# CASE COMMENT: *R.* V. *SHARPE*[1]

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## I. INTRODUCTION

On January 26, 2001, the Supreme Court of Canada released its judgment in what will probably always be known as the "kiddie porn" case.

John Robin Sharpe had been charged with two counts of possessing child pornography, contrary to s. 163.1(4) of the *Criminal Code*[2] and two counts of possession of child pornography for the purposes of distribution or sale, contrary to s. 163.1(3). Sharpe argued that these sections of the *Code* infringed his freedom of expression as guaranteed in s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[3] The trial judge accepted that there was an infringement of freedom of expression, that the infringement could not be justified in a free and democratic society, and he ruled "courageously," as McLachlin C.J.C. subsequently put it, that the *Code* section was unconstitutional. Therefore, Sharpe was acquitted. The British Columbia Court of Appeal upheld the acquittal by a 2 to 1 majority. The Crown appealed to the Supreme Court of Canada.

The appeal was heard in the atmosphere of public hysteria that has become commonplace in Canada. Media coverage of the proceeding revealed another commonplace of contemporary Canadian life: the inability of Canadian journalists to understand anything. The appeal was portrayed publicly as a contest between freedom of expression and the protection of children. The idea was promoted that unless the Supreme Court upheld the *Code* prohibitions against child pornography, all Canadian children would be at risk of serious harm. The hysteria became such that an Ottawa father who took photos of his naked four-year-old son to a photo lab to be processed was arrested, and the son was apprehended by the Children's Aid Society.[4]

The current prohibition against child pornography was a very long time in the making. In 1977 Bill C-239 to amend the *Code* was introduced in Parliament. Clause 2 of the Bill stated:

> Everyone commits an offence who photographs, produces, publishes, imports, exports, distributes, sells, advertises or displays in a public place anything that depicts a child performing a sexual act or assuming a sexually suggestive pose while in a state of undress.[5]

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1 *R.* v. *Sharpe* (2001), 194 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Sharpe*].

2 R.S.C. 1985, c. C-46 [hereinafter *Code*].

3 Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

4 C. Guly, "Photo labs vigilant about child porn: Ottawa father charged after taking snapshots of naked son" *The Ottawa Citizen* (28 March 2000) B3.

5 *An Act to Amend the Criminal Code*, 3d Sess., 30th Parl., 1977.

On March 23, 1978, the Standing Committee on Justice and Legal Affairs made a report on pornography to the House of Commons. This report recommended the creation of an offence to prohibit depicting a person under sixteen engaged in sexual acts or displaying "any portion" of his or her body in a sexually suggestive manner.[6] In 1987 Bill C-54 contained proposed amendments to the *Code*, which would have prohibited any visual matter that showed a person who is, or appears to be, under the age of eighteen years engaged in sexual conduct.[7] Finally, in 1993[8] Parliament amended the *Code* by adding the following after s. 163.

163.1 (1) In this section, "child pornography" means a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means, 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.

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of

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

(b) an offence punishable on summary conviction.

(3) Every person who distributes or sells any child pornography is guilty of

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

(b) an offence punishable on summary conviction.

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

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

(b) an offence punishable on summary conviction.

(5) It is not a defence to a charge under subsection (2) that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

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6 Canada, House of Commons, Standing Committee on Justice and Legal Affairs, "Report on Pornography," No. 18-3 (22 March 1978) at 18:8 (Chairman: M. MacGuigan).

7 *An Act to Amend the Criminal Code and Other Acts in consequence thereof*, 2d Sess., 33d Parl., 1987.

8 S.C. 1993, c. 46.

(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 that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.

(7) Subsection 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3) or (4).[9]

As has become inevitable in Supreme Court hearings, a large number of parties intervened in the *Sharpe* case. The intervenors included the Attorney General of Canada, the Attorneys General of six provinces and a host of organizations, including the Canadian Association of Chiefs of Police.

