



## The Skins Controversy - A Canadian Perspective

January 24, 2011 by Bob Tarantino

The recent premiere of MTV's show *Skins* (which was shot in Toronto, and is based on a show of the same name originally broadcast in the UK by E4) has ignited a minor controversy: multiple media outlets have reported that some advertisers are pulling from the show and TV watchdog groups have raised the spectre of a violation of US child pornography laws (see Brian Stelter reporting in the *New York Times*, Nellie Andreeva at *Deadline Hollywood*, and Raju Mudhar in the *Toronto Star*). An allegation of creating or distributing child pornography is one of the most incendiary statements that can be made - and I'll leave it to others (like, say, lawyers in the US) to assess whether the allegation has any legal basis in the United States - what I'd like to take a look at is what Canadian law says about "child pornography" in the context of artistic works. As we'll see, it would be exceedingly unlikely that *Skins* would be found to constitute "child pornography" for purposes of Canadian criminal law.

Section 163.1 of the *Criminal Code (Canada)* sets out various offences relating to child pornography (such as making, transmitting, possessing and accessing). As compared to the United States, the analysis in Canada as to whether something constitutes "child pornography" is greatly simplified by the fact that we have a single criminal code which governs the entire country - whereas each US state also has its own idiosyncratic criminal laws, Canadian provinces do not have constitutional authority to legislate in respect of criminal activity (though they can legislate "regulatory" offences, and, of particular relevance to the issue under consideration, they can and do legislate in respect of the classification, theatrical exhibition and sale of films and television programs - but that's for another post). In short, in Canada, we have only one definition of "child pornography" about which to worry. The definition encompasses visual representations of a person who is under 18 (or who is depicted as being under 18) engaged in (or depicted as engaged in) "explicit sexual activity". The definition also includes visual materials of which the "dominant purpose" is the depiction, for a sexual purpose, of the sexual organs of a person under 18.

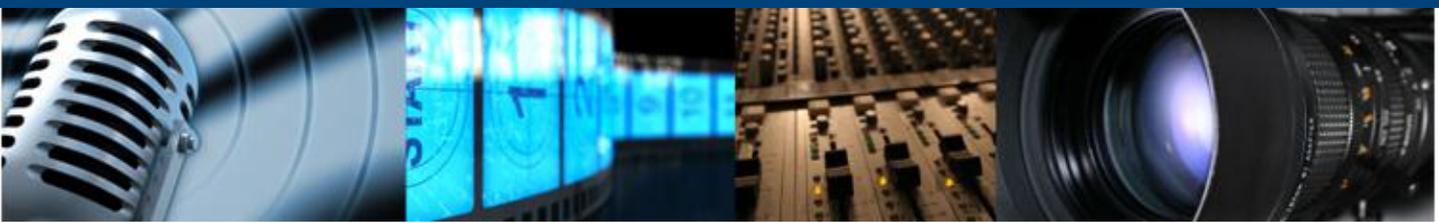
Section 163.1(6) sets out a "legitimate purposes" defence to a charge under the section:

(6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence

(a) **has a legitimate purpose related to** the administration of justice or to science, medicine, education or **art**; and

(b) **does not pose an undue risk of harm** to persons under the age of eighteen years.

To satisfy the elements of the definition of child pornography, then, *Skins* would have to depict individuals who are under 18 (or who are over 18 but are portrayed as being under 18) engaged in "explicit sexual activity". For greater verisimilitude, the producers of *Skins* elected to hire age-



appropriate actors - so there are no 25-year olds playing the part of 10th-grade 15-year olds. But what constitutes "explicit sexual activity"? The Supreme Court of Canada, in the *R. v. Sharpe* (2001 SCC 2, [2001] 1 S.C.R. 45) decision, held that the phrase is to be interpreted in a "restrained" manner, meaning that only "acts which viewed objectively fall at the extreme end of the spectrum of sexual activity – acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion" would qualify. Of the possibly problematic scenes in *Skins* which have been mentioned in the news reports, only one would appear to be of any concern under the Canadian *Criminal Code* definition: according to the Deadline Hollywood report, one scene depicts "a 17-year-old girl who appears to be having sex". Even there, we should note that the reporter has qualified the description ("appears to be"), whereas the Supreme Court has indicated that off-side depictions must be "graphic and unambiguous".

