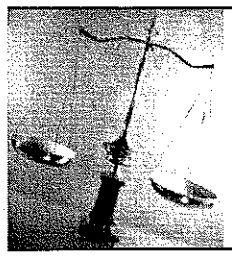

CASE 3

R. v. Sharpe,

[2001] 1 S.C.R. 45 Supreme Court of Canada

Introduction

The *Canadian Charter of Rights and Freedoms* guarantees all Canadians freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication. Is child pornography a form of self-expression protected by the *Charter*? Does prohibiting the possession of child pornography restrict rights protected under the *Charter*? While the offensive nature of child pornography may reduce its worth constitutionally, does it negate its value as a form of expression? If the legal prohibition against possessing child pornography does violate free expression, are there sufficient reasons for justifying the prohibition as a reasonable limit under Section 1 of the *Charter*?

Facts

After the police raided his home and seized material, the accused, Robert Sharpe, was charged with four counts under the *Criminal Code* for simple possession of child pornography, as well as possession for the purpose of distribution or sale. The seized material consisted of computer diskettes containing text entitled *Sam Paloc's Boyabuse—Flogging, Fun and Fortitude: A Collection of Kiddiekink Classics* and a collection of books, manuscripts, stories, and photographs alleged to constitute child pornography.

Before trial the accused brought a preliminary motion challenging the constitutionality of Section 163.1(4) of the *Criminal Code*—possessing child pornography; he did not challenge the constitutionality of the section prohibiting its possession for the purpose of sale and distribution. Mr. Sharpe claimed that the prohibition against mere possession of such material violated his right to freedom of expression under Section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Both the trial judge and the majority in the British Columbia Court of Appeal ruled that the section was unconstitutional, and the Crown appealed to the Supreme Court of Canada.

Issues

1. Does Section 163.1(4) of the *Criminal Code* prohibiting possession of child pornography limit a *Charter* right?
2. If so, is the infringement justified under Section 1 of the *Charter*?
3. If there are aspects of this law that cannot be justified, is there an appropriate remedy short of striking down the law in its entirety?

Held

Appeal allowed. Section 163.1(4) upheld, and accused remitted for trial on all counts.

Judicial Reasoning

(per McLachlin C. J. for the majority)

The relevant provisions of the *Criminal Code* are:

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

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

(1) 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

(2) the dominant characteristic or 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; or

(2) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offense under this *Act*.

(4) Every person who possesses any child pornography is guilty of

(1) an **indictable offence** and liable to imprisonment for a term not exceeding five years; or

(2) an offence punishable on **summary conviction.**

(6) ... the court shall find the accused not guilty if the representation or written material ... has artistic merit or an educational, scientific or medical purpose.

(7) Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under Subsection (2), (3) or 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) ... 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) ... the motives of an accused are irrelevant.

The relevant sections of the *Charter* are:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms ...

(2) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Freedom of expression is one of the most fundamental rights that Canadians possess, enabling their liberty, creativity, and democracy. It protects unpopular and even offensive expression in the belief that the best way to truth, individual flourishing, and peaceful coexistence is a society that permits different beliefs and a free flow of divergent ideas and images. While we do not have to accept ideas and images we deem wrong or offensive, and have the right to argue against or ignore them, we cannot forbid a person from expressing them. However, free expression is not an absolute right, and constitutionally valid limitations on certain kinds of expression can be enacted by Parliament or provincial legislatures. Overriding considerations such as preventing hatred that divides society, or harm to vulnerable members of society, may justify limiting expression.

Important values at the heart of the guarantee of free expression include individual self-fulfillment, searching for the truth, and political discourse fundamental to democracy. Some forms of expression, such as political expression, lie closer than others to the core of the guarantee. In the present case it is the value of self-fulfillment that is primarily in question, since child pornography does not generally contribute to political discourse or a search for the truth.

