

R.v. Sharpe Supreme Court Factum (2000)

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL) Court No.
27376

Between: HER MAJESTY THE QUEEN (Appellant)
and JOHN SHARPE (Respondent)

MEMORANDUM OF ARGUMENT OF THE INTERVENERS BEYOND BORDERS,
C.A.S.E, ECPAT and INTERNATIONAL BUREAU FOR CHILDREN'S RIGHTS

Part I Statement of Facts

1. The interveners accept the statement of facts made by the appellant.

Part II Points in issue

2. The interveners accept the statement of points in issue made by the appellant.

Part III Argument

A. The Section One Onus and International Human Rights

3. Not all human rights can be realized through negative state forbearance. There are some human rights that can be respected only through positive state action, only through legislation. Some of these positive duties are reflected in the Charter. Others are not.

4. For instance the right to free and fair elections is reflected in the Charter. The duty to prohibit hate speech is not. Canadian Charter of Rights and Freedoms, section 13 International Covenant on Civil and Political Rights, Article 20(2) Convention on the Elimination of All Forms of Racial Discrimination, Article 4

5. When a positive human rights duty is not reflected in the Charter, the only way the Courts can deal with it in a Charter challenge is through section one of the Charter, by holding that the legislation implementing the positive duty is a reasonable limit on any negative right infringed. For instance, the courts have held that hate propaganda legislation is a reasonable limit to the right to freedom of expression. Taylor and The Western Guard v. C.H.R.C. [1990] 3 S.C.R. 892 R. v. Keegstra (1990) 1 C.R. (4th) 129 (S.C.C.)

6. Although the Charter applies to governments and legislatures, the rights and freedoms extended to individuals have to be guaranteed by the State. The Court's role is not active, but reactive. Who is to provide for protection of children if not the State? The Court can guarantee rights, but only after the fact of their infringement or denial. *Canadian Human Rights Commission v. Canadian Liberty Net and Derek J. Peterson*, T-209-92, March 3, 1992, per Mr. Justice Muldoon.

7. The problem with relying on section one of the Charter for the protection of rights not found elsewhere in the Charter is that once we enter section one of the Charter, the onus reverses. Initially, the onus is on a person who claims that the state infringes a right to show that there is infringement of the right. Once that is shown, the onus shifts to the state to show that the infringement is a reasonable limit to the right which is demonstrably justified in a free and democratic society.

R. v. Oakes [1986] 1 S.C.R. 103

8. This shifting onus is inappropriate for legislation implementing positive state duties to respect human rights. It creates an artificial hierarchy of rights not found in the international human rights instruments. State forbearance preventing violations is given a higher status than state activity promoting and realizing rights. Under section one of the Charter, the negative prohibitions against violating rights sit in judgment on the positive duties to respect rights.

9. The Charter should be interpreted in conformity with international human rights law. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038

10. Given the Charter framework as it is, the better way to deal with legislation implementing positive state duties to protect international human rights would be to place the onus in section one on the individual challenging the legislation. This can be done in one of two ways. The first way is to require the individual to show both that there is an infringement of a substantive right in the Charter and that the contested law is not a reasonable limit to the violated right demonstrably justified in a free and democratic society.

11. The second way is to require the state to show that invalidity of the contested legislation would put Canada in breach of an international human rights law duty. The onus would then be on the individual to show that invalidation of the contested law is a reasonable limit to the positive state duty to protect the international human right implemented in the contested legislation.

B. Section One Onus and Equality Rights

12. The notion that the onus remains on the individual even after the individual establishes that the legislation violates a provision of the Charter is recognized in section 15 of the Charter. Under section 15 positive state action realizing equality is protected from the invalidating effect of section 15 of the Charter. An individual who invokes

section 15 of the Charter has to show both that the contested legislation falls inside section 15(1) and outside section 15(2). It is not left to the state to show that contested legislation falls within section 15(2) once the individual shows that the contested legislation falls within section 15(1).

