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Child Rights Protection and Criminal Law Reform in Canada

INTRODUCTION

The protection of children and their rights covers a broad area of activity. Canada has been very active in promoting the rights of children for many years. In this context, Canada signed the Convention on the Rights of the Child in 1990 and ratified it in 1991. Article 19 of the Convention identifies the protection against abuse and neglect as a basic right of children. This includes all forms of abuse-physical, sexual and emotional-as well as the neglect of children. It also covers all kinds of interventions in all sectors. Other articles which expand on this general one are Article 34 on the right to protection from sexual abuse and exploitation including child prostitution and child pornography, Article 35, which deals with the prevention of child abduction and the sale of or traffic in children, and Article 36, respecting the protection of children from all other forms of exploitation prejudicial to the child's welfare. Other articles require that measures be taken to ensure that these protections will be respected in law and actual practice in the child's best interests. The Convention also provides for children's rights in the area of youth justice in articles 37 and 40 to ensure that young offenders are dealt with differently from adults when they are accused or convicted of crimes and not mistreated when dealt with by the justice system. The other pillars of the Convention call for recognition of children's rights to express their views and to be heard as well as to have time and places for leisure activities.

I will now describe briefly our Canadian division of authority regarding the making and administration of laws and the delivery of government programs and services.

CANADIAN FEDERAL-PROVINCIAL CONSTITUTIONAL STRUCTURE

In Canada, the constitutional authority for the making of laws and their enforcement is divided between the federal government and the 10 provinces. In addition, the two territories have a special arrangement with the federal authority. Our judicial system provides that the federal government has the exclusive power to legislate in matters dealing with the criminal law and procedure. The provinces have explicit jurisdiction over the administration of justice. They also have the power to legislate in matters dealing with child protection and welfare generally, and to provide services to children. The Criminal Code provisions apply to all Canadians, and generally speaking, their application and enforcement by the province and territories provide a consistent treatment across the country. With respect to the child protection and welfare laws of the provinces, they are generally similar for children's rights and consistent with each other. However, there are some differences from one province to another in their administration but not sufficiently so to attract difficulties with the Canadian Charter of Rights and Freedoms equality provisions.

CRIMINAL LAW REFORM IN CANADA AND THE PROTECTION OF CHILDREN'S RIGHTS

This presentation will restrict itself to criminal law reform initiatives that have taken place in Canada during recent years in the area of the protection of children. This includes children as victims of crime and as perpetrators of criminal activity. Canada's policy has been to implement various International Conventions and treaty commitments as they affect children and youth. In that context, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child have received special attention in Canada with respect to their implementation in the Criminal Code and the Young Offenders Act. It should be noted that these reforms have complemented Provincial laws, programs and services that have also been put in place or modified to implement the Conventions.

The federal and provincial governments have law reform institutions or processes that provide detailed information and recommendations to the legislative bodies to pass new laws. At the federal level, the former Law Reform Commission of Canada made many recommendations calling on the government to make the necessary changes to increase the protection of children through the use of the criminal law by new offences, increased penalties for certain offences and special procedures including the protection of child witnesses at trial. These proposals for change were supplemented by several Special Commissions and Task Forces that called for changes relating to sexual abuse of children. In addition, Parliamentary committees have reviewed the need for change and improvements to ensure the laws relating to young offenders were adequate in our changing times. At the provincial level, many Commissions and Task Forces have made recommendations calling for revisions and changes to not only the laws but more particularly with respect to the programs and services to be provided to protect children who are at risk and in neglect.

CRIMINAL LAW AND PROCEDURE TO DEAL WITH ABUSE AGAINST CHILDREN

The Criminal Code of Canada deals with the matter of the protection of children with respect to physical abuse and neglect, sexual exploitation, child prostitution and child pornography. These include both substantive offences and procedural protections.

We all are familiar with the problem of the sexual exploitation of children, which has emerged in recent years as a major global issue with transnational aspects. Children are increasingly being used for the sexual gratification of adults. Children are defined under the Convention on the Rights of the Child as "...every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." However, tied to this is the age of consent to a sexual act which may be lower. With respect to child prostitution and pornography, the age of sixteen is considered by many countries to be preferred and considered to be in conformity with the spirit of the Convention. We must also be mindful not only of the countries that supply other countries but also of those that

are consumer countries in our efforts to counter the sexual exploitation and abuse of children.

