

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R. *v.* Katigbak, 2011 SCC 48, [2011] 3 S.C.R. 326 | **Date:** 20111020  **Docket:** 33762 |

**Between:**

**Robert Katigbak**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Canadian Civil Liberties Association**

Intervener

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

|  |  |
| --- | --- |
| **Joint Reasons for Judgment:**  (paras. 1 to 85)  **Concurring Reasons:**  (paras. 86 to 91) | McLachlin C.J. and Charron J. (Binnie, Deschamps, Abella, Rothstein and Cromwell JJ. concurring)  LeBel J. (Fish J. concurring) |

R. *v.* Katigbak, 2011 SCC 48, [2011] 3 S.C.R. 326

Robert Katigbak *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Canadian Civil Liberties Association *Intervener*

**Indexed as: R. *v.* Katigbak**

2011 SCC 48

File No.: 33762.

2011:  February 21; 2011:  October 20.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for ontario

*Criminal law — Child pornography — Defences — Accused charged with one count possession of child pornography between 1999 and 2006 — Statutory defences amended 2005 — Accused testifying purpose of collecting child pornography to create artistic exhibition from perspective of exploited children — Trial judge accepting testimony and acquitting accused on basis of pre‑2005 artistic merit defence — Whether accused’s actions constituted artistic merit or served public good per pre‑2005 defences — Whether accused’s actions had legitimate purpose which did not pose undue risk of harm per post‑2005 defence — Criminal Code, R.S.C. 1985, c. C‑46, ss. 163(3), 163.1(6).*

*Criminal law — Appeal from acquittal — Powers of court of appeal — Accused charged with one count possession of child pornography between 1999 and 2006 — Trial judge acquitting accused — Court of Appeal overturning acquittal and registering conviction — Whether substituting conviction exceeded Court of Appeal’s jurisdiction limited to questions of law — Criminal Code, R.S.C. 1985, c. C‑46, ss. 676(1)(a), 686(4)(b)(ii).*

*Criminal law — Information — Accused charged with one count possession of child pornography between 1999 and 2006 — Statutory defences amended 2005 — Whether Information defective because only one count of offence charged for period during which statutory defences amended*.

The appeal concerns the nature and scope of the child pornography defences found in the *Criminal Code* as they existed before and after Parliament amended those provisions. Prior to November 1, 2005, the defence under s. 163.1(6) applied if the accused raised a reasonable doubt as to his or her guilt by establishing, *inter alia*, the material’s artistic merit. In addition, the accused would be acquitted where the acts served, but did not extend beyond what served, the public good (s. 163(3)). After November 1, 2005, the public good defence no longer applied and s. 163.1(6) was amended to provide a defence if the acts: (1) had a legitimate purpose related to the administration of justice or to science, medicine, education or art; and (2) did not pose undue risk of harm to persons under the age of eighteen. The accused was charged with one count of possessing child pornography between 1999 and 2006, therefore engaging both versions of the defence. He testified that he was in possession of child pornography for the purpose of creating an artistic exhibition that would present the issue of child exploitation from the perspective of the child. Accepting that testimony, the trial judge held the accused was entitled to rely on the defences as they existed before and after the 2005 amendments and acquitted him on the basis of the pre‑2005 artistic merit defence. The Court of Appeal set aside the acquittal and registered a conviction, concluding that none of the defences were available to the accused on the record.

*Held:* The appeal should be allowed and a new trial ordered.

*Per* McLachlin C.J. and Binnie, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: The trial judge made errors of law regarding both versions of s. 163.1(6). First, she erred by finding that the pornographic material fell within the scope of the pre‑2005 artistic merit defence on the ground that the accused possessed the material for an artistic purpose, notwithstanding the fact that the material itself had no artistic merit. Second, she erred in her interpretation of the phrase “legitimate purpose” in the current defence by inquiring solely into the accused’s subjective purpose for possessing the material. Parliament’s use of the word “legitimate” connotes its intention that the connection between the impugned activity and the stated purpose also be objectively verifiable. That is, based on all the circumstances: (1) there is an objective connection between the accused’s actions and his or her purpose; and (2) there is an objective relationship between the accused’s purpose and one or more of the protected activities (administration of justice, science, medicine, education or art).

In light of those errors, the Court of Appeal was correct to set aside the acquittal. However, it erred in substituting a conviction. The proper remedy is a new trial. Appellate courts may only substitute an acquittal with a conviction if the trial judge’s findings of fact, viewed in light of the applicable law, supported a conviction beyond a reasonable doubt (s. 686(4)(*b*)(ii)). In making findings of fact about the accused’s activities and that they extended beyond what served the public good, the Court of Appeal went beyond the jurisdiction conferred on it which, in an appeal from acquittal, is limited to questions of law alone (s. 676(1)*(a*)). As the trial judge did not make the requisite factual inquiries, an appellate court cannot conclude on this record whether the pre‑2005 defence of public good would be successful or not. The same is true in relation to the current defence. The connection between the repeated collection and storing of child pornography over a seven‑year span and the accused’s stated purpose of creating an art exhibition was highly contentious at trial. In the circumstances, the trial judge’s findings of fact on credibility cannot simply be applied to answer the objective component of the legitimate purpose branch of the defence. Because the factual underpinnings for the objective component of the legitimate purpose branch of the defence were not fully explored, the appropriate remedy is to order a new trial. As to the undue risk of harm branch, the Court of Appeal erred by relying on a community standard of tolerance test to determine if the risk of harm posed was undue. The correct approach is to assess whether the physical and/or the psychological harm is objectively ascertainable and whether the level of the harm poses a significant risk to children. The question is what degree of harm will be tolerated in the case of activity that has a legitimate purpose. The Court of Appeal also erred by substituting its own views on the harm posed by the accused. Determining the ways that the accused’s conduct posed a risk of harm to young persons and whether the risk of harm was undue will be questions to be determined based on the evidence at the new trial.

Finally, while it may have been preferable to charge the accused separately for the activities in the pre‑ and post‑amendment periods, the Crown’s decision to lay a single charge is not fatal. The Information was not duplicitous as it was clear to the accused that he had to meet both defences for both periods of the alleged offence, and his defence was conducted accordingly. Moreover, he was not prejudiced, since he would have been required to meet both defences had the Crown charged him with separate counts of the offence.

*Per* LeBel and Fish JJ.: The social interests at stake in relation to child pornography offences are not all the same and the importance of the public interest is not identical. Thus, the nature and scope of the defence must be consistent with the nature of the crime itself. Without downplaying its seriousness, possession can entail a lesser risk to the public and to children than the making and distribution of child pornography. The harm to be proven to establish an “undue risk of harm” must therefore be greater than the generic harms associated with possession of child pornography. A court must find facts and circumstances that create an undue risk in the context of the case before it, such as a lack of security and ease of access to the material by others. The effect of holding that the generic harms amount to undue risk is to practically eliminate a defence left open by Parliament where the purpose of the possession is related to the administration of justice, science, medicine, education or art.

