

**Justice for Children and Youth:**  
**A Policy Statement on *R v. Sharpe* and the Child Pornography Law**

Justice for Children and Youth is a legal aid clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. The clinic provides legal representation and summary advice to low-income children and youth. As well, the clinic provides public legal education to youth, youth-serving agencies and other interested parties. The mandate for Justice for Children and Youth is to assist and empower children and youth in obtaining fair and equal access to legal, educational, medical and social resources. The organization believes that children and youth must be recognized as individuals under the law, and that in order to obtain such recognition, young people need advocates to work with them and address any legislation or policy affecting their rights. To that end, Justice for Children and Youth puts forth the following position statement on the recent Supreme Court of Canada decision on the constitutionality of the child pornography law.

Justice for Children and Youth supports the Supreme Court of Canada's decision in *R. v. Sharpe*<sup>1</sup>, which upholds the law banning the possession of child pornography. The majority of the Court in *Sharpe* concluded that, except for two peripheral applications, the law is constitutional. These two exceptions delineated by the Court relates to material privately created and kept by the accused.<sup>2</sup> The dissent in *Sharpe* found the law constitutional in its entirety, without exception.

The Supreme Court produced a balanced decision in *Sharpe*. Chief Justice McLaughlin wrote the majority opinion, finding that provisions in the *Criminal Code* prohibiting the possession of child pornography did not unjustifiably intrude on constitutional rights of Canadians to free expression. But for the two exceptions created by the majority, Chief Justice McLaughlin found that the benefit of preventing harm to children far outweighed the cost to freedom of expression of prohibiting such materials. In carving out certain exemptions to the child pornography law, however, the Court acknowledged the harmful effects of the child pornography legislation on adolescent sexuality, freedom of expression and self-fulfillment. The Court reasoned that for young people grappling with issues of sexual identity and self-awareness, private expressions of a sexual nature may be crucial to personal growth and sexual maturation. The Court deemed that possession of certain materials, like a teenager's auto-depictions of lawful sexual activity, posed little or no risk of harm to children. In so doing, the Court showed great sensitivity to, and recognition of, the significance of adolescent self-fulfillment, self-actualization and sexual exploration and identity.

Justice for Children and Youth agrees with the majority position in *Sharpe*, but also finds merit in the dissenting opinion and supports its reasoning, as articulated by Justice L'Heureux-Dube. More than just a balancing between the prevention of harm to

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<sup>1</sup> *R. v. Sharpe* [2001], 1 S.C.R. 45.

<sup>2</sup> Specifically, these two categories of material which the Supreme Court exempted from criminalization are (1) written materials or visual representations created and held by the accused alone, exclusively for personal use; and (2) visual recordings created by or depicting the accused that do not depict unlawful sexual activity and are held by the accused exclusively for private use.

children and the right to freedom of expression, L'Heureux-Dube viewed the constitutional debate surrounding the child pornography legislation in terms of a violation of children's equality rights. The dissent characterized the harm of child pornography as an infringement on the dignity and equality rights of children, asserting that such material hindered a child's autonomous development and dignity by "eroticising their inferior social, economic and sexual status" and "preying on preexisting inequalities."<sup>3</sup> As such, the dissent interpreted Parliament's attempt to prohibit the possession of child pornography as a promotion of children's right to equality under section 15 of the *Charter*.

The strong language of a child's right to equal treatment and dignity, which permeates the entire dissenting opinion, is an important alternative perspective on the child pornography debate. The dissent in *Sharpe* reminds us that the issues surrounding the criminalization of child pornography involve more than just considerations about freedom of expression. As observed by Justice L'Heureux-Dube, one must not lose sight of the other rights and democratic values which Parliament has sought to protect in enacting this child pornography law.

The prohibition of the possession of child pornography is consistent with the democratic values which are essential in our community, and also with the *Charter* rights of children. It is legislation which promotes respect for the inherent dignity of children by curbing the existence of materials which degrade them. This in turn helps to protect children's equality and security rights.<sup>4</sup>

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<sup>3</sup> *Ibid.* at 132-133.

<sup>4</sup> *Ibid.* at 159.