Judicial Activism in *R.* v. *Sharpe*:

An Administration or Perversion of Justice?

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I. Introduction

Few Canadian judicial decisions have generated more outrage[1] than the 1999 British Columbia Supreme Court[2] ruling striking down the Criminal Code of Canada[3] prohibition of child pornography possession. The British Columbia Court of Appeal affirmed the finding that the prohibition was an unjustifiable restriction on freedom of expression, as guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms,[4] in July of 1999.[5] These judgments were labelled "completely unacceptable and inappropriate"[6] and prompted the dire warning that such liberal interpretation of the Charter's guarantees would give license to extreme social deviance and lead incrementally to the legalization of "intergenerational sex."[7] This outrage quickly became a criticism of the judiciary and a "justice system wholly oblivious to the public mood."[8] The Official Opposition in Parliament was also quick to jump on the controversial ruling, issuing such statements as the following:

> the real legal nuclear bomb . . . is the abuse of judicial authority exercised by judges such as the one in this case, where they use their own narrow parochial, social, political values to impose them on society, contra the virtual unanimity of Canadian democracy.[9]

Further, the Opposition also suggested that as a response to such judicial politics, the Federal Government use the Charter's section 33 "notwithstanding clause" to uphold the prohibition on possession of child pornography.[10]

An examination of the reasoning of the majority at the Court of Appeal, however, illustrates that outrage surrounding the ruling is more "ignorance conjured up . . . [by] the spectre of a judge giving judicial approval to sexual exploitation of prepubescent children . . . contrary to the will of Parliament"[11] than legitimate concern over judicial activism. Indeed, rather than an example of the courts usurping the power of the legislature, the *Sharpe* decision is a demonstration of the judiciary fulfilling its proper institutional role by ensuring that Parliament acts within the legal confines of the Constitution.

II. Background

At issue in the *Sharpe* case is the constitutional validity of section 163.1(4) of the

1 "Porn ruling draws public wrath" *Toronto Star* (25 January 1999) A16; Ian Bailey, "Judge in BC child-porn case receives death threat over ruling" *Globe & Mail Metro Edition* (23 January 1999) A10; Carla Yu, "See no evil: moral taboos tumble as a judge uses the charter to legalize child porn" *British Columbia Report* v.10:7 (8 February 1999) at 38-42; Mark Hume, "Child porn will flourish without law, police warn" *National Post* (27 April 1999) A1, A8.

2 *R.* v. *Sharpe* (1999), 169 Dominion Law Reports (4th) 536 (British Columbia Supreme Court).

3 Revised Statutes of Canada 1985, chapter C-46; hereinafter cited as "the Criminal Code".

4 Part I of the *Constitution Act, 1982*, being Schedule B to by *Canada Act 1982* (U.K.), 1982, c.11; hereinafter "the Charter."

5 *R.* v. *Sharpe* (1999), 175 Dominion Law Reports (4th) 1 (British Columbia Court of Appeal); hereinafter cited to Dominion Law Reports as "*Sharpe*."

Criminal Code,[12] which prohibits possession of pornography for the purpose of private viewing or communication (known as simple possession). To understand the ambit of the prohibition, section 163.1(4) must be read in the context of section 163.1(1), which defines child pornography. Section 163.1(1) contains several subsections, which may be explained as follows. Subsection (1)(a) refers to visual representations that (i) show a person who is depicted as being under the age of eighteen and is depicted as engaged in explicit sexual activity; or (ii) the dominant characterization of which is the sexual depiction of a sexual organ or the anal region of a person under the age of eighteen. This subsection has been interpreted as potentially covering any visual representation, including sketches, sculptures, and cartoons, and extends to materials that were created without the use of actual children.[13] Subsection (1)(b) refers to any written or visual material that advocates unlawful sexual activities with a person under the age of eighteen years. Thus, this section captures purely imaginative written works, potentially even one's diary.[14]

At both the trial and appeal levels, the Crown conceded that the impugned provisions infringe section 2(b) freedom of expression guaranteed by the Charter. Thus, the only issue before the courts was whether the prohibition of simple possession of child pornography

6 Terry Murray, "Pediatrician groups protest BC child pornography ruling" *Medical Post* v.35:7 (16 February 1999) 2, 73.
7 "Southam's Big Mistake" (Feb. 8, 1999), *British Columbia Report* v.10:7 (8 February 1999) 42.
8 See above.
9 See above. Statement of Jason Kenney, Reform.
10 Nahlah Ayed, "MPs debate whether to reinstate child pornography law" *Canadian Press Newswire* (2 February 1999).
11 Justice Southin commenting on the media furore in *Sharpe,* above note 5 at para. 5.
12 Revised Statutes of Canada 1985, chapter C-46, as enacted. Statutes of Canada 1993, chapter 46, section 2.
13 See note 5 at paras. 161, 128.
14 See above at para. 197.

could be justified as a reasonable limit of freedom of expression under section 1 of the Charter.

