

**TECHNOLOGICALLY-FACILITATED VIOLENCE AGAINST WOMEN:  
INVITATION TO SEXUAL TOUCHING CASE LAW**

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## A. OFFENCE ELEMENTS

### Invitation to sexual touching

s 152 Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of 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 90 days.

## **B. SELECTED CASE LAW**

### **I. ALBERTA**

#### **i. 2013 ABQB 322**

In 2013 ABQB 322, Mr. S was charged with a number of sexual offences against his daughter over a period of years. In one incident, shortly before the victim turned 15, S learned that his daughter was sending nude photographs of herself to online contacts. S then demanded that his daughter send him the nude photos. S was charged with making, possessing and accessing child pornography in relation to these photos.

At trial, S claimed that his daughter fabricated stories and set him up by placing pornographic images of herself on his cell phones and in his online album. He argued that she did this because he had cut off her phone use. As the Court noted, “As [the victim] had very few friends at school her phone was her only connection to the outside world, and she relied on it for the ability to phone, text, gain access to the internet, Hotmail, Facebook, and online friends. [She] had her phone with her at all times, and considered it her lifeline.”<sup>1</sup> Photos of S’s daughter, which met the definition of child pornography under the Criminal Code, were found on S’s phone and the Court rejected his claims that he was unaware of the photos.

S was ultimately found guilty of historic sexual assaults, making, accessing and possessing child pornography, but not guilty of sexual exploitation in relation to one specific incident. The decision on sentencing for this case has not been located.

#### **ii. 2011 ABPC 9**

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<sup>1</sup> 2013 ABQB 322 at 38.

In 2011 ABPC 9, DDM was found not guilty of offences relating to his 13-year-old stepdaughter. He took photos of her in her mother's lingerie. She sent these photos to boys in her school, claiming that she wanted to be popular. Noting that the victim's cognitive difficulties posed problems for her ability to retain and communicate evidence, the Court found that credibility was a key issue. The Court noted that the victim's credibility "must be considered in relation to the evidence presented. Her disclosure arose when she and her mother wanted the accused, her stepfather, out of their residence. Further, her evidence is in conflict with other evidence."<sup>2</sup> The Court ultimately held that the Crown did not discharge its burden of proof and accordingly found DDM not guilty.

## II. BRITISH COLUMBIA

### i. 2009 BCPC 401

In 2009 BCPC 401 Mr. B pleaded guilty to sexual interference, obstruction of justice and sexual assault against a 14-year-old girl. This case involved the social networking site Nexopia. The victim had a profile on Nexopia, and listed her age as 16. Mr. B was friends with the victim and had previously dated her sister's friend. The victim had recently lost both of her parents and lived in foster care.

Mr. B was persistent in his efforts to get the girl to have sex with him. He raped her and later tried to convince her to drop the charges. He also raped another 17-year-old girl while she was passed out. Mr. B claimed that he thought his 14-year-old victim was 16.

Crown counsel sought 3.5 years in prison, while defence sought 2 years with 3-years probation. The Court noted that B had substance abuse issues and a criminal history. B was ultimately sentenced to 12 months imprisonment for sexual touching and 36 months imprisonment for sexual

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<sup>2</sup> 2011 ABPC 9 at 199.

assault, along with prohibitions on possession of firearms and attending places where persons under 16 are present, an order to provide a DNA sample, and an order to comply with the Sexual Offender Information Registry Act.

### III. MANITOBA

#### i. 2014 MBPC 63

In 2014 MBPC 63, two 17-year-old twin brothers NG and FG used social media to bully and sexually exploit a 14-year-old girl. NG and FG pleaded guilty to invitation to sexual touching, possession of child pornography, distribution of child pornography, and transmission of sexually explicit material to a child.

An 18-year-old man, ZM, initially coerced the victim into taking nude photographs of herself. ZM communicated with the victim over social media and threatened to “do something to her” if she did not comply with his demands. After the victim sent ZM a photo of her breasts, ZM threatened to distribute the photographs if she did not send him more. She complied, sending photographs of her genitals and breasts. ZM then told NG and FG, the accused twins, about how he had been able to extort photos from the victim online. The twins began communicating with the victim, and demanded that she also send them explicit images. When the victim eventually sent photographs of herself, FG and NG distributed those photos to people in her community, including her classmates. The photographs showed her face, as well as her genitals and breasts.

Although the victim did not file a victim impact statement, her mother filed a statement on behalf of the family. This statement indicated that the victim stopped eating, grooming, and sleeping as a result of the offences.

At trial, the Court recognised that the offenders’ actions were violent and had caused the victim bodily harm:

The psychological damage to the victim is long-term and profound. Her reputation in the community has been damaged and she has been ridiculed at school. Given the difficulty in controlling the use of images, once they enter cyberspace, the harmful impact on the victim may well be long-term.<sup>3</sup>

Accordingly, the trial judge determined that a custodial sentence was available and sentenced the brothers to 16 months of secure custody, followed by 8 months of community supervision and a year of probation. The Manitoba Court of Appeal varied this sentence to 12 months of secure custody, 6 months of community supervision, and 6 months of probation to bring the sentence in line with the 2-year maximum sentence available under the Youth Criminal Justice Act. The Court of Appeal unanimously held:

[...] the moral culpability of the appellants in this case is on the high end of that spectrum. First, there was a significant age difference between the appellants and the victim. Second, the conduct engaged in by the appellants was not childhood exploration. It was aggressive, relentless, sexually abusive and humiliating. The images were extracted from the victim in a systematic manner by the appellants causing her to virtually break down. Third, the images included the victim's face, breasts and vagina. They were distributed by way of social media to her community. Fourth, as can be expected, the victim and her family continue to suffer the effects from the commission of these offences.<sup>4</sup>

#### IV. ONTARIO

##### i. 2010 ONJC 600

In 2010 ONCJ 600,<sup>5</sup> MS pleaded guilty to 13 counts of assault, sexual assault, invitation to sexual touching, possession of child pornography and producing child pornography. Among other things, MS filmed himself conducting multiple assaults and sexual assaults against women and girls over many years, while they slept.

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<sup>3</sup> 2014 MBPC 63 at 41.

<sup>4</sup> 2014 MBPC 63 at 37.

<sup>5</sup> Child pornography offences; sexual assault; invitation to sexual touching

After reviewing the evidence, the Court sentenced MS to 12-years imprisonment for one particularly violent count (brought down to three years because of 1:2 time spent in pre-trial custody) and 3-years imprisonment for the other counts to be served concurrently (brought down to 3 days because of pre-trial considerations). MS was also designated a long-term offender (LTO) and received a 10-year LTO order with recommendations for parole conditions.

## V. QUEBEC

### i. 2016 QCCQ 6167

In 2016 QCCQ 6167, DG pleaded guilty and was convicted of incest, sexual abuse, and the non-consensual distribution of an intimate image of his 8-year-old daughter while he had custody of her on the weekends. He also admitted to taking and sharing an intimate photograph of a woman, Y. Following a joint submission by counsel, the Court sentenced DG to 14-years imprisonment for the offences against his daughter and 6-months for the intimate images offence against Y. The ancillary orders made against DG including requirements to provide a DNA sample and to comply with the Sex Offender Registry, and prohibitions on direct or indirect contact with the victims and possession of firearms.