CHRISTIAN LEGAL FELLOWSHIP

ALLIANCE DES CHRÉTIENS EN DROIT

Submissions of the

Christian Legal Fellowship

to the

Standing Committee on Access to Information, Privacy and Ethics

regarding

Protection of Privacy and Reputation on Platforms such as Pornhub

May 5, 2021

Introduction

A just society cannot tolerate sexual exploitation in any form. And yet, sexually exploitative content—including child pornography, "revenge porn", and other forms of illegal or non-consensual pornographic material—remain available in Canada today. While some freely choose to participate in the production of pornography, others are trafficked, coerced, manipulated, or deceived into producing such content. The resulting images memorialize and perpetuate their victimization and exploitation, often to the continued financial benefit of the original perpetrators.

The persistent presence of these materials online entails the ongoing victimization of those persons depicted in them and must be stopped. However, the flow of such content online and elsewhere is unlikely to cease as long as corporations can still profit from its publication.

It is time to fill the gaps in legislation and enforcement that enable this state of affairs to continue. Christian Legal Fellowship ("CLF") implores the Ethics Committee to investigate and pursue legislative and executive changes that will not only enhance the enforcement of existing prohibitions on sexually exploitative content, but will also eliminate the financial incentives underlying its continued online publication.

Though much more can be said on these issues, this brief will focus on: (a) identifying an especially noteworthy gap in the enforcement of existing *Criminal Code* provisions, (b) identifying "pornography trafficking" and consent as two areas of potential legislative concern, and (c) highlighting the need for greater recourse for victims and survivors of pornographic exploitation.

Making better use of existing tools

Existing *Criminal Code* provisions offer important and necessary protection against sexual exploitation, but they are not fully or consistently enforced in the context of pornographic content.

For reference, the following is a summary of *Criminal Code* protections designed to combat the pornographic memorialisation of sexual exploitation:

- Section 162 prohibits voyeurism, whereby an individual surreptitiously observes or records another person while that other person is exposed or engaged in sexual activity;
- Section 162.1 prohibits the publication of an intimate image without consent, often referred to as "revenge porn";
- Section 163 prohibits publication and distribution of obscene material, as interpreted by the Supreme Court of Canada in *R v Butler*;[1]

[1] *R v Butler*, [1992] 1 SCR 452.

- Section 163.1 prohibits the production, distribution, possession, and accessing of child pornography; and
- Section 171.1 prohibits the transmission, distribution, or sale of sexually explicit content to children, specifically for the purposes of facilitating the commission of an exhaustive list of other offences.

Despite the reality that a large quantity of sexually exploitative pornographic content could be captured by the obscenity provisions,[2] very few charges have been laid under these provisions.[3] Research in this area demonstrates that, since the *R v Butler* decision, in which the constitutionality of the obscenity provisions was upheld, "there have been very few obscenity charges laid" and "[a]n even smaller subset of these cases concerned charges directed at the making or distribution of pornography that is violent or degrading to women."[4] For this reason, "it can be asserted with some confidence that adult pornography that depicts or presents sexual violence against women is clearly not an enforcement priority for police in Canada today, and it has not been a priority since at least the mid-1990s."[5]

Given the consequences of permitting such exploitation to continue unabated, CLF strongly urges a review of the policies concerning the enforcement of these existing provisions, with an eye to improving their application in the fight against exploitative content.

Legislative gaps to fill

Beyond increased enforcement of existing protections, there are also legislative *gaps* to be considered. The overlap between pornography and human trafficking, in particular, is an area warranting a more targeted legislative response. "Pornography trafficking", as some have termed it, can take multiple forms. In the course of trafficking an individual for the purposes of forced sex work, traffickers will often force the victim to produce pornographic content, which the trafficker can then profit from.[6]

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[2] Janine Benedet, "Canadian Obscenity Law 20 Years after *Butler*: The Mainstreaming of Violent Pornography", Centre for Constitutional Studies and Legal Education Society of Alberta (4 October 2013) at 20: "*Hawkins/Jorgenson* does seem to take a clear position that explicit sexual material coupled with violence can be considered obscene, so long as the distributor is aware of, or willfully blind as to their contents. Given that sexually violent pornography is widely available in Canada today, a further explanation is needed for the lack of obscenity prosecutions involving this material."

[3] *Ibid* at 10-18. See also at 31-32: "*Butler*'s critics predicted that the retention of the community standards test would serve as a vehicle for the reassertion of conservative sexual morality. In fact, the test has been used to validate materials that present the sexual degradation and violation of women because of the widespread acceptance of such materials in Canada. Pornography thus validates itself."

[4] *Ibid* at 10.

[5] *Ibid* at 18.

[6] One survey found that 63% of underage sex trafficking victims said they had been advertised or sold online: see Vanessa Bouché, "A Report on the Use of Technology to Recruit, Groom and Sell Domestic Minor Sex Trafficking Victims", Thorn: Digital Defenders of Children (January 2015) at 19, online:< https://www.thorn.org/wp-content/uploads/2015/02/Survivor_Survey_r5.pdf>. See also Melissa Farley, "Renting an Organ for Ten Minutes: What Tricks Tell Us about Prostitution, Pornography, and Trafficking," in David E. Guinn and Julie DiCaro, eds., *Pornography: Driving the Demand in International Sex Trafficking* (Bloomington, IN: Xlibris, 2007) at 145. Farley writes:

While pornography trafficking falls within the legal definition of human trafficking and exploitation, a lack of awareness and enforcement seem to have resulted in a near absence of charges laid in this area. The result is a continuing institutional blind spot to this unique form of sexual exploitation, and so the cycle continues. CLF urges this Committee to consider raising the institutional profile of these offences through a specific legislative response.