The framework of the section 1 analysis was established in 1986 in *R.* v. *Oakes*.[15] There are two main branches of inquiry under the test. First, the government must establish that the impugned provision has an objective that is a pressing and substantial concern. If so, the analysis moves onto the second branch, "Proportionality," where the court assesses whether the *means* chosen to attain the legislative objective are reasonable and demonstrably justified in a free and democratic society. Here the court assesses the rational connection between the law and its objectives, whether the law is sufficiently tailored, and the balance struck between the deleterious and salutary effects of the impugned measures.[16]

At the British Columbia Court of Appeal, Justices Rowles and Southin (with Chief Justice McEachern dissenting) upheld the trial decision and found that the law was not a reasonable limit, primarily on the grounds that it failed the minimal impairment test as being overbroad.

III. The Vices and Virtues of Judicial Review

Charter section 1 analysis underscores the debate over the proper role of judiciary in Canada—a sometimes dormant but potentially divisive issue. After the entrenchment of the Charter, the courts became vastly more powerful in the Canadian political system.[17] Not only can the judiciary determine *who* can make laws through division of powers jurisprudence, but since entrenchment, it also has the power to rule that *no level of government* can enact a particular law (subject to the section 33 override) if it violates a protected right.[18]

Initial interpretation of the section 1 limiting provision suggested that courts would be strict with legislative violations of the enshrined rights.[19] Generally, the jurisprudence has not followed such early indications, rather suggesting a path of deference to legislators,[20] perhaps the result of the Court wishing to uphold legislation that promotes a desirable social agenda.[21] In fact, the *Oakes* test has become a highly contextualized analysis, in which courts balance many factors,[22] such as whether the legislation is aimed at protecting a vulnerable group[23] and whether the violated right is closely connected to the core principles of the Charter.[24] In balancing these factors, the courts may adopt a more deferential or activist analysis in assessing the reasonableness of government action.

Whatever the perceived trend, an all-encompassing analysis of judicial review under the Charter is difficult and conclusions drawn are contentious.[25] Thus, it is perhaps instructive to examine the case that has again revived the debate over judicial activism in Canada: the Court of Appeal's reasoning in *Sharpe*. This paper will explore arguments that advocate and oppose judicial review of legislation in the context of the Court of Appeal's judgment. Through this examination, I will illustrate that the *Sharpe* decision reveals the necessity rather than the pitfalls of judicial review under the Charter.

A. Framing Democracy

Critics primarily charge that the Charter allows judges to usurp legislative power and

15 *R.* v. *Oakes*, [1986] 1 Supreme Court Reports 103; hereinafter cited to Supreme Court Reports as "*Oakes.*"

16 *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 Supreme Court Reports 835, modified the last requirement of the Proportionality branch of the *Oakes* test.

17 Brian Dickson, "The Canadian Charter of Rights and Freedoms: Context and Evolution" in Beaudoin & Mendes, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1996) 1-1 at 1-15.

18 W.A. Bogart, *Courts and Country: the limits of litigation and social and political life of Canada* (Toronto: Oxford University Press, 1994) at 257.

19 Errol P. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the context of Section 1" in Beaudoin & Mendes, eds., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1996) 3-1 at 3-11.

20 See above at 3-11.

21 See above at 3-32.

22 *Thomson Newspapers (c.o.b. Globe and Mail)* v. *Canada (A.G.)*, [1998] 1 Supreme Court Reports 877.

23 *Irwin Toy Ltd.* v. *Quebec (A.G.)* [1989], 1 Supreme Court Reports 927.

24 *R.* v. *Keegstra*, [1990] 3 Supreme Court Reports 697; hereinafter cited to Supreme Court Reports as "*Keegstra.*"

25 For an example see note 18 at 277-286, Bogart discussing the works of F.L. Morton and Peter Russel. See also Carmen Whittmeier, "The pro-Charter side strikes back: An Osgoode Hall study claims that judges are, if anything, not peremptory enough" *Alberta Report* v.26:18 (16 April 1999) 30-31.

decide fundamental questions of social policy, which are better left to elected representatives than an unrepresentative, unresponsive judiciary.[26] The counter-argument is that the courts are rather fulfilling their institutional role whereby they ensure that government acts in accordance with the freedoms enshrined in the Charter.[27] In rendering decisions, the courts are not only assessing a particular situation but also creating a framework within which Parliament will pursue future actions.[28] Therefore, the court is bound to consider not only the individual case but also the broader implications and ramifications of its decision.[29]