The right to free expression also includes the right to possess expressive material; without the right to *possess* such material, the right to *express* it would be compromised. Moreover, the *private* nature of prohibited material might heighten the seriousness of the limitation of the right to free expression. Privacy is an important value in Section 7 of the *Charter*; the court has observed in other cases that "privacy is at the heart of liberty in a modern state."

However, there are other values at stake in this appeal and these relate to society's interest in protecting children from any harm that could befall them as a result of the possession of child pornography. No one denies that it involves the exploitation of children, and although perhaps less directly harmful than the sale and distribution of such material, possession of it contributes to the market for it, and the consequent harm and exploitation of children when the material is produced to meet the market's demand. While Mr. Sharpe does not argue that prevention of harm to children can never justify limits on free expression, he contends that the limitation imposed by Section 163.1(4) is overly broad and catches material posing no risk of harm to children, since the links between mere possession of child pornography and such harm are too weak.

The court must determine what material Section 163.1(4) catches when it is properly interpreted. Until we know the reach of the law we cannot say if it is overextended, catching too much behaviour. In the language of Section 163.1, the law sets out targets that require examination and interpretation.

Section 163.1(1) provides two categories of child pornography: visual representations, and written and visual advocacy and counselling material. To be child pornography a visual representation must show, depict, advocate, or counsel sexual activity with a "person." Two issues arise: *does it* [the material in question] *include imaginary persons, and does it include the person who possesses the material?* Evidence suggests material can be harmful whether it depicts actual children or computer-generated images of children. Current technology makes it very difficult to distinguish actual from "created" persons. Considering Parliament's intention to protect children from harm, "person" should be interpreted to include both actual and imaginary persons. The prohibition thus extends to imaginary beings privately created and kept by their creator. Does it also extend to sexually explicit depictions a person under 18 has taken of himself or herself alone? The court concludes that Parliament apparently intended it to extend to this type of conduct, leading to the possibility that teenagers, even married ones, could be charged and imprisoned for keeping videos of themselves engaged in lawful sexual activity for their own, exclusive personal use.

Next, what does "depicted" mean. The *test is objective, i.e., based on what would be conveyed to a reasonable observer* rather than what was in the minds of the author/maker and possessor.

Meaning also needs to be given to "explicit sexual activity." Sexual activity includes a broad spectrum, from flirting, through touching parts of the body incidentally related to sex (hair, lips, breasts), to sexual intercourse and touching the genital and anal regions. The use of the term *explicit* (meaning graphic and unambiguous), the mention of children's genitals and anal regions in another subsection, and the overall objective of preventing harm, taken together suggest that Parliament intended to catch only *acts which, viewed objectively, fall at the extreme end of the spectrum*—those involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion, with persons under or depicted as under 18 years of age.

The second category of child pornography is material that counsels or advocates activities with a person under 18 that are offences under the *Criminal Code*. Again, the intention of the maker or possessor is not key, but rather, *whether the material, viewed objectively, advocates or counsels* a crime. In criminal law "counsel" is given the stronger meaning of "actively inducing." So, "to meet the requirements of 'advocates' or 'counsels,' the material, *viewed objectively, must be seen as 'actively inducing' or encouraging the described offences* with children." The words must also be read in conjunction with what are the actual offences in the *Criminal Code* regarding children. However, the provision is arguably broad enough to catch works written by a lone author for his or her own eyes only, such as a teenager's diary account of a sexual encounter.

The defences of artistic creativity, education, medical research, or other purposes for the public good also limits the scope of the definition of child pornography. Such defences should receive liberal interpretation.

"Artistic merit" should be interpreted to mean "possessing the quality of art" or "artistic character." Such works would be protected no matter how crude or immature they were thought to be by an objective observer. *Any objectively determined artistic value, no matter how small,* is sufficient for the defence to apply. The question of whether something has artistic merit depends on its creator's intention; its form and content; its connections with artistic conventions, traditions and styles; its mode of production, display and distribution; and the opinion of experts. No **community standards** test should be imported, as Parliament introduced no such qualification.