13. Section 15(2) of the Charter furthers the guarantee of equality in section 15(1) and does not provide an exception to it. The purpose of the equality guarantee in section 15(1) is to remedy disadvantage. Identical treatment can perpetuate disadvantage. Equality may sometimes require different treatment. Section 15 recognizes that achieving equality may require positive action by Parliament to improve the conditions of socially disadvantaged individuals and groups in Canadian society. Sections 15(1) and (2) of the Charter must be read together to embrace this one consistent concept of equality. Because legislation for the disadvantaged furthers the guarantee of equality, legislation under section 15(2) should be generously and liberally assessed, consistent with the court's approach to the interpretation of the rights and freedoms in the rest of the Charter. *Re Lovelace and the Queen in Right of Ontario*, indexed as *Ardoch Algonquin First Nation v. Ontario* (1997) 148 D.L.R. (4th) 126 paragraphs 55, 61 (Ontario Court of Appeal).

14. The child pornography legislation falls within the ambit of section 15 of the Charter as legislation ameliorating the situation of children, a disadvantaged group within Canadian society. If the adult in this case had attempted to invoke section 15 of the Charter to invalidate the contested legislation, the onus would have been on him to show both that section 15 (1) does apply and that section 15(2) does not apply. The adult should not be able to escape that onus by invoking another section of the Charter besides section 15, by invoking the right to freedom of expression. The section 15 onus should be incorporated into the section one analysis in order for the Charter to be read and applied consistently as an integrated whole.

C. Section One Onus and the Rights of Children

15. For the rights of children which require positive state action, the legal argument raised here is even stronger than it is for adults. At international human rights law, the rights of children are given primacy over the rights of adults. The Convention on the Rights of the Child provides that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 3(1)

16. The manner in which human rights are to be respected for adults is different from the manner in which human rights are to be respected for children. For adults, the respect for human rights means liberty. Adults should be free to do what they want. There are limits to the liberty of adults; but those limits should be strictly construed and applied.

17. Both the rights of children and the rights of adults are based on the individual's right to dignity. The child, by reason of his or her physical and mental immaturity, needs special safeguards and care, including appropriate legal protection. Children are entitled to be protected by the State, including a right to be protected from all forms of sexual

exploitation and abuse. Preamble to the Convention on the Rights of the Child 1959
United Nations Declaration of the Rights of the Child

18. In the areas of child pornography, the fundamental human rights of children and the fundamental human rights of adults clash. For adults, the right to freedom of expression is violated. Child pornography is not in the best interests of children. There is violation of the child's right to be protected from sexual exploitation and abuse. All forms of sexual exploitation of children amount to a grave breach of the basic human rights and human dignity of children. International Tribunal for Children's Rights' Global Report on the International Dimensions of the Sexual Exploitation of Children, pages 16-17.

19. The Charter should be interpreted so that the human rights of children take precedence over the human rights of adults. This precedence can be achieved by reversing the onus in section one of the Charter. When the rights of the child are at stake, the burden should fall on the adult, not the state representing the best interests of children. It should be the adult that should have to show that section one does not apply, rather than the state representing the interests of children having to show that section does apply.

20. The interveners accept the arguments of others that, if the burden were to fall on the state representing the best interests of children, then it is discharged. However, we would go further, and place the burden on the shoulders of the adult and say that it is the adult that has not discharged the burden.

21. The adult must show that any law which is in the best interests of children, but which infringes on adult rights, is not a reasonable limit to the adult right demonstrably justified in a free and democratic society. Alternatively, the adult must show that invalidating the child pornography law is a reasonable limit to the rights of children demonstrably justified in a free and democratic society. The interveners submit that the adult in this case has shown neither that the validity of the current law is a unreasonable limit on adult's rights nor that invalidity of the current law is a reasonable limit on children's rights.