Although the courts will consider the importance of a particular government policy, the tangential and broader effects of government action under that policy are also examined. A worthy motive will not alone legitimize every government action. The importance of government policy is recognized in the first step of the *Oakes* test: pressing and substantial legislative objective. Here, Justice Rowles accepted arguments advanced that Parliament's objectives were to protect children from both the direct and indirect harms of child pornography. Direct harm refers to the exploitation of actual children in producing child pornography. Indirect harm refers to the dangers flowing from the use of child pornography—including the desensitization of society to the sexualization of children and the use of pornography by paedophiles in grooming potential victims and confirming "cognitive distortions" (the illusory belief that their behaviour is normal).[30] In thus characterizing the legislative intent as multi-faceted and broad, the second stage of the *Oakes* test, Proportionality, is easier for the Crown to meet. If an objective entails addressing several problems, the government will more likely be able to justify using diverse means in meeting those problems. Therefore, the government was granted more room within which to justify the scope of section 163.1(4).

However, Chief Justice McEachern took his endorsement of Parliament's objectives a step further, and completely yielded to the government, refusing to "second-guess Parliament on either the scope of the definition it chose . . . or on the prohibition of simple possession."[31] There is a danger in following an analysis that allows the importance of a legislative objective to answer any concerns raised over the means used in accomplishing that objective. Such reasoning suggests that if Parliament asserted an objective of compelling enough importance, there would be no limits on the extent to which Parliament could violate fundamental rights. In her reasons, Justice Rowles expressly rejected the notion that the government can rely solely on the pressing nature of its objectives, asserting that to do so "would ultimately eviscerate the rights and freedoms guaranteed by the Charter."[32]

In enunciating the framework under which the government could pursue child pornography legislation and limit freedom of expression, Justices Rowles and Southin were mindful that the principles articulated in this case might be applied to future situations. Thus, they were wary of issuing categorical edicts and acknowledged the potential for situations where serious infringement of a right would be justified. One of Justice Southin's strongest objections to the provision was that it criminalizes the private possession of expressive material. Justice Southin noted that presently the possession of other forms of objectionable material is not prohibited.[33] She therefore found that any restriction on private thoughts must

26 See note 18 at 269-270.
27 Lorraine Weinrib, "'Limitations on Rights' in a Constitutional Democracy" in Macklem, et. al., eds. *Canadian Constitutional Law,* 2nd ed. (Toronto: Emond Montgomery Publications, 1997) 617 at 617.
28 Scott Reid, "Penumbras for the people: Placing judicial supremacy under popular control," in Anthony A. Peacock, ed., *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Don Mills, ON: Oxford University Press, 1996) 186 at 189.
29 See note 27 at 617.
30 See note 5 at para. 42.
31 See above at para. 274.
32 See above at para. 206.
33 See above at para. 92.

be based on the most compelling evidence of necessity[34]—evidence that the government failed to adduce.

This ruling does not conclude that as a matter of policy Parliament can not criminalize simple possession of child pornography. It was not on the government's objective that the Court ruled but rather on the basis needed for a restriction on private expression. In demanding clear and compelling evidence of necessity, the Court articulated a framework within which Parliament can pursue its objectives.

B. A Needed Check

Those who reject an activist role for the courts and who favour absolute parliamentary supremacy envision Parliament as the guarantor of liberty—liberty being the freedom to do what the will of the majority, expressed through Parliament, does not forbid. Conversely, those who favour the entrenchment of rights in the Charter accept that Parliament sometimes disregards its role as protector of individual liberties and must be held accountable for these lapses.[35] Essentially, Charter supporters are fearful of the power of an unchecked majority. The courts are thus perceived as an essential constraint against the potential rashness of parliamentary action.[36]

Even at the time of enactment, the provisions banning child pornography were criticized for their overbreadth and difficulties of interpretation.[37] The Bill itself was passed and received Royal Assent within six weeks of being introduced. It is not surprising that such a rushed bill on such a contentious issue has received subsequent scrutiny and been found lacking.

