are victims of “unfair surprise” or in other words, they could not have foreseen that the law would apply to their behaviour. Gonthier J. indicates that “fair notice” must take into

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<sup>171</sup> *Ibid* at 5.

<sup>172</sup> Ribeiro, *supra* note 170 at 2.

<sup>173</sup> *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No.67 [*Pharmaceutical Society*].

<sup>174</sup> *Ibid*.

account two factors. First, the core concept of notice looks not only at procedural content, but also at substantive content.<sup>175</sup> In other words, it is not enough to bring the law to the attention of citizens, but, fair notice also necessitates that the law has arisen due to a subjective understanding that it responds to some underlying value or policy in society. Thus, citizens must have a formal aspect of notice, meaning the “acquaintance with the actual text of a statute”,<sup>176</sup> they should also have a subjective understanding that the behaviour prohibited by the statute is regarded by society as one in need of regulation. However, Gonthier J. shows deference to the common law maxim “ignorance of the law is no excuse.”<sup>177</sup> In fact, in *Finta*,<sup>178</sup> the Supreme Court of Canada indicated that even without specific knowledge of the criminality or moral reprehensibility of given behaviour, mens rea can be established. Noticing that this statement diverges somewhat from the writings of some international legal scholars, the Supreme Court clarified that while scholarly contributions are useful, their comments often need to be regarded as suggestions as to what the law ought to be, rather than what it is.

One academic writer, Healy, interprets the common law maxim very differently, indicating that because the principle of legality requires prior notice, no person could be convicted of an offense unless s/he could have known that the actions were in

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<sup>175</sup> “The doctrine of vagueness is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion...Fair notice to the citizen comprises a formal aspect -- an acquaintance with the actual text of a statute -- and a substantive aspect -- an understanding that certain conduct is the subject of legal restrictions.” *Prostitution Reference and Committee for the Commonwealth of Canada in Pharmaceutical Society*, *supra* note 173.

<sup>176</sup> *Pharmaceutical Society*, *supra* note 173, at para. 44-45.

<sup>177</sup> Section 19 of the *Criminal Code*. See also *R. v. MacDougall*, [1982] 2 S.C.R. 605.

<sup>178</sup> *R. v. Finta*, [1994] 1 SCR 701.

contravention of the law.<sup>179</sup> Since ignorance of the law is not a valid defence in our legal system, it would be unjust to convict someone for a crime that s/he could not ascertain (with regard to its existence or content). He concedes that expecting any individual to know every intricacy within the law is absurd, given a complex system; however, the assertion is made that this “knowability” component is important. Thus, it is imperative that laws are published in some manner.

The second “core concept of notice” demands a more subjective interpretation.

Gonthier J. states,

the substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.<sup>180</sup>

It is not possible to have fair notice (in the formal concept) when a law is so vague as to prevent an understanding of its scope. For instance, substantive notice requires that a citizen can, with reasonable thought, discern whether something is incorporated within Canadian law. With rational thinking, one should be able to determine that Canadian law likely has some provisions against murder and assault; while they may not be privy to the specific intricacies of the law, it is obvious that these behaviours would be illegal in some way.

Now, take the issue at hand. In terms of section 7(4.1) of the *Criminal Code*, vagueness rests mainly on the issue of jurisdiction. Is it reasonable to assume “sufficient notice” given Canada’s claim of jurisdiction on an offence that occurred entirely outside of

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<sup>179</sup> P. Healy, “Restraint in the Criminal Law” (n.y.) The International Cooperation Group: Department of Justice Canada, online: <<http://www.doj.ca/eng/pi/icg-gci/cl-dp/cl-dp.pdf>>.

<sup>180</sup> *Pharmaceutical Society*, *supra* note 173, at para. 48.

its borders? While it may be posed that it is reasonable to assume that Canada might assert jurisdiction on offences on aircraft, drug trafficking and terrorism, and also offences where some aspect is connected to the territory of Canada (i.e.: associated events or planning began in Canada), the question remains: is it reasonable to know that sexual offences against children will fall into this category? A few scenarios can be readily envisioned where this principle might become problematic. Given the application of s. 7(4.1) to Canadian citizens committing what Canadians would consider to be an offence while they are overseas, one can imagine a situation where someone has visited an overseas location to the extent that the boundary becomes blurred as to whether they are indeed still travelling, or have taken up residence in the country.

An example that complicates matters is when a Canadian national has taken up residence in another country and participates in behaviour that, while not against the laws of the country in which s/he resides, is forbidden in the country in which s/he is a national. This may not be a problem when foreign consent is given to Canada for a prosecution; however, in more recent (post 2002) or future cases where foreign consent is not necessary, this issue may be a live one. In the case of Klassen, the accused lived in at least one of the countries where the offences took place (Colombia). Whether a reasonable person<sup>181</sup> in his position had reasonable notice that he was subject to Canadian law in the case of child sexual offences, remains unclear. If we can point to the nationality principle to demonstrate an appropriate nexus between the crime and the country of prosecution, the problem is minimized, however, the problem persists in the scenario where a person has lived abroad for many years. Further, Bill C-27 suggests that the purpose of the policy is to curb the

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<sup>181</sup> Knowledge of the law is that of the reasonable person; thus we need not ask whether the actual accused knew of the law, but rather whether the reasonable person would have knowledge.

practices of child sex *tourists* – if the scope of the law is read to apply to expatriates as well, this might be conceived of as an expansion of the intended scope of the legislation.

A contrary view arises considering the current social climate in Canada and globally, indicative of domestic interests in combating transnational crime. Notice of this trend could serve to create the substantive elements required for notice of the parameters of the legislation. Would a reasonable person, faced with international concern (particularly in the advent of increased globalization) with child exploitation assume that Canada would have laws dealing with such crimes? The likely answer to these questions would be determined in court by using expert testimony and consulting academic and policy literature with reference to what the reasonable Canadian could be expected to know. Although it remains to be seen what the reasonable person would know, the efforts to promote awareness in Canada surrounding the issue predict some level of public knowledge.

In sum, crimes are generally prosecuted in the jurisdiction where they are committed. In the case of CST, however, ET legislation allows for the prosecution by an offender's national country even when the crime occurred in another country. One might argue that it would be unreasonable to assume that actions committed on foreign soil would be illegal in Canada and thus notice of the substantive law would be absent, leading to a vagueness challenge. Differing circumstances might serve to make the concern even greater: for example, lengthy residence in the foreign country by the accused, and the non-culpable legal status of the offence where it occurred are each relevant factors. Would a rational person, upon their contemplation of what is included in Canadian law, come to the determination that a few matters of criminal law, namely offences against children would assume Canadian jurisdiction wherever they are committed? Or would they instead be subject to unfair surprise?

If challenged, s. 7(4.1) may be found to be inconsistent with the principles of fundamental justice. This could arise if a claim is made that the provision suffers from: vagueness created by a lack of sufficient notice produced by the scope of the law. While ignorance of the law is certainly not a defence, and while each citizen is required to have knowledge of the law governing his/her conduct, it is fair to ask: would a reasonable Canadian national be an expert in understanding to which law s/he owes obedience? Thus, the application of Canadian law to a case that occurred outside of Canada may be problematic because the accused may not have had reasonable notice that he/she was to conduct him/herself in a particular manner according to Canadian law.

*Principle of Fundamental Justice: Due Process*

The common law provides an illustration of what constitutes a fair trial in terms of achieving procedural fairness adhering to the dictates of due process. Due process considerations are important in the consideration of s. 7(4.1) on two fronts. First, challenges to investigatory practices centre on the fairness of the process. Second, transparent court processes rely on properly collected evidence overseas as an important factor arising in ET criminal cases. In a discussion of procedural fairness and its guarantee by s. 7, La Forest J. for the majority in *Lyons* stated that “s. 7 of the Charter entitles the [accused] to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined.”<sup>182</sup> Furthermore, L’Heureux-Dube J. for the minority in *O’Connor*<sup>183</sup> suggested

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<sup>182</sup> *R. v. Lyons*, [1987] 2 S.C.R. 309.

<sup>183</sup> In *R. v. Carosella*, [1997] S.C.J. No. 12 the accused was charged with gross indecency against a student. Evidence in the form of social worker notes upon a visit by the complainant had been destroyed prior to trial. See also *R. v. O’Connor*, [1995] 4 S.C.R. 411.

that in cases “where evidence is unavailable, the accused must demonstrate that a fair trial, not a perfect one, cannot be held as a result.”<sup>184</sup>

There have been a number of cases alleging breaches of procedural fairness involving a challenge based on s. 7 of the *Charter* that have failed based on the comments of L’Hereux-Dube J. In *Czuczman*,<sup>185</sup> a case regarding the right of the accused to be present at his own trial, the Ontario Court of Appeal accepted that the standard of fairness requires “the right of an accused to be present to face his accuser and cross-examine him, to give evidence, to make full answer and defence and generally to participate in the trial...”<sup>186</sup> It would appear to follow then, that fairness necessitates the accused to be able to face (in person) the victims in a CST case. Additionally in *Ruby v. Canada (Solicitor General)*,<sup>187</sup> Justice Arbour gave reasons for the court’s dismissal of a s. 7 challenge to part of the *Privacy Act* which mandated in camera hearings and ex parte representation.

In order to achieve a fair trial, the accused must have a right to cross-examine witnesses. The leading case defining the scope of the law in this area of evidence is *Osolin* (1993)<sup>188</sup> wherein Cory J., for the majority stated that:

Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to the accused. This is an old and well established principle that is closely linked to the presumption of innocence.<sup>189</sup>

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<sup>184</sup> Stuart, *supra* note 129.

<sup>185</sup> *R. v. Czuczman*, (1986), 49 C.R. (3d) 385 (Ont. C.A.).

<sup>186</sup> Brooke J.A. in *Czuczman*, *supra* note 185.

<sup>187</sup> *Ruby v. Canada (Solicitor General)* (2002), 7 C.R. (6<sup>th</sup>) 88 (S.C.C.) [*Ruby*].

<sup>188</sup> *R. v. Osolin*, [1993] S.C.J. No. 135.

<sup>189</sup> *Osolin*, *supra* note 182.



He further indicated that the

right is now protected by ss. 7 and 11(d) of the Charter [sic]. As a result it should be interpreted in the ‘broad and generous manner’ befitting its constitutional status.<sup>190</sup>

The right to cross-examine is not an absolute one, and is limited by the dictates of reason so that admissibility is sought and a balance between probative value and prejudice is struck.<sup>191</sup>

After establishing how two principles of fundamental justice are affected by the CST legislation, the majority in *Suresh* indicate that we should ask whether the deprivation would “shock the Canadian conscience.”

#### *The Value of Taking a Contextual Approach*

The court may also pay close attention to the context of CST and Canada’s international commitment in addressing whether the restriction on liberty can be justified in accordance with the principles of fundamental justice. Currie identified a contextual approach taken towards the principles of fundamental justice, recognizing, for example, the transnational context of extradition,<sup>192</sup> and likewise, Sharpe and Roach identify the utility of a holistic approach to a s. 7 analysis where contextual factors are taken into account.<sup>193</sup> Such a distinction has been justified by the courts by a need to balance concerns of restricted individual liberty (in the case of extradition, concerns of torture) with the principles of

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<sup>190</sup> *Osolin*, *supra* note 189.

<sup>191</sup> *Stuart*, *supra* note 129.

<sup>192</sup> R.J. Currie, “Charter Without Borders? The Supreme Court Of Canada, Transnational Crime And Constitutional Rights And Freedoms” (Spring 2004) 27:23 *Dalhousie L.J.* [Currie, “Charter”].

<sup>193</sup> R.J. Sharpe & K. Roach, *The Charter of Rights and Freedoms*, 3<sup>rd</sup> ed. (Irwin Law: Toronto, 2005) at 72.

comity and international relations including the goal of fighting transnational crime.<sup>194</sup> In the balancing act, fleshed out in *Suresh*,<sup>195</sup> the Canadian government clearly identifies torture as inconsistent with the principles of fundamental justice. However, it was indicated that Canada's interest in combating a transnational crime must be balanced against individual liberty. Applied to CST, this balancing scheme indicates that the interest of addressing the victimization of millions of vulnerable children worldwide must be balanced against the restriction on liberty of those Canadians who are accused of abusing them. This argument is especially persuasive since, in the case of risk of torture, a grave human rights concern, the restriction on liberty may lead quite possibly to death, whereas the consequences due to limited liberty in the context of CST investigations and prosecutions are considerably less severe. The ruling in *Suresh* left open the possibility that a limit on liberty might be justified in a transnational matter of public security by balancing the above interests in s. 7 or in s. 1.<sup>196</sup>

## SECTION 1 ANALYSIS

Section 1 can potentially be used to justify a legislative provision where it has been found to breach s. 7 of the *Charter*.<sup>197</sup> While there is no explicit mention by the SCC

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<sup>194</sup> Currie, "Charter", *supra* note 192.

<sup>195</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [*Suresh*].

<sup>196</sup> The issue of comity is an important one where liberty is concerned. Historically, comity and liberty have been balanced where matters of transnational interest are at stake, particularly extradition. While the courts in cases such as *Suresh* have alluded to the principles of comity as a appropriate limit on fundamental rights and freedoms, especially due process, there has also been concern that international law will water down what have been instrumental rights for centuries. See A. Warner La Forest, "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28 *Queen's L.J.* 95 – 176.

<sup>197</sup> See for example *Morgentaler*, *supra* 163.

indicating that a breach of s. 7 can never be saved by s. 1, arguments to the contrary have been unsuccessful to date. Wilson, J. in *Motor Vehicle Reference* suggests that by definition, a violation of s. 7 cannot be a reasonable limit.<sup>198</sup> Accordingly, s. 7 limits are usually justified in the principles of fundamental justice stage.<sup>199</sup> In light of *Suresh*, however, the transnational elements of CST and the blatant international commitment made by Canada to exercise ET law in response, present a vastly different character than those cases that have been heard at the Supreme Court. As a result, it remains important to ask if in fact it can be determined that section 7(4) places a limit on a right guaranteed under the *Charter*, whether this is a justifiable limit and thus saved by s. 1 of the *Charter*.<sup>200</sup>

The analysis of s. 1 usually develops along two overarching dimensions: “prescribed by law” and “reasonable limit.” In considering “prescribed by law” we come to the second way by which vagueness enters the analysis. If a law is considered too vague (perhaps by the argument described above), it cannot be said to be prescribed by law.<sup>201</sup> To determine the threshold for vagueness for this purpose, Gonthier J. goes further in stating that “a vague provision does not provide an adequate basis for legal debate.”<sup>202</sup> If the statute is so vague that the judiciary could not partake in a useful discussion of its merit, there is no point in attempting to do so. However, it has been determined by subsequent legal scholars that

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<sup>198</sup> *Motor Vehicle Reference*, *supra* note 167.

<sup>199</sup> See for example, *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No.194. & *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

<sup>200</sup> Section 1 reads: “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.”

<sup>201</sup> See *Pharmaceutical Society*, *supra* note 173.

<sup>202</sup> *Pharmaceutical Society*, *supra* note 173 at para. 63.

“almost any provision, no matter how vague could provide a basis for legal debate,”<sup>203</sup> indicating that the threshold for defining a vague statute as too vague is extremely high. It must be only minimally intelligible to allow debate. As the vagueness doctrine is still in its infancy, it has not been concretely determined by courts just how it fits into the Canadian legal framework.

The *Oakes* test is generally accepted as setting the dictates of when a *Charter* violation may be upheld as a reasonable limit. It is generally impossible to save a s. 7 violation under s. 1 since a law that has been found to be not in accordance to the principles of fundamental justice, can rarely be claimed to be a reasonably prescribed limit under s. 1. Although the analysis above does not conclude outright that s. 7(4) is inconsistent with s. 7 of the *Charter*, it is a worthwhile legal exercise to imagine a hypothetical case that identifies an inconsistency. In view of the hypothetical case, it is essential to carry on with the *Oakes* test to determine whether a limit could be saved by s.1. The idea behind s. 1 is that “it may become necessary to limit (individual) rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.”<sup>204</sup>

## THE OAKES TEST

*R. v. Oakes*<sup>205</sup> determined that there is a two step process to be engaged when assessing whether a *Charter* violation is a justifiable limit on individual freedom.<sup>206</sup> It is

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<sup>203</sup> P. Hogg in Ribiero, *supra* note 170.

<sup>204</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 65, Dickson C.J.

<sup>205</sup> *Oakes*, *supra* note 204.

during this analysis where we look toward the social purpose of the law as balanced against individual freedoms, keeping in mind that the standard of proof is on a balance of probabilities.<sup>207</sup> The steps are laid out as follows:

1. Sufficient importance of the objective (to avoid trivial or discordant objectives)
2. Means chosen are reasonable and demonstrably justified (the proportionality test)

Carefully crafted – rational connection

Minimal impairment of right or freedom in question

Proportionality between the effects and the objectives

It would be difficult to suggest that the objective, that of reducing and creating accountability for international child exploitation, is anything other than important. The social science literature comprising Chapter 2 of this thesis indicates the importance of a united international response to CST particularly as globalization requires enhanced and creative responses to all issues of transnational nature. As well, protection of children can be seen as a general goal of governments. Furthermore, the international commitment made explicit by Canada by signing the *CRC*, this claim can be readily substantiated. Rather than proving part 1 of the *Oakes* test, the conclusion of which seems readily apparent, it is the task of this analysis to address the three part proportionality test.

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<sup>206</sup> It should be noted that the onus here is on the party seeking to maintain the limit and the proof is on a balance of probability.

<sup>207</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 78 [*Irwin Toy*].

## *The Proportionality Test*

It may be submitted that a rational connection exists between the objective and the law; whereby the objective of combating CST is secured through a carefully tailored legislative scheme. It may also be asserted that there is proportionality between the effects and the objectives of the law. However, problems may be found with the minimal impairment of the freedom in question, the section of the *Oakes* test that can be described as the most important. If the law is determined to be vague, it may unnecessarily limit s. 7. If the law were re-written, perhaps s. 7 could be less impaired.<sup>208</sup> While vagueness was considered in the s. 7 analysis,

it can also be raised under s. 1 of the Charter in limine, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on Charter rights be "prescribed by law." Vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test. Vagueness, when raised under s. 7 or under s. 1 in limine, involves similar considerations and should be considered a single concept. Vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of "overbreadth."

Vagueness, in relation to s. 1 can be understood in two main ways. First, when determining if a limit or a right is "prescribed by law" – it is relevant to ascertain whether it is overly vague, if so, it cannot be considered a law in the first place. Second, since vague laws can be interpreted in an overly broad way, it may be difficult to prove that a vague law meets the requirement of minimal impairment of a *Charter*-protected right.

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<sup>208</sup> Although beyond the scope of this analysis, we must at some point ask, if Canadian citizens can be prosecuted for offences overseas, should they not also be afforded *Charter* protections for corresponding overseas investigations? In case law, it has been determined that such application is not necessary, however, if the case is then tried in Canada, would such protections be necessary for adjudication? In *R. v. Hape*, [2007] 2 S.C.R. 292, LeBel J. indicated that while Canadian police are encouraged to conduct overseas investigations "in accordance with the letter and spirit of the *Charter*," (para 112) the guarantees within the *Charter* do not apply directly to these investigations.