D. The Duty to Protect Children from Sexual Exploitation and Abuse

22. The general obligation on Canada in the Convention on the Rights of the Child most relevant to this case is the duty to protect children from all forms of sexual exploitation and sexual abuse. That duty falls on the state, not just the government. It is a duty that falls on this Court as a state organ as much as it falls on the appellant. International Tribunal for Children's Rights' Global Report on the International Dimensions of the Sexual Exploitation of Children, pages 21 and 26.

23. Two particular obligations which flow from that general obligation in the Convention are the duties to take all appropriate measures to prevent the exploitative use of children in pornographic materials and the duty to prevent the inducement of a child to engage in

any unlawful sexual activity. The contested legislation puts Canada in compliance with these obligations under the Convention on the Rights of the Child. Invalidating the contested legislation would put Canada in violation of these international obligations. Article 34.

24. One can argue whether the contested legislation is the best way, consistent with freedom of expression, to respect these obligations. The Convention does not specify the exact form compliance must take and says only that the compliance measure must be "appropriate". For examples of appropriate measures needed to prevent the sexual exploitation of children, the interveners refer the Court to the International Tribunal for Children's Rights Global Report on the International Dimensions of the Sexual Exploitation of Children recommendation 9.3 and the recommendations with regard to child pornography and the internet.

25. The argument whether a measure is appropriate or inappropriate is properly part of an analysis whether invalidity of the legislation is a reasonable limit demonstrably justified in a free and democratic society. There should be no argument with the proposition that the contested legislation helps Canada's efforts to respect its international children's rights obligations and that those efforts would be compromised by the invalidating of the impugned legislation. Indeed, without the impugned legislation or something to take its place, Canada would be in violation of Article 34 of the Convention.

E. Objective

i) The Criminal Code provision

26. According to this Court in *Oakes*, in determining whether a limit is reasonable and demonstrably justified in a free and democratic society, first, it is necessary to ask whether the objective of the challenged measure is sufficiently important to warrant limiting a Charter right or freedom. The objective of the impugned legislation in this case, it is submitted, is to protect children from all forms of sexual exploitation and sexual abuse.

27. In the case of a ban on possession of child pornography, if the onus is on the individual and not the state, then the respondent in this case must show that the objective of the child pornography possession legislation is not sufficiently important to warrant limiting his right to freedom of expression. The interveners submit that the respondent has not shown that and could not show that.

28. The stance taken by the international community in protecting human rights is relevant in reviewing legislation under section 1 of the Charter, and especially in assessing the significance of a government objective. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

29. The stance taken by the international community on possession of child pornography can be seen by the myriad of laws in other free and democratic countries penalizing the possession of child pornography. The Appellant has provided the Court with these laws.

30. Any government objective has a heightened importance once the objective is reflected in international human rights instruments to which Canada is a party. Article 34 of the Convention on the Rights of the Child demonstrates the commitment of the international community to eradicate child pornography. This provision emphasizes the substantial weight which must be given to the aim of preventing the harms caused by child pornography. That the value of equality is enshrined in section 15 of the Charter further magnifies the weightiness of Parliament's objective in enacting section 163.1(4) of the Criminal Code. This Charter provision indicates that the guiding principles in undertaking the section 1 inquiry include respect and concern for the dignity and equality of children. As the harm flowing from child pornography works in opposition to linchpin Charter principles, the importance of taking steps to limit its pernicious effects becomes manifest. *Taylor and The Western Guard v. C.H.R.C.* [1990] 3 S.C.R. 892

ii) Freedom of expression

31. If the onus is on the respondent, then, as alternative to showing that the objective of the child pornography possession legislation is not sufficiently important to warrant limiting his right to freedom of expression, the respondent must show that the objective of the form of freedom of expression he seeks to assert, possession of child pornography, is sufficiently important to warrant the limiting of the international human right that children have to be protected from all forms of sexual exploitation and sexual abuse. The interveners submit that the respondent cannot show that the objective of the form of freedom of expression he seeks to assert, possession of child pornography, is sufficiently important to warrant the limiting of the international human right that children have to be protected from all forms of sexual exploitation and sexual abuse.