Ultimately, the legislation failed to meet the test of minimal impairment under the Proportionality branch of the *Oakes* test, due in part to evidentiary failings in the government case. It was conceded that the government could legitimately prohibit pornography that harmed actual children in its production. Therefore, Justices Rowles and Southin limited their analysis as applying to pornography that does not exploit actual children in its creation. The government was thus required to justify the provisions by showing a reasonable apprehension of indirect harm to children arising from purely imaginative works.[38] Most evidence indicated that the indirect dangers of child pornography (as used for grooming and confirming cognitive distortions) arose from depictions of actual children engaged in sexual activity. One influential report recommended limiting prohibitions of child pornography possession legislation to depictions of actual youth.[39] Justice Rowles thus declined the government's invitation to "infer" a risk of harm from imaginative works, when balanced against the prohibition's profound invasion of freedom of expression and privacy.[40]

In light of these evidentiary problems, the imprecise and expansive language used in the provision resulted in the legislation being found overbroad. One factor relied upon heavily by Justice Rowles was the extension of the prohibition to private communication. In determining that restrictions on similar forms of expression, such as hate speech and obscenity, are allowable, the courts have relied to an extent on the fact that the legislation did not extend to private viewing or communication.[41] Further, the sweeping scope of prohibited materials

34 See above at para. 124.
35 R.P. Kerans, "Address" (Charter 15: A symposium on the Charter After 15 years, University of Alberta, 1996) [unpublished]. Also see note 18 at 256.
36 Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1992) at 48.
37 B. Blugerman, "Beyond Obscenity: Canada's new child pornography law" (1993) 11 Entertainment & Sports Law 3 at 5-7.
38 See note 5 at para. 183.
39 See above at para. 184.
40 See above at para. 185.
41 See note 24. See also *R. v. Butler*, [1992] 1 Supreme Court Reports 452.

under the provision was problematic. Elements of the prohibition that were particularly troublesome included the following: that it extended to adults depicted as being under the age of eighteen; that it extended to depictions of sexual activity between individuals aged fourteen to eighteen, when actual sexual activity between such individuals is legal; that other jurisdictions employ less intrusive measures; and that it catches those under the age of eighteen who have records of their own sexual activity.[42]

It is worth noting that the majority did not find all elements of the provision unconstitutional and supported a prohibition of pornography that depicts actual children. Justice Southin even notes that parts of the prohibition "would be less troubling if it were confined to persons under the age of fourteen years,"[43] clearly inviting Parliament to refine this law to meet the standards of Charter scrutiny.

C. Thwarting Progressive Initiatives

Another endorsement of the Charter and judicial review is that in granting protection to individuals, the courts must sometimes measure fundamental rights against the collective welfare, an unpopular task best performed by an independent judiciary.[44] However, this argument is countered by the contention that the courts are historically conservative institutions and are thus as likely to regressively thwart progressive government initiatives as to be agents of social justice.[45] Therefore, it is asserted that Parliament is often more effective at improving the welfare of Canadians than the courts[46] and, of necessity, performs a role of mediating between competing groups and conflicting interests, where one interest must inevitably be subordinated to the greater good.[47]

This concern is at least partially addressed by the *Oakes* test itself. In a section 1 analysis the court does not in isolation consider only the infringed right. The courts also recognize and accord weight to any factors that compete with and mitigate the importance of interests protected by the Charter right. Although ultimately not enough to justify this intrusion on freedom of expression, the conflicting interests at issue in this case were recognized and accorded different levels of importance. In assessing the government's actions, Justice Rowles adopted a deferential standard and noted that in protecting vulnerable groups, here children, the government need not adopt the least intrusive means of accomplishing its objectives.[48] Further, she recognized that child pornography is not closely related to the "core" principles underlying Charter protection of freedom of expression: the search for truth, participation in the political process, and individual self-fulfillment.[49] Therefore, the expression was granted a lesser degree of protection and the government could more easily justify its restriction thereof.[50]

Additionally, the final stage of the *Oakes* test—weighing the salutary and detrimental effects of the legislation—requires that the court explicitly address whether the provision truly accomplishes its objective in a beneficial manner. In finding that the provisions met this final step of the Proportionality test, Chief Justice McEachern determined that the objective of protecting children was owed greater weight than the unlikelihood that the law would catch innocent possessors. Although he conceded that the definition could criminalize some

42 See note 5 at paras. 126, 128, 197.
43 See above at paras. 127.
44 See note 28 at 189-190.
45 See note 18 at 259-260. To illustrate, Bogart uses the case of *Singh et. al. v. Minister of Employment and Immigration*, [1985] 1 Supreme Court Reports 177, where the Court struck down legislated procedures for disposing of refugee claims because they did not afford an oral hearing. New procedures created a backlog of 85,000 cases by the end of 1988 and were nearly $100 million dollars overbudget by 1989.
46 See above at 267.
47 See note 19 at 3-24.
48 See note 5 at para. 156.
49 See note 24 at 762-67.
50 *R. v. Lucas*, [1998] 1 Supreme Court Reports 439 at 459.

conduct that does not present a serious risk to children, he asserted that such instances would be very rare, ultimately finding that any real risk of harm to children is enough to tip the scales in favour of the legislation. In reaching this conclusion, however, Chief Justice McEachern balanced the "risk of harm to both children and society against the right of every person, innocent or nefarious, to possess *any kind* of child pornography."[51] His analysis clearly included pornography that uses actual children in its production.