All nine Supreme Court Justices heard the appeal. The majority judgment was delivered by Chief Justice McLachlin.[10] In introducing her reasons, she briefly described the material that led to the charges against Sharpe. This material was seized by Canada Customs officials and consisted of two computer disks containing a text entitled "Sam Paloc's Boyabuse – Flogging, Fun and Fortitude: A Collection of Kiddiekink Classics." Sharpe was charged with illegal possession of this material as well as with possession for the purposes of distribution and sale.

Inevitably, in his defence Sharpe plead the *Charter*. He argued that the *Code* sections infringed his freedom of expression as guaranteed in s. 2(b) of the *Charter* and his right to liberty in s. 7. The majority accepted Sharpe's arguments and held that child pornography was a constitutionally protected form of expression under s. 2(b) of the *Charter*. As has been true of most Supreme Court decisions dealing with freedom of expression, the appeal turned on the application of s. 1 of the *Charter*.

## II. THE MAJORITY JUDGMENT

In dealing with the first element of the s. 1 analysis, the Supreme Court held that Parliament's objective in creating this limit on expression was "pressing and substantial." Parliament, McLachlin C.J.C. said, criminalized the possession of child pornography because such material posed a "reasoned risk" of harm to children.[11] She further held that the state was not obliged to adduce proof based on concrete evidence that the possession of child pornography caused harm to children. On the contrary, "a reasoned apprehension of harm" would suffice. What, in the view of the majority, was the connection between child pornography and harm to children?

First, "child pornography promotes cognitive distortions."[12] I have no idea what "cognitive distortion" means, although I suspect it may involve the thinking of bad thoughts. McLachlin C.J.C. did not actually define "cognitive distortion," but she

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9 *Code*, *supra* note 2.

10 *Sharpe*, *supra* note 1 at 16-59.

11 *Ibid.* at 39.

12 *Ibid.* at 42.

suggested that child porn might cause "attitudinal harm."[13] She further adverted to the fact that there was "limited scientific evidence linking cognitive distortions to increased rates of offending."[14] She did try to explicate this link by noting that "possession of child pornography fuels fantasies, making paedophiles more likely to offend."[15] The majority in the Supreme Court provided no further direction, although it did suggest that child pornography might invite past offenders to reoffend. How or how often this might happen were not issues the Court chose to address.

Second, child pornography was also deemed *bad* by the Court because it could be used for grooming and seducing children. The Court also drew a link between the production of child pornography and harm from abuse.[16] It is disturbing that the majority did not require concrete evidence to support any of these hypotheses. The trial judge was less confident of his own omniscience and demanded proof of the actual harm caused by child pornography. The majority in the Supreme Court, nonetheless, was convinced that the means chosen by Parliament went too far, regulating "expression where it borders on thought."[17] However, the justices did not wish to strike the relevant *Code* provisions down in their entirety. Rather, the Court decided to redraft the sections, by "reading in" certain exceptions where the actual wording of s. 163.1 was "problematic."[18]

Chief Justice McLachlin's judgment was useful in that she did provide some guidance as to the importance of freedom of expression. She noted that free expression "makes possible our liberty, our creativity and our democracy," adding that freedom of expression also protects "unpopular or even offensive expression."[19] McLachlin C.J.C. also recognized that some types of expression were more important than others, stating, "[w]hile some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society."[20]

It is encouraging that, after many prolix and turgid opinions on freedom of expression from the Supreme Court, there is, at long last, one judge who understands why free expression matters.

### A. THE SIGNIFICANCE OF FREEDOM OF EXPRESSION

The difficulty with Supreme Court decisions about the guarantee of freedom of expression in s. 2(b) of the *Charter* is that most of them say little about the significance of expression. This is largely a consequence of the approach the Court took in *Irwin Toy* v. *Québec*.[21] In this case the Court stated that if an activity had expressive content and sought to convey a meaning, it qualified as constitutionally protected expression. The

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13 *Ibid.* at 42.
14 *Ibid.* at 43.
15 *Ibid.* at 43.
16 *Ibid.* at 44.
17 *Ibid.* at 51.
18 *Ibid.* at 53.
19 The Chief Justice's discussion of freedom of expression is found at *ibid.* at 22-24.
20 *Ibid.* at 22-23.
21 [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*].