Additionally, the Supreme Court has indicated that minimal impairment does not always require the absolute least impairment, particularly in cases where victims are involved and where these victims are especially vulnerable. For instance, in writing for the minority in *Sharpe*,<sup>209</sup> McEachern C.J. suggested that sometimes text cannot be revised in a way that would still achieve the mandated purpose, but would offer less impairment.<sup>210</sup> This appears to be the case with the CST law; although the net cast by the law is wide and thus may catch some people who would not have been able to know that their behaviour was covered under the law, it is difficult to envision how the law could be re-written and still meet the same objectives. In the past, the court has indicated its aversion to requiring the legislature to take “the least ambitious means to protect vulnerable victims.”<sup>211</sup> Simply due to a possible way to reformat the legislation, does not indicate that this is a preferable solution.

Furthermore, McEachern C.J., indicates that when balancing the interests of vulnerable children against the individual who may have his/her rights limited, we are not to become overly concerned with the latter. Taking this into consideration, the examples that arise in imagining where a particular *Charter* challenge may arise in the instance of the CST laws (related to vagueness or due process concerns) are likely not common. To allow these instances to restrict protection of children seems in direct contrast to the goals of the *Charter* which hold protection of vulnerable groups paramount. McLaughlin C.J. for the minority in *Sharpe*,<sup>212</sup> agreed with McEachern C.J. clarifying that children are one of the most vulnerable groups in society and are deserving of heightened protection: a universally accepted goal

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<sup>209</sup> *R. v. Sharpe*, [1999] BCJ No. 1555 (C.A.).

<sup>210</sup> *Sharpe*, *supra* note 209 at 285-288, McEachern C.J.

<sup>211</sup> *Irwin Toy*, *supra* note at 207.

<sup>212</sup> *R. v. Sharpe*, [2001] S.C.J. No.3. at 175-180.

documented by international norms such as the *CRC*. She further emphasised that the severity of the impact by impairing a right should be tempered by the beneficial effect of protection of children. Clearly, if the existence and enforcement of the law deters even one potential offender, or assists in prosecuting a child sex offender, the benefits are immense.

Two other considerations regarding minimal impairment exist; a clarification of minimal impairment as a *reasonably* possible rather than an absolutely possible, and a clarification of the different balancing act partaken when balancing state interests against individuals versus balancing the interests of vulnerable populations against the individual. Regarding the first consideration, Sharpe and Roach indicate that there has been a “trend away from a rigorous or mechanical approach to the question of minimal impairment towards a more contextual approach.”<sup>213</sup> While a government should remain thorough in its reasoning as to why another less restrictive means would be less effective at achieving its purpose, the contextual approach does allow for more flexible approach to minimal impairment.

In the remaining component of the proportionality test, we are required to address the ultimate deleterious effects of the law (on the fundamental rights and freedoms) in question with the potential benefits sought through the overarching purpose. According to Hogg, if the first two sections of the proportionality test are satisfied, intense discussion of the third component is somewhat redundant. Sharpe and Roach agree, reiterating that this last step has not been decisive in the Supreme Court.<sup>214</sup>

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<sup>213</sup> Sharpe & Roach, *supra* note 193 at 72.

<sup>214</sup> Sharpe & Roach, *supra* note 193.



## *ALTERNATIVE LEGAL RESPONSES*

Pretending that the crime occurred on domestic soil is but one way that countries have created CST laws.<sup>215</sup> Australia's approach makes it illegal to travel to other countries for sex with children, while the US law is commerce based, prohibiting foreign travel to have sex with children and allows a conviction upon intent alone. Clearly these laws would miss some of the offenders that Canada's broad law is designed to catch. Specifically, the US law includes the element of purchasing sex as a requirement, thus leaving out of its net exploitation for non-commercial purposes.

Section 105 (Penalties Against Child Sex Tourism) of the U.S. *Prosecutorial Remedies and Other Tools to End Exploitation Today Act* of 2003 (PROTECT Act)<sup>216</sup> led to the creation of Section 2423 in the U.S. Penal Code, based on regulating foreign commerce. This represents a marked change from the original US CST legislation which was specifically based upon (the extremely difficult to prove element of) intent, which had to be formed in the US.<sup>217</sup> The PROTECT Act still indicates that the United States derives its power to criminalize offences abroad very differently than Canada.<sup>218</sup> Article I, Section 8 of the US Constitution

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<sup>215</sup> While it is beyond the scope of this paper to discuss other approaches to CST laws in detail, a cursory overview is helpful in providing international context.

<sup>216</sup> *The PROTECT Act*, Pub. L. No. 108-21, 117 Stat. 650.

<sup>217</sup> K.D. Breckenridge, "Justice Beyond Borders: A Comparison of Australia and U.S. Child Sex Tourism Laws" (2004) 13 Pac Rim L & Policy 405.

<sup>218</sup> Section 2423 now criminalizes the following behaviour: (b) Travel with intent to engage in illicit sexual conduct – A person who travels in interstate commerce or travels into the united states, or a united states citizen or an alien admitted for permanent residence in the united states who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both. (c) Engaging in illicit sexual conduct in foreign places – Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both. (d) Ancillary offenses – Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in

provides that law can be created “to regulate commerce with foreign nations.” The United States considered the jurisdictional, constitutional and statutory elements of a CST case when faced with a challenge launched in *United States v. Clark*<sup>219</sup>. In 2003, Clark travelled from Seattle, Washington to Asia on a route through Japan, Singapore, Thailand and Malaysia, ultimately arriving (at his home of five years) in Cambodia. The issues in the case are slightly different from any arising in the Canadian context in that the applicable law is shaped and justified differently.<sup>220</sup>

Essentially, Clark argued that applying the newly formed s. 2423(b) of the U.S. Penal Code<sup>221</sup> to his case was inappropriate in that a period of two months existed between his travel and his abuse of children. He argued that a temporal link between travel and conduct was necessary for the section to be applied to his case, particularly because the charging provision referred to child sex *tourism*. He further proposed that the application of s. 2423 to his case was inappropriate in that his actions did not affect the channels of commerce (in the US), since his actions were situated fully in Cambodia. Ultimately, it was held that, the state can regulate use of the channels of commerce, instrumentalities of commerce, and all activities having a substantial connection to commerce.

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interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.” (e) Attempt and conspiracy – Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.” (f) Definition – As used in this section, the term ‘illicit sexual conduct’ means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109a if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

<sup>219</sup> *United States v. Clark* 435 F. 3d 1100 (9<sup>th</sup> Cir. 2006) [*Clarke*].

<sup>220</sup> This justification was visited (and clarified) by the Supreme Court in *United States v. Lopez*. The *Lopez* case created a framework whereby Congress could regulate commerce. See Klain, *supra* note 13; see also “Constitutional Law – Foreign Commerce Clause – Ninth Circuit Holds that Congress Can Regulate Sex Crimes Committed Abroad” (2006) 8 Harvard Law Review, Vol 119, 2612 [Harvard Law Review].

<sup>221</sup> The section prohibits “transportation with the intent to engage in criminal sexual activity and travel with the intent to engage in sexual acts with a juvenile.”

The court decided that limiting the statute to apply only in circumstances where the travel connection was very close would be absurd, and that a proper reading of the statute should include Clark's behaviour in its reach. The court refused to identify how closely the behaviour and travel had to be linked, alluding to some limit being inherent in the provision, because without one, the state would be able to control all acts of commerce without limit. The court suggested that only a clear demonstration that the circumstances violated the behaviour-travel link would be required to establish the application is constitutionally invalid. Additionally, the Ninth Circuit found that both the universality and nationality principles were appropriate bases upon which to assert jurisdiction, and that, based on the wide condemnation entrenched in public policy of child sexual abuse, such exercise of jurisdiction was reasonable.

Although the exertion of jurisdiction in the Clark case was based on the nationality principle owing to Clark's US citizenship, the mention of the universality principle is noteworthy when considering legal alternatives. "The universal principle allows states to exercise criminal jurisdiction over any individual, regardless of nationality, who commits certain crimes in any geographical location."<sup>222</sup> The benefit of such a jurisdictional extension involves reducing the chances of impunity, specifically if an accused flees his country or the country where the offence took place.<sup>223</sup> Accordingly, Currie and Coughlan point out that universal jurisdiction, when extended by treaty, is particularly effective at reducing impunity as it is usually coupled by an *aut dedare, aut judicare* provision. The provision requires that member states unwilling to prosecute accused individuals are "obliged to extradite the

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<sup>222</sup> Currie & Coughlan, *supra* note 137 at 147.

<sup>223</sup> Ferens, *supra* note 4.

individual to a treaty partner state which indicates a willingness to prosecute.”<sup>224</sup> While the US decision indicates a presence of prescriptive universal jurisdiction,<sup>225</sup> this extension does not address the associated enforcement impracticalities.

However, a criticism by a comment in the Harvard Law Review indicated that “by giving Congress a blank cheque to regulate the lives of US citizens abroad, the Ninth Circuit has missed an opportunity to question a doctrine that is sure to come under close scrutiny in the near future.”<sup>226</sup> Instead, a more desirable approach would have been to rely on international commitments as a justification where commerce-based justifications might fall short. The Necessary and Proper Clause would give the Senate the appropriate justification to develop ET law tied to the US signature on the *CRC-OP-SC* for ratification purposes. Furthermore, the commerce-based law suggests that US nationals may not be criminally responsible if they do not exchange money or goods for the sexual activity.<sup>227</sup> Breckenridge criticises the effectiveness of the PROTECT Act and suggests that difficulties are compounded by the Sixth Amendment to the US Constitution providing for a defendant’s right to confront his/her accuser which may be impossible given the international nature of the crime.

In 1994, Australia introduced its Act against CST. The Crimes (Child Sex Tourism) Amendment Act covers sexual offences committed against children under 16 years of age while overseas and, like Canada, by excluding the commerce element, also covers intra-

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<sup>224</sup> *Ibid* at 148.

<sup>225</sup> To be clear, the US has relied upon universal condemnation supported by the *UNCRC* and *UNCRC-OP* rather than a formal treaty establishing universal jurisdiction.

<sup>226</sup> Harvard Law Review, *supra* note 220 at 2617

<sup>227</sup> Harvard Law Review, *supra* note 220.

familial sexual assaults and indecencies. David indicates that “rather than being a ‘paper tiger’ as predicted, the legislation has resulted in a number of substantial convictions for offences committed by Australians overseas.”<sup>228</sup> Another important and unique element within the CST Act is the ability for victims to testify by video-link addressing the difficulty in gathering testimony from overseas and traumatized victims. Australia has constitutional powers relating to external affairs which allow it to legislate on the basis of an over-arching protective principle, thus aiming to protect global peace.<sup>229</sup> The German law, although narrower in focus was hailed as the most successful law in a 1998 UNICEF report; it extends only to those German citizens residing in Germany.<sup>230</sup> The uniting component in each of these laws is their extra-territoriality, without which, they would not be able to respond at all to CST.<sup>231</sup>

## CONCLUSION

While it is unclear precisely how the Supreme Court will rule given the constitutional uncertainty of s. 7(4.1), it is certain that given the above legal wrangling, what would occur is somewhat of a legal conundrum. Clearly, it would not be desirable to read the constitutional interpretation of a legislative provision in complete opposition to Canada’s international commitment in the *CRC*, yet it is equally undesirable to justify limits to the core principles of fundamental justice upon which Canada is founded. Likely, one of the most important

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<sup>228</sup> F. David, “Child Sex Tourism” No. 156 Australian Institute of Criminology: Trends and Issues on Crime and Criminal Justice, June 2000 at 5, online: <<http://www.aic.gov.au/publications/tandi/ti156.pdf>>.

<sup>229</sup> Fraley, *supra* note 21.

<sup>230</sup> Fraley, *supra* note 21.

<sup>231</sup> Fraley, *supra* note 21.

factors in any legal analysis will be the specific transnational characteristics of CST, coupled with an international responsibility to respond and prevent such abuses that separate it from the other cases heard by the Supreme Court thus far. While precedent is crucial in predicting what factors may influence the court, it is not possible to remain inextricably tied to the past wherein we neglect our efforts to address the phenomenon within the context of a globalized community. International crime prevention and response techniques will evolve significantly within the next few decades and will likely signify a move away from stagnant, inflexible approaches towards more creative responses. If changes to the legislation were required, it would be wise to resist a complete re-drafting of the law, since at the very least; the current legislation represents a starting point from which to finesse a more appropriate law in accordance with *Charter* rights. A law that is clearly constitutional would be stronger because enforcement agencies would know that their efforts will be supported in court, and also public awareness of the reach of Canadian law would inevitably increase.

## **CHAPTER 4: Methodology**

### ***INTRODUCTION***

While traditional science might identify experimentation as the best way to establish policy (in)effectiveness by applying the results of positive research to the issue, this is not an appropriate methodology given the subject matter at hand. The small number of practitioners in Canada who can be identified as experts, or even as knowledgeable professionals in the field of child exploitation was as a natural limit to the way data could be collected. Furthermore, both the lack of known cases and the clandestine nature of the subject matter being studied indicated that a traditional policy evaluation would be impossible. Thus, the nature of CST, and more generally many other criminological issues, prohibits traditional experimentation modes of analysis since quantitative evidence is nearly impossible to gather; the dark figure of under-reporting covers nearly all the incidents.

Accordingly, as policy reviewers, criminologists can make significant contributions often by theorizing about the vastness of the issue and by turning to alternative methodologies (such as qualitative approaches) to supplement traditional policy evaluation. Through this approach, it follows that by finding evidence regarding the (in)effectiveness of a given policy approach, new directions for future reform can be suggested, and hypotheses as to the barriers to success can be identified. In this sense, the generation of over-arching explanatory theory is not the aim of this thesis, rather the identification of a framework in which to situate revised responses to CST is the goal. Analysis of these data anticipated that, (1) the most effective and least effective strategies for responding to international child

exploitation would arise, (2) a clearer account of the way CST is framed by specialists would be evident, and (3) an understanding of proposed changes and new directions sought would become clear. In order to access the relatively obscure information, it was important to illuminate the voices of the practitioners with first-hand experience with CST and the current policy response. This chapter describes the research questions, outlines constructivist grounded theory as it applies in this thesis and discusses methodological decisions made throughout the research process.

## *RESEARCH QUESTIONS*

There are four questions which serve to create the framework for this thesis. They are:

Can Canada create and use extra-territorial law for cases of CST in a legal sense?

Can Canada use extra-territorial law for CST cases in a practical sense?

Should Canada use extra-territorial law?

How might Canada impose extra-territorial law – or change the current situation?

## *CONSTRUCTIVIST GROUNDED THEORY*

In light of the literature presented in Chapter 2, it was the aim to design a strategy that would access the candid opinions of those in direct contact with victims and offenders in their work in the Canadian legal framework and also on the international front. This not only provided insight into what was happening at a local level, but also addressed how the law works “on the ground” rather than theoretically-based notions of how the law “should” work. To achieve this, a constructivist grounded theoretical approach was employed – a



strategy designed to illuminate the patterns present in the data while paying particular attention to the context from which they arose.

The term grounded theory (GT) has become somewhat unclear and misunderstood since it first occupied the academic work of Glaser and Strauss in 1967, becoming co-opted by qualitative researchers (usually as a means of simplification) to the point where some use it in direct contrast to its original exposition.<sup>232</sup> The history and growth of GT as a method is such that the simple acknowledgement of its use, is of extremely little value. While it is unnecessary to outline each of the divergent uses of GT, it is essential to summarize how GT is understood in the context of *this* study. While parts of the traditional definition are closely followed here, it would be more accurate to characterize this research as taking a constructivist GT approach.<sup>233</sup> What follows is a consideration of the intricacies of constructivist GT employed in this research.

Grounded theory has been described simply as “a qualitative research method that uses a systematic set of procedures to develop inductively derived theory about a phenomenon”<sup>234</sup> or more specifically “is the generation of emergent conceptualizations into integrated patterns, which are denoted by categories and their properties.”<sup>235</sup> The method is considered particularly advantageous since it generates concepts from the data itself rather

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<sup>232</sup> B. Glaser, “Conceptualization: On Theory and Theorizing Using Grounded Theory” (2002) 1:2, Article 3 International Journal of Qualitative Methods, online: <<http://www.ualberta.ca/~ijqm/>>.

<sup>233</sup> J. Mills, A. Bonner, & K. Francis, “The Development of Constructivist Grounded Theory” (2006) 5:1 Article 3 International Journal of Qualitative Methods, online: <[http://www.ualberta.ca/~ijqm/backissues/5\\_1/html/mills.htm](http://www.ualberta.ca/~ijqm/backissues/5_1/html/mills.htm)>.

<sup>234</sup> A. Strauss & J. Corbin, “Grounded Theory's Applicability to Nursing Diagnostic Research” (A Monograph of the Invitational Conference of Research Methods for Validating Nursing Diagnoses, Palm Springs, CA, 1989) pp. 4-24 at 4.

<sup>235</sup> Glaser, *supra* note 232.

than forcing pre-conceived theories onto data where the fit may be poor.<sup>236</sup> Constructivist GT methodologies represent an offshoot in the middle of a GT continuum where the so-called traditional, positive oriented GT, opposes a more post-modern research orientation. Considering the epistemological and ontological underpinnings of the researcher, a decision was made identifying the middle of the continuum as appropriate for this thesis. Since epistemologically, theory was understood as “interpretations made from given perspectives as adopted or researched by researchers,”<sup>237</sup> a constructivist GT was most aligned. In fact, the methodological orientation decision is generally made upon a consultation of the relationship between the researcher and the data; if the researcher is seen as separate from the understanding of the data, Glaser’s more traditional approach will be taken. If the researcher is seen as the author of the emergent theory, as was the case in this research, a constructivist approach is more useful.<sup>238</sup>

The middle ground represented by constructivist GT moves away from the assumption “that following a systematic set of methods” allows for the discovery of reality and the construction of “a provisionally true, testable, and ultimately verifiable ‘theory’.”<sup>239</sup> Constructivist GT rejects objectivist underpinnings in favour of an approach that “distinguishes between the real and the true”<sup>240</sup> ceasing the pursuit for a single unchanging truth basing reality instead upon the convergence of multiple perspectives. This realist

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<sup>236</sup> Glaser, *supra* note 232.

<sup>237</sup> Mills, Bonner & Francis, *supra* note 233.

<sup>238</sup> Mills, Bonner & Francis, *supra* note 233.

<sup>239</sup> K. Charmaz, “Grounded Theory: Objectivist and Constructivist Methods” in N.K. Denzin & Y.S. Lincoln eds., *The Handbook of Qualitative Research* 2<sup>nd</sup> ed. (California: Sage, 2000) at 524.

<sup>240</sup> Charmaz, *supra* note 239 at 523.

approach assumes that objective knowledge is based on our own perspective, and thus moves in the direction of a more post-modern approach.

Two key issues specifically relating to the generation of theory via the identification of concepts should be resolved in separating constructivist GT from its more traditional counterpart. As researchers, we must avoid becoming part of the “theoretical capitalists” (and risk falling victim to the “self-fulfilling prophecy”) by ensuring we do not become too closely tied to particular groundings. We must also avoid generating theory from one or a few instances, where we too hastily contribute to groundless theories. Instead, as Glaser suggests, a researcher using GT should identify patterns over a series of cases, thereby partaking in cross-comparison, and thus *grounding* the theory. In all, GT becomes an abstraction of the data, and thus not necessarily a reflection of the “voice” of the data, although generated from it.

