



COMMENT

By
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Our child sex offender laws should cross borders

not resulted in any noticeable prosecutorial activity.

Impact of child sex tourism

Foreign child sex offenders who pay to abuse children in developing countries disproportionately drive the demand for human trafficking. They generally pay significantly more than local men to sexually exploit children. As a result, certain known sex venues overseas cater almost exclusively to Western tourists and businessmen.

The sexual exploitation of children and young women overseas results in severe psychological and physical harm to victims. Rates of HIV/AIDs and sexually transmitted diseases are much higher among these individuals than the general population. Often, they are threatened, beaten and raped to ensure their compliance.

Sex tourism also depends on the complicity of local authorities, which is frequently secured through corruption and bribery – undermining democratic institutions that are often in their infancy. Organized crime also frequently profits from the buying and selling of children and young women overseas for the sex trade.

As a result of these harms, child sexual exploitation by foreigners is a serious transnational crime and fundamental affront to

human rights. It calls out for an international response. Canada must do its part.

Validity of Canada's extraterritorial law

Some defence lawyers have commented in the media that Canada's extraterritorial child sex offender law may be vulnerable to a constitutional challenge. They question the jurisdiction of Canadian criminal law to apply extraterritorially to offences involving child sexual exploitation. Such a challenge should fail.

In 1996, a federal Department of Justice official appearing before the Standing Committee of Justice and Legal Affairs stated that commercial child sex tourism is an international crime of universal jurisdiction. As a result, Canada would be fully entitled under international law to prosecute its nationals for that crime wherever it took place.

The validity of Canada's extraterritorial child sex tourism legislation has only grown stronger with the passage of time.

By 2000, approximately 23 countries had adopted extraterritorial child sex offender laws. Today, the number of countries that have done so has doubled to approximately 50. Prosecutions under those laws for both commercial and non-commercial

child sexual exploitation continue to grow.

To date, 191 countries have ratified the *U.N. Convention on the Rights of the Child*, committing to take action to protect children from all forms of sexual exploitation. This international treaty is just one of several statements by the international community that child sexual exploitation is universally condemned.

A detailed analysis of this evidence of the state of customary international law on extraterritorial criminal responsibility for child sex offences is currently underway at the University of British Columbia. The findings of the UBC Human Trafficking Working Group will be released within the year.

Towards active enforcement

Research shows that general deterrence in criminal law is largely driven by the extent to which a given law is enforced. The likelihood of being charged deters would-be offenders.

Unfortunately, because Canada's approach to enforcing its extraterritorial child sex offender law has been passive, it is likely not deterring child sex offenders from travelling overseas to seek out victims.

Donald Bakker, the only individual convicted to date under our law, was initially being investigated for abusing prostitutes in the Vancouver area. It was by chance that a police search discovered evidence of his abuse of children overseas and led to charges for those alle-

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A constitutional challenge of extraterritorial laws should fail.

Canada has only convicted one person in the last decade under our extraterritorial child sex offender law. This stands in stark contrast to other developed countries that actively enforce similar laws.

Canadians are continuing to travel abroad and sexually abuse children, despite a criminal prohibition dating to 1997.

Documents recently released by the federal Department of Justice under the *Access to Information Act* reveal that at least 146 Canadians were charged with child sex offences overseas from 1993-2007. The data is based on requests for consular support. This figure does not include the likely much larger number of Canadians who engage in such conduct without being detected, or who evade charges by bribing local officials.

Foreign governments and non-governmental organizations alike have brought suspected cases to the attention of Canadian authorities, where charges were not possible in the territory where the allegations originated for a variety of reasons. However, to date, those referrals have

Most evidence devoted to organization charge

HELLS

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doubt that Giles had a measure of control over the cocaine.

"In summary, the Crown's interpretation of the evidence is strained. The actual evidence against Giles which relates to the possession offence is weak and the intercepted discussions the Crown says relate to the offence are unreliable. The Crown has urged the Court to view Giles' actions in light of the expert evidence and the clubhouse intercepts to infer that Giles operated in a cell with Revell and Rempel, directing them in the commission of the possession offence.

"The Crown has over interpreted Giles' statements and used the expert evidence to see an agenda that has no basis in the evidence. The totality of the evidence fails to prove the guilt of Giles beyond a reasonable doubt. Cumulatively considered, the gaps in the evidence are fatal to

the Crown's case. They cannot be filled by speculation, or 'shrewd guesses'. I agree with counsel for Giles that the evidence against Giles is sparse, and no amount of context or theory fitting can fill the gaps in the Crown's case.

"In this case, on the evidence, whatever knowledge Giles had after Revell and Rempel committed the offence is insufficient to prove he had knowledge and control, and therefore possession of the cocaine at the time the offence was committed.

"There is no proof that Giles was a party to the offence Revell and Rempel committed. There is no evidence that Giles did anything to assist or encourage them to possess the cocaine."

Justice MacKenzie pointed out that convicting Revel and Rempel of the criminal organization charge depended upon a finding that Giles was guilty of the cocaine possession offence because he was the only link to the EEHA.

Since Giles is not guilty of the cocaine possession offence, the criminal organization charge "fails as against all the accused. It is therefore unnecessary to consider or address all the evidence called on whether the EEHA is a criminal organization..."

Richard Fowler, counsel for Giles, told *The Lawyers Weekly* that "I think the case is an example of the problems with the legislation. The substantive or predicate offence should be tried separately from the criminal organization offence. It doesn't seem to me to be a very good use of judicial resources to have them tried together. In this case, 60 to 70 per cent of the evidence was devoted to the criminal organization charge and all for nothing..."

J.D. Jeving acted for Revell and J.W. Sherren was counsel for Rempel. M.M. Devlin and Brad Smith appeared for the Crown.

Reasons: *R. v. Giles*, [2008] B.C.J. No. 522.

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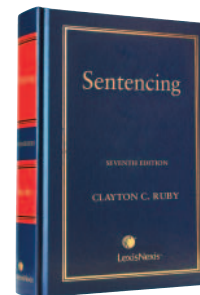
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