**Cases Cited**

By McLachlin C.J. and Charron J.

**Applied:**  *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728; **referred to:***R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Mara*, [1997] 2 S.C.R. 630; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

**Statutes and Regulations Cited**

*An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, Bill C-2, 1st Sess., 38th Parl., 2004‑2005 (assented to July 20, 2005), S.C. 2005, c. 32.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 163, 163.1 [ad. 1993, c. 46, s. 2; am. 2005, c. 32, s. 7], 172, 590(1)(*b*), 676(1)(*a*), 686(4)(*b*)(ii).

**Authors Cited**

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Ontario Court of Appeal (Moldaver, Simmons and Blair JJ.A.), 2010 ONCA 411, 263 O.A.C. 301, 255 C.C.C. (3d) 365, 76 C.R. (6th) 330, 212 C.R.R. (2d) 272, 100 O.R. (3d) 481, [2010] O.J. No. 2412 (QL), 2010 CarswellOnt 3838, setting aside the accused’s acquittal for possession of child pornography and entering a conviction. Appeal allowed and new trial ordered.

*David E. Harris*, for the appellant.

*Christine Bartlett‑Hughes*, for the respondent.

*Christopher D. Bredt*, *Margot Finley* and *Jamie Cameron*, for the intervener.

The judgment of McLachlin C.J. and Binnie, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

The Chief Justice and Charron J. —

I. Overview

1. This appeal concerns the nature and scope of the child pornography defences found in the *Criminal Code*,R.S.C. 1985, c. C-46, as they existed before and after Parliament amended the provisions which came into force on November 1, 2005 (S.C. 2005, c. 32). The appellant, Robert Katigbak, was charged with one count of possessing child pornography over a seven-year period between 1999 and 2006. Given that the Information spanned this period, both versions of the defence were at play.
2. At trial, Mr. Katigbak admitted that the materials he collected constituted child pornography and that he was in possession of at least some of the materials throughout the relevant seven-year period. He testified, however, that his purpose in collecting the materials was to create an artistic exhibition that would present the issue of child exploitation from the perspective of the child. His intention was not to display the materials themselves, but rather “to use mannequins and other visual aids to evoke in his audience the sense of emotional upset that the images had on him” (trial judgment, November 7, 2008, unreported, at para. 8).
3. Prior to November 1, 2005, the defence under s. 163.1(6) applied if the accused raised a reasonable doubt as to the material’s artistic merit, or its educational, scientific or medical purpose. In addition, the public good defence set out in s. 163(3) was imported into the child pornography provisions. It provided that the accused should be acquitted where the act alleged to constitute the offence serves, and does not extend beyond what serves, the public good. After November 1, 2005, the public good defence no longer applied to the child pornography offences. Rather, s. 163.1(6) was amended to provide a defence if the act that is alleged to constitute an offence: (1) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and (2) does not pose undue risk of harm to persons under the age of 18.
4. Mr. Katigbak was acquitted at trial. The trial judge, Botham J., accepted Mr. Katigbak’s testimony that he was in possession of child pornography for the purpose he espoused. She held further that he was entitled to rely on the defences set out in s. 163.1(6), as they existed before and after the 2005 amendments.
5. The Crown successfully appealed to the Court of Appeal for Ontario. Writing for a unanimous court, Blair J.A. concluded that the trial judge erred in her interpretation and application of the pre-amendment and post-amendment s. 163.1(6) defences. In his view, Mr. Katigbak was not entitled to rely upon either version of the defence. Nor was he entitled to rely on the public good defence. As a result, the Court of Appeal allowed the appeal, set aside the acquittal, and registered a conviction for possession of child pornography (2010 ONCA 411, 263 O.A.C. 301).
6. Mr. Katigbak appeals to this Court as of right.
7. In our view, the trial judge made errors of law regarding both versions of s. 163.1(6). First, she erred by finding that the pornographic material fell within the scope of the pre-2005 artistic merit defence on the ground that Mr. Katigbak *possessed* the material for an artistic purpose, notwithstanding the fact that the material itself had no artistic merit and was not created for one of the enumerated purposes. Second, she erred in her interpretation of the phrase “legitimate purpose” in the current version of s. 163.1(6) by inquiring solely into the accused’s subjective purpose for possessing the material. In our view, Parliament’s use of the word “legitimate” connotes its intention that the connection between the impugned activity and the stated purpose also be objectively verifiable. That is, based on all the circumstances: (1) there is an objective connection between the accused’s actions and his or her purpose; and (2) there is an objective relationship between the accused’s purpose and one or more of the protected activities (administration of justice, science, medicine, education or art).
8. In light of those errors, the Court of Appeal was correct to set aside the acquittal. However, in our respectful view, it erred in substituting a conviction. Because of the erroneous analytical framework applied at trial, the trial judge did not make the necessary findings of fact for an appellate court to find Mr. Katigbak guilty of the offence. Consequently, we would allow Mr. Katigbak’s appeal and order a new trial.

II. Legislative History

1. Before discussing the circumstances of this case, it may be useful to briefly review the legislative history of the child pornography provisions.
2. In 1993, Parliament enacted s. 163.1 of the *Criminal Code*, creating a number of offences related to child pornography (S.C. 1993, c. 46, s. 2). This provision supplemented laws making it an offence to make, print, publish, distribute, or circulate obscene material (s. 163), and to corrupt children (s. 172). By enacting s. 163.1, Parliament created a comprehensive scheme to address the production, publication, importation, distribution, sale, and possession of child pornography. The child pornography possession offences were, and continue to be, set out in s. 163.1(2) to (4).
3. The offences related to the possession of child pornography were initially subject to two related defences. First, the s. 163.1(6) defence applied if the material that was alleged to constitute child pornography could reasonably be viewed as art, or it served an “educational, scientific or medical purpose”. Thus, the former s. 163.1(6) referred to the purpose that the *material*, viewed objectively, may serve, rather than the *purpose* for which the accused actually possessed the material. Section 163.1(6) read as follows:

(6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

1. Second, the “public good” defence applied if the material that was alleged to constitute child pornography served the public good and, further, did not extend beyond what was necessary to serve the public good. Subsection 163.1(7) imported this “public good” defence from the obscenity provisions of the *Criminal Code* by providing:

(7) Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3) or (4).

The public good defence, which continues to apply to the obscenity provisions, is set out in ss. 163(3) to (5). It provides:

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section, the motives of an accused are irrelevant.