While Glaser’s points were crucial throughout this analysis in order to remain pragmatic and to avoid theoretical capitalism, his view further distinguishes traditional GT from constructivist GT. Constructivist GT seeks to retain voice in data without the oversimplification in uncovering patterns for which Glaser has been criticized. While constructivist GT honours higher-level thinking and analysis, it “preserves realism through gritty, empirical inquiry and sheds positivistic proclivities by becoming increasingly interpretive.”<sup>241</sup> So, in developing an analytical process for constructivist GT, it was helpful to look toward traditional GT, but without the heavy focus on abstraction.

Glaser suggests that researchers using GT should strive away from lengthy descriptions of particular instances of data and move toward abstract conceptualization

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<sup>241</sup> Charmaz, *supra* note 239.

(which more closely embodies the traditional use of GT). The benefit reaped is the ability to compare abstract concepts and to form hypotheses. Conversely, descriptions cannot be compared since they contain specific unchanging aspects such as time and space. One might consider the description as a stage before the conceptualization. For example, Glaser suggests it is useful to describe a series of instances prior to the researcher thinking abstractly. However, it is necessary for abstraction to take place before theoretical building can occur. The abstraction is also necessary for validation of the presence of specific theory.<sup>242</sup> Additionally, Glaser states that a GT should be able to explain the “core process” within a particular unit rather than a specific and detailed description of the unit.<sup>243</sup> One way to understand this relationship is to remember that GT looks to uncover general theory through latent processes and content with less regard to manifest details. This fixation with general theory is another area where some GT again diverges between post-modern and realist practices. It seems that traditional GT is somewhat out of alignment with the underlying propositions of qualitative research in general in that it supports conceptual abstraction at the expense of rich contextual evidence. These differences were reconciled in this study by remaining cognizant of contextualized descriptions as the evidence of the presence of an abstract concept within an instance. In other words, constructivist GT indicated that contextual descriptions (excerpts) formed a starting point to the later developed abstract concepts which then generated a broader theory.

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<sup>242</sup> Charmaz, *ibid.*

<sup>243</sup> Charmaz, *ibid.*

Glaser and Strauss identify two major elements of a theory generated by data.<sup>244</sup> The first element is the concepts, which are drawn from the data, and the second element is the relationships and inter-connections among categories. Additionally, the researcher should be transformed in his or her analysis of data, moving from a passive approach to the data towards a hypothesis-forming state. Glaser and Strauss also acknowledge that while the researcher begins by taking notice of any significant elements imbedded within the data, as they become more engaged, they will readily take notice of properties for the purpose of addressing certain hypotheses made along the way.<sup>245</sup>

The traditional GT method becomes risky where conjecture, due to researcher difficulty in abstraction or even over-eagerness to abstraction is present in the attempted generation of theory. This researcher was aware of the risks (and challenges) of creating conjecture due to theory “grabs” which are not actual theoretical elements imbedded within the data, caused predominantly by the drive to create abstract concepts where context is vital. In general, a tenuous circumstance is likely to arise when encountering an intellectual “double-edged sword” in this process; at this level of academia, and particularly due to the immersion within this body of research over a period of two years, one hopefully equipped with enough theoretical knowledge to be able to recognize the emergence of theory, yet simultaneously not to allow this knowledge to guide conceptualizations that are distinct and not supported within the data.<sup>246</sup> In order to guard against what Glaser calls “undisciplined abstraction” that gives rise to conjecture within analysis, it is important to recognizing the

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<sup>244</sup> Charmaz, *ibid.*

<sup>245</sup> Charmaz, *ibid.*

<sup>246</sup> Glaser, *supra* note 232.

ease with which this could occur.<sup>247</sup> Grounded theory also necessitates a particular comfort or excellence with the theoretical developments within one's own discipline so that when a theory is present, the researcher will be able to identify it.<sup>248</sup> It should be noted at this point, however, that the appropriate goal in this research is not theory development in the sense of working toward a theoretical understanding of the phenomenon, but rather working toward acquiring policy-relevant information. In sum, constructivist GT is a methodological drive to reject theoretical capitalism and to reconnect findings to data. It can serve to re-direct the researcher to hold the data itself as supreme in the analysis. Constructivist GT uses processes similar to traditional GT, yet moves the focus away from positive objectivity. It is particularly useful for this thesis given the adherence to an exploratory focus.

## *SAMPLING STRATEGY*

As is appropriate in a GT-style methodology, theoretical sampling was used to obtain and compile data. Glaser and Strauss suggest that

theoretical sampling is the process of data collection for generating theory whereby the analyst jointly collects, codes and analyzes his (or her) data and decides what data to collect next and where to find them, in order to develop his theory as it emerges.<sup>249</sup>

Ultimately, this process derives its direction from the *data* rather than the researcher in terms of where additional data will be collected and when the process is complete. Adhering to a

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<sup>247</sup> The largest problem that arises from this undisciplined abstraction is how easily a researcher can make the mistake, and how easily it can be passed off to readers as genuine authentic theoretical findings.

<sup>248</sup> This notion of the theoretically educated researcher will be contemplated more thoroughly in the discussion section. See Glaser, *supra* note 232.

<sup>249</sup> B.G. Glaser and A.L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine: Chicago, 1967) at p. 45.

GT approach means that the beginning of sampling is not directed by any pre-existing theoretical grounding, but rather only on previous knowledge. For instance, at the outset of this research, it was known that individuals working with or for exploited children and those in law enforcement specializing in child exploitation would form the population to be sampled. The parameters were deliberately vague by holding that “individuals considered experts in the field” would be consulted for the study, and sample selection only be constrained by the researcher’s need to satisfy the Research Ethics Board at Simon Fraser University. This strategy gave control over sampling to the data itself with the aim of identifying and fleshing out theory.<sup>250</sup>

The participants included in the sample met a series of criteria fulfilling elements of a purposive strategy as well. Individuals who had professional knowledge of child exploitation were sought. The type of knowledge varied across the sample as some had enforcement experiences, while others had developed their perspectives from their roles as advocates. Some worked locally whereas others worked in the national setting, and still others worked in an international environment. This criterion yielded diversity within a heterogeneous sample. To fit within the criteria, it was held that the participants must deal either specifically or predominantly with child sexual exploitation. The sampling method also has characteristics of convenience sampling,<sup>251</sup> particularly since elements of practicality were taken into consideration. For example, all but one participant resided in Canada, and most

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<sup>250</sup> Corbin & Strauss indicate that a theoretical sampling frame will proceed by sampling the “properties, dimensions and variations” of concepts rather than individuals. By gaining an understanding of the varied concepts specific to the phenomenon, the researcher will interview then select individuals who can discuss these concepts. Accordingly, it is difficult to clearly outline the sampling parameters prior to collecting data because sampling decisions are made in the process of collection. See J.M. Corbin & A Strauss, “Grounded Theory Research: Procedures, Canons and Evaluative Criteria” (1990) 13:1 *Qualitative Sociology* at 8.

<sup>251</sup> See J. Ritchie & J. Lewis eds., *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (London: Sage, 2003).

were selected due to their availability to meet with the researcher in person. The referral method undertaken was integral to the research process; while the intent was to inquire with each participant if he/she knew anyone else who would be an appropriate informant, most participants offered contacts without probing. Throughout the interview process over the course of ten months,<sup>252</sup> the sample was expanded to include participants, many of whom were identified by participants themselves in the course of describing the current situation of CST. Aside from two participants who had been identified prior to beginning the work, all participants were recommended from within the sample, some being recommended by multiple unconnected participants.<sup>253</sup>

In order to refrain from gathering too much unwieldy data, a line was drawn using the GT tool of sampling saturation. Glaser & Strauss suggest that the point of data saturation has been reached when subsequent interviews no longer produce new information. Data collection can cease when data analysis is satisfied by identifying a particular set of instances as a theme, and when sufficient description exists such that an adequate description of the theme has occurred. This way, the researcher becomes confident that continued data collection is unlikely to yield new material.<sup>254</sup> One obvious limitation to this convention is that we will never be certain about knowing whether we were right or wrong with where we drew the line. If, in fact, data collection is done in a haphazard way, lacking rigour, one can expect to his/her point of cessation called into question. However, if the researcher openly demonstrates the process of participant

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<sup>252</sup> One interview was conducted in February 2007, and the remaining nine were conducted between September 2007 and February 2008.

<sup>253</sup> It should also be noted that while nearly every participant offered the contact information of at least one other person, it was impossible to follow up on each referral.

<sup>254</sup> Glaser & Strauss, *supra* note 249.



identification, and explains the end of data collection in a transparent manner, critique is minimized. In this study, when I had sufficient information to come to an understanding of the existence and representation of CST as a cultural product, and the data illustrated a (multi-pronged) theoretical basis of understanding, I ceased investigation. Sampling saturation yielded ten informants of interest. Data saturation was reached for some themes in the first few interviews; however, it was not a prudent time to end data collection as clarification and elaboration upon these themes and concepts was expected (and subsequently occurred) upon further data collection.

## *THE INTERVIEWS*

The interview process took on some very interesting characteristics due to the data being collected in various ways including using semi-structured interviews conducted in person, by telephone and over email. While optimally all interviews would have been conducted in person, the referral strategy led to a non-proximate sample, where an alternate strategy was required in order to reach some of the non-local participants.<sup>255</sup> Although conducting interviews remotely has inherent disadvantages, these shortfalls were balanced with the benefits of gathering data from some key contacts, some whom had been recommended by multiple participants. Specifically, an *e-interview*, one conducted by email, more closely mimics a survey rather than an interview. E-Interviews may thus fall prey to

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<sup>255</sup> After liaising with non-local participants, it was determined that they were more comfortable with an emailed interview rather than a phone interview, specifically due to time constraints, convenience and to address the challenges of mis-matched time zones. Respecting the wishes of the participants, and hoping to maximize participant response, e-interviews were conducted.

losing the richness, characteristic of most qualitative research. The ability of the researcher to ask follow-up questions, to allow the participant to guide the interview, and also to probe on some questions may, without careful consideration, be virtually lost in this format.<sup>256</sup> To be discouraged by these disadvantages, however, would have been a massive oversight owing to the already limited number of participants and existing difficulties in accessing specialists in this field.<sup>257</sup>

Eager for more information, throughout the process of data gathering and analysis, I attended a series of conferences and working groups related to child exploitation. One such international conference and another local working group provided in-person links with each participant who had taken part in an interview by phone or email. The meetings provided a venue for follow up with overseas participants as well as a chance to network. Ultimately, all participants who had taken part in e-interviews (two) and telephone interviews (three) were met in person allowing lengthy follow-up discussions.

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<sup>256</sup> This study demonstrated that changes to the questions asked in an in-person interview are necessary when the setting changes to the online environment. While it would be desirable to communicate with participants through instant communication, allowing for follow-up and probing questions, this is not always possible. Conversely, one of the advantages of communicating this way is that it allows participants to provide their answers at their leisure, or from an incompatible time zone.

<sup>257</sup> While a lengthy discussion of e-interviews is beyond the scope of this thesis, some short comments are warranted as the e-interviews were intriguing by providing an opportunity to experiment using a newer medium of communication in the context of research. While it was beneficial to the study at hand that the participants were also met with in person, as the emailed responses indicated a lack of richness, it will be important to look toward developing a strategy to elicit responses by email for future research. Given the international scope of the problem of CST, and of many other areas worthy of inquiry, it follows that many research designs would benefit from formalizing a strategy to elicit information through an online medium. Brampton & Cowton write at length on the "e-interview" discussing its strengths and weaknesses, finally concluding that while e-interviews may not be an effective replacement of in person interviews, they can be complementary by allowing researchers to reach distant populations and can also offer significant savings in time and cost. See: R. Brampton & C.J. Cowton, "The E-Interview" 3:2 Forum: Qualitative Social Research, online: <<http://www.qualitative-research.net/fqs-texte/2-02/2-02bamptoncowton-e.htm>>.

I began the interviews with curiosity, seeking to find whether exploratory interviews would provide validation for the findings discussed in the literature review, and whether participants were similar to or different from one another owing to their varied perspectives. The interviews provided perspectives of local, national and international law enforcement practitioners with first-hand knowledge of the use of ET legislation and measures against CST, perspectives of employees in related NGOs, and some perspectives of policy makers at both the provincial and national level. Over a one to two hour period, exploratory, open ended questions regarding CST were considered with the participants. Similar questions were posed to email and telephone respondents.

I endeavoured to talk with each participant moving with them as their stories developed, thus taking a more active role in data generation. While it was imperative to uncover the vast knowledge held by the participants, it was also important to actively develop and direct each participant to provide insights into future directions. In this vein, a series of open-ended questions were prepared that encouraged flexibility within the interview, respecting the semi-structured format. It is helpful to consider the interview instrument in sequential phases. Phase I was considerably more structured, eliciting definitional information and organizational mandates and procedures. Phase II, however represented a more interactive interviewing style as conversation flowed more easily and the researcher probed into content brought up by the participants.<sup>258</sup> The set of questions was pre-tested with the investigator and a colleague, and then revised once more following the first interview.

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<sup>258</sup> This style of interviewing can be understood in alignment with a feminist approach where the interviewer and the participant interact in a collaborative style largely void of the hierarchy characteristic of traditional interviewing (Ritchie & Lewis, *supra* note 251).

To preserve the integrity and richness of the data, the researcher attempted to audio record the in-person interviews for transcription purposes. Due to budgetary limits, audio recording was not conducted on the telephone interviews, and due to the nature of the casual conversations at meetings, audio recording was also not conducted in those instances. In all, verbatim transcripts were created for four of the in-person interviews, and written records were obtained for the e-interviews. The data collected in the other instances were recorded with detailed note-taking both during and after the interview (for the phone interviews and the spur of the moment in-person meetings).

Ritchie and Lewis suggest that validation or verification of findings in qualitative research is sought in two specific ways: internally and externally.<sup>259</sup> While the GT approach assists in achieving internal verification through negative case analysis, the use of triangulation in obtaining a diverse sample is cited as a way of looking at the same issue through a different lens which, “will help to both confirm and to improve the clarity, or precision, of a research finding.”<sup>260</sup> While a researcher must be careful not to hastily assume that more data sources directly leads to validity, it can be noted that multiple methods *may* “add credibility by strengthening confidence in whatever conclusions are drawn.”<sup>261</sup>

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<sup>259</sup> Ritchie & Lewis, *supra* note 251.

<sup>260</sup> Ritchie & Lewis, *supra* note 251 at 275.

<sup>261</sup> M. Q. Patton, *Qualitative Research and Evaluation Methods* (Thousand Oaks, CA: Sage Publications, 2003) at 556.

## *ETHICAL CONSIDERATIONS*

This research fulfilled the requirements of a ‘minimal risk’ designation by the Research Ethics Board at Simon Fraser University. The ethical considerations of import to the researcher consisted of maintaining the integrity of the data, and in maintaining professional, ethical relationships with the interview participants. In order to maintain data integrity, measures were taken to engage with the data to its fullest extent in a rigorous fashion exercising reflexivity throughout the process.<sup>262</sup> Additionally, each participant was guaranteed anonymity and confidentiality to the highest level possible in exchange for their participation in the study. Whereas it was appropriate to offer participants meeting in person quite a high level of security on these issues, telephone and email communication naturally offered less privacy. It was important to let the participants know that while it was the goal of the investigator to keep information as private as possible, it would be limited by the extent possible with the given method.<sup>263</sup> Another important consideration was that no harm comes to the participant. Ritchie and Lewis suggest that this concept refers not only to harm of a physical nature, but also to psychological distress that could result from

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<sup>262</sup> Reflexivity, a term that literally means “bending backwards upon oneself” can be defined as a process where “researchers turn a critical gaze towards themselves” (p.3). See L. Finlay, “The Reflexive Journey: Mapping Multiple Routes” in L. Finlay & B. Gough eds., *Reflexivity: A Practical Guide for Researchers in Health and Social Sciences* (Blackwell, 2003) at 3-21 [Finlay, “The Reflexive Journey”]. Reflexivity involves a quest to determine and think about how one’s own subjectivity transforms and impacts research. The process, an integral part of qualitative research helps to demonstrate trustworthiness and to alleviate the unconsciousness that can be detrimental to research. See also L. Finlay, “Negotiating the Swamp: The Opportunity and Challenge of Reflexivity in Research Practice” (2002) 2:2 *Qualitative Research*, 209-30 [Finlay, “Negotiating the Swamp”].

<sup>263</sup> Participants were provided with the following guarantee: “all correspondence will be kept confidential where possible; data will only be presented in the context of this thesis and associated research papers and presentations. Raw data collected during in-person interviews will not be linked with individual participants and will be kept in a secure location accessed only by the investigator. Data collected via email and telephone will only be confidential to the level possible using these un-secured methods. In other words, participants cannot be guaranteed complete confidentiality and anonymity when submitting their responses in either of these fashions because it is known that information can be viewed by third parties and stored on servers for various lengths of time.”

discussions of a sensitive nature.<sup>264</sup> Since CST is a highly disturbing topic, interviews were conducted with compassion for the work of the participant and sensitivity to the topic to minimize negative outcomes. Furthermore, since discussing CST issues is an integral part of each participant's daily life, it is safe to assume they would not be exposed to any greater risk than they would otherwise endure outside of this research environment.

An issue stemming from the use of the referral method was ensuring that anonymity and confidentiality were protected to the utmost level. Because many participants knew each other, and the population of experts in Canada is relatively small, identity had to be carefully guarded. While it was desirable to provide participants with pseudonyms noting their occupation and whether they were employed at a local, provincial, national or international level, this information had to be excluded because it was deemed identifying. For this reason, pseudonyms only contain information as to whether the participant worked in law enforcement, an NGO or a policy position.

## ***THE 'RUBIX CUBE' CODING PROCESS***

To make sense of the overwhelming amount of data, an approach similar to an analytic hierarchy process was taken.<sup>265</sup> True to the inductive ground-up method, the steps taken in organization and analysis were: organization of raw data; labelling data by concept;

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<sup>264</sup> Ritchie & Lewis, *supra* note 251.

<sup>265</sup> The coding process and synthesis of the data represents one of the most challenging, yet fulfilling aspects of this research. Because this research is somewhat of a pilot project for e-interviews, there were few previous studies to turn to in understanding what might be the most productive way to gather data. The lack of e-interview history, however, cannot be counted as a misfortune since it made it necessary to perform an analysis directed specifically by the data, and allowed the researcher to become more closely aligned with GT, rather than imposing a tested strategy. See L. Spencer, J. Ritchie & W. O'Connor, "Analysis: Practices, Principles and Processes" in J. Ritchie & J. Lewis eds., *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage: London, 2003).

identification of initial themes; coding data into categories; refining categories; detecting patterns and typologies; developing explanations; revising research questions and linking to wider policy-relevant theory.