The defence of possession for medical or educational purposes refers to the objective purpose the material may serve, and not to the purpose for which the holder possesses it. This would include therapeutic materials and those created for self-analysis or counselling purposes.

"Public good" has been held to mean that which is "necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, art, or other objects of general interest." For example, possession of child pornography by justice officials for the purpose of prosecution would serve the public good, as would its possession by researchers studying the harm that it causes children.

The above interpretation of the legislation reveals that it may catch some material that engages the constitutional value of self-fulfillment but poses little or no risk to children. In its prohibition of self-created, privately held, expressive material (e.g., private journals, diaries, writings, drawings, and other works of the imagination), the law reaches into a "realm of exceedingly private expression where Section 2(b) values may be implicated" while the risk of harm from the private creation and possession of such materials is low. The other category of child pornography involving visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use also involves the value of self-fulfillment and self-actualization, which lie near the core of the freedom of expression protected in Section 2(b).

Since the Crown has conceded that criminalizing possession of child pornography limits freedom of expression, the real issue is whether the limitation is justified under Section 1 of the *Charter*. The test for justification under Section 1 is laid out in *R. v. Oakes*. The first step is to examine the *law's objective* and determine whether it is *pressing and substantial*. The government's aim in criminalizing possession of child pornography was to reduce not only the direct exploitation of children but also the erosion of society's valuation of children. These embody pressing and substantial concerns. The question is whether the government has used reasonable and proportionate means to achieve the objectives.

The first step in the analysis of proportionality requires the government to show that the means it chose is rationally connected to its goal. The Crown need only raise a *reasoned appre-*

hension of harm, rather than provide scientific proof based on concrete evidence. The Crown claims that prohibiting simple possession of child pornography is related to a reduction of child sexual abuse in five ways: (1) possession promotes thinking disorders; (2) possession fuels fantasies inciting offenders; (3) its prohibition helps police efforts to reduce its production, distribution and use—all of which result in direct harm to children; (4) it is used for grooming and seducing child victims; and (5) some of it is produced by using real children.

Even though scientific evidence that links thinking distortions to increased rates of offending may be limited, there is some evidence that raises a reasoned apprehension that exposure to child pornography may reduce a pedophile's inhibitions and make the abnormal seem normal, and the immoral acceptable. A similar conclusion can be drawn regarding objections to the Crown's second contention. Though the scientific evidence that mere possession fuels fantasies that make pedophiles more apt to offend is weak, there are studies that show such a link. Unanimous scientific opinion is not necessary to raise a reasoned apprehension of harm.

The evidence that pedophiles possess pornographic material to aid in seducing and grooming children is clear and unchallenged, so criminalizing its possession is likely to help reduce this form of harm.

Finally, it has been proven that children are directly abused in the production of some of the material. The production of such material is a direct function of the demand for it. Criminalizing the possession of child pornography may reduce the market for it and the attendant abuse of the children used in its production.

In conclusion, the social science evidence led in this case, along with experience and common sense, meet the rational connection component of the *Oakes* test.

The final two arms of the proportionality test are whether the law impairs the right of free expression only minimally, and whether, on balance, there is proportionality between the benefits of the law and its detrimental effects on human rights. Parliament cannot be held to a standard of perfection; the minimal impairment test does not require that the government adopt the least restrictive means of achieving its objective. Rather, the means adopted must fall within a range of reasonable solutions to the problem and be reasonably tailored to the objectives sought. In answer to the claim that the legislation is over-broad, the law catches much less material unrelated to harm than alleged by Mr. Sharpe. Many of the hypothetical examples given disappear on a proper interpretation of the definition of child pornography or are narrowed to the extent that only material that relates to harming children is caught.

Considering the overall proportionality of the means and the rights impaired, one can conclude that the costs imposed on freedom of expression by the vast majority of the law's applications are outweighed by the risk of harm to children. For all the reasons given above, it can be concluded that the *main* impact of Section 163.1(4) is proportionate and constitutional.

