Child Pornography and the Media: *R.* v. *Sharpe*

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You may have heard that the prosecution of John Robin Sharpe attracted some media attention.[1]

As the trial judge, I can assure you that the reaction of the public and the media to the various decisions rendered in regard to Mr. Sharpe did not escape my attention—nor the attention of my wife and family—nor my colleagues'.

What I propose to do here is tell the story of what occurred—from my point of view—what it was like to be in the middle of the powerful storm which the case generated and make some observations that may be of use to the media and the bench.

Mr. Sharpe was charged with four counts of possession of child pornography. Two charges were of simple possession, and two were of possession for the purpose of sale or distribution. The charges arose from two seizures of materials in Mr. Sharpe's possession at the Canada/US border and at his home in Vancouver, consisting of photographs of boys in sexual poses and situations, and of stories written by Mr. Sharpe describing various sexual relations with boys.

The case was assigned to me to be heard by a judge without a jury. Mr. Sharpe represented himself.

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1 *R.* v. *Sharpe*, [2002] B.C.J. No 1219 (B.C.S.C.) [hereinafter *Sharpe*].

At the outset, the case appeared to be simply part of the daily work of the court—which ordinarily attracts no media or public attention.

However, Mr. Sharpe raised constitutional questions regarding the child pornography provision in section 163.1 of the *Criminal Code*.[2] He alleged that the ban on simple possession was unconstitutional as it violated the *Canadian Charter of Rights and Freedoms*.[3] He also argued that the ban on possession of written materials was unconstitutional.

We therefore embarked upon a *voir-dire* to hear evidence and argument on the points raised by Mr. Sharpe.

The media gave no attention to the hearing. Few spectators were in the courtroom. It was simply an ordinary case unfolding as it should.

The general division of the Ontario Court of Justice had already upheld the constitutionality of section 163.1 and leave to appeal to the Supreme Court of Canada had been refused. Initially, there did not appear to be much cause for concern.

In the *voir-dire*, the Crown presented expert evidence on the evils of child pornography. Mr. Sharpe cross-examined these witnesses in his layman fashion. I asked the experts many questions in order to understand the underlying evidence upon which their opinions were based. I gave careful attention to the Ontario decision (which was thoroughly researched and reasoned) but soon realized that the judge was dealing with a matter quite different from mine. His issue was whether various works of art seized from a Toronto Art Gallery should be forfeited to the Crown. I had to decide whether Mr. Sharpe had committed any criminal offence.

When we moved into argument, I could see serious grounds for the constitutional challenge. Close to the time of the Ontario decision, the Supreme Court of Canada in *Dagenais* v. *Canadian Broadcasting Corp.*[4] added a further test to those in *R.* v. *Oakes*,[5] being the need to weigh the beneficial effects of the impugned legislation against its detrimental

2 R.S.C. 1985, c. C-46.

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

4 [1994] 3 S.C.R. 835.

5 [1986] 1 S.C.R. 103.

effects. That test had not been applied by the Ontario Court, but I was aware of it and knew it had to be taken seriously.

At the end of the argument, I saw I had a tiger by the tail. Looming up was the most difficult decision of my judicial life. I say this in the sense that the issues were extremely complex and hard to come to grips with and resolve. Moreover, hovering in the background was the realization that if I found the legislation to be unconstitutional (and by then I was becoming convinced that it was), an indignant public reaction would be inevitable. I gave the decision all the care of which I was capable, prepared endless drafts and my judgment was handed down in January of 1999.

It decided two things:

1. The simple possession part of section 163.1 was unconstitutional.

2. The ban on possessing written child pornography (as defined) for sale or distribution was constitutionally valid.

The outpouring of media and public disapprobation exceeded, in volume and fury, anything I have ever seen in Canada for a court decision. It was a field day for TV and the newspapers. A majority in Parliament was ready to use the notwithstanding clause of the *Charter* to uphold the *Criminal Code* and scuttle my decision. Wiser counsel prevailed and the Crown took the appeal route. Most reactions were not only dead against the decision but dead against the judge who wrote it. A few courageous commentators supported the decision and several leading members of the Bar rose to my defence. Bless them. The police protected our home. The furor was probably harder on my wife than on me but was an unpleasant experience for both of us. Community approval is something we all cherish; vilification by large segments of the public is something else.

I will give a few examples of particularly disturbing things which occurred.

In a national newspaper, just below the front page headline concerning the case, there was a purported quote from my judgment. I was quoted as saying:

> "There is no evidence that demonstrates a significant increase in the danger to children caused by pornography."

The real sentence was:

> "There is no evidence that demonstrates a significant increase in the danger to children *related to the confirmation of cognitive distortion* caused by pornography."

The writer removed key words from the middle of the sentence and joined the beginning and the end, conveying a meaning totally different from the complete sentence. This was unfair reporting, making the judgment and the judge appear absurd.

A cartoon in a local newspaper in British Columbia depicted Judge Shaw, robes and all, stuffed upside down into a garbage can.

Of more far reaching effect was a hot-line show in British Columbia. The hot-liner constantly referred to "Mr. Justice Bonehead". One of his staff telephoned my home and asked my wife if I would come on the hot-line show to explain my judgment. My wife replied that she did not think so but that she could not answer for me. She suggested that they call me directly. I was then at work. I received no such call. The hot-liner then advised his listeners that Mr. Justice Bonehead was hiding behind his wife's skirts.

The case went on to the British Columbia Court of Appeal. By a two to one majority, the Court of Appeal upheld my ruling.