An interesting aspect of this type of coding was the task of moving back and forth between steps as more data were collected; an iterative process similar to turning forward and backward the rows on the *rubix cube*.<sup>266</sup> If a pattern was seen to arise and then disappear or become substantially less clear after subsequent analysis, it was left out of the analysis. What happened more frequently, however, was that a vague pattern would emerge and upon subsequent collection and analysis, the pattern would become more complex, and developed.<sup>267</sup> Often, themes would become so complex they were divided further into sub-themes. Only in a few instances did a lack of additional supporting data cause a particular pattern to fade away entirely. By using a constructivist GT approach, constant comparison was carried out during collection and analysis involving re-visiting transcripts multiple times. Some patterns emerged, but upon further examination, the researcher was required to constantly re-format the conclusions to ensure an effective overall theoretical fit. “Fit” was used in this research to strive for pragmatism, uniting the data so as to form cohesive policy recommendations; yet did not adhere to Glaser’s notion of “fit”, which has been criticised for over-summarising and “forcing” data.<sup>268</sup>

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<sup>266</sup> The analogy of a *rubix cube* is somewhat helpful in conveying the dynamic process that was performed throughout the coding process in this research. While the steps were followed consecutively, detecting patterns was loosely carried out throughout data collection as some concepts quickly formed certain patterns.

<sup>267</sup> See Corbin & Strauss, *supra* note 250 at 6 for more on data collection and analysis as interrelated processes.

<sup>268</sup> Charmaz, *supra* note 239.

In order to keep track of the data, a chart was created into which excerpts from the transcripts were slotted. Familiarization<sup>269</sup> with the data was sought through the organization of raw data; each transcript was visited and re-visited allowing the themes and patterns to emerge. Once this was complete, a few concepts were identified from the transcripts in order to organize data into a table. The transcripts were reviewed again, this time gathering evidence that fit loosely into the concepts that emerged the first time. This practice allowed for concepts to emerge and also kept the data organized in a clear fashion. Excerpts that seemed important were also put into the table, being assigned to categories with no labels. This information was looked at numerous times in order to recognize concepts. The specific labels for each concept were initially fluid, as they were changed throughout the analysis as more evidence was compiled.

Finally, once the data in the spreadsheet were organized into meaningful concepts and themes, the categories were taken together to attempt to recognize any overarching policy-relevant directions which might illustrate the character of the discourse as a whole. Ritchie and Lewis<sup>270</sup> suggest, and this author agrees, that theoretical frameworks should not be imported upon data too early in the analytic process. Submersing data into theory too early, results in camouflaging the detail of the data by fitting the data into a theory, rather than the opposite (which is more appropriate). The data in this research were left intact in the spreadsheet until it was thought that saturation had occurred and only then was a theory looked to for explanation. This activity also had the purpose of ensuring internal validation as explained by Corbin and Strauss by allowing negative cases to arise and by allowing for

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<sup>269</sup> Ritchie & Lewis, *supra* note 251.

<sup>270</sup> Ritchie & Lewis, *supra* note 251.



instances that did not fit easily into the theory, remain as outliers.<sup>271</sup> More specifically, they suggest that by constantly attempting to verify provisional hypotheses (by analyzing data that might not readily fit into our provisional hypotheses), researchers will be able to add depth to theories and understand more clearly the inter-linkages between concepts.

### *ADDITIONAL STRENGTHS & CHALLENGES*

There are many advantages to using semi-structured interviews as a methodological technique. With face-to-face interviews, because participants were approached in person, the completion rate was maximized, and clarification could be immediately made regarding any confusion with the instrument. Furthermore, the referral strategy assisted in creating rapport between the researcher and participants, as participants introduced the researcher to other potential participants. The strengths and weaknesses of the referral strategy, however, had to be balanced against one another particularly with regard to identifying the key knowledge-holders to compose the sample. Taking control of who fit within the sampling parameters away from the researcher has two specific impacts. First, giving agency to the participants to decide who to consult fit nicely into the qualitative paradigm where participants themselves should play a part in forming the research; however, in some cases this threatened to pull the research off-track by including participants whose knowledge was not within the scope of this thesis. It was up to the researcher to manage the research relationships and referrals in order to produce coherent research.

There were also a few weaknesses to the method used. As with any type of survey or interview method, the presence of social desirability errors is possible. This risk is

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<sup>271</sup> Corbin & Strauss, *supra* note 250.

dramatically increased when one considers the sensitive nature of the topic at hand, and the roles they are paid to perform in their occupations. “Social-desirability bias is considered to be one of the most common and pervasive sources of bias affecting the validity of experimental and survey research findings in psychology and the social sciences.”<sup>272</sup> Especially relevant to this sample and perhaps worsened by the setting, participants may have responded in a more acceptable way due to their roles in human service environments. For instance, each of the mandates of the organizations indicated a compassionate approach to children everywhere. Participants may have been unable to criticize this viewpoint for fear of representing their organization in a poor light, or by disagreeing with what may have been readily apparent viewpoints of the researcher. While it was impossible to screen for this bias, the anonymity and confidentiality provided to participants yields a cloak expected to enhance honesty.

The data were collected and analyzed by only one researcher, and while colleagues were consulted informally throughout the process for feedback on emergent themes, researcher triangulation would undoubtedly have increased the validity and trustworthiness of the data. “Triangulation is typically a strategy (test) for improving the validity and reliability of research or evaluation of findings.”<sup>273</sup> The logic of triangulation can be found in the origin of the word: triangulation as used in land surveying promotes precision whereby knowledge of multiple points on a line allows one to decipher a specific point upon their axis. Its metaphorical history further clarifies the concept: the triangle being the strongest

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<sup>272</sup> M.F. King & G.C. Bruner, “Social Desirability Bias: A Neglected Aspect of Validity Testing” (2000) 17:2 *Psychology in Marketing* at 80.

<sup>273</sup> N. Golafshani, “Understanding Reliability and Validity in Qualitative Research” (2003) 8:4 *The Qualitative Report*, 597-606, online: <<http://www.nova.edu/ssss/QR/QR8-4/golafshani.pdf>> at 603.

shape.<sup>274</sup> While Seale discusses triangulation as having roots in the realist paradigm, he also indicates that it can be useful in a post-modern paradigm. A series of conceptions of triangulation exist within qualitative research ranging from the assumption that multiple methods assume a fixed reality,<sup>275</sup> to a more post-modern understanding of triangulation<sup>276</sup> contributing to the depth and breadth of the known phenomenon. Investigator or researcher triangulation involves multiple researchers reviewing and analyzing the data simultaneously with the aim of checking consistency in identifying emergent themes.<sup>277</sup> While Patton suggests that “triangulation is ideal”, he concedes that it can be taxing on resources as it will add significant costs to a small research project.<sup>278</sup> In hindsight, costs of researcher triangulation would likely not have been prohibitive, and would have been beneficial to the research.

Conversely, triangulation was employed in the various forms of data gathered; an archival review of policy documents and a review of case law in addition to the qualitative interviews allowed for a multiple ways of viewing CST and related policy measures. This procedure allowed for a more complete picture with contextual importance given to Canadian common law and methodologically allowed for enhanced clarity and precision in analysis and related policy recommendations.

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<sup>274</sup> M.Q. Patton, *Qualitative Research and Evaluation Methods* 3<sup>rd</sup> ed. (Thousand Oaks, CA: Sage, 2002).

<sup>275</sup> See for example, the early work of A.V. Cicourel, *Cognitive Psychology: Language and Meaning in Social Interaction* (New York: Free Press, 1974). Also N.W.H. Blaikie, “A Critique of the Use of Triangulation in Social Research” (1991) 25 *Quality & Quantity* 115-136.

<sup>276</sup> See: N.K. Denzin, *The Research Act in Sociology: A Theoretical Introduction to Sociological Methods* (Butterworths: London, 1970). See also: D. Silverman, *Doing Qualitative Research* 2<sup>nd</sup> ed. (London: Sage, 2005). See also: U. Flick, *An Introduction to Qualitative Research* (Thousand Oakes, CA: Sage, 1998). Finally, see: C. Seale, *The Quality of Qualitative Research* (London: Sage, 1999).

<sup>277</sup> Golafshani, *supra* note 273.

<sup>278</sup> Patton, *supra* note 274 at 266.

A final methodological critique of this research relates to the focus drawn. While important to adhere to a specific focus in research, and while data saturation was reached for the population chosen, an expansion of this population is an important consideration. Reaching other types of professionals and those in other countries with non-Western perspectives would produce intriguing, relevant data. While it might be useful for a future study to consult a more diverse population, doing so was not an objective of this study; this study attempted to break ground in addressing perspectives from a predominantly Canadian perspective.

## **CHAPTER 5: Qualitative Results & Implications**

### ***INTRODUCTION***

Chapter 5 discusses the results of the qualitative interviews beginning with a series of orienting responses describing some of the more deeply rooted philosophical understandings held by the participants. To answer the research questions, responses were organized in the following thematic sections: barriers to enforcement; why Canada ought to use ET law in its response to CST, and; new directions based on lessons learned in practice. The data demonstrates that the current response is too legalistic and weakened by cultural and territorial barriers making international inter-agency cooperation difficult. With attention to new directions, an *intersectional approach* to policy development is proposed and illustrated by the comments from participants and throughout the literature.

### ***ORIENTING RESPONSES***

Ten interviews were conducted over a period of ten months with some follow-up providing 50 pages of transcriptions over 20 hours. It was of interest to the researcher to first determine the participants' understandings or definition of the term "child sex tourism." Acutely aware of some disagreements in the literature and in practice about what falls into this category, it was imperative to gather the understandings and conceptions held by participants. This question was followed up by inquiring as to what other offences relate to CST in order to allow respondents to elaborate on their often complex descriptions. It also enabled the researcher to develop a clearer understanding of the interwoven relationships

and context of child sexual exploitation – as organizations rarely focus on just one area of exploitation, it was necessary to preserve context by addressing the larger framework.

The most readily apparent divergence, in defining CST, was the suggestion by four participants that the term itself was a misnomer. For example, one law enforcement participant suggested that,

we prefer to call this Traveling Child Sex Offenders as not only tourists, but also expats living and working abroad for longer periods are involved. Usually we find that this is people from another country or region traveling to abuse children away from their usual controlled environment. However, you can also find traveling child sex offenders within a country – from the city to a beachfront resort as an example. No continent of the world is free of this.<sup>279</sup>

This statement represents an attempt to shed the image of a sexual abuse occurring in the context of a beach front holiday, and is broader and more inclusive of the diverse nature of the offence. Another participant, however, was extremely resistant towards refining the traditional term, stating that to do so would break the connection between the crime and the terms used in the *CRC-OP-SC*. For example, Article 10 of the Protocol specifically indicates the promise of signatories to take all necessary steps to resolve a series of exploitive practices including “child sex tourism.”<sup>280</sup> The disjoint that would inevitably result, in her eyes, would serve to threaten the international justification for prosecuting this type of crime. Finally, a viewpoint commonly re-iterated among those working in the NGO community, was that Canada itself has become a destination for CST. One participant suggested that while we are quick to visualize Canadian offenders abusing children in exotic locations, we have been resistant to the notion that citizens of other countries are committing sexual abuse offences

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<sup>279</sup> Kim\_LE. Please note: pseudonyms were given to participants with an indication of whether they fit into the designation of NGO, Policy or LE (law enforcement). These designations could not be made more specific as they would compromise anonymity.

<sup>280</sup> *CRC-OP-SC*, *supra* note 112.

on Canadian children. Two participants elaborated on this position indicating that it is in fact the Canadian stance on age of consent<sup>281</sup> that so readily puts Canadian children in a vulnerable situation, particularly those who are already marginalized.<sup>282</sup>

The discussion surrounding the other offences related to CST was not particularly surprising considering the relevant literature. Child trafficking and the creation and distribution of child abuse images and films (child pornography) were the two most commonly cited. Additionally, due to the international and transnational element, Internet sexual offences were also identified as related. The common elements are the international nature of the offences and the focus on abuses of children. In fact, some participants suggested that the inter-connectedness of these three crimes is so high, that many offenders participate in all three within the context of a few victims, and that sometimes, enforcement is alerted to the commission of one offence while the other is being investigated. For example, as has been a common situation in the recent Canadian cases, Canadian Border Services has apprehended some Canadian citizens entering Canada in the possession of child sexual abuse images. Upon further inspection, it is often determined that the images were created overseas, and hence the crime of CST is identified.<sup>283</sup>

One participant, Ruth\_policy discussed the link between CST and Trafficking as one where the resolution is very similar. With elements of international investigation, as well as considerations of how to deal with the crime within the Canadian justice system, there exists an overlap in responses. However, a key difference here is the fact that victims of CST are

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<sup>281</sup> It should be noted that after collection of data, Canada raised its age of consent from 14 to 16 years on April 30, 2007.

<sup>282</sup> Danielle\_NGO & Rose\_NGO.

<sup>283</sup> Terrance\_LE.

generally located overseas while enforcement officials are usually alerted to trafficking when victims show up on Canadian shores.

Acknowledging the relationships between CST and other offences served not only to provide context, but also to provide comparisons between the resulting societal responses. Participants often pointed to positive elements of responses to other offences. These were identified as best practices that should be adopted in dealing with CST; and conversely, were able to use other offences as a reference point in criticizing the current response to CST. For example, in his discussion of cooperation as a positive element of a response model, one enforcement participant, Raymond\_LE, pointed to the advances that have been made regarding child exploitation offences via the Internet. The intelligence links used in investigating Internet crimes can and should be used as a model to develop similar collaboration for CST; one primary transferable advantage in the cyber-crime initiative is coordination bodies that serve to collect and disseminate information widely.

It was also common for participants to attribute the prevalence of CST to two levels of causal factors. Some indicated that the opportunity structure is such that an offender has relative freedom while traveling overseas because of the uncertainty of apprehension. Others pointed towards deeper underlying cultural issues or root causes of the issue. Both notions have support in the literature. Interestingly, some participants identified both levels of causal factors in their interview, indicating that the various explanations are not mutually exclusive. For instance, Rebecca suggested that CST is not strictly a law enforcement issue wherein enforcement acts as a deterrent to undesirable behaviour, but rather, it “is a social environmental issue.” She indicated that:

we need to consider how we have changed as a society that this (child sexual abuse) is okay...as a society we are much more desensitized to abuse and violence...our social structure allows us to rationalize youth as sexual beings...This is a slippery slope.



Simultaneously, she recognized that law enforcement activities and strong legislation are imperative, but only *part* of a successful strategy. Jacqui poses a broader ideological understanding of CST and child exploitation in general. In her response, she rejected a behavioural/ opportunistic explanation and characterized child sexual abuse as a systemic ill of Western culture. She suggested that a “puritanical undercurrent” underlying our culture exacerbates inappropriate behaviour and that when “coupled with new technology and hyper-sexualized images...creates an atmosphere – and behaviour – that is ultimately, on a cultural level, unacceptable.” She suggested that it is this dual and inconsistent messaging that in the end leads to the pervasiveness of pedophilia. Furthermore, she elaborated by identifying the cyclical nature of pain where “hurt people hurt people” referring to the perpetual nature of sexual abuse. Her comments mirror commentary within the literature regarding CST as much more than just a legal issue; the systemic global inequalities demanding a broad response system described by O’Connell-Davidson.<sup>284</sup>

In the context of CST, nearly all of the participants spent some time discussing the power differentials apparent between sending and destination countries in the context of CST. Some suggested that a law will serve to make it *appear* that Canada is taking action, and on that front is necessary, but this fails to consider the underlying imperialistic attitudes held by governments, communities and individuals, resulting in law not reaching its potential. Use of terms and phrases such as ‘entitlement’, ‘racism’, ‘patriarchy’, and ‘commoditization [sic] of children’ to describe Western sentiments and behaviours pervaded the interviews. The notion of Westerners being valuable in foreign countries simply by virtue of their nationality was also noted as a mindset believed by participants to be widely held. This

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<sup>284</sup> O’Connell-Davidson, *supra* note 34.

sheds light onto the global power variations. Conversely, destination countries and victims were described using terms such as ‘impoverished’, ‘orphans’, ‘foreign’ and ‘defence-less’ further illustrating the sentiments of power disparities.

The data collected by the Protection Project indicated that many offenders are under the false impression that children choose to prostitute themselves.<sup>285</sup> Similarly, Jennifer\_LE, from her experience in law enforcement, suggested that CST occurs because women and children have “no identity” in their home countries. She further framed the issue as a by-product of greater underlying issues such as poverty, which is exploited by the “monsters” from wealthier countries. She supported each of the earlier notions by suggesting that it is “preferential child molesters” who commit child abuse where the opportunity exists exacerbating their feelings of power over “the other.” The opportunity is “present due to the base...of poverty...and it needs to be addressed.” She indicated that an effective strategy will address the inequalities between offenders and victims that create the opportunity for crime and exploitation.

Finally, many participants described their own feelings of inadequacy in dealing with a pervasive and sensitive issue such as CST. The

“...helpless[ness] as an investigator, and a parent and as a person...the children are so unreachable, especially when we know the chances of ever finding them are very low...we don’t know if they are alive. To go home and eat your spaghetti and meatball dinner and know what is going on out there – it eats away at you.”<sup>286</sup>

The commentary above sets the stage and sensitizes further analysis by providing insight into the oftentimes diverse understandings held by participants, and also indicates some of the underlying similarities such as the systemic ills underlying CST. Coupled with the intense

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<sup>285</sup> Mattar et al., *supra* note 28.

<sup>286</sup> Jennifer\_LE.

emotion felt with regard to child exploitation, the remarks represent a raw human element each practitioner brings to their professional perspectives.

Referring to the holistic approach identifying the disjuncture between policy and practice, it is apparent that these varied understandings of the issue come together in the interconnected web of factors conceptualizing CST and its cause. The comments give meaning to the multiple understandings that can be taken into account to provide detail and elucidate the complex context. To be clear, each participant emphasized the necessity of understanding CST as more than a law enforcement issue, as a phenomenon more deeply rooted in culture.

## ***BARRIERS TO ENFORCEMENT***

### *Introduction*

One research question sought to discern whether there are investigative, prosecutorial and diplomatic obstacles that bar the use of ET law. The question is perhaps far too simplistic given the complexity of the data. It was found that there are significant barriers to ET law enforcement; however, while these were paired with a characterization of the present situation as largely ineffective, most participants still expressed an interest in the transnational effort. Coughlan et al. suggest that enforceability is a key criterion in identifying “whether it is worth prescribing the law”,<sup>287</sup> while all laws have *some* symbolic value, a law that is not enforceable is solely symbolic. Laws of this nature, characterized as paper tigers, may erode confidence rather than promote justice. No participant suggested

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<sup>287</sup> Coughlan et al., *supra* note 133 at 62.

that the obstacles to enforceability made the use of ET law inappropriate. Interview data support the notion that weaknesses and barriers exist regarding proximity, culture, language, inadequate resources, lack of experience, lack of cooperation, failure of diplomacy, shortage of commitment, poor attitudes, a reactive orientation that fails to take proactive measures and competing interests.

*Proximity: it's easier to let it slip off the edge of the table...*<sup>288</sup>

Several participants felt that the sheer distance between Canada and the place where the crime occurred created an often insurmountable hurdle, particularly in gathering evidence. In Raymond\_LE's experience:

examining the crime scene is difficult...especially due to time issues and depending on police...information is limited IF evidence is collected...also, how can this be presented in court? If one relies on local police, quality is usually weak for Canadian court scrutiny.<sup>289</sup>

In addition to the quality and ease of collecting evidence, going to some countries poses dangers to personal safety of enforcement officers, of which they are acutely aware. Terrance indicated that even with an investigative plan in mind, decisions need to be made and strategies developed in awareness of the often hostile environments in which investigative teams are asked to gather evidence. He stated:

of course you get to this stage of who are we going to work with, how are we going to go about tracking down victims, and then it comes up to us later that some of the areas in Columbia, well, there's no way that foreign diplomat like myself can fly down to go in these areas. It's like I might be okay for a day and then the Columbians are telling us that if you spend more than one day there, you're putting

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<sup>288</sup> Terrance\_LE.

