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Concerns about Prosecuting Art Portraying Child Abuse

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Author, Yvan Godbout, was charged on April 2019 with making child pornography, an offence under s.163.1(2) of the Criminal Code of Canada (CCC).[1] The charges arose from Godbout's rendition of *Hansel and Gretel*, a single story out of a collection of dark reinterpretations of old fairy tales. The story contains a fake depiction wherein a father sexually assaults his daughter, no more, no less. The charges resulted from the complaint of a single University Professor in January 2018. Not much media attention has been given to these charges in provinces outside of Quebec, but inside the province, concerns around censorship have risen. One group, the Canadian Civil Liberties Association, went so far as to write the Minister of Justice in Quebec, The Honourable Sonia Lebel, and voice their opinion of how these charges amount to censorship and are "a terrible exercise of [her] quasi-judicial powers."[2]

In what follows, I will examine the nature of the offence to look at the elements of 'making child pornography' and to examine the requisite mens rea and actus reus of the charge. Next, I will apply the law to Godbout's position, highlighting how the law, as written, is too broad and needs to be curtailed to avoid the absurd result of people getting charged for viewing child pornography, for reading a book.

The elements of making child pornography are explained in R v Keough: "…'making' in s. 163.1(2) involves the creation of novel child pornography, that is, an instance of child pornography that is different from existing instances. Examples are taking a photograph, making a video recording, or writing a work that qualifies as child pornography."[3] So it follows that the actus reus is the making of material containing or qualifying as child pornography, and the mens rea can be seen as the culprit intending to make the pornographic material.

At this point, a huge issue presents itself: what is considered written child pornography? s.163.1(1) of the CCC defines child pornography as follows:

> (b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;[4]
>
> (c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act;[5]

Thus, to write about sexual activity is an offence if its purpose is to goad people into performing sexual activities with children or if it is a piece of writing predicated on sexual abuse for a sexual object. It should be easy to discern a piece of writing with its dominant characteristic as the description of sexual abuse with a child: a piece of writing that focuses on sexually abusing children.

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[1] *Criminal Code of Canada*, R.S.C., 1985, c. C-46.
[2] Cara Faith, "Letter to Quebec Minister of Justice Regarding Child Pornography" (April 12 2019), online: [Canadian Civil Liberties Association] <https://ccla.org/letter-quebec-minister-justice-regarding-child-pornography-prosecution-authoreditor/> [https://perma.cc/N8XX-W3JL].
[3] *R v Keough*, 2011 ABQB 48 at para 232.
[4] *CCC, supra* note 1 at s.163.1(1)(b)
[5] *CCC, supra* note 1 at s.163.1(1)(c)

However, the charges laid against Godbout muddy the waters of this description and bring dangerous consequences with them. Essentially, if one can be charged with making child pornography by writing *fictitious* abuse into a small part of a story, then more people can be charged for accessing child pornography.

s.163.1 (4.1) states, "Every person who accesses any child pornography is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or[6]
- (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.[7]

Mr. Godbout needs protection from the charges laid because s.163.1(4.1) leads to an offence where anyone who reads his book or a similar book can be charged for accessing child pornography. This absurd result must not materialize.

Now there are a few defences that are available for such a charge, namely if the purpose of the work is related to the administration of justice or to science, medicine, education or art. Or if it does not pose an undue risk of harm to persons under the age of eighteen years. However, these defences only provide a fix to a symptom. The cause needs to be examined and changed; hence, the offence as laid out in s.163.1(4.1) needs narrowing to avoid putting people in jail and appointing them with the worst social stigmatism possible for reading a book.

My proposition is furthered by the fact that the effectiveness of the provisions is not impacted by reading in a requirement that making or accessing child pornography mustdeal with real accounts, not fictitious ones. This reading should protect the innocent (such as the teacher who logged the complaint) from being charged with accessing child pornography while simultaneously holding the morally culpable liable for their actions.

[6] *CCC, supra* note 1 at s.163.1(4.1)(a)
[7] *CCC, supra* note 1 at s.163.1(4.1)(b)