Court also stated that acts of physical violence would not qualify as expression. Thus pure commercial advertising was expression,[22] as were hate propaganda[23] and pornography.[24]

Since almost any activity qualifies as expression, the first stage in freedom of expression cases — determining whether the state has limited the *Charter* right in question — is almost a given. As a result, the heart of Supreme Court decisions on expression is usually found in the s. 1 analysis, which determines whether the particular state-created limit on a right is one that can be demonstrably justified in a free and democratic society. The *Sharpe* decision is no exception to this pattern. As a consequence, Supreme Court decisions on expression generally do not involve much in the way of discussion or analysis of expression and appear to be little more than ad hoc evaluations of the desirability of particular state policies. This would explain why Professor Hogg has described these decisions as "unprincipled and unpredictable."[25]

One other decision in which the Supreme Court discussed the essential connection between freedom of expression and political democracy is *Libman* v. *Quebec (A.G.)*.[26] This case involved the constitutionality of restrictions on spending during a Quebec referendum campaign.

In its decisions on freedom of expression the Supreme Court has accepted that freedom of expression is valuable and desirable because it is essentially connected to three important social values:

a. seeking truth;
b. democratic government; and
c. self-realization.[27]

The Supreme Court has relied on this approach in many of its decisions on the *Charter* guarantee of freedom of expression.[28]

Chief Justice McLachlin's opinion was consistent with the approach taken in other Supreme Court decisions in that she talked at length about "harm,"[29] thus adopting the fundamental principle, set out in J.S. Mill's *On Liberty*,[30] that the state may only legitimately limit basic freedoms in order to prevent harm.

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22 *Irwin Toy*, *ibid.* and *R.J.R. MacDonald Inc.* v. *Canada*, [1994] 1 S.C.R. 311.

23 *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

24 *R.* v. *Butler*, [1992] 1 S.C.R. 452.

25 P.W. Hogg, *Constitutional Law of Canada*, 3d ed., (Toronto: Carswell, 1999) at 965.

26 (1997), 151 D.L.R. (4th) 385.

27 This formulation was first set out in T.I. Emerson, *The System of Freedom of Expression* (New York: Random House, 1970).

28 This question is discussed in R. Moon, *The Constitutional Protection of Expression* (Toronto: University of Toronto Press, 2000) at 8-24.

29 *Sharpe*, *supra* note 1 at 22-24.

30 (Chicago: Henry Regnery Company, 1947). The "harm" principle has a long lineage in Canadian jurisprudence on expression. See *R.* v. *Boucher*, [1950] 1 D.L.R. 657 (S.C.C.); *R.* v. *Keegstra*, [1990] 3 S.C.R. 697; and *R.* v. *Butler*, [1992] 1 S.C.R. 452.

The Supreme Court first enunciated the Emerson approach[31] in its *Irwin Toy* decision in which it opined:

> (1) seeking and attaining the truth is an inherently good activity;
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> (2) participation in social and political decision-making is to be fostered and encouraged; and
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> (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.[32]

Given the central importance of the expression, one wishes that the Supreme Court might have developed a clearer, more precise statement.

## B. THE DECISION

McLachlin C.J.C. conducted a meticulous and detailed analysis of the scope of the *Code* prohibitions. She rigorously analyzed the wording of s. 163(1), as well as spending considerable time defining and delineating the different defences found in the section. It was only after satisfying herself as to the precise meaning of s. 163(1) that McLachlin C.J.C. moved to an analysis of whether the limit on expression created in the *Code* could be justified under s. 1 of the *Charter*. She noted that s. 163.1(4) "evinces a clear and unequivocal intention to protect children from the abuse and exploitation associated with child pornography."[33] She added, fortunately, that the *Code* provisions would not catch "innocent baby-in-the-bath photos and other scenarios of non-sexual nudity."[34] She concluded that Parliament's purpose was to "prohibit possession of child pornography that poses a *reasoned* risk of harm to children."[35]

McLachlin C.J.C. conducted a thorough s. 1 analysis, noting that the law might "also capture the possession of material that we would not normally think of as 'child pornography' and that raises little or no risk of harm to children."[36] She thought the *Code* prohibition went too far because it "regulates expression where it borders on thought."[37] For these reasons, Chief Justice McLachlin decided to *read in* certain new exceptions to the *Code* prohibitions.

