Criminal Law

Child porn law sometimes produces perverse results

By Jacob Stilman

The child pornography sections of the Criminal Code were enacted to protect against the horrific exploitation of children. The statutory scheme in s. 163.1 of the Criminal Code criminalizes the production, possession, and distribution of sexual imagery of children (statutorily defined as being under the age of 18). Few offences under the Criminal Code attract the degree of public abhorrence and denunciation as do these provisions.

Child pornography producers and collectors are subject to harsh mandatory minimum penalties, and those convicted will frequently receive sentences well above the statutory minimum. Indeed, the graphic and disturbing imagery which is typical in child pornography cases, which may depict toddlers and even infants being raped, understandably elicits some of the most visceral reactions from the public, law enforcement officers, and the judiciary.

In short, it is hard to imagine a category of offenders who attract greater moral opprobrium than “kiddie pornographers.”

With this in mind, the recent case in Victoria, wherein a teenage girl was convicted of child pornography distribution for "sexting" photos of her boyfriend's ex, is highly troubling. The accused posted nude pictures of her boyfriend’s ex-girlfriend, as well as sexual texts, in an apparent effort to embarrass and harass her. While the conduct of the accused teen was certainly deserving of some form of criminal sanction, the resort by the Crown to the child pornography provisions is misguided and amounts to an abuse of process.

While the images depicting the nude underage girl would technically qualify as “child porn,” the decision to prosecute under these provisions ignores the context in which this act occurred. Simply put, the legislative intent of Parliament could not have been to have these laws attached to this sort of conduct. Context, while difficult to define statutorily, ought to have been taken into account before a blind adherence to the letter of the law was engaged by the prosecution.

The context of this case, and the intent of the youth offender, was surely not to post graphic sexual images to satisfy the prurient tastes of her audience for underage nude imagery. Given that the offender and the target would have been approximately the same age, it is doubtful that the offender ever turned her mind to the fact that technically she was circulating materials which satisfied the legal definition of child porn. By contrast, an adult individual who collects or circulates graphic imagery of child sexual abuse certainly would appreciate the illicit quality of the material. There is a clear qualitative distinction between the two situations.

Had the prosecution given appropriate consideration to the context of this offence, and recognized the obvious motives of the accused, a more sensible approach and a more appropriate charge could have been established. A charge under the criminal harassment provisions, or the offence of threatening, would have been sufficient to respond to this situation. The fact of the circulation of humiliating images should have been dealt with as a severely aggravating factor on sentence, but ought not to have attracted this particular charge in the first place.

Faced with the blunt instrument that is our Criminal Code, it is easy to see how the Youth Court judge in this case had little option but to convict, given that the offending conduct would appear to have satisfied the legal definition for the offence.

Nevertheless, as this case clearly demonstrates, sometimes a strict adherence to the law produces a perverse result.