The 1996 Stockholm World Congress Against the Commercial Sexual Exploitation of Children committed itself to a plan of action against those who have trapped hundreds of thousands of children in the sex trade. More than 1,000 delegates from 130 countries agreed to pressure their governments to adopt laws similar to the Bill now before the Canadian Parliament that will permit countries to prosecute nationals who engage in sexual activity with children under 18 years of age while outside their home nation. I will come back to these proposals with reference to Canada during my comments.

PHYSICAL ABUSE AND SEXUAL EXPLOITATION

The Canadian government has become increasingly concerned with the problem of the physical abuse and sexual exploitation of children over the past 20 years. With respect to physical abuse, the assault provisions of the Criminal Code apply to both adults and children. In addition, section 215 imposes a legal duty on parents and guardians to provide the necessities of life to children under the age of 16 years of age. In the absence of a lawful excuse, the parent will be liable to a maximum penalty of two years imprisonment.

Section 218 of the Criminal Code makes it a crime to unlawfully abandon or expose a child under the age of ten years to risk without protection, so that its life is endangered or its health could be permanently injured. A further requirement regarding the duty of a parent or guardian is found in Section 219 which makes it a crime to do anything or omit to do anything that it is their duty to do, to show wanton or reckless disregard for the lives or safety of their children. This includes the failure of one parent to protect the child from an abusive parent or other person, or to fail to seek medical assistance for a child. These are all subject to the test of reasonableness as with other forms of criminal negligence. The maximum penalty is ten years. A final protection is found in Section 223 which prohibits injury to a child before or during its birth as a result of which the child dies.

CHILDREN AND CORPORAL PUNISHMENT

One controversial area which is the subject of much debate in Canada is that of children and corporal punishment. The Convention on the Rights of the Child imposes on States to take measures, including legislative ones, to protect children from all forms of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse while in the care of their parents or guardians. In Canada, the Criminal Code in Section 43 provides that a school teacher, parent or guardian is justified in using force by way of correction toward a pupil or child if the force does not exceed what is reasonable in the circumstances. This issue of the use of physical force by parents and teachers is presently under review with child protection and advocacy groups demanding its repeal by invoking the Convention to support their positions.

SEXUAL EXPLOITATION, PROSTITUTION AND PORNOGRAPHY.

One of the first major reports in Canada to investigate the broad area of sexual exploitation of children was published in 1984 by the Badgely Committee on Sexual Offences Against Children and Youths. The Government responded in 1987 by appointing a special advisor to implement the recommendations. In 1985 the Fraser Committee report was also published, which put forward proposals to deal with the problems of both child prostitution and pornography. As a result of these reports and wide consultation with the professional community, interest and advocacy groups as well as the general public, in 1988 the Canadian Parliament (and again in 1993) amended the Criminal Code and the Canada Evidence Act to provide strong measures to combat child sexual exploitation, child pornography and juvenile prostitution.

As part of these amendments, the law was changed to provide that any sexual offence committed by anyone on Canadian territory can result in a prosecution no matter how much time has passed, that is, there is no time limitation on laying charges. The matter of consent as a defense in cases of sexual offences with children under 18 years was also modified. The law now states that a child under 14 years cannot consent to sexual acts and the consent of the child cannot be invoked by the accused as a defense. However, if an accused person is aged 12 to 15 then the consent of the other can be invoked as a defense if the other is 12 years old or more and there is a difference of at least 2 years of age between the accused and the complainant. Moreover, the accused must not be in a position of authority or trust towards the complainant nor be in a relationship of dependency with the accused. In fact, the accused must have taken every reasonable step to ascertain the age of the complainant. No longer is it possible for the accused to say that the child wanted or desired the act or that the child seduced the accused. It should be noted that this does allow children between 12 to 15 to engage in sexual acts between themselves and this continues to disturb some people who claim that this encourages promiscuity among children. However, the point to be made here is simply that this activity is neutral in that it is not criminalized conduct.

SEXUAL EXPLOITATION, SEXUAL INTERFERENCE AND TOUCHING

Legislation has been created which deals with the offences of sexual interference, invitation to sexual touching and sexual exploitation. It is also an offence for a parent or guardian of a person under 18 years of age to procure this sexual activity. The following sections fall under this legislation.

Section 151 states that every person who, for sexual purposes, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under 14 years is guilty of an offence with a penalty ranging from a minor penalty up to a maximum of 10 years imprisonment. This offence deals with a range of touching situations that is different from sexual assault, where there is usually some physical injury, and targets abusive sexual touching of children.