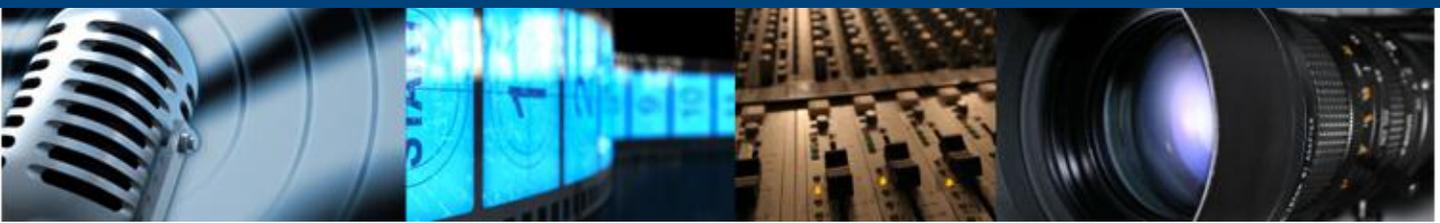
Imagine for a moment, though, that the *Skins* depiction was deemed to be "explicit sexual activity" - what then? There would still be a defence available under Section 163.1(6). What are the contours of that defence? Section 163.1(6) has an interesting history: prior to 2005, it used very different language, stating that an accused was to be found not guilty if the material in question had "artistic merit or an educational, scientific or medical purpose". The *R v Sharpe* decision noted above, which considered the constitutionality of the entire section, including the "artistic merit" defence, and upheld it, was hugely controversial - and led to the amendment of 163.1(6) into the form in which we find it today, which contemplates a defence where the act alleged to constitute the offence has a "legitimate purpose" (which may include "art") and does not "pose an undue risk of harm" to persons under 18 years of age.

When the Supreme Court considered the earlier version of the defence (the "artistic merit" version), the majority held that the defence "must be construed broadly". In expanding on that point, Chief Justice McLachlin stated the following:

"artistic merit" should be interpreted as including any expression that may reasonably be viewed as art. Any objectively established artistic value, however small, suffices to support the defence. Simply put, artists, so long as they are producing art, should not fear prosecution under s. 163.1(4).

The Supreme Court has not yet reviewed the new "legitimate purpose" defence, but the Ontario Court of Appeal did so last year in *R v Katigbak* (2010 ONCA 411 (CanLII)). In *Katigbak*, the Court of Appeal stated that the post-2005 version of the defence was deliberately narrower than the previous "artistic merit" version, and held

While the shape of that defence has changed with the November 2005 amendments, it remains still an important statutory bulwark against the unconstitutional infringement of the s. 2(b) *Charter* value. At the same time, though, Parliament has determined that not all acts relating to education or the arts (or the other enumerated spheres of valued activity) in this context will be immune from prosecution in the interests of buttressing freedom of thought and expression – only those that serve a *legitimate* purpose will be, and then, only those that do not pose an *undue* risk of harm to minors. [para. 62]



In para. 63 of the *Katigbak* decision, the court notes that "while [the defence] is to be liberally construed, [it] must not be construed in a manner that renders the child pornography offences essentially inoperative".

In assessing whether the creation and broadcast of *Skins* has a "legitimate purpose" related to art, it would be difficult to conclude otherwise: any of the scenes which are purportedly pornographic exist fleetingly in the context of an episodic television series which contains multiple characters and story arcs - such long-form expression, irrespective of whether it is "good" or "bad" or "high" or "low", is indisputably "art". The original UK version of the show has, in addition to garnering respectable ratings, received considerable critical praise and has been nominated for and received numerous awards - though those facts are merely indicative (and of the source material only, not the actual US version of *Skins*), they are indicative of some kind of purpose "related" to artistic activity.

The second step of the Section 163.1(6) defence, that the activity "not pose an undue risk of harm" to persons under 18, is also relatively easy to meet in these circumstances. If the concern is with the actors themselves, few workplaces are as controlled as the television set of a big-budget production, particularly where underage actors are involved. The risk of harm to *other* minors (such as viewers of the show) is, at best, speculative, and such an analysis would need to show multiple causal links which would be difficult in the extreme to demonstrate.

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