Reading in is a technique invented by Lamer, C.J.C. (as he then was) in *Schachter* v. *Canada*[38] and followed in *Vriend* v. *Alberta*[39] and *M.* v. *H.*[40] This technique allows

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31 *Supra* note 27 and accompanying text.
32 *Irwin Toy*, *supra* note 21 at 976.
33 *Sharpe*, *supra* note 1 at 39.
34 *Ibid.*
35 *Ibid.* [emphasis added].
36 *Ibid.* at 48.
37 *Ibid.* at 51.
38 [1992] 2 S.C.R. 679.
39 [1998] 1 S.C.R. 493.
40 [1999] 2 S.C.R. 3.

a court to avoid invalidating a problematic statute by adding words to it that will render it constitutional.

There were two exceptions to the *Code* provisions that McLachlin C.J.C. created in *Sharpe*:

> (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
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> (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.[41]

The first exception addresses the case of the closet paedophile who, say, writes down his fantasies or creates drawings depicting them and keeps these creations entirely for his own private use. The second exception has been called "the horny teenager exception" and might involve two persons under the age of eighteen who videotaped themselves engaging in sexual activity. The videotape would, subsequently, have to be kept private and be only for personal use. In Chief Justice McLachlin's view, these exceptions would avoid what she called "problematic applications" of s. 163.1 of the Code.

In the formal disposition of the case, the appeal was allowed, and, with the constitutional issues out of the way, Sharpe was remitted for trial on all the charges.

## III. THE DISSENTING JUDGMENT

As often happens in *Charter* litigation, Justice L'Heureux-Dubé dissented.[42] She was joined in her dissent by Gonthier and Bastarache JJ. Once more, as is the case with many of her dissents, L'Heureux-Dubé J.'s judgment was difficult to follow. She appeared to believe that child pornography was *bad* because it could "undermine the *Charter* rights of children"[43] and because "all members of society suffer when harmful attitudes are reinforced."[44] The dissenting justices could not find any evidence of actual harm caused by child pornography but observed that it might cause "attitudinal harm."[45] As with the majority, the minority did not attempt to define what, if anything, that phrase might mean.

In her reasons L'Heureux-Dubé J. did not appear sure whether or not child pornography was constitutionally-protected expression. The established approach to the guarantee of freedom of expression in s. 2(b) of the *Charter* is complicated. The first step in this analysis requires that a court look at the activity in question to determine if it is a form of constitutionally protected expression. If the activity is constitutionally protected expression, a court must then determine whether the state has acted in such a way as to

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41 *Supra* note 1 at 53.
42 *Ibid.* at 60-104.
43 *Ibid.* at 70.
44 *Ibid.* at 72.
45 *Ibid.* at 71.

limit that expression. If the state has limited this form of expression, the court must then decide whether the particular limit is one that can be justified in a free and democratic society. The dissent rendered the entire analysis more complicated than it had previously been. While the authors of the dissent were not entirely clear whether child pornography was a protected form of expression, they, nonetheless, concluded that s. 163.1(4) limited expression.[46]

The authors of the dissent were not concerned about the lack of concrete evidence concerning the harm caused by child pornography. They concluded that child pornography was "inherently harmful."[47] They were worried about "attitudinal harm" and stated:

> [T]he attitudinal harm inherent in child pornography is not empirically measurable, nor susceptible to proof in the traditional manner but can be inferred from degrading or dehumanizing representations or treatment.[48]