1. This Court interpreted the former legislative framework in *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45. It held that certain aspects of s. 163.1(4) infringed s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and could not be saved by s. 1. Subsequent to the Court’s decision in *Sharpe*, Parliament overhauled the child pornography defences as part ofBill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act* (assented to July 20, 2005). This overhaul came into force on November 1, 2005.
2. Since November 1, 2005, the child pornography provisions in s. 163.1 no longer incorporate the public good defence. Under the current version, the defence related to the possession of child pornography applies if the accused meets a two-part legitimate purpose/undue risk of harm test set out in s. 163.1(6). It reads as follows:

(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.

III. Facts

1. Mr. Katigbak was charged with one count of possession of child pornography after the police found 628 images (of which 61 were duplicates) and 30 video clips of child pornography on his computer’s external hard drive. Of the 628 images, 616 were “accessible”, defined at trial as “ones which can be located by any computer user with a minimum of effort” (Agreed Statement of Facts (A.R., at p. 183)). All of these materials showed the actual abuse of real children, including babies. Some of the images depicted children engaging in sexual activity with adults and other children, while others showed children exposing their genitals, and being anally and vaginally penetrated.
2. At trial, Mr. Katigbak admitted that all of the images of children constituted child pornography within the meaning of s. 163.1(1) of the *Criminal Code*, and that he had collected them between 1999 and 2006. However, he contended that he only collected child pornography because he intended to create an artistic exhibition exploring the sexual exploitation of children. As such, he argued that he was entitled to rely on the defence in s. 163.1(6) for artistic expression. He explained that his artistic project would not include any images of actual child pornography, but rather that he would try to convey the psychological effect of child abuse by using mannequins and dolls.
3. Mr. Katigbak stated at trial that he collected child pornography to research what child pornography looked like and then explore his emotional responses to it. He explained that he knew that viewing images would invoke an “extreme sense of anger” and that he wanted “those feelings to be fresh” when he was working on the project (A.R., at p. 93).
4. Investigators also found a large collection of adult pornography intermingled with the images of child pornography on Mr. Katigbak’s computer. When asked in cross-examination, Mr. Katigbak stated that the images of adult pornography found in his possession were not related to the proposed art project but for “personal entertainment” (A.R., at p. 113). He admitted to making no effort to isolate the child pornography from the adult images on his computer. He also took no steps to add safeguards on the computer, such as adding password protections to the child pornography files. He confirmed in his testimony that the computer was out in the open and whoever wanted to use it had access to it. On a daily basis, this included his father and brother, and occasionally at parties, up to 30 or 40 people.
5. Mr. Katigbak testified that he conceived of this art project on child pornography while he was completing a Bachelor’s degree in psychology at McMaster University. As evidence, he introduced his notebooks from 2000, 2001 and 2003 in which he wrote about how such an exhibit could be created. In one such entry, Mr. Katigbak wrote: “[H]ow do you do a show on child porn? (you can’t show it) — maybe do a documentary? . . . models should show a broken spirit, fear, helplessness — show a child w/ an adult in the background (looming or doing-up his pants after the abuse has occurred)” (A.R., at p. 239).
6. Mr. Katigbak also spent a number of years working in the photography industry, and testified that he hoped his exhibit on child pornography would draw attention to his work. One of his colleagues from Japan Camera Centre, Stacey Tyrell, testified that she and Mr. Katigbak discussed various ideas for artistic projects. She testified that, in early 2004, the two talked about using child mannequins in an artistic project after they saw a store window that displayed undressed child mannequins. Mr. Katigbak never specifically spoke to her about a project relating to the sexual abuse of children, but she stated that this was one of the themes that they discussed. He never told her that he was collecting child pornography as part of an art project.
7. By the time Mr. Katigbak was charged with possession of child pornography in 2006, seven years had passed since he had started collecting the materials. He had never produced an exhibition, nor had he secured a venue for one. He testified that he had not found an appropriate venue that he could afford, and that he nonetheless continued to collect child pornography “even if it was redundant at that point or repetitive”, in order to feel like he “was doing something to keep the project going” (A.R., at p. 112).

IV. Judicial History

A. *Ontario Court of Justice, November 7, 2008, Unreported*

1. At trial, Botham J. accepted that Mr. Katigbak “collected the images for the purpose that he has described” (para. 32), namely to create an art exhibition. She explained: “I can find no reason on the evidence before me to reject his assertion that he was concerned about the issue of sexual abuse or exploitation of children, many people are. Furthermore in my view it is plausible that he would have been interested in putting together some sort of visual exhibition or display as an expression of that concern” (para. 29).
2. The trial judge noted that the defence set out in s. 163.1(6) was amended in November 2005. Since the accused was charged with a single count of the offence for a period spanning from 1999 until 2006, both the pre- and post-amendment defences under s. 163.1(6) were at issue. Although the public good defence under s. 163(3) was referenced by Crown counsel during his final submissions, defence counsel made no express reference to it and the trial judge made no finding in that regard. The trial judge held that Mr. Katigbak was entitled to rely on both versions of the defence under s. 163.1(6).
3. First, the trial judge interpreted the former defence under s. 163.1(6). She observed that prior to November 2005, the defence focused on whether the materials themselves had artistic merit, and not whether the accused had an artistic reason for possessing them. There was no suggestion that the materials themselves had artistic merit, or that they were created for one of the specified purposes. However, the trial judge rejected the Crown’s argument that Mr. Katigbak was barred from invoking the defence for that reason. She held rather that the defence had to be interpreted broadly, in light of the *Charter* value of freedom of expression.
4. The trial judge held that “[t]he need to protect creative expression and a free exchange of ideas which is the impetus for the statutory defence set out in s. 163.1(6) is triggered as much where a person possesses otherwise pornographic materials for an artistic or creative purpose as it is when such materials are actually created for one of the enumerated legitimate purposes” (para. 21). If persons were morally exempt when they possessed pornographic material that itself was created to further a legitimate purpose, a similar moral exemption “must logically exist . . . for those who possess pornographic material for a similarly legitimate goal” (para. 22). The trial judge therefore concluded that Mr. Katigbak was entitled to rely on the pre-amendment defence to the child pornography offences under s. 163.1(6).
5. As for the current version of the defence, the trial judge held that Mr. Katigbak collected the child pornography for a legitimate purpose related to art, based on her factual finding that Mr. Katigbak only possessed the child pornography in order to create an art exhibition. The trial judge further held that his actions did not pose an undue risk of harm to young persons. In reaching the latter conclusion, she made the following observations:

The works possessed by Mr. Katigbak were not purchased by him so the makers of the materials did not profit from his viewing of them and the market for such material was not encouraged by his actions. There is no suggestion that his interest in the materials was motivated by any sexual interest. The risk that he would become desensitized to the issue of child abuse or more likely to offend sexually has to be far less in this situation than where the material is collected for the purpose of arousal. It was not his intention that the images themselves would ever be distributed or even replicated in his exhibit; rather he sought to demonstrate the feelings of helplessness and fear experienced by the victims. This in my mind negatives the concern that the victims are being re-victimized by a viewing of the images. Finally there was no suggestion that the artistic project was to be sexual in nature which would reduce the concern that it would provide sexual gratification for others or desensitize others to the issue of child abuse. [para. 36]

In the result, Mr. Katigbak was acquitted at trial.