The case then proceeded to the Supreme Court of Canada. In January 2001, the Supreme Court held section 163.1 to be constitutionally valid. The court, by a 6 -3 majority, found certain constitutional problems with the legislation, but overcame them by writing in exceptions to the legislation. They ordered the trial to proceed.

The case came back to me for trial. What had been appealed was only a ruling made on a *voir-dire* during the course of the trial. Thus, I never ceased being the trial judge.

This time the trial attracted the full glare of media coverage. Mr. Sharpe was represented by counsel. He raised *Charter* objections to the methods used to obtain the Crown evidence. I dismissed those objections. The trial then focused mainly upon conflicting expert evidence on what constituted artistic merit. Here was another sensitive issue. Significantly,

the Supreme Court of Canada in its judgment had ruled that any artistic merit, however small, was a defence to written child pornography. I had to be very careful in dealing with this delicate and controversial issue. The defence also argued that the written materials did not "advocate or counsel" (those are the words of section 163.1) the commission of sex crimes against children. This was another delicate issue.

The trial lasted about three weeks. Both counsels were highly competent.

No defence of substance was raised about Mr. Sharpe's collection of photographs.

The defence put into evidence many examples of works of recognized writers which described sexual relations with children. Mr. Sharpe's extensive writings were also put in evidence.

I concluded that Mr. Sharpe's written materials upon which the charges were based had some artistic merit and that they did not counsel or advocate sex crimes against children, but only described them. Therefore, I acquitted Mr. Sharpe of possessing written child pornography but found him guilty of possessing pornographic photographs.

As predictable as day follows night, a large body of the population was outraged.

Our courts operate under the law in accordance with the evidence. This is fundamental to our system of justice. To achieve this end, the judges must act with independence. If judges bend to the latest wind of public opinion, the bedrock upon which our judicial system is founded will be undermined.

Being sworn to uphold the law, I did so to the best of my ability.

On the charges involving possession of photographs, I imposed a four-month conditional sentence. I did so after taking into account the six years Mr. Sharpe had obeyed strict bail conditions and the significant public disapprobation which forced him to move from his home to far less desirable quarters. I also took into account that he had no criminal record and at age 68, he suffered severe health problems. I kept in mind that Mr. Sharpe was not charged with being a pedophile or having committed any sexual offences against children; the charges on which he was convicted were of simple possession of pornographic photographs.

The sentence provoked some adverse media reactions. Many members of the public would have preferred that I lock him up and throw away the key.

Again, judicial independence was put to a test. Would a judge have made the same decisions if he had to run for re-election? Would there be at least a subconscious tendency or temptation to overlook the law and the evidence and be swayed by public opinion? Food for thought.

I was not about to let the media or public reaction deter me from carrying out my responsibilities as required by my oath of office. I believe I can say on behalf of my colleagues—judges who hear and decide cases every day, whether at trial or on appeal—that they act in the same manner. They call cases to the best of their ability, in accordance with the law and the evidence and nothing else.

My constitutional decision was the toughest decision I have ever had to make but many *Charter* decisions are equally difficult. There is often a clash between the freedoms set out in the *Charter* and limitation by the state of those freedoms. Section 1 of the *Charter* reads:

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

Parliament and the legislatures have placed upon the shoulders of the judges the responsibility of deciding in specific cases, the application of the words "reasonable limits" and "demonstrably justified" as they are used within section 1. That is not a simple job, being susceptible to differences of opinion on what reasonable limits on our freedoms are or should be, or what is or is not demonstrably justified.

The *Sharpe* case is a good example of differences of opinion. A judge at trial level, and judges in the Court of Appeal and the Supreme Court of Canada tackled the constitutional questions and, in their reasons for judgment, came up with six different approaches.

In many of the decisions of the Supreme Court of Canada, there is no unanimity. Take the hate literature and hate communications cases, *Keegstra* and *Taylor*, for example.[6] Both cases were decided by four to three margins. Powerful but differing opinions were expressed by both the majority and the minority judges.

The views expressed in the media, in favour or against a court's decision, are free to be offered in our democratic society. Sometimes, however, criticism goes too far when it becomes an attack against the judge who rendered the decision. It is here that I suggest that the media should exercise particular care. Having a proper understanding of the reasons for judgment is, of course, vital.

I have seen judges, who have faithfully and carefully carried out their duties for years, savaged in the media for a single decision which, in some respect, is seen not to conform with the writer's sense of political correctness.

Judges have little opportunity to defend themselves. The media possesses the great power of direct communication to the public. As a rule, judges do not go public to defend or explain their decisions. Their reasons for judgment must speak for themselves. It is those reasons upon which appeals to higher courts are based.

I return to the media treatment of my decisions in the *Sharpe* case—and of me personally.

Despite the discomfort I felt from the criticisms of my judgment and me personally, I continue to believe in the public right to criticize the decisions of the courts. We are a strong society because of freedom of expression, even when ill-informed.

Society is even stronger when our critics are well-informed. It is easy to arrive at opinions without knowing the facts. Before attacking court decisions, members of the media should carefully read the reasons for judgment. Most do, but some apparently do not.

6 *R.* v. *Keegstra*, [1990] 3 S.C.R. 697; *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892.

The *Kopyto*[7] decision of the Ontario Court of Appeal makes it clear that freedom of expression gives wide scope for public attacks on judges.

Personal attacks on judges undermine public confidence in the body responsible for governing our society under the rule of law. Is this what we as a society want? I think not. I call upon the media: be careful. You have vast power—use it wisely.

How have I fared from having gone through this experience? I am well and enriched for having been put to a demanding test. I can face my worst critic—myself—with good conscience, confident I gave it my best.

7 *R.* v. *Kopyto*, (1987), 47 D.L.R. (4th) 213.