32. If the onus is on the respondent here, the respondent must show that the possession of child pornography has a substantial connection with the rationale underlying freedom of expression. One rationale for freedom of expression is that it is the means by which the individual expresses his or her personal identity and sense of individuality. *Ford v. A.G. of Quebec* (1988) 2 S.C.R. 712 at 749

33. Yet, the possession of child pornography has a tenuous connection with this rationale. Presumably, a person would express his/her identity or sense of individuality as a possessor of child pornography by showing his/her child pornography to others. Yet, this appeal proceeds on the assumption that the offences of making, printing, publishing, or possessing for the purpose of publication, as well as the offences of importing, distribution selling or possession for the purpose of distribution or sale are constitutionally valid. If prohibiting the showing of child pornography to others is constitutionally valid, where is the self expression rationale for possessing child pornography?

34. Another rationale for freedom of expression is that it is a means to ensure the ability to gain self fulfilment by developing and articulating thoughts and ideas as a person sees fit. The underlying idea behind this rationale is that a person develops an identity through what the person says to others, not what the person mutters to himself or herself. R. v. Keegstra (1990) 61 C.C.C (3d) 1 at page 49 (S.C.C.)

35. Child pornography advocates or induces sex with children. Yet, advocacy of sex with children is illegal, and for the purposes of this appeal, that illegality is assumed to be constitutionally valid. If the prohibition of advocacy of sex with children, is ex hypothesi constitutionally valid, then the ability to gain self fulfilment by developing and articulating to others the thought or idea of sex with children has only a tenuous connection with the rationale of self fulfilment through articulation.

F. Rational Connection

i) The Criminal Code

36. The second aspect of a section one analysis, after the analysis of objective is complete, is examining proportionality. Is the impugned measure well-suited to carry out the objective? Is the impact of the impugned measure upon an entrenched right or freedom needlessly or unacceptably severe? A proportionality analysis requires an examination whether there is a rational connection between the impugned power and its objective; whether the infringed right is impaired as little as possible; and whether the effects of the power are tolerable in a free and democratic society.

37. If the onus is on the respondent under section one of the Charter, then the respondent must show that there is no rational connection between section 163.1(4) of the Criminal Code and its objective of preventing sexual exploitation and sexual abuse. It is submitted that the respondent has not shown this absence of rational connection; nor could he do so.

38. There is a rational connection between preventing the inducement of a child to engage in any unlawful sexual activity and protecting a child from all forms of sexual exploitation and abuse. The Convention on the Rights of the Child asserts that connection by obligating states, in particular, to take all appropriate measures to prevent the inducement of a child to engage in any unlawful sexual activity in order to respect the general obligation to protect children from all forms of sexual exploitation and sexual abuse. Article 34 (a).

39. There is also a rational connection between preventing the exploitative use of children in pornographic performances and materials and protecting a child from all forms of sexual exploitation and abuse. The Convention on the Rights of the Child asserts that connection by obligating states, in particular, to take all appropriate measures to prevent the exploitative use of children in pornographic performances and materials in order to respect the general obligation to protect children from all forms of sexual exploitation and sexual abuse. Article 34 (d).

40. Child pornography is either the inducement of children to engage in unlawful sexual activity or the exploitative use of children in pornographic performances and materials or both. One element of the definition of child pornography in the Criminal Code is any written material or visual representation that advocates or counsels unlawful sexual activity with children. The advocacy or counselling of unlawful sexual activity with children is obviously an inducement of children to engage in unlawful sexual activity. Section 163.1(1)(b).