B. *Ontario Court of Appeal, 2010 ONCA 411, 263 O.A.C. 301*

1. The Ontario Court of Appeal unanimously allowed the Crown’s appeal. Writing on behalf of the court, Blair J.A. held that the trial judge committed legal errors in her discussion of each version of s. 163.1(6). He held further that none of the defences was available to Mr. Katigbak on the record. The court therefore substituted the acquittal with a conviction.
2. First, Blair J.A. held that the trial judge erred in her interpretation of the artistic merit defence as it existed prior to November 2005. The former version of s. 163.1(6) only applied when the child pornography itself had artistic merit, and not simply when the accused had an artistic purpose for possessing the materials. The trial judge’s conclusion that the defences extended to a consideration of the broader purpose underlying the accused’s possession of child pornography failed to give effect to the clear language of s. 163.1(6) as it existed and, moreover, was contrary to the interpretation given to that provision by this Court in *Sharpe*. Accordingly, Blair J.A. held that Mr. Katigbak was not entitled to rely on the defence since there was no suggestion that the materials that he collected had artistic merit. Mr. Katigbak conceded before the Court of Appeal that the pre-amendment artistic merit defence had no application to the facts of his case.
3. Mr. Katigbak submitted, however, that the trial judge’s considerations with respect to the pre-amendment artistic defence were more appropriate to the former public good defence. Therefore, for the first time on appeal, he argued that he could rely on the public good defence in s. 163(3) for the period before November 2005, given that he only collected child pornography as part of the research for his future public exhibit. He argued that his ultimate purpose in possessing the images was akin to researchers studying the effects of child pornography.
4. Blair J.A. rejected this argument, and held that the accused was not engaged in research on the psychological effects of child pornography. Additionally, Blair J.A. held that the possession in this case extended beyond what served the public good. Particularly, he was of the view that Mr. Katigbak’s admission that he persisted in repetitive downloading of the images in order to “feel like [he] was doing something to keep the project going” underscored the conclusion that Mr. Katigbak’s act of possession extended well beyond what could reasonably be said to serve the public good (para. 42).
5. Thus, Blair J.A. concluded that Mr. Katigbak was not entitled to rely upon either the artistic merit defence or the public good defence as they had existed prior to the November 2005 amendments.
6. Second, Blair J.A. concluded that Mr. Katigbak was not entitled to rely upon the current defence provided by s. 163.1(6) of the *Criminal Code*. Blair J.A. held that the trial judge was mistaken in her interpretation and application of the legitimate purpose branch of the test, although he ultimately did not allow the appeal on that ground. He also found that the trial judge erred in her application of the undue risk of harm part of the test. Given that the two components of the s. 163.1(6) defence were conjunctive, he set aside the acquittal.
7. Blair J.A. first considered the legitimate purpose branch of the analysis. In his view, by qualifying the word “purpose” with the word “legitimate”, Parliament “signalled that it was putting limits on the defence” (para. 52). The 2005 amendments sought to ensure “that *any* artistic value or educational purpose, however slight, would no longer suffice as a defence but, instead, a ‘legitimate’ purpose relating to one of the enumerated spheres of valued activity had to be raised” (*ibid.* (emphasis in original)). In his view, what makes the act worthy of protection in law under the “legitimate purpose” component of the defence “is its objectively verifiable connection with the purpose and the ultimate worthy goal” (para. 55). Blair J.A. then set out the legal framework for the undue risk of harm branch of the analysis. In his view, the risk of harm becomes “undue” when society would find it “inappropriate, unjustifiable, excessive or unwarranted in the circumstances of the case” (para. 76).
8. Blair J.A. then applied the legal framework for the new defence to the case at bar. On the first branch, he noted that the Crown did not attack the trial judge’s finding that Mr. Katigbak had the purpose he espoused, but argued on legal grounds that the purpose was not a “legitimate” one (para. 65). Blair J.A. confessed to having “serious reservations” about the trial judge’s finding that Mr. Katigbak had the purpose or intention he espoused (para. 66). Further, referring to a number of uncontested facts in support of his view, Blair J.A. reasoned that the trial judge would have concluded differently on the legitimacy of the purpose had she assessed the evidence in light of the appropriate legal framework (*ibid.*). However, given that the Crown accepted the trial judge’s finding about Mr. Katigbak’s purpose for possession, Blair J.A. elected not to interfere with the trial judge’s decision on this basis.
9. Regarding the undue risk of harm analysis, Blair J.A. held that a number of the trial judge’s conclusions were “simply wrong and/or irrelevant” (para. 80). Among other things, he stated that the trial judge erred in failing to give effect to the principle that the harm flowing from particular material may be inferred from the nature of the material itself. Blair J.A. also held that the trial judge erred in concluding that the makers of the material did not profit from Mr. Katigbak’s viewing because he did not purchase the material, as “[t]he number of ‘hits’ is important in the world of cyberspace” (para. 82). Similarly, while Mr. Katigbak’s intention not to distribute or replicate the images may have “avoided *redoubling* the victimization, it did not *diminish* the re-victimization of the actual children involved through the very process of downloading and possessing the images” (*ibid.* (emphasis in original)). After reviewing the evidence, he concluded that the risk posed by Mr. Katigbak’s possession was, in all the circumstances, undue.
10. Finally, Blair J.A. rejected Mr. Katigbak’s argument, which was raised for the first time in the Court of Appeal, that the Information was defective. Mr. Katigbak argued that the Information should be quashed because it charged a single count of the offence stretching over a seven-year period, during which the statutory defence was amended. He argued that the Crown should have charged two counts of the offence; one for the period before November 2005, and one afterwards. Blair J.A. held that while it may have been preferable for the Crown to have charged Mr. Katigbak with two counts, the Crown is only required to charge separate counts if the elements of the offence change, and not when a statutory defence is amended. Further, Mr. Katigbak was not prejudiced by the Information as it stands, given that he and the Crown proceeded on the premise that he was entitled to the pre-amendment defences for the period ending October 31, 2005 and to the post-amendment defence for the subsequent period, and he was tried and conducted his defence accordingly (para. 97).