Some guidance as to the possible meaning of attitudinal harm was provided when the dissenting justices observed that child pornography was used by paedophiles to reinforce the opinion that children are appropriate sexual partners and that "paedophiles show child pornography to children in order to lower their inhibitions toward engaging in sexual activity and to persuade them that paedophilic activity is normal."[49] The dissenting justices opined that "the harm of child pornography is inherent because degrading, dehumanizing and objectifying depictions of children, by their very existence, undermine the *Charter* rights of children and other members of society."[50] The justices gave no indication as to how they reached this conclusion, but we must, I assume, accept that they *just knew* all this to be true. The real problem with child porn, so it appeared, was that its dissemination created a heightened risk of what L'Heureux-Dubé J. described as "attitudinal harm." She was not concerned about "the lack of scientific precision"[51] in the social science evidence available to Parliament when it enacted s. 163.1. It was enough for her that Parliament had a "reasoned apprehension" that child pornography caused "attitudinal harm"[52] and that Parliament's objective in enacting s. 163.1 was to promote "children's right to equality."[53] Once again, we must assume that L'Heureux-Dubé J. *just knew*. The dissenting justices thought that s. 163.1 in its pristine form was acceptable. They did not accept McLachlin C.J.C.'s two exceptions.

The dissenting justices, following a "contextual" approach, believed that it would be easier for the state to justify limits on child pornography than to justify limits on other forms of expression.[54] This suggests a hierarchy of forms of expression, something which

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46 *Ibid.* at 66.
47 *Ibid.* at 70.
48 *Ibid.* at 71.
49 *Ibid.* at 73.
50 *Ibid.* at 70.
51 *Ibid.* at 73.
52 *Ibid.* at 74.
53 *Ibid.* at 82.
54 *Ibid.* at 79.

seems to contradict the approach set out in *Irwin Toy*.[55] The emphasis on equality is a thread that runs through many of L'Heureux-Dubé J.'s decisions.[56]

## IV. REACTION TO THE DECISION

It is difficult to understand many of the reactions to the *Sharpe* decision without adverting to the wave of hysteria about paedophiles that is now convulsing Canadians. Paedophilia is imagined to be endemic, and it is believed that paedophiles lurk everywhere, preying on children without number. It is widely believed that the child pornography offence in the *Code*, by some magical means, protects Canadian children against paedophiles.

Much of the reaction to the Supreme Court's decision appeared to be based on the unstated assumption that tens of thousands of paedophiles had been eagerly awaiting the decision and that had the Court struck down s. 163.1 of the *Code*, this army of paedophiles would have concluded that it was now free to sally forth and begin ravaging Canada's children. This statement conveys some sense of the general irrationality of the response to the *Sharpe* decision.

Ontario's former Attorney General, James Flaherty, contributed to the general hysteria through his incessant public pronouncements in favour of a tough, law and order agenda. James Flaherty observed of the decision of the Supreme Court that the two exceptions read in by the Court would make it "more difficult to prosecute and be effective in law enforcement against child pornographers, who are often pedophiles."[57] *Toronto Star* columnist Michele Landsberg also wrote about the *Sharpe* decision.[58] Her opinions were strikingly vitriolic and, in many places, less than accurate. She said that the *Sharpe* decision "opened up a damaging breach in the shield meant to protect children from sexual abuse" and congratulated L'Heureux-Dubé J. on a "vibrantly written" dissent. Landsberg had scathing words for civil libertarians, who, she said, attempt to "confuse people" with "high-flying theories about freedom of expression." She exaggerated what is known about child porn and child abuse, referring to the "routine sexual abuse and exploitation of tens of thousands of victims."[59] So much for rational discourse about child pornography.

The belief that only s. 163.1 of the *Code* stood between Canadian children and a horde of paedophiles was regularly repeated. Another opinion in the *Globe and Mail* suggested

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55 *Supra* note 21.