However, as indicated earlier, some materials are also caught that may indeed pose little or no risk to children but also deeply implicate the values underlying freedom of expression as well as privacy interests inherent in a person's right to liberty. Here then the proportionality is problematic. The materials fall into two broad categories already identified above. The first are self-created visual or written works of the imagination that are intended for the sole, private use of their creator. Works such as personal journals, writings, drawings and other visual forms of expression are intensely private and engage the values of self-fulfillment, self-actualization, and dignity of the individual. Restricting materials such as these borders on restricting thoughts themselves.

The second category involves auto-depictions and the recording of lawful sexual behaviour. Visual recordings made by a person him- or herself alone, and held in private for his or her own use may be important for self-actualization and fulfillment or sexual exploration and

identity. The same holds true for lawful sexual acts that are recorded in photographs or on videotape for the private, exclusive use of the participants, and that could possibly reinforce relationships and self-actualization.

In conclusion, in their broad impact and general application, the limits imposed by Section 163.1(4) are justified by the protection from abuse afforded children. The same cannot be said for the two problematic categories discussed immediately above. Their inclusion has a heavy impact on freedom of expression while adding little to the objective of child protection. Thus, the law cannot be said to be proportionate in its effects, and infringement is not justified under Section 1.

This leaves the question of an appropriate remedy. This court has said in *Schacter v. Canada*, [1992] 2 S.C.R. 679, that this type of problem may be fixed by severing offending parts of otherwise valid legislation (called "reading down"), or reading necessary additions into it (called "reading in"). In doing so, the court must heed two guiding principles: respect for the role of Parliament and respect for the purposes of the *Charter*. In this case, it is appropriate to "read in" an exception to Section 163.1(4), as follows:

> (1) self-created expressive material, i.e., any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and
>
> (2) private recordings of lawful sexual activity, i.e., any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.

These exceptions would apply also to the offence of making child pornography under Section 163.1(2), so long as it were exclusively for personal, private use.

The appeal is therefore allowed, and the respondent is remitted for trial on all charges.

Note: *A dissenting opinion written by three justices disagreed that the law was overly broad and that there was a need to read in an exception for the two categories identified by the majority of the court. They would have upheld the law in its entirety, dismissed the appeal, and remitted the accused for trial.*

Questions and Activities

Knowledge/Understanding

1. Why is freedom of expression considered one of the *most fundamental rights* of Canadians? What are some of the limitations placed on it?
2. Identify the significant values entrenched within freedom of expression. Which of these was or were at issue in this case? Explain.
3. In several sentences, restate what the court found ambiguous about each of the following terms within Section 163.1: (i) *person* (ii) *depicted* (iii) *explicit sexual activity* (iv) *sexual purpose.*
4. What stage of the "Oakes test" did Section 163.1 fail? Outline the court's reasoning.
   (a) Explain the remedy given by the court.
   (b) In your judgment, was this an appropriate remedy? Why? Why not?
   (c) What other remedy could the court have given?
5. Why was John Sharpe permitted to argue freedom of expression for his own personal use of child pornography, in view of the fact that he was also charged with possession for the purpose of distribution?

Thinking/Inquiry

1. One of the central questions the court had to answer was whether Section 163.1 was too broad to be effective, or "cast the net too far." The Supreme Court of Canada in *R. v. Heyword*, [1994] 3 S.C.R. 761 at 792-93, attempted to clarify the meaning of "overbreadth":

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

   (a) Explain why overbreadth is an important criterion in determining the validity of a law.

   (b) How did this criterion apply to Section 163.1(4)? Support your answer.

   (c) Regarding Section 163.1(4), did the "ends justify the means"? Justify your opinion.