V. Issues

1. Mr. Katigbak concedes that he possessed child pornography, as defined by s. 163.1(1) of the *Criminal Code*, during the period alleged by the Information. He further concedes that the pre-November 2005 artistic merit defence is not open to him on the facts. He raises the following issues:

1. Did the Court of Appeal err in finding that the public good defence was not available to Mr. Katigbak for the period before November 2005?

2. Under the post-November 2005 defence,

(a) did the Court of Appeal err in its interpretation of “legitimate purpose”?

(b) did the Court of Appeal err in finding that there was no reasonable doubt on the “undue risk of harm” branch of the defence?

3. Did the Court of Appeal err in finding the Information was not defective?

VI. Analysis

1. Before turning to the defences raised by Mr. Katigbak, a general comment is in order. When interpreting the defences for child pornography offences, courts must strike a difficult balance between the importance of freedom of expression and the need to protect children from abuse. Giving primacy to either of these objectives would defeat Parliament’s objective. On the one hand, interpreting the defences too narrowly would result in the punishment of expressive conduct that poses a minimal risk of harm to young persons. By enacting these defences, Parliament recognized that “the law could unduly impinge on some of the values protected by the guarantee of free expression, like artistic creativity, education, medical research, or other public purposes, and sought to provide protection for activities furthering these values” (*Sharpe*, at para. 60). On the other hand, interpreting the statutory defences too broadly would undermine the laws against child pornography. The defences must not be read in a way that defeats Parliament’s objectives of criminalizing child pornography and protecting children from abuse.

A. *Pre-November 2005*

1. As stated earlier, prior to November 2005, the *Criminal Code* child pornography provisions contained a defence of artistic merit and a public good defence. The defence of artistic merit is not in issue in this appeal. Mr. Katigbak correctly concedes that the trial judge erred in law when she held that, even if the materials themselves had no artistic merit, an artistic motive for possessing the materials sufficed to raise the defence. It is clear from the wording of the provision that Parliament only intended the defence to apply where the materials themselves had artistic merit, and not where the accused simply had an artistic purpose for possessing them. This Court confirmed this interpretation in *Sharpe*.
2. While Mr. Katigbak concedes that the trial judge erred in applying the defence of artistic merit, he argues that he may rely on the public good defence for the period before November 2005.
3. The analysis under the public good defence involves two steps: (1) whether the actions of the accused served the public good; and, if so (2) whether the actions of the accused extended “beyond what served the public good”. For ease of reference, we repeat the relevant provision here:

**163.** . . .

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section, the motives of an accused are irrelevant.

(1) Whether Accused’s Actions Served the Public Good

1. At this step of the analysis, the trial judge must decide whether the possession of child pornography served the public good. The court must begin by reaching factual conclusions about what the accused did, and the effects of his actions. Once his or her conduct has been characterized, the court must consider whether the accused’s actions served the public good. The focus is on the *effect* of the activity, not the motives of the accused. This distinguishes the public good defence from the legitimate purpose branch of the new defence. As a preliminary matter, the trial judge must determine whether, considered objectively, there is evidence that the activity in question advanced the public good. If so, the Crown bears the burden of proving beyond a reasonable doubt that the public good was not served by the actions of the accused.
2. Under s. 163(4), it is a question of law whether an act served the public good. In *Sharpe*, the majority of this Court interpreted the term “public good” as “necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest” (para. 70, quoting J. F. Stephen, *A Digest of the Criminal Law* (9th ed. 1950), at p. 173). The majority provided examples of situations in which possession of child pornography would serve the public good, such as “possession of child pornography by people in the justice system for purposes associated with prosecution, by researchers studying the effects of exposure to child pornography, and by those in possession of works addressing the political or philosophical aspects of child pornography” (para. 70).
3. If the court is left with a reasonable doubt that the activities, viewed objectively, served the public good, the court must go on to ask whether the conduct of the accused extended “beyond what served the public good”.

(2) Whether Accused’s Actions Extended Beyond What Served the Public Good

1. Under s. 163(4), it is a question of law whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good. Here again, the Crown bears the burden of proving beyond a reasonable doubt that the defence does not apply.
2. The requirement that the acts not go beyond what serves the public good ensures that the public good defence will only be available if all of the activities that are alleged to constitute the offence are connected to the advancement of the public good. As stated earlier, the focus is on the effect of the activity, not the motives of the accused.

(3) Application to the Case at Bar

1. Mr. Katigbak submits that the trial judge’s findings on the artistic merit defence establish the public good defence, as “*the purpose of the possession* is the focal point of the public good defence” (A.F., at para. 53 (emphasis in original)). We disagree.
2. As discussed above, the assertion that the accused’s *purpose* was to advance the public good is not enough to establish the defence. The question is whether, viewed objectively, the evidence supports the contention that the activities in question actually served the public good. The accused will be acquitted if the trial judge is (1) left with reasonable doubt as to whether “the public good was served” by his conduct, and, (2) if so, the Crown has not established beyond a reasonable doubt that the conduct extended beyond what served the public good. The trial judge addressed neither point. She merely accepted that Mr. Katigbak’s *purpose* for possession was to create a public exhibition on child abuse. Therefore, we reject Mr. Katigbak’s argument that the trial judge’s findings are capable of being applied to the public good defence.
3. This conclusion means that the trial judge’s verdict of acquittal cannot be restored.
4. The next question is whether the Court of Appeal erred in substituting a conviction for the trial judge’s acquittal insofar as the pre-November 2005 activities are concerned. The Court of Appeal concluded, beyond a reasonable doubt, that Mr. Katigbak could not rely on either the artistic merit or the public good defence, and went on to substitute a verdict of conviction for the trial judge’s acquittal. Since this was an appeal from acquittal, the jurisdiction of the Court of Appeal was limited to “question[s] of law alone” (s. 676(1)(*a*) of the *Criminal Code*). Consequently, the Court of Appeal could not make its own findings of fact. Additionally, s. 686(4)(*b*)(ii) of the *Criminal Code* establishes that appellate courts may only substitute an acquittal with a conviction if the trial judge’s findings of fact, viewed in light of the applicable law, supported a conviction beyond a reasonable doubt. If the trial judge’s findings of fact do not support a conviction beyond a reasonable doubt, the proper remedy is a new trial.
5. As stated above, the question we must answer under s. 686(4)(*b*)(ii) is whether the trial judge’s findings of fact support a conviction beyond a reasonable doubt. In this case, we cannot conclude that they do.
6. In our view, the Court of Appeal, in entering a conviction, relied not on findings of the trial judge, but on its own findings. First, it found that Mr. Katigbak was not engaged in “research” because his activities were not sufficiently “systematic” (para. 41). However, as Blair J.A. acknowledges, the trial judge “made no such finding” in her trial judgment (*ibid.*). Second, the Court of Appeal found that Mr. Katigbak’s actions extended beyond what served the public good. This is an issue defined by s. 163(4) as a question of fact. In making these findings of fact, we are of the view that the Court of Appeal went beyond the jurisdiction conferred on it by s. 676(1)(*a*) of the *Criminal Code*. These matters were for the trial judge to determine. As the trial judge did not make the requisite factual inquiries, an appellate court cannot conclude on this record whether Mr. Katigbak’s defence of public good would be successful or not. The accused is entitled to have these facts determined by a trial judge. The proper remedy therefore is a new trial.