41. The other element of the definition of child pornography is a visual representation that shows a person who is or is depicted as being a child and is engaged in or is depicted as engaged in explicit sexual activity, or the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a child. A visual representation that shows a child engaged or depicted as engaged in explicit sexual activity or the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a child amounts to the exploitative use of children in pornographic performances and materials. Criminal Code section 163.1(1)(a)

42. The Criminal Code exempts from prosecution the possession of any material alleged to be child pornography if the representation or written material has artistic merit or an educational, scientific or medical purpose. A visual representation that shows an adult who is depicted as being a child and is engaged in or is depicted as engaged in sexual explicit activity and has no artistic merit and serves no educational, scientific or medical purpose is an unjustifiable inducement of children to engage in unlawful sexual activity. Criminal Code sections 163.1(1)(a)(i) and 163.1(6).

43. Finally, there is a rational connection between preventing the inducement of a child to engage in any unlawful sexual activity and preventing the exploitative use of children in pornographic performances and materials, on the one hand, and prohibiting the possession of child pornography, on the other hand. Prohibiting the possession of written materials or visual representations that induce a child to engage in unlawful sexual activity reduces the likelihood that children will be induced to engage in sexual activity. Allowing the possession of written materials or visual representations that induce a child to engage in unlawful sexual activity increases the likelihood that children will be induced to engage in sexual activity.

44. The trial judge found as a fact that the dissemination of written material which counsels or advocates sexual offences against children poses some risk of harm to children. The petitioners say that even if the material is not disseminated, but only possessed, the risk is lessened, but not removed, since the person who possesses the material himself or herself may be persuaded by that material.

45. Prohibiting the possession of visual representations of the exploitative use of children in pornographic performances and materials reduces the likelihood of the exploitative use of children in pornographic performances and materials. Allowing the possession of visual representations of the exploitative use of children in pornographic performances

and materials increases the likelihood of the exploitative use of children in pornographic performances and materials.

46. Prohibiting the possession of visual representations of children or adults depicted as children engaged in unlawful sexual activity or of the sexual organ or the anal region of a child for a sexual purpose also reduces the likelihood that children will be induced to engage in sexual activity. Allowing the possession of visual representations of children or adults depicted as children engaged in unlawful sexual activity or of the sexual organ or the anal region of a child for a sexual purpose also increases the likelihood that children will be induced to engage in sexual activity.

47. The trial judge found as a fact that sexually explicit pornography involving children poses a danger to children because of its use by pedophiles in the seduction process. He found further that highly erotic pornography incites some pedophiles to commit offences. He also found that pornography involving children can be a factor in augmenting or reinforcing a pedophile's cognitive distortions. These findings all show the rational connection between prohibiting the possession of visual representations of children or adults depicted as children engaged in unlawful sexual activity or of the sexual organs or the anal region of a child for a sexual purpose and reducing the likelihood that children will be induced to engage in sexual activity.

ii) Freedom of expression

48. If the onus is on the respondent under section one of the Charter, then, as an alternative to showing that there is no rational connection between section 163.1(4) of the Criminal Code and its objective of preventing sexual exploitation and sexual abuse, the respondent must show that there is a rational connection between the possession of child pornography and the objective of freedom of expression in the Charter. The interveners submit that the respondent cannot show that there is a rational connection between the possession of child pornography and the objective of freedom of expression in the Charter.

49. The Canadian Charter of Rights and Freedoms has to be read as an integrated whole. Although the Charter lists many individual rights, none of them is an absolute to be read in isolation. Rather they all fit together and are imbued by common underlying values. These underlying values are the genesis of the rights and freedoms of the Charter and the ultimate standard against which a limit of the right or freedom must be judged. *R. v. Oakes* [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321 at page 346

50. The possession of child pornography has no rational connection with the values underlying the Charter. To name a few of those values, the possession of child pornography has no rational connection with respect for the inherent dignity of the human person. On the contrary, child pornography is an attack on the inherent dignity of children. The possession of child pornography has no rational connection with the commitment to equality. Child pornography is an objectification of children for the

sexual gratification of adults. Possession of child pornography does not respect the identity of children. Child pornography treats children as adults rather than as children.