56 See *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330; *R.* v. *O'Connor*, [1995] 4 S.C.R. 411; *R.* v. *Mills*, [1999] 3 S.C.R. 668; *Symes* v. *Canada (M.N.R.)*, [1993] 4 S.C.R. 695; and *Thibaudeau* v. *Canada (M.N.R.)*, [1995] 2 S.C.R. 627. In one public speech, L'Heureux-Dubé J. suggested that equality rights should take precedence over fundamental rights, "Are We There Yet? Gender Equality in the Law of Canada" (Keynote Address, American Bar Association, Toronto, 1 August 1998).

57 R. Benzie, "Exceptions must be clarified, Ontario says: Attorney-General concerned about hampering police" *National Post* (27 January 2001) A8.

58 M. Landsberg, "Porn law loopholes an affront to children's dignity" *Toronto Star* (4 February 2001) A2.

59 *Ibid.*

that the *Sharpe* decision has "weakened our protection"[60] and quoted Canada's Justice Minister, the Honourable Anne McLellan, describing the decision as an "astounding victory for children." Ontario Attorney General Flaherty expressed his intention of meeting with Ms. McLellan to discuss the "loopholes" created by the *Sharpe* decision. Seemingly influenced by these, or other, discussions, the Justice Minister, on March 14, 2001, introduced a particularly bizarre Bill in the House of Commons.[61]

## V. CONCLUSION

### A. GOOD ENDS DO NOT JUSTIFY OPPRESSIVE MEANS

As proposed, Bill C-15 would amend the *Code* by extending the ambit of the existing child pornography offence. It would now be an offence even to view child pornography, for example, on a computer. The implications of such an offence are chilling. Will hardware manufacturers be required to supply a police officer to watch the way each machine is being used? An offence of "luring" a child using a computer system was created. The Bill would also create a series of offences with respect to cruelty to animals.

On March 31, 2001, Ms. McLellan wrote a letter to the editor of the *Toronto Star* in which she sought to justify Bill C-15.[62] Her argument was simple: Bill C-15 is designed to protect children, and, therefore, it is okay. This argument — if the state claims to be pursuing noble objectives, it is justified in taking any steps that may be thought likely to achieve those objectives — subverts our system of constitutional democracy. In 2000 the Ontario legislature enacted the *Victim's Bill of Rights Amendment Act*.[63] This may well have been the most high-handed and oppressive statute ever enacted in Canada, but it was believed to be justified because its ostensible purpose was to "protect" women against domestic violence.[64] It is especially discouraging that the Supreme Court of Canada has endorsed the *if you claim to be pursuing noble objectives, anything you may do is fine* theory. In 2000 the Court decided the case of *K.L.W.* v. *Winnipeg Child and Family Services*.[65] Here, the agency seized a one-day-old infant from the hospital where the infant and its mother were both undergoing treatment, without having first obtained a judicial authorization to do so. L'Heureux-Dubé J. concluded that since the Agency claimed to be acting so as to "protect" a child, its actions were legally and constitutionally proper.

The Rule of Law will not survive for long when both judges and legislators alike adopt the *good ends justify oppressive means* attitude. While McLachlin C.J.C. did talk of the

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60 L. Dueck, "The road not taken" *The Globe and Mail* (29 January 2001) A13.

61 Bill C-15, *An Act to amend the Criminal Code and to amend other Acts*, 1st Sess., 37th Parl., 2001 (debated at second reading May 3 and 7, 2001).

62 A. McLellan, "Justice Minister defends new child porn legislation" *Toronto Star* (31 March 2001) G7.

63 S.O. 2000, c. 32, originating from: Bill 117, *An Act to Better Protect Victims of Domestic Violence*, 1st Sess., 37th Leg., Ontario, 2000 (proclaimed in force 11 June 2001).

64 D. Brown, "Bill 117 guts men's rights" *The Ottawa Citizen* (20 December 2000) F1, F2.

65 [2000] 2 S.C.R. 519 [hereinafter *K.L.W.*].

need to protect children from harm, her judgment in *K.L.W.* was a compelling affirmation of the need for judges always to uphold the Constitution.