B. *Post-November 2005*

1. Mr. Katigbak submits that the Court of Appeal erred on both branches of the analysis of the post-November 2005 defence in s. 163.1(6), arguing that there was no reason to interfere with the trial judge’s interpretation and application of the defence.
2. While the Court of Appeal overturned the acquittal on the “undue harm” branch of the defence, the Crown seeks to uphold its judgment on the first branch as well. It argues the following: As the Crown’s right to appeal from an acquittal is limited to questions of law under s. 676(1)(*a*) of the *Criminal Code*, the Crown did not attack the trial judge’s finding that Mr. Katigbak had the purpose or intention he said he had in the court below, but argued on legal grounds that the purpose was not a “legitimate” one. While the Court of Appeal chose not to interfere with the trial judge’s finding on the first branch of the defence, it did conclude that she had erred in law in her interpretation of the phrase “legitimate purpose”. The Crown submits that the Court of Appeal was correct in concluding that, for an act of possession to have a legitimate purpose related to art or to one of the other spheres of valued activity enumerated under s. 163.1(6)(*a*), the act of possession must have an “objectively verifiable connection with the purpose and the ultimately worthy goal” (R.F., at para. 40, citing the Court of Appeal, at para. 55). Since the Court of Appeal was also of the view that the trial judge would have concluded differently had she assessed the possession of the pornographic images in light of the appropriate legal framework, its reasoning ought to have led it to overturn the acquittal on this basis as well. Thus, the Crown relies on this branch of the defence as an alternative basis upon which to support the judgment below.
3. We will therefore consider each component of the defence in turn. For convenience, we reproduce the current version of s. 163.1(6) here:

(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.

1. As we will explain, ss. 163.1(6)(*a*) and (*b*) must be treated as independent requirements. The accused raises the defence by pointing to facts capable of supporting a reasonable doubt concerning the two components, at which point the burden falls on the Crown to prove beyond a reasonable doubt that either of the two requirements is not met.

(1) Legitimate Purpose: Section 163.1(6)(*a*)

1. Under paragraph (*a*), the court considers whether the act of the accused “has a legitimate purpose related to the administration of justice or to science, medicine, education or art”. The court must assess whether the accused committed the alleged acts in order to serve one of the listed grounds — administration of justice, science, medicine, education or art.
2. The court must first evaluate whether it is left with reasonable doubt that the accused, from a subjective standpoint, had a genuine, good faith reason for possessing child pornography for one of the listed grounds. However, the inquiry does not end here. Had Parliament intended the court to simply assess whether or not the accused subjectively had a purpose related to at least one of the enumerated activities, it would not have qualified the word “purpose” with the word “legitimate”. It would simply have said “has a purpose related to the administration of justice or to science, medicine, education or art”.
3. It is trite law that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; and *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 21. In addition, every word of a statute is presumed to have a role in achieving the objective of the Act. No word or provision should be interpreted so as to render it mere surplusage: *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28; *McIntosh*,at para. 21; *Rizzo*, at para. 21; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 6 and 210-13.
4. Applying these principles of statutory interpretation to the language used in s. 163.1(6)(*a*), it is clear that Parliament intended something more than a subjective purpose related to one of the listed grounds, regardless of the circumstances. Rather, the language of the provision directs the court to assess whether the accused’s stated purpose is “legitimate”. In our view, the legitimacy requirement is met when there is an objectively verifiable connection between the impugned act and the accused’s stated purpose. Additionally, the accused’s stated purpose must be objectively related to at least one of the enumerated grounds. That is, based on all of the circumstances, a reasonable person would conclude that (1) there is an objective connection between the accused’s actions and his or her purpose, and (2) there is an objective relationship between his or her purpose and one of the protected activities (administration of justice, science, medicine, education or art).
5. It is important to stress that this objective assessment does not involve the court in any assessment of the *value* of the particular scientific or artistic activity in question. As this court held in *Sharpe*, courts are ill-equipped to inquire into whether or not a work is “good” art or not (paras. 62-65). Similar logic applies to the other enumerated categories set out in s. 163.1(6)(*a*). However, courts are well equipped to assess what is objectively reasonable in all the circumstances. Thus, when determining whether or not the accused has a legitimate purpose related to science, for example, courts will not evaluate whether or not the project has any scientific merit. However, the court can and must assess whether there is an objective connection between the accused’s actions and his or her stated purpose and, further, whether there is an objective relationship between the accused’s stated purpose and one of the protected activities.
6. The inquiry under the objective component of the legitimate purpose branch of the defence is also distinct from the question of “undue risk of harm” under the second branch. For example, let us assume that child pornography is collected by medical professionals for the purpose of showing the material to convicted sex offenders in the context of a treatment program. The question whether the collection of pornographic material depicting *actual* children for the stated purpose goes too far is one that falls to be determined under the second branch of the defence. It is sufficient under the first branch if a reasonable person would conclude in all the circumstances that there is (1) a connection between the impugned act and the purpose of treating sex offenders, and (2) a relationship between the stated purpose and, in this example, the protected activity of science or medicine.
7. To conclude, if the court is left with a reasonable doubt that the activity is objectively related to a listed ground and was undertaken genuinely and in good faith, s. 163.1(6)(*a*) is satisfied.

