

LEGAL MEMORANDUM

From: Solomon Friedman, Counsel (Edelson Clifford D'Angelo LLP)

To: Charles Brownstein (Comic Book Legal Defense Fund)

Date: February 27, 2012

Re: Pornographic anime and manga under Canadian law

[The following material is presented as legal information only and cannot be relied upon as legal advice. Individuals seeking legal advice should consult counsel.]

As recent prosecutions have demonstrated, Canada has some of the most stringent laws regarding child pornography and related material. Canadian laws are particularly onerous, not just due to the presence of serious mandatory minimum sentence of imprisonment, but also due to the extremely broad definition of "child pornography" in Canada's *Criminal Code*.

The following is an outline of some of the legal issues which comic book and manga collectors need to be aware of when either travelling to Canada or conducting transactions, online or otherwise, with Canadian entities.

The definition of "child pornography"

As noted, the Canadian definition of child pornography is extraordinarily broad. Of particular interest to the Comic Book Legal Defense Fund are the following materials, which constitute child pornography in Canada. Section 163.1 of the *Criminal Code of Canada* reads as follows:

163.1 (1) In this section, "child pornography" means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Therefore, under the *Criminal Code* any anime/manga material whose “dominant characteristic” is the description of sexual activity “for a sexual purpose” may be captured by section 163.1 (1) (c).

Similarly, anime that either (a) shows a person who is or is depicted as being under the age of eighteen years and is engaged in explicit sexual activity or (b) shows, as its “dominant characteristic”, the anal area or sexual organs, may fall under the *Criminal Code* definition of child pornography.

Notably, these images do not need to be actual photographs or video images of children. Under the *Code*, drawings are sufficient to ground a conviction for possession of child pornography.

The child pornography offences

The *Criminal Code* sets out the following offences with regards to child pornography:

- 163.1 (2) – Making, printing, publishing or possessing for the purpose of publication
- 163.1 (3) – Transmitting, making available, distributing, selling, advertising, importing, exporting or possessing for the purpose of transmission, making available, distribution, sale, advertising or exportation
- 163.1 (4) – Possessing
- 163.1 (5) - Accessing

For each of these offences, like most offences in the *Criminal Code*, there are two potential modes of proceeding, each carrying different procedure, and most importantly, different possible penalties.

The Crown prosecutor can elect to proceed “by summary conviction”, the less serious mode of procedure. Alternatively, the prosecution can proceed “by indictment”, where harsher minimum and maximum penalties apply. This distinction is, in some ways, analogous to the “misdemeanour” or “felony” division in some U.S. jurisdictions.

Notably, for international visitors to Canada, when child pornography material is brought across the border, simple possession of that material is likely to constitute “importing”, within the meaning of section 163.1 (3) – resulting in the possibility, as explained below, of a one year mandatory minimum sentence.

Mandatory minimum sentences

Every one of the above offences carries a mandatory minimum sentence of imprisonment.
Therefore, where an individual is convicted of one of these offences, regardless of any mitigating personal and circumstantial factors, a judge has *no discretion* to impose a non-custodial sentence.

The mandatory *minimum* sentences for child pornography offences are as follows:

163.1 (2) – Making, publishing, etc.

<i>Summary conviction</i>	90 days
<i>Indictment</i>	1 year

163.1 (3) – Transmitting, making available, etc.

<i>Summary conviction</i>	90 days
<i>Indictment</i>	1 year

163.1 (4) – Possessing

<i>Summary conviction</i>	45 days
<i>Indictment</i>	14 days

163.1 (5) - Accessing

<i>Summary conviction</i>	45 days
<i>Indictment</i>	14 days

The “legitimate purpose” defence

Section 163.1 (6) of the *Criminal Code* provides for a limited defence to the above-discussed child pornography offences. The provisions reads as follows:

163.1 (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.

The leading decision on the interpretation of this position is the Supreme Court of Canada judgement of *R. v. Katigbak*, 2011 SCC 48. In short, the Court outlined the following analytical framework for assessing the application of the “legitimate purpose defence”:

- a. Has the accused *raised a reasonable doubt* that he, from a subjective standpoint, had a genuine, good faith reason for possessing child pornography for one of the listed grounds?
- b. Was the accused's stated purpose legitimate? That is, is there an objectively verifiable connection between the impugned act and the accused's stated purpose?
- c. Does the accused's conduct pose a significant risk of objectively ascertainable harm?

Notably with regard to the “objectively verifiable connection” step of the analysis, the Court has stated that “this objective assessment does not involve the court in any assessment of the value of the particular scientific or artistic activity in question.”

Accordingly, it is possible that in the case of a prosecution with regards to anime or manga material, the defence may be able to establish the required grounds for steps (a) and (b) of the above analysis. Moreover, with regard to step (c) – the risk of harm analysis – defence counsel would need to argue that this material is not produced via the abuse of real children. These are fictional drawings and in general, they are not based on and do not resemble actual children.

Furthermore, the ordinary rationale for the criminalization of child pornography – that is, that consumers create a market for producers - breaks down when applied to anime material. *This material is legal in most jurisdictions around the world, including the United States and Japan.* The market exists and is prospering. Unlike traditional child pornography, where the market has been driven underground and is supported by clandestine collectors, this material is legal and freely available throughout the world.

However, this defence remains relatively unexplored and has yet to be properly tested with regards to anime and manga material.

The powers of the Canada Border Services Agency

In Canada, individuals are generally protected against warrantless searches. Section 8 of the *Charter of Rights and Freedoms* recognizes the right of all persons “to be secure against unreasonable search and seizure”.

That right is extremely limited when a traveller is crossing the Canadian border and entering Canada. As the Supreme Court has put it, “the degree of personal privacy reasonably expected at customs is lower than in most other situations.”

The *Customs Act* states that a customs officer can “examine any goods that have been imported” at any time until a traveller is released from customs. Accordingly, all belongings can be examined with virtually no restriction on routine customs searches.

Of course, “any goods” includes any electronic device, laptop, tablet or smartphone. In fact, customs officers are always on the alert for illegal materials stored on electronic devices such as child pornography or obscene material.

In addition, for travellers who password protect their devices or files, it is an offence under the Customs Act to hinder an officer in the execution of his duties. This may include failing to provide a password upon demand by a customs officer. Moreover, as customs officers are “peace officers” under the Criminal Code, a traveller who fails to unlock his device – digitally or otherwise – may well find himself charged with a the criminal offence of obstructing a peace officer.

The bottom line

Visitors to Canada, particularly those who acquire and possess anime and manga materials, must be aware of Canada’s extremely strict child pornography laws. As outlined above, the definition of “child pornography” in Canada is extraordinarily broad and can capture explicit anime/manga images.

They must also be aware of the powers of the border officials to search “hard copy” materials and digital storage devices. Finally, they should note that judicial discretion has been removed for child pornography offences and extremely strict mandatory minimum sentences of imprisonment apply to all such offences.