TECHNOLOGICALLY-FACILITATED VIOLENCE:
LURING A CHILD CASE LAW

A. OFFENCE ELEMENTS

Luring a child

172.1(1) Every person commits an offence who, by a means of telecommunication, communicates with

(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 with respect to that person under subsection 153(1), section 155, 163.1, 170, 171 or 279.011 or subsection 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2);

(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.

B. SELECTED CASE LAW

I. SUPREME COURT OF CANADA

i. 2019 SCC 22

In **2019 SCC 22**, Mr M was convicted of child luring. He was communicating with person who he thought was a 14-year-old girl but was actually a police officer posing as the girl online. The police officer in this case made a fake email and Facebook account posing as the girl. The officer did not get prior judicial authorization to conduct the investigation. The officer did not make any friend requests using the fake account, but received one from Mr. M, who said he was a 23 years old man, but was actually 32 years old. Mr. M sent several messages, including a photo of his genitals to the girl. He also instructed her to delete the messages and to keep their relationship secret. The officer had used a program called "Snagit" to screen capture a copy of the communication with Mr. M in real-time. Mr. M made arrangements to meet the girl at a park, where he was arrested.

The trial judge found that the police had intercepted a private communication that required prior judicial authorization, which they did not have, and that the use of "Snagit" program was a search or seizure, which violated Mr. M's *Charter* rights to be free from unreasonable search or seizure. However, despite the violation, the judge admitted the evidence and convicted Mr. M.

The Court of Appeal found that the use of the "Snagit" program was similar to printing the emails out and held that it should not be considered an interception. It also found that because Mr. M was communicating with someone he did not know, he had no reasonable expectation of privacy. The Court upheld Mr. M's conviction. His sentence of 14 months' imprisonment was affirmed. Additional orders included registration on the sex offender list, and a DNA sample order.

The Supreme Court dismissed Mr. M's appeal in a plurality, affirming Mr. M's guilt (Brown, Abella and Gascon; Karakatsanis and Wagner; Moldaver; and Martin gave four concurring judgements). The majority found that the investigation did not amount to a search or seizure and that the police had not intercepted a private communication needing prior judicial authorization.

Brown, Abella and Gascon

Supreme Court Justices Brown, Abella and Gascon found that Mr. M's *Charter* rights were not engaged when the officer recorded his electronic communications. The majority decision found that although Mr. M had a subjective privacy expectation in the conversation, Mr. M did not have an objectively reasonable expectation of privacy because he was an adult talking to a child who was a stranger to him. Because of the police investigation (i.e. making a fake account of a child), it was clear that the child was a stranger to Mr. M. The Court found that a relationship between an adult and child who are strangers to each other is fundamentally different than other relationships. It noted that relationships where the adult knows the child "are worthy" of protections against unreasonable search and seizure, such as those with "family, friends, processionals, or religious advisors"[1], but stranger relationships were not.

The majority held that the police did not require prior judicial authorization before recording the communication in this case because they knew that the relationship was between an adult who was a stranger to the child, because the child was not a real child. Mr. M did not have a reasonable expectation of privacy. The Court confirmed his guilt.

[1] 2019 SCC 22 at para 24.

Karakatsanis and Wagner

Supreme Court Justices Karakatsanis and Wagner held that when an undercover police officer communicates with an individual in writing there is no search and seizure. They stated that a person cannot expect their communication to be kept private from the person they are talking to, finding it similar to a person conversing with an undercover police officer face to face, where police do not need to get prior judicial authorization. The police were directly involved in the conversation and Mr. M intended to communicate with the person on the other end of the communication.

They stated:

> […] while the Internet empowers individuals to exchange much socially valuable information, it also creates more opportunities to commit crimes. […] Undercover police operations, using the anonymity of the Internet, allow police officers to proactively prevent sexual predators from preying on children.[2]

In response to concerns that the police could impersonate a variety of types of people in police investigations who would be strangers to children, the Justices stated, "certain undercover techniques, such as posing as a prison chaplain or a legal aid lawyer to elicit incriminating evidence, go too far and must be condemned by courts *because they threaten the integrity of the justice system itself*."[3]

They also held that the screenshots of the written conversation did not engage Mr. M's *Charter* rights, because a record of the conversation already existed in email and Facebook. Judicial preauthorization was not required and Mr. M's *Charter* rights were not violated. They would also dismiss the appeal.