(2) Undue Risk of Harm: Section 163.1(6)(*b*)

1. The second requirement of the current defence is that the accused’s actions may “not pose an undue risk of harm to persons under the age of eighteen years”. Once again, this provision must be interpreted purposively. The courts must strike a balance between the importance of freedom of expression and reducing the risk of harm to children. This provision only comes into play *after* the court has held that the accused had a “legitimate purpose related to the administration of justice or to science, medicine, education or art”. The question is what degree of harm will be tolerated in the case of activity that has a legitimate purpose. This requires the judge to determine whether such activities pose an “undue risk of harm” to children. This raises the question of how the judge determines the risk of harm that the activities pose to children.
2. The “risk of harm” test found in s. 163.1(6)(*b*) recalls the early jurisprudence related to the offence of obscenity set out in s. 163(8), which also uses the term “undue”. For many years, it was held that courts should consider the moral views of the community when determining whether the exploitation of sex in the impugned materials was “undue”.
3. A majority of the Court rejected the “moral views of the community” approach to “undue” and replaced it with a norm of significant objectively ascertainable harm in *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728. McLachlin C.J. for the majority reasoned:

[O]ver time, courts increasingly came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices. This led to a legal norm of objectively ascertainable harm instead of subjective disapproval. [Emphasis added; para. 14.]

In addition to the requirement of objectively ascertainable harm, the Court in *Labaye* held that the conduct of the accused must pose a “significant risk of harm” (para. 30) or create a level of harm that is “incompatible with the proper functioning of society” (para. 24).

1. In our view, the *Labaye* interpretation is applicable in the present appeal. The words “undue risk of harm” set out in s. 163.1(6)(*b*) should be interpreted to mean a significant risk of objectively ascertainable harm as required by the law of obscenity, rather than the former “moral views of the community” approach. Relying on the moral views of the community would be as unworkable for child pornography offences as it is for obscenity charges. Reasonable people may hold sharply divergent views about the level of risk to young persons that should be tolerated as a result of artistic expression, or scientific research. Instead, the courts must ask whether the harm is objectively ascertainable and whether the level of the harm poses a *significant* risk to children. It goes without saying that the harm may be either physical, psychological, or both.
2. The determination of what the accused did and its consequences are questions of fact, to be decided on the basis of the evidence at trial. The trial judge must make findings of fact regarding the risks posed by the accused’s activities, based on evidence as to the degree of the risk, viewed objectively. Expert evidence, while not always necessary, may assist in establishing a link between the actions of the accused and the creation of a risk of harm to young persons. As stated in *Labaye*, “[t]he focus on evidence helps to render the inquiry more objective” (para. 60). Having made these factual findings, however, the question of whether the risk is so significant that it is “undue” is a question of law (*ibid.*; *R. v. Mara*, [1997] 2 S.C.R. 630, at para. 24). The application of this legal standard to the facts is also a question of law: *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20; *Labaye*,at para. 60.
3. The intervener Canadian Civil Liberties Association (“CCLA”) submits that the risk of harm will only be “undue” if it is greater than the inherent risk posed by the possession of child pornography. It argues that if the courts find that all acts of possession of child pornography necessarily create an “undue risk of harm”, they will effectively remove the defence Parliament intended for the administration of justice, science, medicine, education and art. To avoid this result, the CCLA submits that an “undue risk” must arise from something specific to the case, rather than the harms inherent to the offence charged (Factum, at para. 21). LeBel J. would adopt this approach.
4. We agree that the two-step legitimate purpose/undue risk of harm defence must be read in a way that would allow it to apply in *some* cases. As stated by the majority in *Sharpe* when discussing the artistic merit defence, “Parliament clearly intended that some pornographic and possibly harmful works would escape prosecution on the basis of this defence; otherwise there is no need for it” (para. 65). However, it is our view that no useful purpose would be served by drawing a distinction — assuming one can realistically be drawn — between harms that are “inherent” and those that are “specific” to the offence charged. All risks flowing from the commission of the offence must be considered in the “undue risk” assessment. We respectfully disagree with LeBel J. that this means that “the defence would inevitably fail” at the second stage of the analysis (para. 88). Whether or not the risk to children is “undue” is a question that can only be answered on a case-by-case basis having regard to all of the circumstances.
5. In our view, the proper approach is to consider the two stages of the defence as independent requirements. Section 163.1(6)(*a*) lists purposes that may be considered *prima facie* capable of serving as defences, so long as a trial judge is left with reasonable doubt as to their applicability in given circumstances. Section 163.1(6)(*b*) then provides that if the acts of the accused pose undue risk to children, the *prima facie* defence is negated, and does not apply. The purpose remains legitimate, but because of the undue risk of harm the activity poses to children, it cannot serve as a defence.

(3) Application to the Case at Bar

1. On the first branch, the trial judge found as a fact that Mr. Katigbak collected child pornography for his stated purpose of creating an art exhibition. She inquired into the veracity of his evidence and found no reason to reject his testimony. She therefore concluded that he had a legitimate purpose related to art within the meaning of s. 163.1(6)(*a*).
2. It is apparent from her reasons that the trial judge concluded as a matter of law that Mr. Katigbak’s genuine, subjectively held view that he was collecting child pornography for an artistic exhibition was enough to satisfy the legitimate purpose requirement set out in s. 163.1(6)(*a*). Based on our interpretation of the phrase “legitimate purpose” set out above, however, it was not enough to inquire into whether Mr. Katigbak’s subjective purpose for possessing child pornography was genuine. The trial judge also had to assess whether this purpose was “legitimate” in the sense that there was an objectively verifiable connection between the impugned activities, his stated purpose, and, in this case, the protected activity of art.
3. In assessing the veracity of Mr. Katigbak’s testimony, the trial judge considered his evidence regarding the connection between the impugned activities and his stated purpose and concluded that his “answers were reasonable given his interests in photography and art” (para. 31). She further noted that his answers were “corroborated by the evidence of Ms Tyrell” and by “the existence of notes and sketches prepared during the time period in question” (*ibid.*). The trial judge therefore accepted that Mr. Katigbak “collected the images for the purpose that he has described” (para. 32).
4. There is a logical connection between the inquiry into the reasonableness of Mr. Katigbak’s answers in explaining his conduct, and the inquiry into the objective reasonableness of the connection between the impugned actions and the stated purpose. Thus, arguably, had the trial judge conducted the requisite inquiry, she may well have concluded that the objective component of the legitimate purpose branch of the defence was also made out. Nonetheless, the two inquires are different — the first is subjective and the second is objective. Under the subjective component of the defence, the question is whether the accused has a genuine, good faith reason for possessing child pornography for one of the listed grounds. Under the objective component of the defence, the question is whether a reasonable person, having regard to all the circumstances, would so conclude. For example, it is well established that the reasonable and probable ground test for assessing the legality of a police officer’s conduct has both a subjective and an objective component (see, e.g., *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Collins*, [1987] 1 S.C.R. 265; and *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253). By analogy, a court could well consider that the officer’s answers in explaining his conduct were “reasonable” having regard, for example, to his level of experience and conclude on that basis that he genuinely believed that the requisite grounds existed. This conclusion, however, does not answer the question of whether the requisite grounds in fact existed from an objective standpoint.
5. The relationship between Mr. Katigbak’s purpose of creating an art exhibition and the protected activity of “art” is obvious and was never in issue. But the connection between the repeated collection and storing of child pornography over a seven-year span and Mr. Katigbak’s stated purpose of creating an art exhibition was highly contentious at trial. In the circumstances, we are not persuaded that the trial judge’s findings of fact on credibility can simply be applied to answer the objective component of the legitimate purpose branch of the defence.
6. Given the erroneous legal framework applied at trial, Mr. Katigbak’s acquittal cannot stand. However, because the factual underpinnings in relation to this objective component of the legitimate purpose branch of the defence were not fully explored, the appropriate remedy is to order a new trial.
7. In light of our conclusion that there must be a new trial, we do not find it necessary to comment on the trial judge’s findings or her conclusion on the second branch of the defence. We wish to note, however, that the Court of Appeal erred in two respects. First, it erred in its interpretation of the current version of the defence by relying on a community standard of tolerance test to determine if the risk of harm posed was “undue” within the meaning of s. 163.1(6)(*b*). Blair J.A. stated that “the risk of harm is ‘undue’ in this context when society would find that risk of harm inappropriate, unjustifiable, excessive or unwarranted in the circumstances of the case” (para. 76 (emphasis added)). As discussed above, the correct approach is to assess whether the accused’s activities pose a significant risk of harm to young persons.
8. The second error of the Court of Appeal was to substitute its own views on the harm posed by Mr. Katigbak for those of the trial judge. Since this was a Crown appeal from acquittal, the Court of Appeal was only permitted to consider errors of law (s. 676(1)(*a*)). Determining the ways that Mr. Katigbak’s conduct posed a risk of harm to young persons and whether the risk of harm was “undue” will be questions to be determined based on the evidence at the new trial.