Section 152 provides that a person who ,for sexual purposes, invites, counsels or incites a child under 14 years to touch directly or indirectly , with a part of the body or with an object, the body of any person, is guilty of an offence with a maximum penalty of up to 10 years imprisonment.

Section 153 deals with those situations where there is a position of trust or authority towards a young person or where there is a young person in a position of dependency. It provides a maximum penalty of 5 years for touching or inviting to touch.

Section 155 continues to prohibit sexual intercourse within family members , that is, the offence of incest as we commonly know it in the western world.

Section 159 continues to prohibit anal intercourse where the parties are under 18 years. The changes that have been made apply only to permit adults to engage in this form of activity.

Section 160 prohibits relations with an animal, that is, bestiality.

Section 170 deals specifically with a parent or guardian who procures a person under 18 years for the purpose of sexual activity and provides for different penalties where the child is under 14 years and between 14 and 18 years of age.

Section 171 prohibits householders from permitting sexual activities in the house where there is a person under 18 years.

Section 172 deals with corrupting children by parents or others by their conduct of adultery, immorality , drunkenness etc.

Section 173 prohibits anyone from committing an indecent act in a public place and more particularly for a sexual purpose, to expose one's genital organs to a child under 14 years of age.

CHILD PORNOGRAPHY

The production, sale and possession of child pornography is considered to be a form of sexual abuse and sexual exploitation of children. Adults who produce these materials use them for the purpose of sexual gratification to the detriment of children's privacy and security of the person. Since 1993 the Criminal Code prohibits the production, publication and possession of photographs, films, videos and other visual representations that shows a person who is or is depicted as being under the age of 18 years of age as engaged in explicit sexual activity.

Section 163.1 (1) of the Criminal Code also prohibits written materials of this nature and provides for a maximum penalty of 10-years imprisonment. Importing and exporting are also offences. It is not a defense to a charge that the accused believed that a person

shown in the materials is or is depicted to be 18 years or older. However, it is a defense if it is shown to the court that the materials have artistic merit and / or educational, scientific or medical purpose.

YOUTH PROSTITUTION

In Canada , prostitution is not illegal. However, soliciting for the purposes of prostitution, keeping a common bawdy house and living on the avails of prostitution (pimping) are criminal offences. This includes soliciting in Canada for purposes of prostitution abroad as well as inciting a person to leave Canada to travel to another country for the same purposes. Section 212 of the Criminal Code does provide for a more severe penalty with a maximum of 14 years imprisonment if a person who lives on the avails of another person (pimping) who is under the age of 14 years. In addition , a person who attempts to obtain or obtains the sexual services of a person under the age of 18 years is guilty of an offence punishable by a maximum of 5 years of imprisonment.

Recent efforts to combat youth prostitution are continuing to increase the difficulties of those that engage in these activities. Most importantly, the Canadian government has committed itself to making changes which will further protect children from adult predators who seek children for sexual services or exploit young prostitutes for economic gain. These proposed amendments, set out in Bill C-27, include a new mandatory minimum prison sentence of 5 years for those convicted of engaging the sexual services of children, and also allow for special provisions to ease the burden on young complainants testifying against their exploiters.

CHILD SEX TOURISM

Sex tourism, although a long time problem, has only recently been a focus of world wide attention. Sex tourism is defined generally as tourism organized for the purpose of facilitating the effecting of a commercial sexual relationship. Currently, twelve countries (Australia, Belgium, Denmark, Finland, France, Germany, Iceland, New Zealand, Norway, Sweden, Switzerland and the United States) have legislation which allows a person to be prosecuted in his own country for engaging in illegal sexual relations in a foreign country with a child. The extension of extraterritorial jurisdiction has become essential to deal with foreigners who travel to a country and commit a crime, and who are then arrested, post bail and escape prosecution by fleeing back to their home country. If that home country can prosecute the offender even though the crime was committed in a different jurisdiction the result will be to deter would be sex tourists if they face punishment at home.

The Canadian government has introduced new legislation in Bill C-27 to crack down on the exploitation of children for money and other considerations. The Criminal Code already addresses certain aspects of “sex tourism”. More particularly, section 212 could apply to tour operators or travel agents offering sex tours, since subsections 1) (a) and (g) specifically provide that “every one who (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada;

(g) procures a person to enter or leave Canada, for the purpose of prostitution;... is guilty on a indictable offence and liable to imprisonment for a term not exceeding ten years". Depending on circumstances, these subsections could apply to the persons who make sex tours available.