2. The Canadian Conference of the Arts (CCA), a group representing artists and art organizations, were opposed to an amendment (Bill C-20) to the child pornography law removing the defence of "artistic merit." Mr. Addario, a spokesperson for CCA, argued:

> In a democracy, freedom of expression is an end in itself, not a vehicle of secondary value. If you want consensus art that represents majority mainstream values, look [at] the Soviet Union, or China, or any state-sanctioned art. Nobody liked it, nobody looked at it, nobody bought it.
>
> (**Source:** http://www.globeandmail.com/servlet/story/RTGAM.20031008.wart1008/BNStory/Entertainment/)

Note: Bill C-20 (An Act to amend the *Criminal Code* [protection of children and other vulnerable persons] and the *Canada Evidence Act*) died on the Order Paper when the second session of the 37th Parliament ended on 12 November 2003.

   (a) Interpret Mr. Addario's concern. In your opinion, is it valid?

   (b) What problems would Mr. Addario's viewpoint impose on the court's application of Section 1 of the *Charter of Rights* in cases involving artistic expression and depiction of sexual images of children?

Application

1. Analyze and compare with Section 163.1(4) of the *Criminal Code of Canada* the following Ohio statute on child pornography:

> (A) No person shall do any of the following:
> (3) Possess or view any material or performance that shows a minor who is not the person's child or ward, in a state of nudity, unless one of the following applies:
> (a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a *bona fide* artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, clergyman, prosecutor, judge, or any other person having a proper interest in the material or performance.
> (b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.
>
> (**Source:** MacKay, A.W., "R. v. Sharpe: Pornography, Privacy, Proportionality and the Protection of Children" National Journal of Constitutional Law 11 (2000): 14)

(a) How are the Canadian and Ohio provisions similar and different in both purpose and substance?

(b) How might the Ohio statute be a more acceptable law on child pornography in the opinion of the Supreme Court of Canada?

2. Should computer-simulated images of child pornography disseminated over the Internet be regarded as a form of "artistic expression"? Write a 1-page opinion.

3. Giving reasons, decide whether a person could be convicted under Section 163.1(4) in each of the following cases:

(a) A person makes a sketch, drawing, or cartoon depicting a person under 18 years of age in explicit sexual activity.

(b) A couple (including a married couple), who record their own sexual activity, if one or both are between 14 and 17 years of age, and the recording is in their private possession.

(c) A narcissistic 17-year-old youth who takes an erotic photograph of him- or herself and keeps it in his or her private possession.

Communication

1. CAVEAT, an advocacy organization opposing violence against children, published a series of media releases in response to the British Columbia Court of Appeal's ruling in *Regina v. Sharpe.*

January 18, 1999—CAVEAT URGES IMMEDIATE ACTION BY ATTORNEY GENERAL: "Judge Duncan Shaw's ruling is disgraceful and dangerous beyond belief."
(**Source:** ***Jurisweb:*** http://www.caveatbc.ca//news180199.html. Retrieved 17 Feb. 2004.)

July 1, 1999—PRESS RELEASE: "Child Pornography Ruling Renders Canada Day the Blackest for Canadian Children."
(**Source:** ***Jurisweb:*** http://www.caveatbc.ca//news010799.html. Retrieved 17 Feb. 2004.)

March 27, 2002—CHILD-PORNOGRAPHY VERDICT FAILS TO PROTECT CHILDREN: "Justice Shaw's Ruling is Harmful to Society's Most Vulnerable"
(**Source:** ***Jurisweb:*** http://www.caveatbc.ca//news270302.html. Retrieved 17 Feb. 2004.)

Select one of these media releases. Write your own 1-page article either supporting or challenging the message in the title.

2. In the aftermath of the *Sharpe* decision, when Justice Shaw struck down Section 163.1(4), the Reform Party proposed to the House of Commons on February 2, 1999 that it be re-enacted using the notwithstanding clause in Section 33 of the *Charter of Rights and Freedoms.*

Assume the role of an M.P. involved in the parliamentary debate on the Reform Party's motion. Prepare either a written or oral argument supporting or opposing the motion to be presented before the House of Commons. To what Party do you belong? How would party affiliation affect your position and vote on the motion?