Resolving the balance in favour of the impugned provisions was more difficult under the approach of Justices Rowles and Southin, who considered only the more narrow prohibition of materials that do not use actual children in their creation. Thus, the potential of harm from imaginative works was balanced against the potential incarceration of innocent people. The scant evidence of harm arising from imaginative pornography was found to be an insufficient justification for the scope of materials prohibited, which potentially could include innocent behaviour.[52] In assessing the risk of incarceration, Justice Southin noted that the existence of such a penalty also raises the possibility that legitimate expression will be chilled as people are forced to become their own censors. Further, she found the salutary effects of the provision minimal in the context of the overall legislative scheme, which includes prohibitions of the sale, distribution, publication, manufacturing, and importation of child pornography.[53]

Thus, despite the recognition of competing interests and the low level of protection afforded child pornography, the scant evidence of danger to children arising from purely imaginative materials[54] was insufficient to show a reasonable basis for the government's action. Overall, the actual benefits of the prohibition of imaginative works were minimal and did not outweigh the real danger that innocent people could be charged under the provision. The government did not establish that section 163.1 of the Code was a proportional response to the problem of child pornography, and the infringement of freedom of expression failed to be a "reasonable limit demonstrably justified in a free and democratic society."[55] And because Parliament has declined to act by either amending the provisions or overriding the *Sharpe* ruling,[56] the criminal justice system is left in limbo.

D. The Inertia of Parliament

Parliament's inaction in the wake of the *Sharpe* case does, however, illustrate a potential danger of judicial activism: the sapping of the democratic process. While acknowledging the deficiencies of the political process, objectors to judicial intervention contend that courts hand down conclusions rather than build consensus. Therefore, the danger attaching to any court imposed solution, no matter how enlightened, is that politicians and the public will no longer seek consensus but will leave tough decisions to the courts, a course of action that ultimately breeds populist apathy and resentment.[57]

The federal government has resisted calls to overturn the ruling, being content to "let justice run its course instead of rewriting its legislation before the Supreme Court [of Canada] rules."[58] As noted, the laws were poorly drafted from the outset—encompassing a wide breadth of materials of little potential harm. Further, section 163.1 was not even the initiative of the present Liberal government but of its Progressive Conservative predecessor. Arguably,

51 See note 5 at para. 291. Emphasis added.
52 See above at para. 213.
53 See above at para. 214.
54 See above at para. 184.
55 Section 1, see note 4.
56 Janice Tibbets, "B.C. urges high court to weigh public opinion in pornography case" *National Post* (2 October 1999) A4.
57 See note 18 at 269-270.
58 See note 56.

the present Parliament could amend the laws without losing face. Instead of amending the legislation, however, Parliament is content to let the courts deal with the unwieldy provisions and also bear the criticism. The focus of the debate should be a problematic, poorly-drafted law. Instead, the focus has been the unpopular role that the courts play in reviewing government action—a role that only becomes necessary when Parliament has failed in its own duty.

In a recent speech, Preston Manning admonished the government for abdicating its responsibilities. He advocated reforming measures, including "a process of pre-legislative review to ensure Parliament clearly specifies within each statute it passes the intent of that statute, and obtains independent legal advice of the Charter compatibility of bills before they leave [Parliament] . . . rather than after."[59] His comments are particularly revealing of Parliamentary lassitude as his "reforming" measures amount to nothing more than an obvious and elementary review that is necessary for all proposed legislation.

IV. Conclusion

Overall, the *Sharpe* case simply does not support the contention that the judiciary is running amok with unchecked power and deciding fundamental issues of policy. The judgment does not issue an edict that the government cannot prohibit possession of child pornography. It merely states that the governments must limit such prohibitive measures to pornography that uses actual children in its production or present evidence that children are put at risk by pornography that is purely imaginative. Nor does this case signal that the courts are diverging from a deferential analysis under section 1 of the Charter. Although deference ought to be afforded to Parliament in many instances, the notion of deference must not be extended too far. In requiring the government to adduce something more than scant evidence to justify its violation of entrenched rights, the courts are merely ensuring that Parliament is meeting its obligation to act within the limiting framework of the Constitution.

59 Douglas Fisher, "Manning challenges the Trudeau legacy" *Toronto Sun* (17 October 1999) C7.