G. Minimal Impairment

i) The right of adults to freedom of expression

51. If the onus under section one is on the respondent, then the respondent must show that the Criminal Code child pornography possession law more than minimally impairs the right to freedom of expression. The interveners submit that the respondent cannot show that the Criminal Code child pornography possession law more than minimally impairs the right to freedom of expression. The Criminal Code provision furthers an objective of great significance, the protection of children from sexual exploitation and abuse, and impinges upon expression exhibiting only tenuous links with the rationale underlying the freedom of expression guarantee.

ii) The right of children to be protected from all forms of sexual exploitation and sexual abuse

52. If the section one onus is on the respondent, then, in the alternative, the respondent must show that invalidity of the contested law only minimally impairs the right of children to be protected from all forms of sexual exploitation and sexual abuse. The interveners submit that the respondent cannot show that invalidity of this law only minimally impairs the right of children to be protected from all forms of sexual exploitation and sexual abuse.

53. It is wrong to look at the impairment to freedom of expression in isolation. One must also look at the impairment to the right of children to be protected from sexual exploitation and abuse by not upholding the contested legislation. The test of minimum level of impairment is a test of minimum level of impairment to human right values, not a test of minimum level of one human right value to the exclusion of all others. Looking at the values of the right of adults to freedom of expression and the right of children to protection from sexual exploitation and abuse in combination, the intervener submits that human rights values are less impaired by upholding the impugned legislation than by deciding that the Charter invalidates the legislation.

54. Laws prohibiting the possession of child pornography are an expression of human rights values. Without them, the human rights of children to be protected from sexual exploitation and abuse are not fully realized. The Courts below have erred in failing to appreciate that the absence of child pornography possession laws violates human rights values.

55. The linkage between the need for effective child pornography possession laws and the protection of children from sexual exploitation and abuse is set out in the Convention of the Rights of the Child. The intervener submits that what is explicit in the Convention on the Rights of the Child is implicit in the Canadian Charter of Rights and Freedoms. For

the Charter protection of rights to be truly meaningful, it must include an entitlement to protection of children against sexual exploitation and abuse. Criminal Code provision 163.1(3) is an attempt to provide that protection. It is necessary for the Charter to allow at least for the possibility of prohibition of child pornography possession for the human rights value of protection of children from sexual exploitation and abuse to be realized.

56. In this case, there are two different human rights that need to be balanced off against each other, the right of children to be free from sexual exploitation and abuse and the right of adults to freedom of expression. A choice has to be made between them. The primacy that the Convention on the Rights of the Child gives to the best interests of children argues for the choice to be made in favour of the right to protect children from sexual exploitation and abuse.

57. Even putting aside that primacy, the interveners argue that the Charter favours children. While possession of child pornography may be part of the self expression and self realization of adults, it is at the expense of or, at the very least, the risk of the degradation, humiliation and corruption of children. The denial of the self realization of adult perverts is a lesser harm than the degradation, humiliation and corruption of children.

H. Effects

58. The third component of the proportionality test is whether the effects of the impugned power are tolerable in a free and democratic society. If the onus is on the respondent, the respondent must show first that the effects of the child pornography possession laws are intolerable in a free and democratic society. The interveners submit that the respondent cannot show that. Child pornography possession offences have a wide measure of acceptance in Canada and in other free and democratic countries.

59. Alternatively, the respondent must show that the free possession of child pornography is tolerable in a free and democratic society. Given that the free possession of child pornography would violate children's human rights as shown by the Convention on the Rights of the Child, the interveners submit that the respondent cannot show that the free and untrammelled right to possess child pornography is tolerable in a free and democratic society. Indeed, the uproar in Canada over the decisions in the Courts below as well as the suggestion coming from many quarters to introduce "notwithstanding" legislation should this Court uphold the decisions of the lower courts, though not in itself determinative of Charter values, is an indication that the untrammelled right to possess child pornography is intolerable in a free and democratic society.

Part IV Order requested

60. The interveners request the order requested by the appellant. Respectfully submitted, David Matas Counsel for the intervener 30 November 1999.