<sup>289</sup> Raymond\_LE.

yourself at high risk. Basically, the risk is with the militant groups down there, creates a higher risk of abduction for foreign diplomats. They will know right away. For instance in some of the towns involved in this investigation were smaller, they were outside of main cities such as Bogota, so there are some risks there – so that took another bit of time. We had to step back and decide, ok, what are we going to do with this? We needed to get the victim, to identify the victim, all of these types of things, and obviously not put ourselves in harm while doing this.<sup>290</sup>

Sometimes prospective investigations can become difficult to the point where they reduce the incentive to investigate at all. A common sentiment was that even if the safety burdens were overcome, evidence was still difficult to gather and might not be strong enough to stand up to scrutiny in Canadian courts. In addition to these difficulties, there was also an understanding that the ET nature of CST meant the crimes and victims were easily forgettable. For example:

I would like to see a better approach in the future as to how we're dealing with some of this because I think it's an issue where...I shouldn't say that we have been sitting on our hands, but I just don't think anybody has taken a look at the bigger global issue. Because it's easier, when stuff is going on in a foreign country, it's easier to let it slip off the edge of the table...<sup>291</sup>

The barriers regarding geographic distance such as danger to investigators, quality of evidence and sheer complexity of orchestrating an overseas investigation, serve to illustrate the difficulties discussed in the literature. The image of CST investigations as 'off the side of the desk' was a common illustration in the interviews, not only used to draw attention to the non-proximal nature of CST, but also used to identify under-funding and a lack of commitment. Not only was this illustration given, but more significantly, CST was seen to

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<sup>290</sup> Terrance\_LE.

<sup>291</sup> Terrance\_LE.

slip right off the desk and become forgotten when compared to other more proximal and immediate concerns.

*Resources: "...our hands are often tied..."<sup>292</sup>*

Flowing from the geographic problems, difficulty in directing resources to the issue of child exploitation was a concern mentioned by nearly all participants. The lack of funds dedicated to child exploitation was identified by eight participants. It was not clear, however, where to attribute the under-funding; whether due to a true lack of funds, or whether available funds were simply being directed elsewhere. One participant, reflecting upon her role in the non-profit sector and identifying ineffectiveness of the law as the main outcome of lack of funding, stated:

the reasons for the challenge is really due to funds...law enforcement does not feel they would get the resources to follow up a lead...and so they let cases fall into their laps. Awareness among law enforcement needs to be around that they have a large pot of money so that funds aren't diverted from other offences...I wouldn't say that the law is not working, but rather that the implementation of law is perhaps not working.<sup>293</sup>

She indicated that the repercussions stemming from uncertainty in funding necessitates a reactive approach whereby law enforcement is not encouraged to look for cases; they are not confident that they will have sufficient resources to follow-up on the cases they might find.

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<sup>292</sup> Jennifer\_LE.

<sup>293</sup> Rose\_NGO.

The reactive nature of the resulting response has been labelled by all but two participants as the chief problem with the current approach.<sup>294</sup> And further:

of course it has to be off-the-side-of-someone's-desk because we haven't raised the profile enough for people to understand that this is an issue in this province... The most common question is 'is it an issue, what are the numbers?' and of course, we don't know – nobody in the world can tell you that, so it is a real challenge.<sup>295</sup>

Unfortunately, responding to crime in a transnational setting is not the only barrier pushing CST to “the side of someone’s desk.” Unrealistic requests for statistics (due to a lack of understanding of the clandestine nature of the crimes) hamper resource dedication. Following from her comment regarding the profile of specific cases, it was found that there was near unanimity with regard to how to get funding for a particular case: increase its profile. This prevailed regardless of what participants identified as the root causes of the resource problem. From a policing perspective, profile was seen as so instrumental that “a police agency with limited resources typically has limited success even getting out of the starting block unless an offender is high profile...”<sup>296</sup>

While an increase in profile was found to be associated with an upturn in the flow of money toward a specific case, it was also thought to share a positive correlation with personnel expertise.

When things get projected to that level, it changes the dynamics of everyone...just goes right up the food chain in terms of who is involved...of course when you have that many people involved, it gets easier due to resources.<sup>297</sup>

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<sup>294</sup> The notion of reactivity will be discussed in a later theme and is supported in the literature. See also B. Perrin, “Our Child Sex Offender Laws Should Cross Borders (April, 2008) in The Lawyers Weekly, online: <<http://faculty.law.ubc.ca/perrin/pdf/THE%20LAWYERS%20WEEKLY.pdf>>.

<sup>295</sup> Ruth\_Policy.

<sup>296</sup> Raymond\_LE.

<sup>297</sup> Terrance\_LE.

For example, the fact that Christopher Neil's case<sup>298</sup> was handled by INTERPOL was suggested to be a key factor leading to the accused being located. Rose\_NGO suggested that the international attention that resulted proved very beneficial, suggesting it was the primary cause of Thailand's intention to prosecute this offender. Similar resources are not dedicated towards the hundreds of criminal tourists who frequent that country. In fact, Terrance\_LE asserted that

we know it at an enforcement level, what we have to do, but again, it comes down to budgets, manpower what the politics of the day are, and unfortunately, the one thing I always see when I turn on the TV is people like Oprah are continuing on with this stuff. CNN does coverage of all of the type of stuff as well...so I mean it's probably a good thing in the sense that is the big media coverage and it puts political pressure on every one to step up and make sure the right thing is done.<sup>299</sup>

In sum, the resource problem contributes to an intimidating cycle where resources cannot be raised without a high profile, and profile cannot be achieved owing to a lack of resources. Lack of resources is a common factor indicated by the literature and these comments help to illustrate more precisely the effects of this barrier. Even if there is a national commitment to ending CST, individual stakeholders need to be aware of financial support for such investigations. Presently, there is massive uncertainty as to whether there will be enough funding to carry through a case once it has been initiated.

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<sup>298</sup> See Appendix.

<sup>299</sup> Terrance\_LE.



*“Our Courtroom is a War Zone...A Battle Rather than a Searching for Truth Mission”<sup>300</sup>*

Another clear acknowledgement by many participants (but not by law enforcement participants) was that the disadvantages inherent in the legal system itself, play a role in the ineffectiveness of the overall response to CST, particularly due to the difficulties associated with processing overseas cases involving child witnesses. One member of an NGO suggested that,

the adversarial system creates huge barriers for individuals to be prosecuted. We have questions regarding credibility especially concerning aggressive cross-examination of children. In court, “perfect children” are the best witnesses, however, these ‘perfect children’ are not the ones who are sexually exploited, street kids who can’t answer all the questions...they may not remember all the details...these are very very problematic in an adversarial system...our courtroom is a war zone – it is a battle rather than a searching for truth mission.<sup>301</sup>

The sentiment was that systemic barriers within the Canadian legal system make it difficult to resolve many sensitive cases; this was magnified when attempting to address issues raised by victims who may not fit into the Western conception of a “good victim.” This criticism is not unfamiliar to the discipline of criminology; arguments that the adversarial system is a place of re-victimization have been made in regard to cases of child abuse and those of a sexual nature. Because Canada’s court system has only processed one CST case, it is unclear how these hypothesized issues will play out; however, there is good evidence that bringing victims from foreign countries to Canada to face their abuser may be significantly traumatizing and may present challenges to Western notions of justice and due process. The difficulties will likely be illustrated when Canada conducts more trials of this nature.

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<sup>300</sup> Rose\_NGO.

<sup>301</sup> Rose\_NGO.

### *Culturally Irrelevant Policy and Practice*

Yet another reason for the weaknesses in investigative procedures is the sheer complexity of such investigations – requiring a multifaceted response that resists some deeply ingrained Western prejudices. A law enforcement comment indicated that ‘cleaning up’ a problem that challenges Western ideologies, experiences and understandings is far from simplistic. Rebecca\_LE stated:

When we are going into other countries, the socio-dynamic factors need to be kept in perspective...these countries have NGOs who are familiar with these issues. Obviously, child sexual abuse is not a new phenomenon; the Internet part is new however. There are different working positions there – philosophical differences and living conditions. For example, for a family who has a house with no roof, selling their child for one night might mean that the family can be safe and warm for an entire year. I want to make it clear that this in no way justifies the behaviour, but rather offers an understanding towards different perspectives. [And then] we try to go to the other country and clean up the problem.<sup>302</sup>

Some participants discussed the inconsistencies between policy stemming from the *CRC* and *CRC-OP-SC* and Canada’s response. The *CRC* indicates that responses to children should be culturally relevant; however, this ideal has undergone some criticism since the document itself has not been drafted with these considerations. Likewise, the comment above indicates that the socio-dynamic complexities in dealing with transnational crimes must be kept in mind in creating an appropriate response strategy, however, it is very easy for these philosophical variations Rebecca\_LE identifies to be ignored, and thus an uninformed response results. While the formal policies included within the *CRC* encourage and promote the participation of children and the recognition of their special views fits squarely within the

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<sup>302</sup> Rebecca\_LE.

idea of child participation,<sup>303</sup> resulting practice is not seen as accomplishing these objectives. One of the most repeated criticisms of the *CRC* is the lack of consideration given to differing and conflicting notions of childhood,<sup>304</sup> making it difficult to apply in practice.

O'Connell-Davidson suggests that a problem arises because there exists a disconnect in the definition of a child between campaigns against commercial sexual exploitation of children (CSEC) and the *CRC*. While the *CRC* attempts to provide children with a voice, campaigning agents continually emphasize the innocence, helplessness and dependence of children.<sup>305</sup> Furthermore, critics argue that the *CRC* (taking as the norm a stereo-typical nuclear family) promotes a view of children entrenched in the Western liberal ideology at the expense of considering differing contexts in which children survive worldwide. An even more untoward conclusion is that the lack of priority given to issues of exploitation sends an even graver message of social legitimation.

It is clear that, although we have seen major shifts in the typologies underlying child rights in the Western World, these same shifts have not been evident in the Developing World. Acknowledgement has rarely been given to the right of children to be protected, let alone their right of participation,<sup>306</sup> thus the concepts outlined in the *CRC* are rather foreign when implemented globally; notions of children living in nuclear families and being protected from child labour do not coincide with childhood experienced within extended

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<sup>303</sup> Landsdown, *supra* note 43.

<sup>304</sup> While Kelly, et al., *supra* note 70, refer to the European context in providing this criticism, it can also be applied worldwide where consensus on the age of a child and especially the type of rights children should be given had not been reached.

<sup>305</sup> J. O'Connell Davidson, *Children in the Global Sex Trade* (Polity: Malden, 2005) [O'Connell Davidson, *Global Sex Trade*].

<sup>306</sup> Green, *supra* note 53.

families and with the notion that labour is an integral part of childhood. In finding out what we can do by identifying a systemic disadvantage of the current approach, Rebecca says that

...going into countries without feeling out social environment in the community and doing a major police coup. We need to address whether there are other options for youth, and cannot continue to base models on what would work for an Ottawa youth. It is fair and well to go into a community and tell them what to do, but we need to be aware...this may not be the role of the law enforcement agencies, but we need to start developing realistically-based solutions.<sup>307</sup>

Only by shedding ethnocentric Western ideologies and increasing awareness, can realistic solutions be developed.

Within the literature, O'Connell-Davidson questions the "utopian" principles underlying the *CRC* to the extent she asks whether this document that emphasizes a universal right to childhood merely blinds us as to the actual oppression experienced around the world.<sup>308</sup> Levesque, however, shares a different view of the *CRC*.

The rights and principles used to guide their interpretations urge us to rethink fundamentally ingrained ideologies of childhood, families, rights, communities and international law. It is important to understand the manner in which the Convention urges us to rethink these ideologies; for it guides the current children's rights movement and had important consequences for the efforts to combat child sexual maltreatment.<sup>309</sup>

The argument that the *CRC* presents a pleasant picture with hard to meet policy implications is an interesting one to consider. Although the *CRC* and related labour codes forbid labour for many children, it does not consider the state of children for whom work is an essential part of survival. Not being able to be employed through legitimate forms of labour, yet requiring a source of income, more children begin working in illegal and un-regulated labour

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<sup>307</sup> Rebecca\_I.E.

<sup>308</sup> O'Connell Davidson, *Global Sex Trade*, *supra* note 305.

<sup>309</sup> Levesque, *supra* note 91 at 443.

environments. These regulations are inconsistent with a variety of themes supposedly underlying the *CRC*: if children are granted recognition as rational beings, they should also be granted agency to decide what types of legitimate work is necessary for themselves. Protection of children should also consult the lives of children living outside the Western world, since failing to do so takes away from the relevance of the document and adds instead to disenfranchisement.

Compared to the typologies discussed in Chapter 2, the criticisms suggest that the implementation of the *CRC* is stuck at the second child rights typology – recognizing children as objects of care but denying them agency in their own protection. While in theory the *CRC* represents a more subject-oriented theory of child rights, current practice differs and remains somewhat imperialistic and paternalistic. Even the format of the current law has left much to be desired in the eyes of one law enforcement participant who criticized it as not being, “that informed.” However, Rebecca\_LE did acknowledge the strengths of the legislation by predicting that, “...it will be tested soon, which is good...it does give us a legal avenue to stand up for kids.”

*(In)Experience: we had no idea how to do this...a lot of it...and you start to panic*<sup>310</sup>

Inexperience was identified as another significant barrier to effectively responding to CST. A common sentiment was that Canada is in a position of learning how to deal with CST and how to appropriately apply the laws. We are in an environment where the most recent cases, and likely those in the near future, will be ‘test cases’. In fact, one participant compared the current situation to moulding clay whereby the opportunity exists to develop

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<sup>310</sup> Terrance\_LE.

something positive, but the development will involve a series of trials and errors lacking procedural certainty.

Because, like I said, for a lot of us, this was a first go, so new legislation, new this, new that...you're kinda feeling your way...it's like you've got a piece of clay and you're trying to mould it. One we kinda know how to better navigate what we're doing, I think it will be more effective....so, it's a time thing...but it's probably time this year for us to start looking outside the box and not be reactive and wait for these things to drop in our laps...we need to jump in and take the lead and be proactive towards it. And, that time has come...<sup>311</sup>

Investigators will be tasked with learning on the job, and policy-makers will be trying to catch up in determining what might work to deter and respond.

Some respondents felt comfortable in the current steep learning curve, likening it to all new areas of crime control, whereas others seemed more exasperated by Canada's neophyte response. Others moved along this continuum throughout their interview, expressing panic as well as understanding. One participant identified the comingling of inexperience, lack of proximity, seriousness of the offence, and cultural differences leading to a sense of fragility in dealing with the case.

We thought at one point, we could end up losing this because it became such a sensitive issue, and we kind of had to brain storm/ think-tank in terms of how we can [sic] orchestrate this and do it, and obviously do it legally to make sure it's all fine...Some of it, you're ready to drop your head on your desk because you figure, ahhhhh! You're NEVER going to get around all this!<sup>312</sup>

Due to the specific expertise that is required for these intricate investigations, three participants pointed toward working with the same people consistently as being a strong point. However, due to various uncontrollable circumstances, it was not always possible to

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<sup>311</sup> Terrance\_LE.

<sup>312</sup> Terrance\_LE.

maintain these relationships; having to rebuild expertise and communication between parties served as a detriment to the investigations. One participant reflected that it

is very personality based...so if the key RCMP officer we were dealing with has been moved onto something else, you have to start all over again...maybe not at the same level, but you need a system that is not so personality based, that is just entrenched, and that is the way it is and everybody knows who does what.<sup>313</sup>

### *Cooperation Foiled By Competing Interests*

It was clear and somewhat disheartening to learn of the constant frustration experienced by law enforcement, policymakers and NGOs regarding lack of cooperation. Frustration seemed to hinge on varying (mis)understandings of the problem, competing interests and distrust of the unknown. Most participants held close the notion that they knew what was best to solve the problem, and that others did not. This fierce competition mimicked a battle wherein competing interests makes cooperation extremely difficult. The claims were somewhat remarkable considering the acknowledgement within the literature and within the *CRC* that multi-party cooperation is essential in the fight against child exploitation.

Since enforcement usually has the default responsibility for investigation of a case, it was somewhat discouraging to learn that cooperation is not looked upon favourably, particularly “when you are dealing with people of another foreign state.”<sup>314</sup> Terrance\_LE reflected,

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<sup>313</sup> Ruth\_policy.

<sup>314</sup> Terrance\_LE.

My experience has shown me that I would probably not deal with NGOs much...that is just me...I would rather deal only with investigators...I would not close the door on them, but I would not actively seek them.<sup>315</sup>

While the conflict was paramount, there was also evidence that all parties are aware of the tension and likewise aware that a balance needs to be struck. One participant suggested that the friction is based mainly on differing roles and varied goals,

The most important person of course is the child...in the middle of all this...law enforcement, even though they are instrumental in getting (a case) going, their interests are different than a community organization, they would say that they're concerned with the trafficked victim, and they are, but their main concern is to get the person who did the trafficking...it's a bit of a hammer and a glove approach and we need to find some common meeting ground.<sup>316</sup>

As another participant stated, "many groups worked to get the CST legislation; however, they weren't in it for all the same reasons," indicating that the tension existed even prior to the implementation of Bill C-27.<sup>317</sup>

There needs to be political will in each province to make it work – here and away...one doesn't negate the other...Canadians abroad...reaction to a reality that is globalization, Internet and world wide travel which has resulted in people doing bad things...we can't now turn a blind eye.

In order to remedy the situation, we

need to keep an eye on the target – that is we need to consider why we are in the business of protecting children – when there is pressure from government in other countries to be a lead agency, sometimes our objectives move off the ideal and when that happens, we are not very good at achieving that goal.

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<sup>315</sup> Terrance\_LE.

<sup>316</sup> Ruth\_policy.

<sup>317</sup> Rose\_NGO.



This comment suggests that the ego involved in various groups need to be left aside in order to protect children. The competitive nature that this participant saw as a barrier to cooperation served to put organizational interests ahead of the interests of children.

The barriers identified by participants, while characterized as a pervasive set of interwoven challenges, were paired with optimism for the future. While frustration, and oftentimes reactions of helplessness or inexperience were common (especially among law enforcement participants), they consistently indicated that the present situation was undergoing change and reform. The current state of affairs was described by Terrance\_LE as “a learning experience” in preparation for more streamlined and effective approaches in the future. Oftentimes, discussions around the current obstacles were followed by prescriptions for an improved approach. For instance, while reactivity was identified as the most pervasive and destructive barrier, there was speculation that the future would see an enhanced proactive approach based on the lessons that are currently being learned.