However, the provisions of the Criminal Code do not apply to offences committed outside Canada, unless otherwise provided by legislation. Consequently, section 7 of the Code will be amended to provide Canadian courts extra-territorial jurisdiction in relation to Canadian nationals and permanent residents who obtain or attempt to obtain, outside Canada, the sexual services of a person who is under the age of eighteen years.

Proposed amendments will make it possible to prosecute Canadian nationals and permanent residents who have returned after they traveled abroad to obtain sexual services for consideration. Canada is also continuing to campaign for an Optional Protocol on the Rights of the Child that would include provisions obliging other states to adopt legislation to deal with child sex-tourism.

CHILD ABDUCTION AND THE KIDNAPPING OF CHILDREN

Sections 279 to 283 of the Criminal Code extend protections to children who are the victims of abductions by strangers and parents in separation, divorce or custody situations. These offences, including kidnapping (section 279), hostage taking (279.1), abduction of persons under the age of 16 years of age from their parents (section 280), abduction of persons under the age of 14 years from their parents (section 281), abduction by a parent in contravention of a custody order (282) and abduction by a parent where there is no custody order (section 283). Canada has been actively involved with these legislative provisions to fully implement the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption in order to safeguard the best interests of children and their rights in preventing their abduction, sale and traffic.

CHILD WITNESSES

A series of amendments have been made to provide special protections to child witnesses. Section 16 of the Canada Evidence Act provides that a child under 14 years who is a witness in a trial must be able to communicate the evidence and understand the nature of an oath or solemn affirmation to tell the truth and that doing so is the right thing to do. It is no longer essential for the child to believe in a supernatural being. A child can give both sworn and unsworn testimony if the judge is satisfied the conditions have been met to do so.

Section 486 of the Criminal Code gives the court the power to exclude the public from the courtroom to safeguard the interests of witnesses under 14 years in cases where the accused is charged with a sexual offence or a crime of violence. In addition, the judge may order that such a witness have a support person present while giving evidence, such as a parent or relative.

A further safeguard provides that where an accused is charged with such a sexual offence or crime of violence, the accused cannot personally cross-examine a witness under the age of 14 years unless the judge agrees to allow it.

Section 486 (2.1) further provides that where the judge is of the opinion that it is necessary to obtain a full and candid account of the acts complained from the complainant and the complainant is under the age of 18 years at the time of the trial, the judge may allow the complainant to testify outside the courtroom or behind a screen that allows the accused to see the complainant, but does not allow the complainant to see the accused. The screen, usually in the form of a one-way mirror, is the most common device. However, where the witness actually testifies outside the courtroom, closed circuit television, that enables the accused as well as the judge and jury to observe the witness and enables the accused to communicate with his lawyer while the testimony is being given, must be used.

A further provision in section 486(3) permits the judge to make an order directing that the identity of the complainant or child witness under 18 years not be disclosed or published in any way. To violate this order is an offence.

CHILDREN AND THE YOUNG OFFENDERS ACT

The Young Offender's Act is a special law to deal with persons under 18 years of age who commit criminal offences. The Act provides for special criminal procedures and sentencing dispositions applicable only to these persons. It also provides that no person who is a child under 12 years can be charged with a criminal offence. All persons between 12 and under 18 years are young persons and are to be dealt with by the procedures under the Young Offender's Act. The law is in accord with articles 37 and 40 of the Convention on the Rights of the Child. The Young Offender's Act and the youth justice system continues to be reviewed and amended since it was passed and came into force in 1984. A separate presentation would be needed to deal with young offenders.

CONCLUSION

Let me conclude this review by saying that, first and foremost, there is a need for sound legislation to be put in place by all states, through the implementation of the Convention on the Rights of the Child, in order to protect the world's children from all forms of abuse and exploitation. In addition, a meaningful commitment to implement the legislation is required. Serious enforcement of the law requires making appropriate resources available, including the proper training of personnel (police, court, and social services). Further, health, educational and social services and facilities must also be made available to assist children that have been victims of crime.

Finally, governments must support both national and international efforts to raise public awareness and demonstrate openly their opposition to the abuse and exploitation of children.