Another identifiable gap in the Canadian legislative framework concerns the issue of ongoing consent on the part of persons depicted in pornographic materials. It is well established in Canadian law that consent to sexual activity must always be *express*, *conscious*, and *ongoing*.[7] There is no such thing as advance or implied consent to sexual activity in Canada. Further, the *Criminal Code* stipulates that consent to sexual activity is vitiated where obtained on the basis of coercion, fraud, or abuse of authority.[8]

Strictly defining consent in this way protects against victimization and exploitation. However, it also combats the influence of false and harmful "mythical assumptions" such as, for example, that "women are 'walking around this country in a state of constant consent to sexual activity'."[9]

Pornographic images memorialize sexual acts in a manner that can cause psychological and reputational injury long after the depicted activity takes place. Publication of such materials against the wishes of those persons depicted therein is a profound affront to their autonomy. In the context of pornography, however, there is currently no legislative requirement maintaining this same standard for consent. Further, individuals who *previously* consented to the production of pornography but now seek to have that content removed are left without any legal recourse, protection, or support. Such individuals are forced to confront powerful corporations on their own, with no guarantee that their pleas to remove the (now non-consensual) content will be answered.

CLF is concerned that Canada's current regulatory framework is inadequate to ensure that the publication of pornographic content is truly consensual. We urge the Committee to investigate this matter further. A starting point may be to consider the recent Australian approach, which includes a complaint-based system of review through an eSafety Commissioner, removing the heavy burden from individual victims to be their own advocates against online platforms.[10]

"Interviews with 854 women in prostitution in 9 countries … made it clear that pornography is integral to prostitution.… [A]lmost half (49 percent) told us that pornography was made of them while they were in prostitution."

[7] *R v JA*, 2011 SCC 28 at para 39, [2011] 2 SCR 440 (Chief Justice McLachlin, for the majority). Chief Justice McLachlin writes that the language in the *Criminal Code* requires "a present, ongoing conception of consent, rather than advance consent to a suite of activities."

[8] *R v Hutchinson*, 2014 SCC 19 at para 17, [2014] 1 SCR 346 (Chief Justice McLachlin and Justice Cromwell, for the majority): "Consent cannot be implied, must coincide with the sexual activity, and may be withdrawn at any time. Additionally, no consent is obtained if the apparent agreement to the sexual activity is obtained by coercion, fraud or abuse of authority."

[9] *R v Ewanchuk*, [1999] 1 SCR 330 at para 87 (Justice L'Heureux-Dubé, concurring).

[10] eSafety Commissioner, "Civil penalties scheme", Australian Government, online: <https://www.esafety.gov.au/key-issues/image-based-abuse/take-action/civil-penalties-scheme?fbclid=IwAR0iSJ3W_oSORcpXc-C3tFXwA2EotYDyUm4efgglNH92b_ncS8snqi9N3GU>.

As noted above, Canadian jurisprudence is clear that *ongoing* consent is a prerequisite for all sexual activities. The same principle should apply to any images that capture such activities. CLF believes that individuals should have the freedom to demand the removal of sexually exploitative content they no longer consent to (or perhaps, due to coercion or manipulation, *never* truly consented to) from distribution on online platforms.

Each of the legislative gaps identified herein is worthy of further consideration and review, and we strongly urge the Committee to examine them accordingly.

Remedies for victims and survivors

As things currently stand, victims and survivors of pornographic exploitation in Canada have little recourse against those who profit from their ongoing sexual exploitation. Canada currently lags behind several jurisdictions in this regard, such as Australia—where, as mentioned above, the government has created a complaints-based mechanism that allows victims to report content and have the eSafety Commissioner review and remove that content[11]—and the United States—where victims have used laws around business conduct, fraud or deceit, and the misappropriation of likeness to access legal remedies.[12]

According to the testimonies before this Committee, companies have maintained non-consensual, sexually exploitive content on their websites. These companies are well resourced and should be required to meet clear standards designed to curb exploitation and protect victims of human trafficking, pornography trafficking, and abuse. In addition to regulatory regimes that enforce these standards, we submit that victims and survivors should be permitted to hold companies accountable, where companies fail to meet these standards, and sue for damages.

About Christian Legal Fellowship: Canada's national association of Christian lawyers

Christian Legal Fellowship ("CLF") is Canada's national charitable association of over 700 lawyers, law students, law professors, retired judges, and others, with members in eleven provinces and territories from more than 35 Christian denominations. The Supreme Court of Canada, appellate, and other courts have granted CLF intervener status in over 40 cases interpreting the *Canadian Charter of Rights and Freedoms*.

CLF is also a non-governmental organization in Special Consultative Status with the Economic and Social Council of the United Nations. CLF has appeared before Parliamentary committees and made

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[11] *Ibid.*

[12] See e.g. *Jane Does Nos. 1-22 v GirlsDoPorn*, Case No. 37-2016-00019027-CU-FR-CTL, [Proposed] Statement of Decision (02 Jan 2020), online: https://cdn.arstechnica.net/wp-content/uploads/2020/01/GirlsDoPorn-VERDICT-1.pdf.

submissions before provincial governments, regulators, and courts, including issues of prostitution, sex work, and human trafficking.

CLF is deeply concerned with the implications of human trafficking in Canada. We appreciate this opportunity to share our expertise on legal issues relating to protecting vulnerable persons and suppressing exploitation. From a Christian perspective, CLF opposes human trafficking because it represents the commodification, exploitation, and enslavement of precious and unique human lives. Every person is a sacred life, created in the image of God, and having inherent dignity and value (Genesis 1:27, Psalm 139:14). We believe God calls us to defend the most vulnerable members of our society (Deuteronomy 10:18) and to seek the cause of justice (Micah 6:8).