## *CANADA OUGHT TO USE ET LAW*

### *Introduction*

Coughlan et al. assert that Canada should exercise ET jurisdiction only in special circumstances, and highlight the importance of making the choice prudently rather than claiming jurisdiction haphazardly.<sup>318</sup> This next question requires a deconstruction of the issue of CST, resisting the temptation to assume that Canada should participate in a

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<sup>318</sup> The authors identify a paradox where Canada may attempt to assert jurisdiction extraterritorially despite foreign resistance, however, will rebuff foreign assertion of jurisdiction in Canadian territory. This in part is why Canada must pay close attention to when and why it takes this type of action.

transnational effort. Specifically, in light of the substantial obstacles to success in the investigation and prosecution of transnational offences *should* Canada direct resources to this goal? It is important to address this question in order to present the solid ground upon which our current policy is founded.

The most substantiated themes present in the data, favouring an ET approach to combating child sexual exploitation involve (a) image maintenance and; (b) universality of the issue. Additionally, while all respondents suggested that child sexual exploitation is an appalling phenomenon, and that Canada should have some role in the international setting, consensus was not reached regarding precisely what this role should entail. The illustrations below serve to elaborate on the general policy justifications identified by Coughlan et al. for the use of ET law: to regulate activity with a strong connection to Canada; to control territory that is not within the jurisdiction of another state; and remaining in accordance with international agreements. In sum, Canada should have an interest in ET regulation where there is a substantial connection to Canada, and where such a claim will not offend the international law principle of comity.

### *Shedding the Laissez Faire Image*

A sentiment strongly asserted by participants was the claim that Canada needs to be seen to be doing something towards decreasing the worldwide sexual exploitation of children especially in light of commitments made regarding implementation of the *CRC*.

“It (our response) stems from the greater international commitment...and then we try to do something at the provincial level...but we aren’t doing a whole heck of a lot...”<sup>319</sup>

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<sup>319</sup> Ruth\_policy.

Tied closely to this comment regarding inaction is the speculation that (contrary to CST literature) Canadians are becoming desensitized to instances of child abuse, and that a strong, clear National policy response could play a role in reversing this *laissez faire* attitude pervading Canadian communities.

Child sex tourism is one of many crimes when people are pedophiles and when people are morally indiscriminate...we have to end sex with children and acknowledge that it is wrong and damaging...specifically, we need to deal with pedophiles who are most damaging because they have the highest number of victims. We also need to deal with racism, poverty, sex abuse within the family, and exploitation.<sup>320</sup>

Additionally, Ruth\_policy suggested that due to the veiled nature of the offense, occurring away from the well traveled paths, it is hard to get governments and communities to become involved in ending it. She found that the “most common questions are: is it an issue? And if so, what are the numbers?” It becomes “a real challenge” to motivate people because “we don’t know the numbers...nobody in the world can tell you that.” She stated that it has become a difficult task to sensitize the general public to issues of exploitation. She also pointed to the change in attitudes regarding child sexual exploitation over the past twenty years to illustrate the positive direction in which awareness is moving. For example, in the 1980s, child abuse was viewed as being confined to extremely dysfunctional families, whereas today we have begun to move away from these traditional stereotypes towards more educated and nuanced understandings. However, the difficulty in changing attitudes and tolerance levels lies in being able to appropriately convey its seriousness and immanence. As demonstrated in the literature, this is very difficult to do.

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<sup>320</sup> Rose\_NGO.

*“No Continent of the World is Free of This...”*

Opinions begin to diverge again when respondents reflect on the level of responsibility Canada has on the international stage owing to the universal protection of children. In the interviews, CST was often pegged as “a Canadian issue [because] we are...allowing our offenders to prey in other countries without any effort to assist those countries.”<sup>321</sup> While there are underlying moral reasons identified for this responsibility, some participants pointed directly to the international commitments made by Canada, upon signing onto the *CRC*, as reason for our responsibility. Jennifer\_LE asserted that

children everywhere are defenceless...we are a member of the UN...the UN doesn't say that we will protect children in our country, but rather that we will protect children *period*. We have sworn we will uphold these laws...

Pointing to a universal jurisdiction in addressing victimization of children, she advocates a response that is not limited by territorial boundaries. Another recognizes that there is some disagreement as to whether we should devote resources to an overseas commitment, for the reason that we should be accountable only to the Canadian government; however, she asserted that we must begin to shed this misconception as Canadians are consistently discovered as part of the problem, “to acknowledge [this] is imperative.”

The disagreement alluded to is reflected in Danielle\_NGO's comments. Turning to a lack of resources, she states that “we need to look after the children in our own backyard first.” When asked whether CST is a law enforcement issue, one participant suggested that it is, but only in part. At a broader level, the issue is a Canadian one where we must be concerned with why “in some cases we are allowing our offenders to prey in other countries

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<sup>321</sup> Raymond\_LE.

without any effort to assist those countries.”<sup>322</sup> He indicated that even if we do not feel an international commitment, offenders should be held to account because they inevitably “have impacts when they return to Canada” and offend here in the commission of associated offences.

## *NEW DIRECTIONS FOR CANADA*

### *Introduction*

The predominant view expressed throughout this study is that Canada needs to dedicate resources and energy to combating CST. In light of the earlier comments deconstructing the current response regarding the barriers, it is important to partake in a reconstruction and consider how Canada can revise its response. The comments of Rose\_LE were characteristic of many respondents in that “I wouldn’t say that law is not working, but rather that the implementation of law is perhaps not working...” Most participants agreed with Rose\_LE suggesting that while many issues exist in producing a coherent, attentive response to CST, the law or the policy itself is not the problem.

The participants acknowledged that the law has natural limits and can only be a part of a more over-arching set of practices used to deal with the issue. However, they were virtually unanimous that Canada needs to begin to use the law, whatever its state. The barriers that exist impede practice to the point that the law is virtually useless in its current state; it is under-used, under-funded and not enhanced by integration with other areas of importance. A series of CST best practices, pertaining to current law and policy in response

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<sup>322</sup> Raymond\_LE.

to this and related offences, were identified by participants. The main road forward is to work toward an intersectional, rather than predominantly legalistic response. Needed improvements, specifically mentioned, involve (1) obtaining federal action, (2) enhancing collaboration among stakeholders, (3) developing proactive policy measures, (4) increasing education among law enforcement internationally, and (5) promoting awareness among tourist-related businesses, and the public.<sup>323</sup>

### *An Intersectional Approach*

A number of philosophical and practical limits have been noted within the literature, and in the interviews, regarding the current legally-oriented response to CST. Current approaches fail to include victims, fail to address systemic issues, have generated a legally imperialistic system, have neutralized the issue, and have produced an ineffective response. The failure to address the needs of the child victims is perhaps one of the most notable weaknesses identified in the literature, especially considering drives towards making the justice system more accountable to victims in other respects. Also noteworthy, current approaches fail to coincide with the current model of child protection in that they demonstrate a considerable lack of attention to participation by children.

Within the literature, suggestions regarding the enhancement of the effectiveness of CST responses typically envision tougher, more strategic, and wide-reaching law enforcement practices. As previously noted, this approach would fail to fully address CST.

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<sup>323</sup> A press release issued by Beyond Borders Incorporated on June 9, 2008 indicates that the Canadian Association of Travel Agents (ACTA) will be signing *The Code of Conduct for the Protection of Children From Sexual Exploitation in Travel and Tourism* imminently. ACTA will become the second member of the Canadian tourism industry to sign onto *The Code* an ECPAT project, funded by UNICEF and the WTO promoting responsible policies and practice regarding child sexual exploitation from a tourism perspective. *The Code* can be accessed online: <[www.thecode.org](http://www.thecode.org)>. Participation in this code of conduct is an extremely positive move as far as raising awareness and responsibility within the tourism sector.

In order to proceed, policy makers need to recognize the weaknesses inherent in any exclusively legal response, and look toward an integrated approach that simultaneously highlights the strengths of the legal response while building in soci-developmental, cultural, and health/educative approaches. The short-sighted nature of the current legally-oriented resolution fails to address the systemic nature of CST. By failing to respond to the economic reliance on CST, the legal approach creates a false sense of hope by offering a panacea which is severely limited by its reactive character. To re-emphasize an earlier quote, Rebecca\_LE indicated that our response will remain short-sighted if we continue our failure to recognize that

for a family who has a house with no roof, selling their child for one night might mean that the family can be safe and warm for an entire year. I want to make it clear that this in no way justifies the behaviour, but rather offers an understanding towards different perspectives. [And then] we try to go to the other country and clean up the problem.

What can be seen to date is a partial response to the ratification of the international agreements, but one that focuses on a legal approach rather than a holistic, integrative approach to the phenomenon.

The natural next step is to propose a model that focuses on the strengths of multiple, underlying, and interrelated causes of CST; one that situates a response within the accepted approach of recognizing the self-determination of children. Addressing CST in light of an intersectional approach<sup>324</sup> would more fully address the current context of child rights and unite the literature and the data collected in this thesis.

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<sup>324</sup> For more, see: Mattar et al., *supra* note 28.

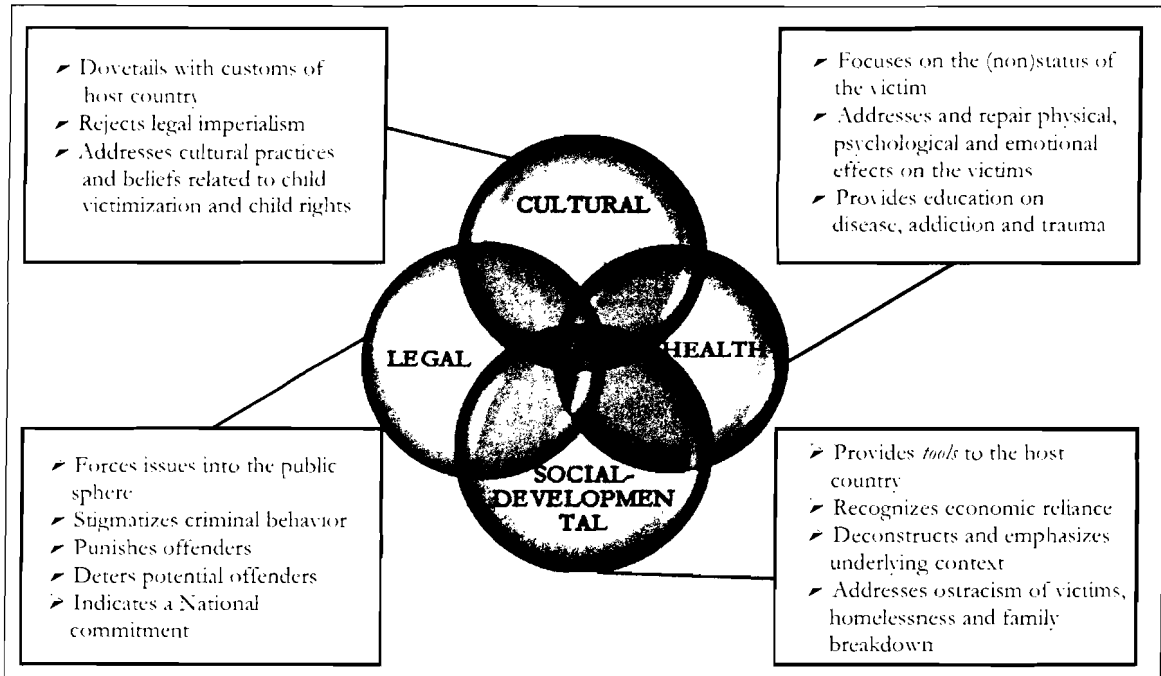


Figure 1: *Benefits of an Intersectional Approach to CST For Achieving the UN Policy Goals*

An intersectional approach illustrated by Figure 1 would support local responses in host countries (legal and social policy reforms). It would include the participation of the victimized community, support education programs, and increase partnerships with local, supportive NGOs. As indicated by the examples provided in Figure 1, the approach would operate in recognition of the interconnectedness of CST, various social processes at work. It would magnify the strengths of any approach by combining the positive contributions of a series of responses.<sup>325</sup> Such an approach would recognize that, “economic development, rest

<sup>325</sup> This approach can also be compared to the Save the Children’s Policy on Protecting Children from Abuse and Exploitation. In order to implement the principles of: supporting child advocacy; drawing public attention to sexual abuse and exploitation; identifying best practices in recovery and integration; building capacity within other organizations; assisting in governmental development and capacity; and focusing on enhancing legal protections, Save the Children take a stance that addresses the responsibility of a variety of sectors within the community and suggest that although a legal response is necessary, it does not have the capability of addressing the issue effectively without support. See: International Save the Children Alliance (2003) *Save the Children’s Policy on: Protection Children from Sexual Abuse and Exploitation*, online: <[www.savethechildren.net](http://www.savethechildren.net)>.



of community, families, access to opportunities, basic necessities all lead to a breeding ground for sexual assault.”<sup>326</sup>

In a recent document published by the Protection Project located at Johns Hopkins University, a model law was proposed recognizing the lack of effective national law enforcement strategies. Although this approach advocates a legal response, designed to reduce the problem by increasing the severity and probability of criminal penalties, it is not entirely inconsistent with what is being proposed here. By including prevention in the proposed model law, the researchers address many of the issues identified here, but propose to move forward by imbedding social/ developmental, health/ education, and cultural considerations into the law itself.

The policy model used by the province of British Columbia’s Office to Combat Trafficking in Persons (OCTIP) to respond to human trafficking has been acknowledged as a model where an integrated response network was identified as the best practice. This provides an exemplar where an issue of international relevance and a strong Canadian connection, was dealt with in a manner that employs an intersectional approach. Law enforcement action is enhanced if we “start looking at it from a ground-up approach” that comes from recognizing that one sector cannot manage all of the responsibility of dealing with such a systemic crime.<sup>327</sup> Specific to the British Columbian trafficking initiative, it has been recognized that assistance needs to be given to victims in regard to housing, health care, schooling, language interpretation, income source development, as well as provision of legal counsel.

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<sup>326</sup> Rebecca\_LE.

<sup>327</sup> Ruth\_policy.

The OCTIP human trafficking initiative recognizes that law enforcement and social support cannot work in isolation from other elements that may be more protective of the victims and their unique circumstances. Collaboration between human service providers, NGOs, clinical counsellors, as well as reconciliation initiatives, are needed to address the underlying issues. The following three themes serve to illustrate specific components of an intersectional approach in relation to CST: (1) advocating for federal assistance on provincial prosecutions, (2) development of a highly cooperative approach, and (3) generating a proactive approach focusing on future-looking policy and an awareness strategy.

#### *Federal Assistance*

While the suggestion of using federal prosecution to respond to crimes of CST was an intriguing one, it does not represent a theme that emerged from this research, as it was mentioned by only one participant. However, it does draw attention to an interesting notion that underlies the difficulties experienced by individual provinces in responding to particular offenders, and it is one that may serve to reduce some of the financial and expertise barriers present in the enforcement sector. Raymond\_LE suggested that by looking towards the strengths of the approach taken to War Crimes prosecutions, individual provinces may be alleviated of the burden associated with the high financial commitments for CST cases, by passing prosecutorial responsibility to the Federal Justice Ministry. This would likely increase the number of offenders held to account by ensuring provincial resources do not hamper a prosecution.

The current legislation requires the approval of the Attorney General of a province to initiate an enforcement response. One law enforcement participant discusses the problems with this first stage, the matter of competing interests.

When a police agency with limited resources is dealing with an investigation who needs to call the AG, it typically has limited success even getting out of the starting blocks unless it is high profile or significant evidence. Offenders may not have been in the last known province for some time....so, the Attorney General may have difficulty wanting to take it on. Individuals living abroad for 10 years plus, why take on the provincial prosecution; should be prosecuted federally like a War Crimes Model.<sup>328</sup>

Similarly, Rose\_NGO suggested that,

...now the law is perfect...perhaps, however, we can look to who funds the big ones, in other words although jurisdiction is provincial, maybe the federal government can provide some funding to assist with the costly prosecutions and investigations...kind of like the Justice Mission....

It is easy to see the connection between these proposed solutions and earlier comments dealing with the burdens of law enforcement and the often insurmountable obstacles created by lack of resources and training in the area. Additionally, there exists a connection between soliciting federal funding and the profile level of the case. In discussing which cases get attention, it was reported that cases promoted nationally, or better, internationally, are dealt with fewer problems through a highly streamlined effort.

*“Inter-dependence: The Catalyst for Setting This All into Motion...”*

Many participants, including the ones who reiterated and explained the tensions of cooperating with other agencies, pointed toward enhanced cooperation as part of a future Canadian initiative to ensure success. One stated that a positive move would be to ensure that all child victims are offered a series of specialized services as a response to their victimization. “Any one individual may not need all of these components, but it has to be a

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<sup>328</sup> Raymond\_LE.

model that responds to that person's needs, so it is a very human rights based approach to this and that is key."<sup>329</sup> Furthermore, stakeholders need to document the lessons they have learned so that partner organizations can partake in information sharing and networking. This might involve more formality that we have in our present procedures. For example, "currently nothing is formalized; while people willingly work together, a more formalized process would be beneficial..."<sup>330</sup>

*"The Overall Protocol has Several Gaps to Get an Accurate Picture..."<sup>331</sup>*

Eight participants acknowledged the reactive nature of the current response. In listening to the experiences of the participants, it was hard to imagine that a response could even attempt to be proactive at this point in time. Some respondents pointed to a lack of experience in investigating and responding to allegations paired with the complexity of the CST as the two main reasons for the current lag in response. Reference to "test cases" by law enforcement indicated that, at this point in time, Canada has had only limited experience to develop protocols and initiatives for dealing with future cases. For example, as one said, "we're waiting for these test problems to fall into our laps, and then we are trying to play catch-up with what's going on...we haven't really done much except react to the claims we've been hit with."<sup>332</sup> Another suggested that it is, in fact, the very nature of the crime – its clandestine nature – that makes for a predominantly reactive response. She stated that

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<sup>329</sup> Ruth\_policy.

<sup>330</sup> Kathy\_policy.

<sup>331</sup> Raymond\_LE.

<sup>332</sup> Terrance\_LE.

“there are definitely proactive elements dealing with undercover work that we are doing, but [the response] can be characterized as reactive because responses are due to reports...people see or hear of an event, and only then we are alerted to it.”<sup>333</sup>

Enhancing a proactive policy, coupled with awareness and prevention strategies, was identified as a key development in addressing the CST issue. Many participants pointed toward educating the public as a whole, in addition to specialized stakeholders, with a focus on attempting to change underlying assumptions and conceptions of what amounts to acceptable behaviour in society. One such area of needed attention is frontline workers in the tourism industry. Kathy\_policy reflected on a personal experience that arose while at a travel clinic where she learned that the travel agent had met a client who intended to travel abroad for the purpose of having sex with children. The traveler justified his intended behaviour by suggesting that it was acceptable in many countries and he asserted that his money would be a valuable source of income for the children. The travel agent in this situation did not know what to do, and thus did nothing.