C. *Validity of the Single Count Information*

1. Mr. Katigbak submits that the Information that charged him was defective because it charged a single count of the offence for the period between 1999 and 2006, during which the statutory defences were amended. He argues that the Information was duplicitous and should be quashed. In the alternative, he argues that he was prejudiced since he was required to meet two sets of statutory defences.
2. It may be that it would have been preferable to charge Mr. Katigbak separately for the activities in the pre-amendment and post-amendment periods, given that different defences applied in each period. However, in our view, the Crown’s decision to lay a single charge is not fatal.
3. First, we see no merit to Mr. Katigbak’s argument that the Information must be quashed because it was duplicitous. As established by s. 590(1)(*b*) of the *Criminal Code*: “A count is not objectionable by reason only that . . . it is double or multifarious”. In *R. v. City of Sault Ste. Marie*,[1978] 2 S.C.R. 1299,Dickson J. (as he then was) established the criteria for finding that an Information is defective because of duplicity, namely: “[D]oes the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge?” (p. 1308). In the case at bar, it was clear to the accused that he had to meet both defences for both periods of the alleged offence. It is also apparent from the trial record that Mr. Katigbak’s counsel was aware of this, and conducted the defence accordingly.
4. Second, Mr. Katigbak was not prejudiced by the single count as he contends, since he would have been required to meet both defences had the Crown charged him with separate counts of the offence.
5. We would not give effect to this ground of appeal.

VII. Disposition

1. For the foregoing reasons, Mr. Katigbak’s acquittal at trial cannot stand, and neither can his conviction on appeal. We would therefore allow the appeal, and order a new trial in light of the appropriate legal framework. We add the obvious — the trial judge on the new trial is not bound by the factual conclusions of the trial judge or the Court of Appeal in these proceedings, and must consider the matter anew.

The reasons of LeBel and Fish JJ. were delivered by

1. LeBel J. — I have read the joint reasons of the Chief Justice and Charron J. I agree with the disposition they propose. But I respectfully disagree with their opinion regarding the meaning of the expression “undue risk of harm” in s. 163.1(6)(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46. They suggest that *any* risk of harm ― including the risk inherent in any act of possession of child pornography ― is undue within the meaning of the provision. On this view, even if the impugned activity had a legitimate purpose, the offence of possession of child pornography would be completely made out without proof of a specific and identifiable risk of harm in the circumstances of the particular case.
2. In my opinion, the Canadian Civil Liberties Association (“CCLA”) raises a valid point in its factum about the interpretation of the concept of undue risk for the purposes of s. 163.1(6)(*b*)*.* As it argues, the effect of holding that the generic harms associated with the possession of child pornography amount to undue risk would be to practically eliminate a defence that Parliament decided to leave open to the accused where the purpose of the possession is related to the administration of justice, science, medicine, education or art.
3. My colleagues’ interpretation means that even if an accused were to raise a reasonable doubt about his or her purpose at the first stage of the analysis, the defence would inevitably fail. For all practical purposes, at the second stage of the analysis, the presence of the generic harms associated with the possession of child pornography would suffice to establish an undue risk to children.
4. It is true that the s. 163.1(6) defence of legitimate purpose is common to all the child pornography offences listed in s. 163.1, including those of making and distributing of such material. Nevertheless, this does not mean that the social interests at stake are the same and that the importance of the public interest is identical in respect of all these offences. Indeed, Parliament has not attached the same penalties to them. The nature and scope of the defence must be consistent with the nature of the crime itself. The making and the distribution of child pornography entail a higher risk to the public and to children. The harms inherent in such offences are necessarily more serious and they always imply a relationship with third parties, that is, parties other than the victims themselves. This factor may restrict the ambit of the defence of legitimate purpose in such cases. Although I would not downplay the seriousness of the offence of possession of child pornography given that the activities of making and distribution often flow from or result in possession, it is not of equal seriousness or consequence. Possession does not have the same impact on others as the making or distribution of child pornography. After all, it is an offence that may, like that of accessing child pornography, be committed in private, in one’s home, without any contact with others (s. 163.1(4.1)).
5. In such circumstances, as the CCLA argues, the harm to be proven to establish an undue risk must be greater than the generic harms. A court must find facts and circumstances that create an undue risk in the context of the case before it, such as a lack of security and ease of access to the material by others. Otherwise, although my colleagues argue that the defence could still be made out in some cases, I wonder how and when. From a practical standpoint, their interpretation forecloses that possibility.
6. Subject to these comments, I agree that a new trial should be held in which this Court’s interpretation of the *Criminal Code* is applied*.* The acquittal entered at the first trial and the conviction entered by the Court of Appeal (2010 ONCA 411, 263 O.A.C. 301) were unwarranted.

*Appeal allowed.*

*Solicitor for the appellant:  David E. Harris, Toronto.*

*Solicitor for the respondent:  Attorney General of Ontario, Toronto.*

*Solicitors for the intervener:  Borden Ladner Gervais, Toronto.*