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Source: Winnipeg Free Press (MB), 05/01/2005, pb4
Document Type: Article
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ISSN: 08281785
Accession Number: 7BS0482822743
Database: Canadian Reference Centre
Section: Special Section 6, pg. b4

Defending child pornographer is odd, but right thing to do

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By Douglas J. Johnston

Last month, the Canadian Bar Association (CBA) took the odd position of defending Canada's marquee convicted pedophile and child pornographer. Odder yet, it was right to do so.

John Robin Sharpe's right to pen child porn for his own consumption was at the heart of the national lawyers' association's submission to the House of Commons justice committee studying the Liberal government's package of proposed Criminal Code amendments to Canada's child-porn laws, Bill C-2.

Sharpe is the retired Vancouver city planner who, following a failed Supreme Court of Canada challenge of the constitutionality of Canada's child-pornography laws, was in 2002 acquitted by British Columbia's Supreme Court on two charges of possessing and distributing child pornography. The alleged child pornography consisted of short stories titled Boyabuse, Timothy and the Terrorist and Stand by America.

AB.C. judge acquitted Sharpe of charges related to his "fiction" about kidnapping, bondage and sex with children, based on the only two legal defences, both previously sanctioned by the Supreme Court, available to him -- "artistic merit" and "private works of the imagination." Sharpe was separately convicted, by the same judge, of two charges of possessing pornographic photos of young boys.

Pity the CBA. Implicitly siding with Sharpe's right, in the privacy of his home, to put his perversions on paper is a tough sell -- both to justice committee MPs and the citizens who elect them.

Astutely, the CBA's pitch to the justice committee was that the amendment criminalizing unpublished or undistributed fictional written descriptions of underage sexual activity may well be unconstitutional.

It will yield, said the CBA, a bumper crop of Charter of Rights and Freedoms litigation, likely to frustrate Parliament's "desired objective" of combating child pornography. More astutely still, its brief lauded the Supreme Court's upholding the constitutionality of
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Canada's existing Criminal Code child-porn laws in the Sharpe case, by interpreting the "legislation as containing a rational balance."

The bill that's passed second reading in the Commons would alter Canada's current child-porn laws in two ways.

It scraps the artistic merit defence -- a proposed change that's received a lot of flak from artists and arts groups as being liable to criminalize bona fide literary works.

But much less bruited in the media, it also prohibits creation or possession of "written material whose dominant characteristic is the description for a sexual purpose of sexual activity with a person under the age of 18 years." This is a much lower threshold of sexual content than Canada's Criminal Code currently requires. As the law stands now, to be unlawful, the writing must actively counsel or advocate sex with a person under 18.

The draft legislation also offers a narrow, two-step defence to a charge of authoring or possessing the kind of dreck Sharpe wrote. An accused can avoid conviction only if his fictive imaginings have a "legitimate purpose" related to science, medicine, art education or the administration of justice, and "does not pose an undue risk of harm" to those under 18.

The CBA rightly sees the criminalizing of private writings drawn from the imagination as problematic, and likely not able to survive a Charter of Rights and Freedoms challenge. But worse still, at the bill's core there's an intellectual disconnect.

Child-porn laws exist to prevent, and punish, harm to children. That it may not be immediate or direct harm, makes it no less harmful.

A guy sitting at his computer downloading photos or video may not have a clue about when, where or by whom they were made. But he sure as hell knows kids were criminally violated to produce them. Possessing pictures of children who are sexually posed or engaged in sexual acts should be criminal because they result from commission of a crime. Someone, somewhere abused the kids in those images. It's self-evident, and self-incriminating.

Creators of child porn deserve to have the hammer of the law brought down on them -- hard. But, the reality is, they're much harder to find to prosecute.

Targeting the audience is a legitimate strategy. According to the RCMP, there are people who hoard and trade child-porn images like baseball or hockey cards. At least some of those people are going to think twice before downloading child-porn images that technicians in the local computer-repair shop, or from a corporate IT department, might uncover next time they're retooling a hard drive.

But what differentiates private scribblings about sex with children, however repugnant, from all other child porn, is that no child was sexually exploited in or by its creation. Unless and until the writing is distributed to others, there's no arguable harm to kids.

Moreover, criminalizing someone's private writings in a diary or journal is right next door to thought control. The Supreme Court of Canada thought so, and said so, in its ruling in the Sharpe case. As Chief Justice Beverley McLachlin put it, making Sharpe's personal stash of dirty little stories illegal "trenches heavily on freedom of expression while adding little to the protection the law provides children."

Any adult who creates child porn and then gets sexually excited about it in the privacy of his own home has serious psychological problems. Sharpe's "literature" is a case in point.

Based on what can be deduced from the trial and appellate decisions, his stories constitute an ugly and pathological depiction of sex, notably devoid of notions of love, freedom or joy.

But his twisted private writings shouldn't land him in jail.

Which is what the CBA, in not so many words, is discreetly saying, too.

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