

**TECHNOLOGICALLY-FACILITATED VIOLENCE AGAINST WOMEN:
MAKING SEXUALLY EXPLICIT MATERIAL AVAILABLE TO A CHILD**

A. OFFENCE ELEMENTS	2
B. SELECTED CASE LAW	4
I. <u>MANITOBA</u>	4
i. 2014 MBPC 63	4

A. OFFENCE ELEMENTS

Making sexually explicit material available to a child

s 171.1 (1) Every person commits an offence who transmits, makes available, distributes or sells sexually explicit material to

(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 212(1), (2), (2.1) or (4) with respect to that person;

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or

(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years and to a minimum punishment of imprisonment for a term of 90 days; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months and to a minimum punishment of imprisonment for a term of 30 days.

Presumption

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of 18, 16 or 14 years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

No defence

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least 18, 16 or 14 years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

Definition of "sexually explicit material"

(5) In subsection (1), "sexually explicit material" means material that is not child pornography, as defined in subsection 163.1(1), and that is

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a person's genital organs or anal region or, if the person is female, her breasts;

(b) written material whose dominant characteristic is the description, for a sexual purpose, of explicit sexual activity with a person; or

(c) an audio recording whose dominant characteristic is the description, presentation or representation, for a sexual purpose, of explicit sexual activity with a person.

B. SELECTED CASE LAW

I. 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 pled 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.¹

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.²

¹ 2014 MBPC 63 at 41.

² 2014 MBPC 63 at 37.