While it is difficult to point to the frequency of such disclosures, it is imperative that frontline tourism workers be equipped with information on what constitutes a crime in Canada, and of where to report incidents of this nature. Participants indicated that, in their perspectives, not enough attention is being paid to avenues of reporting. One participant referred to an upcoming awareness project in her province designed to address CST domestically – awareness in this project will not only focus on identifying criminal

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<sup>333</sup> Rebecca\_LE.

behaviour, but will promote avenues of reporting for those who become aware of CST criminal behaviour.<sup>334</sup>

In a perfect world, education would be a paramount concern...immigration and customs, hotel owners and the public would all be informed of what it (CST) is, what it means...we only have so many police, and if others don't think it's a crime, it won't get better.<sup>335</sup>

And,

Child sex tourism is one of many crimes when people are pedophiles and when people are morally indiscriminate...we have to end sex with children and acknowledge that it is wrong and damaging...specifically, we need to deal with pedophiles who are most damaging because they have the highest number of victims. We also need to deal with racism, poverty, sex abuse within the family, exploitation.<sup>336</sup>

Not only do people misunderstand the issue of CST, oftentimes, people do not think it is wrong. Rose\_NGO suggested that a national publicity campaign should be launched so that we can "be clear on what the crime is – as clear and as simple as possible...Many people don't know what it is, and some people...nice people... think sex abroad should be part of their holiday, and then they like it..."

The one good thing is that with these individual cases and the high media coverage they get, it does send out a big message... some of these guys are going to be saying you know, they'll be taking a sober second thought before they decide to get involved in this type of activity. "I don't want to end up in a Thai jail for the next twenty years in a two foot by two foot cubicle like this guy did"...so, you know, with respects to that, ya, you're right, we've done very little, but we've have noticed that we need to step up.<sup>337</sup>

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<sup>334</sup> Jacqui\_NGO.

<sup>335</sup> Jennifer\_LE.

<sup>336</sup> Rose\_NGO.

<sup>337</sup> Terrance\_LE.

A prevention and education approach needs also to be directed at law enforcement officials.

We also need to train officers in foreign countries in addition to overseas liaisons...in Thailand, there is only one police officer to deal with this type of crime...currently, we don't train LE officers – we should train their officers and prosecutors and also work toward victim responses.<sup>338</sup>

Another participant suggested that strategic use of the law can address prevention. For example, restricting the travel freedom of known child sex offenders may reduce the option for that offender to escape Canada to offend in a more vulnerable country. She stated that the current situation is more like “the tail wagging the dog”, because passports are regularly renewed for sex offenders who are known to travel. In these situations, it seems that inconsistencies are being perpetuated in the justice system where one branch describes the severity of the offence and Canada's commitment to reducing it, while the other provides aid to perpetuate the offender's behaviour. Referencing the MacIntosh case<sup>339</sup> as an example of such inconsistencies, she states,

We shouldn't give passports when someone is wanted in Canada...this gives the appearance of keystone cops, and of bureaucratic bungling...we need a public inquiry into this so that it never happens again.<sup>340</sup>

Furthermore, when a Canadian travels overseas, foreign officials do not have access to data and notification information identifying sex offenders.

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<sup>338</sup> Rose\_NGO.

<sup>339</sup> See Appendix.

<sup>340</sup> Rose\_NGO.

Canada is seen as a valuable exporter of humanitarian aid workers, English language instructors to developing countries. In one participant's perspective, this default attitude needs to be addressed and the sense of privilege revisited.

I would also like to see the issue of doing good to do evil looked at...Western people are hugely valuable in foreign countries...(as a westerner) you can pick which area you would like to be in, if you want to teach, work with orphans...we have all of these skills which are valuable and make us above suspicion.<sup>341</sup>

An important policy avenue would be to organize a mandatory screening process for those destined for overseas work. By proactively addressing the apparent risks, Canada would be acting in a more responsible manner. Currently,

Canada is being a bit passive...there is room to work with agencies that send people on humanitarian initiatives. The manipulation of these organizations that doesn't regulate the work of these organizations...some people will abuse any mechanisms...Canada can help to determine a screening process – I think here is one way to look at our own...<sup>342</sup>

This initiative was also reflected by Rose\_NGO with her suggestions:

We need to develop codes of conduct for organizations sending people abroad...maybe a teaching permit should be issued...a global teaching certificate at the provincial level and then used to teach overseas.<sup>343</sup>

## *CONCLUSION*

Consistent themes emerging from the voices of the key participants interviewed indicate that it is the disjuncture within the policy/ law and intent that are problematic.

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<sup>341</sup> Rose\_NGO.

<sup>342</sup> Rebecca\_LE.

<sup>343</sup> Rose\_NGO.



These are exacerbated by lack of findings lack of public knowledge, differing cultural definitions and global systemic problems of poverty and oppression. An *intersectional* model of procedures was formalised based upon these themes. The *intersectional* model proposed is also consistent with the UN policy intent itself. Also apparent within the interviews, in describing the present policy, allusions were made to very early typologies of child rights, where children were seen as recipients of care rather than beings with their own agency. There was also a clear message, however, that as Canadian policy develops and implementation begins, the present understanding of child rights needs to move beyond this stage and advance to a more participatory, agency-oriented regime, adding the crucial component of cultural relevancy.

## **CHAPTER 6: Translating Research into Practice**

### ***INTRODUCTION***

The final chapter of this thesis pulls together the results of the legal analysis, the responses from interview participants and the resulting intersectional model of policy development to provide specific directions for a Canadian policy; one that will result in a more effective attainment of the policy goals for the well-being of the child as set out in the *CRC* and the *CRC-OP-SC*. Ultimately, CST provides an example of the difficulty in approaching criminal justice policy from a purely behaviourist perspective – the current response epitomizing the over-simplification of a complex set of problems to the point where a solution becomes ineffective. Unfortunately, s. 7(4.1) remains a part of the Canadian government’s symbolic and incomplete reform where a lack of national commitment is evident in a weak law that may not satisfy a constitutional challenge. While the law itself can be applauded in being substantially broader than its American and Australian counterparts, indicating that fewer offenders would slip through its grasp, the judiciary may have its hands tied in concluding its constitutionality.

Contemplating the reach of ET law and policy in the case of CST is but the beginning of a transnational environment where Canadian courts and policy makers will increasingly be called upon to decide on matters dealing with international and often unprotected victims coupled with international agreements. Thus, the current policy response must be viewed as an incomplete solution, part of the incremental change that needs to be followed by more nuanced, educated approach that provides answers through the adoption of a national five-year plan. Most importantly, Canada can be a role model on

the international setting through the development of such a plan,<sup>344</sup> articulating the goals and principles of the *intersectional approach* and outlining the future directions for national policy elsewhere.<sup>345</sup>

## *A FIVE YEAR NATIONAL PLAN & RESEARCH DIRECTIONS*

In light of the evidence that CST necessitates a systemic approach, a five-year plan is the only viable option. Because the underlying assumptions upon which the present policy stands have been questioned and challenged, a holistic contextual approach is required. Time is needed to re-evaluate past practices, re-generate new ideas and encourage dialogue in order to build a more comprehensive scheme upon which to posit policy reformation. The five-year plan is proactive in providing a set of guidelines to focus policy development which will, in turn, also focus on pro-active rather than reactive resolutions.

The five-year plan should seek to accomplish three objectives. First, it should promote comprehensive research to fully identify the systemic nature of CST, including the

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<sup>344</sup> Subsequent to the World Congress against Commercial Sexual Exploitation of Children ECPAT International compiled a report designed to assess the actions taken by participating countries. Canada was heavily criticized, not for lack of action in the realm of child sexual exploitation, but rather for failing to create a national plan of action. Beyond Borders, ECPAT's Canadian affiliate stressed that although Canada has a "pan-Canadian action oriented strategy", it does not fill the place of a national plan; the strategy does not provide enough guidelines to allow progress to be evaluated, compared to other countries or to implement plans of action for the future. See ECPAT International. (2001). Five year after Stockholm: The Fifth Report on the Implementation of the Agenda for Action adopted at the World Congress Against Commercial Sexual Exploitation of Children Held in Stockholm, Sweden, August 1996. ECPAT: Bangkok, online: <[http://www.ecpat.net/eng/ecpat\\_inter/Publication/Other/English/Pdf\\_page/ecpat\\_5th\\_a4a\\_2001\\_full.pdf](http://www.ecpat.net/eng/ecpat_inter/Publication/Other/English/Pdf_page/ecpat_5th_a4a_2001_full.pdf)>.

<sup>345</sup> The rationale for the national plan is two-fold. Firstly, future policy directions must be documented with an end product in mind in order to retain their potential as useful strategies and to actually produce a reformed policy upon the cessation of the mandated term. Secondly, the time limit is thought to be ample for productive and thorough dialogue and education yet, limited enough to create pressure on policy makers in recognition of the immediacy of the issue.

identification of connections between CST and other social problems. Second move forward with a mind to recognizing the limits of a policy dealing nearly exclusively with legal responses and coordinate them with social/developmental, cultural and educative responses. Third develop a policy strategy that better facilitates action and cooperation within the host country. Fourth supports informed interest groups and NGOs and fifth, addresses the acute and systemic needs of victims. As part of any strategic planning, there must be built-in measures that monitor and evaluate progress, thus ensuring the goals are advanced in a timely manner.

Implementation of the five-year plan must also be carefully considered. One of the key issues is identifying where the funding for this initiative will come from. Grants from the federal government and each of the provincial governments are the most logical sources of funding. However, it is important to note that the five-year plan should be generated by a variety of factions holding special knowledge of CST. Community representatives, law enforcement, and members of the involved NGOs would have the expertise to work through a committee in order to identify the main principles governing an appropriate response during the five-year period. Evaluation should be carried out separately by academics with specialized knowledge of the holistic contextual approach being employed, with the aim of piloting various outcomes within the period of the five-years. Additionally, various international experts should be consulted throughout the plan in order to use their expertise to develop approaches which are truly internationally effective in the transnational environment. In order to establish the validity of the outcomes of the five-year plan, performance measures should also be proposed to the United Nations with the aim of evaluation being sponsored by that international body. The outcomes should be measured

against the goals of the *CRC*, in an effort to ascertain whether the reforms comply with the overall holistic goals of the convention.

### *Strengths and Limitations*

The limitations to forwarding a five-year plan for Canada based on the *intersectional approach* are important to consider. Unfortunately, no matter how elaborate a policy is, and how great the extent of global support from agreeing states and from private investors might be, policy can still exist without actually addressing the underlying concerns. The response to CST in its current form is a ready example of this type of symbolic reform, which serves to quiet the public, yet fails to significantly reduce the problem. However, an *intersectional approach* is still at risk (perhaps to a greater degree) of creating symbolic reform. Symbolic reform produces an environment that is more fertile for CST by pushing the phenomenon further underground. This results in sentencing children to a life of violence and exploitation. Accordingly, it is crucial that the future directions take the form of an effective five-year plan. One of the most critical protections against creating symbolic reform is awareness and strategic monitoring, coupled with intense ongoing evaluative research. Through continued maintenance of the plan, and implementation of evaluative techniques that require continued refinement and honest identification of the issues needing to be addressed, the risk of symbolic reform can be negated.

While limitations do curb the effectiveness of the proposed policy directions, the holistic contextual approach must be seen as a positive progression from the current state of affairs, and it places an emphasis on a different direction that expands the understanding of CST. It is the underdevelopment of the legal response that has acted as paralysis for CST policy. The discipline of criminology has often been criticized for its lack of pragmatism in

policy and for producing students and academics securely tied to their 'ivory towers'. The desirability, then for approaches to policy analysis that are both pragmatic and offer parsimony in implementation, is great.<sup>346</sup> This drive, however, often leads analysts to look for simple, straightforward solutions to problems that are defined outside of their contextual boundaries. This occurs at the expense of more appropriate policy resolutions that while recognizing situational environment of a given issue, provide a more complex response. This holistic contextual approach recognizes the interconnectedness inherent in criminological issues where impact must be discussed at a broader level. Each issue has a web of complexity, a series of intricate connections that need to be illuminated within policy responses. This thesis argued that the current legal response to CST exemplifies a straightforward approach at the expense of considering the complexity of the problem.

On this view, a complex social phenomenon such as crime cannot be eradicated with reliance on a single policy directive, and policies made with a failure to recognize this ignore the complexity of the issue and fail to address the relevant interconnected factors.

A holistic contextual approach indicates that we should derive the optimal policy by focusing on an intersection of the policy sectors involved, focusing on inter-connectedness rather than looking only to one policy area for a response. Thus, we should not, when addressing an issue of a legal nature, separate it from social, health or education policy. This approach was also held by the participants as they moved away from a strictly legal solution to a more intersectional response. Their comments are in opposition to the research that suggests that the issue will be combated by increasing the reach of the law.

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<sup>346</sup> J. Gilsinan, "Public Policy and Criminology: An Historical and Philosophical Reassessment" in B. Hancock & P. Sharpe eds., *Public Policy, Crime and Criminal Justice* (New Jersey: Prentice Hall, 2004) 22-34.

### *Lessons Learned*

Despite the paradigmatic changes that have taken place around the world regarding child rights and the exploitation of children, there has not yet been an adoption of a successful framework, either on the international front or on the Canadian front.<sup>347</sup> In order to understand why the law exists in its present state, an analysis of the legal framework was conducted in comparison to the accepted typologies. It was shown that, although the current typology has pulled away from the welfare model of child protection in favour of self-determination and participation by children, some of the technical difficulties seen domestically and the philosophical issues relating to the international documents create an environment where practice is largely un-aligned from the over-arching policy.

By re-visiting some of the components of child rights that are imbedded in international documents and national legislation, we have come to a place where the inherent limits of legislation require us to expand our approach from a mainly legal response to a response adding a social, developmental and educational focus. By shedding some of the inconsistencies of the present framework, and by recognizing the globalized environment within which the response must occur, this paper has begun to work toward a response that is reflective of the context of the twenty-first century. The challenge in responding to CST is not in re-constructing the views of children and the acceptance of self-determination of children, but rather in making up for the inconsistencies present in the resulting practice; the disjuncture between policy and practice.

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<sup>347</sup> There is a disturbing disconnect between the policy and practice of ET law which is especially evident in North America; while very few charges of this nature have been laid, data presented by NGOs suggests that Western Europe and North America house some of the most prolific offenders (Ives, *supra* note 24).

The key findings of this research are best framed in response to the research questions. First, the legal analysis indicates that, while there is some controversy related to the use of ET law in consideration of the *Charter*, the law is grounded in the tradition of international law, particularly since the international community agrees upon the importance of fighting this crime. A second question of whether Canada can, in a more practical sense, use ET law is also extremely complex. While the simple answer is that Canada can use ET law; many adjustments need to be made in consideration of the present barriers to the effectiveness of solely relying on this approach. Third, this inquiry has addressed whether Canada should use ET law in its endeavours to tackle CST. Clearly, Canada's commitment, while problematic, is based upon its international commitment to direct efforts toward combating international child exploitation. While some participants were uneasy about Canada's approach, given the notion that limited resources would be directed away from combating domestic child exploitation in favour of dealing with more high profile international cases, others did not see the two interests as incompatible. In doing so, they cite the abuse travelling sex offenders have perpetuated on Canadian soil as well as abroad.

Reflecting back upon the child rights typologies illustrated in Chapter 2, it became apparent in this thesis that although philosophical changes are evident in how child rights are viewed, these philosophies are not evident in the implementation of the current Canadian policy on CST. While the Industrial Revolution was a main impetus for approaching children from a rights-based perspective, globalization, coupled with its counterpart transnational crime, must likewise be acknowledged as such an instrumental revolution to cause policies concerning children to change.

Due to the nature of what is being studied, this research did not set out to generate over-arching theory. Instead, the objective has been to identify and explore possible policy



and practice reform directions. In essence, each of the specific themes identified here do not constitute the policy directives, but rather are signals and descriptions of the difficulties presented by in the current approach. In sum, it was found that progress is being made, slowly transforming our approach from a reactive to a proactive one in which the beginnings of collaboration can be identified. Additionally, public awareness is the key to future reforms, as is the underlying awareness that natural limits to “the law” mean that any worthwhile reform must be hybrid in nature.

Because the nature of the topics studied within the discipline of criminology is diverse, exemplifying the interconnectedness of people, the model of policy analysis provided in this paper also provides future directions for other criminological policy analyses. This thesis first provided the conceptual details for a complete policy review and subsequently set out a series of future directions designed to use resources more effectively and to explore the problem as a systemic contextual one rather than one that is isolated from other international issues. Due to the pragmatic responsibility inherent in a policy review, this thesis situated policy directives specific to a holistic contextual approach to methodology. As such, this analysis is useful for, and consistent with, the “holistic” response mandated by the United Nations for future child rights policy.

## REFERENCES

### *SECONDARY SOURCES*

- Bachman, S.L., "Translating Standards into Practice: Confronting Transnational Barriers" in B.H. Weston, ed., *Child Labor and Human Rights* (Boulder, Co: Lynne, 2005).
- Beaulac, S., "On the Saying that 'International Law Binds Canadian Courts'" (Fall, 2003) Bulletin 29, Vol. 3 *Canadian Council on International Law : On International Law Binding Canadian Courts*, online: <[http://www.ccil-ccdi.ca/index.php?option=com\\_content&task=view&id=110&Itemid=76](http://www.ccil-ccdi.ca/index.php?option=com_content&task=view&id=110&Itemid=76)>.
- Blaikie, N.W.H., "A Critique of the Use of Triangulation in Social Research" (1991) 25 *Quality & Quantity* 115.
- Brampton, R. & C.J. Cowton, "The E-Interview" 3:2 *Forum: Qualitative Social Research*, online: <<http://www.qualitative-research.net/fqs-texte/2-02/2-02bamptoncowton-e.htm>>.
- Breckenridge, K.D., "Justice Beyond Borders: A Comparison of Australia and U.S. Child Sex Tourism Laws" (2004) 13 *Pac Rim L & Policy* 405.
- Calhoun, A.W., *A Social History of the American Family: The Colonial Period*, Vol. 1. (New York: Barnes & Noble, 1945).
- Charmaz, K., "Grounded Theory: Objectivist and Constructivist Methods" in N.K. Denzin & Y.S. Lincoln, eds., *The Handbook of Qualitative Research* 2<sup>nd</sup> ed. (Thousand Oakes: Sage, 2000).
- "Child Sex Tourism: It's a Crime" *Foreign Affairs and International Trade Canada* (2007), online: <[http://www.voyage.gc.ca/main/pubs/child\\_endure-en.asp](http://www.voyage.gc.ca/main/pubs/child_endure-en.asp)>.
- Cicourel, A.V., *Cognitive Psychology: Language and Meaning in Social Interaction* (New York: Free Press, 1974).
- "Constitutional Law – Foreign Commerce Clause – Ninth Circuit Holds that Congress Can Regulate Sex Crimes Committed Abroad" (2006) 8 *Harvard Law Review*, Vol 119, 2612.
- Corbin, J.M. & A. Strauss, "Grounded Theory Research: Procedures, Canons and Evaluative Criteria" (1990) 13:1 *Qualitative Sociology* 3.
- Corrado, R. & A. Markwart, "The Need to Reform the YOA in Response to Violent Young Offenders: Confusion, Reality or Myth?" (July, 1994) 36(3) *Canadian J. of Criminology*, 343.