Despite the *Sharpe* decision and Bill C-15, the hysteria about paedophilia has not abated. Nor is it confined to Canada. For example, recently a man who sat next to two children on a British Airways flight was asked to move to another seat.[66] And in March of 2001 Toronto police carried out a pre-dawn raid on the house of a Toronto schoolteacher. They seized computers and videotapes and then moved on to raid his office, where other material was seized. The man was charged with making, possessing, and distributing child porn and remanded in custody.[67] A *Toronto Star* story about the arrest was, itself, hysterical and probably unlawful. The story, complete with a colour photo of the man who was arrested, created an unmistakable impression that the man was guilty.[68] Canadian journalists are usually more scrupulous than this, carefully observing established practices designed to ensure that they do not break the *sub judice* rule.[69] Once again it appears that when dealing with child porn the normal rules do not apply.

## B. LAW AS A KEY TO HUMAN BEHAVIOUR?

Another recent Supreme Court decision given in the same atmosphere of public hysteria was *R.* v. *Latimer*.[70] Latimer was accused of murdering his twelve-year-old daughter, ostensibly to free her from the pain and suffering of cerebral palsy. He was convicted of second degree murder and given the statutory minimum sentence of life imprisonment with no eligibility for parole for ten years. Latimer attempted to attack this sentence, raising an argument of "compassionate homicide" and claiming that the imposition of a ten-year sentence was, in the circumstances of this case, cruel and unusual. Disabled persons and organizations claiming to speak for disabled persons became very interested in the appeal. The argument was raised that if the Supreme Court reduced Latimer's sentence, it would be open season on disabled people in Canada. Once again, like the unfounded fear of rampant paedophilia, it appeared to be widely believed that without the "protection" of the law disabled persons would be murdered in droves.

As Canadians have lost whatever moral sense they once possessed, the social cement that used to be provided by moral notions is being sought in the law. Law is seen, more and more, as providing the key to human behaviour. Without the criminal law, or so it appears to be imagined, children would be abused and exploited, and disabled people would be murdered. If the criminal law is the only basis for social cohesion and social order, we do not have much of a society left.

It is worth comparing a prosecution launched in 1977 to the *Sharpe* decision. In *R.* v. *Popert*[71] the accused published a magazine called *The Body Politic*, which was aimed at

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66 M. Phillip, "The paedophile bogeyman and the paranoid parents" *Sunday Times* (18 March 2001) 17.

67 D. Brazao & M. Shephard, "Teacher Arrested on Child Porn Charges" *Toronto Star* (24 March 2001) A1, A25.

68 *Ibid.*

69 R. Martin, *Media Law* (Toronto: Irwin Law, 1997) at 79-106.

70 (2001), 150 C.C.C. (3d) 129.

71 (1981), 19 C.R. (3d) 393 (Ont. C.A.).

homosexual men. In December 1977 *The Body Politic* ran an article called "Men Loving Boys Loving Men," which advocated sexual relations between boys and adult men. The accused were charged with using the mail for the purpose of transmitting indecent, immoral or scurrilous matter, contrary to s. 164 of the *Code*. This case, which went through two trials and two appeals, was considered to raise a host of civil liberties issues and became something of a *cause célèbre*. Chief Justice McLachlin, indirectly, adverted to this issue in *Sharpe*, suggesting that "materials that advocate or counsel sexual offences with children may qualify [as child pornography]."[72] If a prosecution under s. 164 were to be launched today, s. 2(b) of the *Charter* would likely be raised as a defence. If s. 164 were to be found to create a limit on expression, a court might well conclude that the limit was too vague[73] or too broad[74] to be justified. One recent decision suggests that the Supreme Court may take a sympathetic attitude towards homosexual pornography: *Little-Sisters Book and Art Emposium* v. *Canada*.[75]

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72 *Sharpe*, *supra* note 1 at 49.

73 *R.* v. *Zundel*, [1992] 2 S.C.R. 731.

74 *R.J.R.-MacDonald Inc.* v. *Canada*, [1995] 3 S.C.R. 199.

75 (2000), 193 D.L.R. (4th) 193.