- Coughlan, S., R. J. Currie, H. M. Kindred & T. Scassa, *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, (Prepared for the Law Commission of Canada, June 23, 2006).
- Cruickshank, M., *Children and Industry: Child Health and Welfare in North-West Textile Towns During the Nineteenth Century* (Manchester: Manchester University Press, 1981).
- Cullen, H., "Child Labor Standards: From Treaties to Labels" in B. H. Weston ed., *Child Labor and Human Rights* (Boulder: Lynne, 2005).
- Cunningham, H. & S. Stromquist, "Child Labor and the Rights of Children: Historical Patterns of Declines and Persistence" in B. H. Weston ed., *Child Labor and Human Rights* (Boulder: Lynne, 1945).
- Currie, J., *Public International Law* (Irwin Law: Canada, 2001) at 298.
- Currie, R.J., "Charter Without Borders? The Supreme Court Of Canada, Transnational Crime And Constitutional Rights And Freedoms" (Spring 2004) 27 Dalhousie L.J. 235 [Currie, "Charter Without Borders"].
- Currie, R.J. & S. Coughlan, "Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?" (February, 2007) 11:2 Canadian Crim L. Rev 141.
- David, F., "Child Sex Tourism" (June 2000) No. 156 Australian Institute of Criminology: Trends and Issues on Crime and Criminal Justice, online: <<http://www.aic.gov.au/publications/tandi/ti156.pdf>>.
- Denov, M., "Children's Rights or Rhetoric? Assessing Canada's Youth Criminal Justice Act and its Compliance with the UN Convention on the Rights of the Child" (2004) 12:1 Humanities, Social Sciences & Law.
- Denzin, N.K., *The Research Act in Sociology: A Theoretical Introduction to Sociological Methods* (Butterworths: London, 1970).
- DOJ Canada, "Government Initiatives Protecting Children Against Exploitation" (2001), online: <[http://www.justice.gc.ca/en/news/nr/2001/doc\\_25853.html](http://www.justice.gc.ca/en/news/nr/2001/doc_25853.html)>.
- Doyle, C., "Extraterritorial Application of American Criminal Law" (CRS Report for Congress: September 10, 2007)
- ECPAT International, (2001). Five years after Stockholm: The Fifth Report on the Implementation of the Agenda for Action adopted at the World Congress Against Commercial Sexual Exploitation of Children Held in Stockholm, Sweden, August 1996. ECPAT: Bangkok, online: <[http://www.ecpat.net/eng/ecpat\\_inter/Publication/Other/English/Pdf\\_page/ecpat\\_5th\\_a4a\\_2001\\_full.pdf](http://www.ecpat.net/eng/ecpat_inter/Publication/Other/English/Pdf_page/ecpat_5th_a4a_2001_full.pdf)>.
- Factory Act* (UK), 3 & 4 Will. IV. C. 103.
- Felson, D. & Kalaitzidis, A., "A Historical Overview of Transnational Crime" in P. Reichel ed., *Handbook of Transnational Crime and Justice* (London: Sage Publications, 2003).

- Ferens, M., *An Evaluation of Canada's Child Sex Tourism Legislation Under International Law* (unpublished MA Thesis, University of Manitoba School of Law, 2004).
- Finkelhor, D., *Sexually Victimized Children* (New York: Free Press, 1979).
- Finlay, L., "Negotiating the Swamp: The Opportunity and Challenge of Reflexivity in Research Practice" (2002) 2:2 *Qualitative Research*, 209 [Finlay, "Negotiating the Swamp"].
- Finlay, L., "The Reflexive Journey: Mapping Multiple Routes" in L. Finlay & B. Gough eds., *Reflexivity: A Practical Guide for Researchers in Health and Social Sciences* (Blackwell, 2003) [Finlay, "The Reflexive Journey"].
- Flick, U., *An Introduction to Qualitative Research* (Thousand Oakes, CA: Sage, 1998).
- Fraleay, A., "Child Sex Tourism Legislation Under the PROTECT Act: Does It Really Protect?" (2005) 79 *St. Johns Law Review* 445-483, online: <<http://149.68.13.140/Media/3/12ecf9fbc928453aab9730d4a278d697.pdf>>.
- Freeman, M. & G. Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at 92.
- Gilsinan, J., "Public Policy and Criminology: An Historical and Philosophical Reassessment" in B. Hancock & P. Sharpe eds., *Public Policy, Crime and Criminal Justice* (Englewood Cliffs, NJ: Prentice Hall, 2004).
- Glaser, B., "Conceptualization: On Theory and Theorizing Using Grounded Theory" (2002) 1:2, Article 3 *International Journal of Qualitative Methods*, online: <<http://www.ualberta.ca/~ijqm/>>.
- Glaser, B.G. & A.L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research*. (Aldine: Chicago, 1967).
- Golafshani, N., "Understanding Reliability and Validity in Qualitative Research" (2003) 8:4 *The Qualitative Report*, 597, online: <<http://www.nova.edu/ssss/QR/QR8-4/golafshani.pdf>>.
- Green, D., *Hidden Lives: Voices of Children in Latin America and the Caribbean* (London: Cassell, 1998).
- "Harvard Research in International Law" 29 *Am J. Int'l Law* 442 (Supp. 1935).
- Healy, P., "Restraint in the Criminal Law" (n.y.) The International Cooperation Group: Department of Justice Canada, online: <<http://www.doj.ca/eng/pi/icg-gci/cl-dp/cl-dp.pdf>>.
- International Save the Children Alliance (2003) "Save the Children's Policy on: Protection Children from Sexual Abuse and Exploitation," online: <[www.savethechildren.net](http://www.savethechildren.net)>.

- Ives, N. "Background Paper for the North American Regional Consultation on the Commercial Sexual Exploitation of Children". December 2-3, 2001. (Philadelphia, Pennsylvania), online:  
<[http://www.csecworldcongress.org/en/yokohama/Background/Regional\\_analyses.htm](http://www.csecworldcongress.org/en/yokohama/Background/Regional_analyses.htm)>.
- The *Juvenile Delinquents Act*, Statutes of Canada, 1908, chapter 40.
- Kelly, L. & L. Regan, "Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in Women for Sexual Exploitation in the UK" (2000) paper 125 Police Research Series.
- Kelly, L., Wingfield, R., Burton, S., & Regan, L., *Splintered lives: Sexual Exploitation in the Context of Children's Rights and Child Protection* (Essex: Barnardo's, 1995).
- King, M.F. & G.C. Bruner, "Social Desirability Bias: A Neglected Aspect of Validity Testing" (2000) 17:2 Psychology in Marketing 80.
- Klain, K.J., "Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses" (1999) [National Centre for Missing & Exploited Children], online:  
<[http://www.Missingkids.com/en\\_us/publications/nc73.pdf](http://www.Missingkids.com/en_us/publications/nc73.pdf)>.
- Landsdown, G., "Children's Rights: A Second Chance," (2001), online: International Save the Children Alliance Communications Working Group  
<[www.savethechildren.net](http://www.savethechildren.net)>.
- Levesque, R.J.R., "Combating Child Sexual Maltreatment: Advances and Obstacles in International Progress" (1995) 17:4 Law & Policy 319.
- Libel, M., *A Will of Their Own: Cross-Cultural Perspectives on Working Children* (New York: St. Martin's Press, 2004).
- Mattar, M. et al., "International Child Sex Tourism: Scope of the Problem and Comparative Case Studies" (The Protection Project, Washington, DC: Johns Hopkins University, 2007).
- Mills, J., A. Bonner, & K. Francis, "The Development of Constructivist Grounded Theory" (2006) 5:1 Article 3 International Journal of Qualitative Methods, online:  
<[http://www.ualberta.ca/~iiqm/backissues/5\\_1/html/mills.htm](http://www.ualberta.ca/~iiqm/backissues/5_1/html/mills.htm)>.
- O'Connell Davidson, J. "'Child Sex Tourism': An Anomalous Form of Movement?" (2004) 12(1) Journal of Contemporary European Studies, 31 [O'Connell Davidson, "Child Sex Tourism"].
- O'Connell Davidson, J., *Children in the Global Sex Trade* (Polity: Malden, 2005) [O'Connell Davidson, *Global Sex Trade*].
- B.H. Oxman, "Jurisdiction of States" (1987) 10 Encyclopaedia of Public International Law, 279.
- Patton, M.Q., *Qualitative Research and Evaluation Methods* (Thousand Oaks, CA: Sage, 2003).

- Patton, M.Q., *Qualitative Research and Evaluation Methods*, 3<sup>rd</sup> ed. (Thousand Oaks, CA: Sage, 2002).
- Perrin, B. "Our Child Sex Offender Laws Should Cross Borders" (April, 2008) in *The Lawyers Weekly*, online:  
<<http://faculty.law.ubc.ca/perrin/pdf/THE%20LAWYERS%20WEEKLY.pdf>>.
- Perrin, B. quoted in C. Bains, "Canada Law on Child-Sex Tourism Laws, Critics Say" *The Canadian Press* (April 2, 2008), online:  
<[http://www.ecpat.net/EI/Resource\\_Centre/Newsclippings/index.asp?news\\_id=17](http://www.ecpat.net/EI/Resource_Centre/Newsclippings/index.asp?news_id=17)>. Also archived as "At Least 146 Canadians Charged Overseas For Child Sexual Abuse: Justice Dept." Online:  
<<http://cnews.canoe.ca/CNEWS/Canada/2008/04/01/5165801-cp.html>>
- Prober, R., *ECPAT Newsletter* (2002, October), online:  
<http://www.beyondborders.org/Publications/nwslr103b.pdf>.
- Quigley, T., *Procedure in Canadian Criminal Law*, 2<sup>nd</sup> ed. (Toronto: Thomson, 2005).
- Rahikanen, M., *Centuries of Child Labor: European Experiences for the Seventeenth to the Twentieth Century* (Britain: MPG, 2004).
- Ribeiro, M., *The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2005).
- Ritchie, J. & J. Lewis, eds., *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (London: Sage, 2003).
- Rose, L., *The Erosion of Childhood* (NY: Routledge, 1991).
- Seabrook, J., *No Hiding Place: Child Sex Tourism and the Role of Extra-Territorial Legislation* (New York: St. Martin's Press, 2000).
- Seale, C., *The Quality of Qualitative Research* (London: Sage, 1999).
- Sharpe, R.J. & K. Roach, *The Charter of Rights and Freedoms*, 3<sup>rd</sup> ed. (Toronto: Irwin Law, 2005).
- Shaw, M., *International Law*, 6<sup>th</sup> ed. (Cambridge: Cambridge University Press, 2003).
- Silverman, D., *Doing Qualitative Research* 2<sup>nd</sup> ed., (London: Sage, 2005).
- Spencer, L., J. Ritchie & W. O'Connor, "Analysis: Practices, Principles and Processes" in J. Ritchie & J. Lewis eds., *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (London: Sage, 2003).
- "Stockholm Declaration and Agenda for Action" 1<sup>st</sup> World Congress Against Commercial Sexual Exploitation of Children. Stockholm, Sweden, 27-31 August 1996, online:  
<[http://www.csecworldcongress.org/PDF/en/Stockholm/Outcome\\_documents/Stockholm%20Declaration%201996\\_EN.pdf](http://www.csecworldcongress.org/PDF/en/Stockholm/Outcome_documents/Stockholm%20Declaration%201996_EN.pdf)>.

- Strauss, A. & J. Corbin, "Grounded Theory's Applicability to Nursing Diagnostic Research" (A Monograph of the Invitational Conference of Research Methods for Validating Nursing Diagnoses, Palm Springs, CA, 1989) p. 4.
- Stuart, D., *Charter Justice in Canadian Law* (Toronto: Thomson, 2005).
- Svensson, N.L., "Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws" (2007) 28 *Int'l & Comp L Rev* 641.
- Sykes, G.M. & D. Matza, "Techniques of Neutralization: A Theory of Delinquency" (1957) 22 *American Sociological Review*, 664.
- Warner La Forest, A., "The Balance Between Liberty and Comity in the Evidentiary Requirements Applicable to Extradition Proceedings" (2002) 28 *Queen's L.J.* 95.
- Williams, S.A & A.L.C. de Mestral, *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada* (Toronto: Butterworths, 1987).
- Wonders & Michalowski, "The Globalization of Sex Tourism" (2001) in A. Thio, T. C. Calhoun, & A Conyers *Readings in Deviant Behavior* 5<sup>th</sup> ed. (Boston: Pearson, 2008).

## LEGISLATION

- Bill C-27, s. 1 (1996-1997) (2nd Session, 35th Parliament). At: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2329459&Language=e&Mode=1&File=16>.
- Canada Library of Parliament. Bill C-15A, An Act to Amend the Criminal Code and to Amend other Acts. (Royal Assent: 4 June 2002, Statutes of Canada 2002, c. 13). Online: [http://www.parl.gc.ca/common/Bills\\_ls.asp?Parl=37&Ses=1&ls=C15A](http://www.parl.gc.ca/common/Bills_ls.asp?Parl=37&Ses=1&ls=C15A).
- Criminal Code of Canada*, R.S.C. 1985, c. C-46.
- National Defence Act*, R.S.C. 1985, c. N-5
- Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24
- The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
- Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] [note 124].
- UN General Assembly Resolution, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children* (2002), online: <<http://www.ohchr.org/english/law/crc-sale.htm>> [*CRC-OP-SC*].
- UN General Assembly Resolution, *Convention on the Rights of the Child* (1989), online: <<http://www.ohchr.org/english/law/pdf/crc.pdf>> [*CRC*].

## CANADIAN JURISPRUDENCE

- B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.
- Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*].
- Reference re Motor Vehicle Act (British Columbia)* S 94(2), [1985] S.C.J. No. 73.
- R. v. Bakker*, [2005] BCJ No. 1577 (Prov. Ct).
- R. v. Bigelow*, [1982] O.J. No. 3314 (C.A.).
- R. v. B. (O.)*, [1997] O.J. No. 1850 (C.A.).
- R. v. Carosella*, [1997] S.C.J. No. 12.
- R. v. Czuczman*, (1986), 49 C.R. (3d) 385 (Ont. C.A.).
- R. v. Finta*, [1994] 1 S.C.R. 701.
- R. v. Greco*, [2001] O.J. No. 4147 (C.A.).
- R. v. Hape*, [2007] 2 S.C.R. 292.
- R. v. Libman*, [1985] S.J.C. No. 56.
- R. v. Lyons*, [1987] 2 S.C.R. 309
- R. v. MacDougall*, [1982] 2 S.C.R. 605.
- R. v. Morgentaler*, [1988] 1 S.C.R. 30.
- R. v. Morgentaler*, [1988] S.C.J. No.1.
- R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No.67.
- R. v. O'Connor*, [1995] 4 S.C.R. 411.
- R. v. Oakes*, [1986] 1 S.C.R. 103.
- R. v. Osolin*, [1993] S.C.J. No. 135.
- R. v. Sharpe*, [1999] BCJ No. 1555 (C.A.).
- R. v. Sharpe*, [2001] S.C.J. No.3.
- R. v. Swain*, [1991] S.C.J. No. 32.
- Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No.194.
- Ruby v. Canada (Solicitor General)* (2002), 7 C.R. (6<sup>th</sup>) 88 (S.C.C.).
- Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [*Suresh*].



## *AMERICAN JURISPRUDENCE*

*United States v. Clark* 435 F. 3d 1100 (9<sup>th</sup> Cir. 2006) [*Clarke*].

The *PROTECT Act*, Pub. L. No. 108-21, 117 Stat. 650.

## **APPENDIX: Canadian Cases Noted By Participants**

### ***R. v. Bakker***<sup>348</sup>

In 2004, Canada made its first ET prosecution under the CST provisions. Donald Bakker,<sup>349</sup> a Canadian national from the Lower Mainland of British Columbia, pled guilty to sexually assaulting at least twenty female children in their home countries of Cambodia, Vietnam and Thailand. He was identified by law enforcement after a search of his home on a warrant for sexual offences committed on Vancouver's downtown eastside yielded pornographic material that could readily be identified as depicting child victims from various South Asian countries. After much difficulty locating the overseas witnesses, charges were brought concurrent to charges of sexual assault against a series of Vancouver women. Ultimately, the case proceeded with a focus on the Vancouver offences and a concurrent sentence for all crimes resulted in a ten-year custodial term.

The investigation and prosecution of Bakker illustrates the difficulty in relying on cooperative international policing, demonstrated the difficulty in accessing witnesses overseas, shows the minimal attention paid by the courts to distant victims, and reveals how the initial investigation was coincidental nature. Bakker's actions epitomize CST as a crime that is commonly hidden from view.

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<sup>348</sup> *R. v. Bakker*, *supra* note 11.

<sup>349</sup> Media speculated that Bakker's lawyer would raise a constitutional challenge on the basis that Canada had no jurisdiction to apply their national law extra-territorially; eventually, however, Bakker pled guilty alleviating the need for this challenge. In fact, Galatai J., made reference to the questions regarding the constitutionality of the CST legislation within his sentencing report.

### *Kenneth Klassen*

In the third incident of Canadian charges for CST, Kenneth Klassen, a 56-year old British Columbian, faces 35 related charges for offences committed in Colombia, Cambodia and the Philippines from 1998 to 2002, involving at least 17 victims. In 2004, law enforcement was alerted to Klassen when a package containing illicit DVDs was intercepted at the Vancouver International Airport. An international investigation followed, resulting in the location of a series of overseas victims, and from the video-clips taken as evidence, it appears that Klassen had sex with at least 94 females under the age of 18. He is currently awaiting trial.

### *Orville Frank Mader*

In the weeks following the Klassen charges, Orville Frank Mader, another international traveler, was charged with CST-related offences. After arriving in Vancouver, British Columbia from Vietnam, Mader was arrested by the Integrated Child Exploitation (ICE) team of the RCMP.<sup>350</sup> One participant in this research suggested that Mader's decision to come back to Canada, after learning of his impending arrest, had been strategic since he likely knew his prosecution in Canada would be extremely difficult due to the current status of the CST laws, and he likely feared spending time in an overseas prison.

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<sup>350</sup> Mader was arrested under section 810 of the *Criminal Code* on November 1, 2007.

### *Christopher Paul Neil*

Christopher Paul Neil gained international infamy in 2007 when a computer edited photo of him was descrambled by INTERPOL, and the international notice of his identification sparked a worldwide manhunt. Kim\_LE suggested that due to a “red notice” issued by INTERPOL, it was quickly determined that the suspect was a 32 year old Canadian teacher from Maple Ridge, British Columbia, who had travelled to teach English overseas. Neil was arrested in Thailand on October 19, 2007. There is also speculation that Neil abused children in the province of British Columbia; however, evidence has not been made public on this regard.

### *Ernest Fenwick MacIntosh*

Ernest Fenwick MacIntosh’s situation is different from the others as he faces charges for assaulting Canadian children, but lived in India. He was charged by RCMP in Canada in 1995 after a report emerged that he had sexually assaulted a young boy in Nova Scotia during the 1970s. In 1994, MacIntosh moved to New Delhi where he began working in telecommunications sales. Following the laying of the charges, it was hoped that Canada would be able to extradite MacIntosh so that he could face trial; however, he was not immediately extradited. Canada’s commitment to addressing international child exploitation is criticized heavily on the basis of MacIntosh’s case. He was allowed to remain abroad for over ten years before he was finally extradited. While he contested having his passport revoked in 1997, a key concern was the fact that his passport was renewed by the Canadian Passport Office in 2002. If his passport had been allowed to expire, he would have almost certainly been deported by Indian authorities.

During the time that MacIntosh lived in India, multiple allegations of abuse were submitted by the young boys with whom he associated; he was also banned by a series of schools and other faith-based institutions due to suspicion of child sexual abuse. In 2001, the RCMP charged MacIntosh with another 41 counts involving gross indecency and indecent assault when more victims came forward.