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[2] 2019 SCC 22 at paras 59-60.
[3] 2019 SCC 22 at para 62.

Moldaver

Justice Moldaver agreed with the judgements written by Justices Karatsanis and Brown.

Martin

Justice Martin came to a different conclusion and decided that Mr. M's *Charter* rights were breached. Justice Martin held that it was objectionably reasonable for Mr. M to expect his conversation would not be secretly recorded by the police without prior judicial authorization. She also found that the police's use of the screen capture software was considered an interception that required authorization.

Justice Martin stated:

> The sexual exploitation of a minor is an abhorrent act that Canadian society, including this Court, strongly denounces. In an online context, adults who prey on children and youth for a sexual purpose can gain the trust of these young people through anonymous or falsified identities, and can reach into their homes more easily than ever before, from anywhere in the world. Children and youth are therefore particularly vulnerable on the internet and require protection.
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> […]
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> while the state should be empowered to prevent sexual predators from targeting children and youth online, members of society must not, and need not, be subjected to the unregulated state surveillance of their private electronic communications in order for the state to achieve these aims.[4]

Justice Martin stated that online conversations are not like in person conversations, stating: "While electronic communications possess the characteristics of informality and immediacy that define oral conversations, they also possess the characteristics of permanence, evidentiary

[4] 2019 SCC 22 at paras 69, 73.

reliability, and transmissibility that define electronic recordings."[5] She held that this was particularly relevant when the state was the recipient of the communication, stating "an individual engaged in a private, electronic conversation retains the reasonable expectation that the state will only have access to a permanent electronic recording of that private communication if the state agent has sought judicial authorization."[6] She stated the just because some relationships between an adult and a child stranger are ones that society would not wish to shield from the scrutiny of the state this should not allow for well-established privacy principles to be set aside. She held that relationships should not be part of the privacy analysis and should not carve out "privacy-free zones".7

Justice Martin stated that these types of investigations should allowed with judicial authorization but should be regulated by Parliament. She also expressed concern over the privacy rights of the child in the image that the police officer used to impersonate a 14 year old girl without that child's permission.

She found that Mr. M's *Charter* rights had been breached. However, Justice Martin would still have admitted the evidence, despite the *Charter* violation.

Also see: [2017] SCCA No 125 (Leave to appeal); 2017 NLSCA 12 (Appeal); [2015] 364 Nfld & PEIR 237 (NLPC) (Sentencing); [2014] 359 Nfld & PEIR 336 (NLPC) (Trial); [2014] 346 Nfld & PEIR 102 (NLPC) (Evidence ruling); [2013] 343 Nfld & PEIR 128 (NLPC) (*Charter* s 8).

ii. 2019 SCC 15

In **2019 SCC 15**, Mr. M, a 67-year-old man, was convicted of child luring after a police officer posing as a 14-year-old girl, Ms. M, responded to an ad Mr. M had posted on the "casual en-

[5] 2019 SCC 22 at para 91.
[6] 2019 SCC 22 at para 101.
[7] 2019 SCC 22 at para 130.

counters" section on "Craigslist" asking for a "daddy/daughter" sexual relationship. They engaged in sexual conversations where Mr. M counselled Ms. M to touch herself sexually, watch pornography, and suggested that she skip school so they could meet for sexual activity. At trial, Mr. M claimed he thought the was engaging in role playing with an adult woman, in part, because the rules of the website required people to be over 18 years old to use that section of the website.

Mr. M challenged the constitutionality of three subsections of the luring provision.

First, the luring provision presumes that when the person the accused is communicating with represents him or herself as underage, that the accused actually believes the person he or she is talking to is underage, unless there is evidence to show otherwise. Mr. M argued that this violated his right to be presumed innocent. Both the trial judge and the Court of Appeal found this to be unconstitutional.

Second, the luring provision does not allow for the accused to raise the defence that he or she thought the person was of legal age, unless the accused took reasonable steps to determine that person's age. Mr. M argued that this violates his rights to be presumed innocent and impacted his rights to life, liberty and security of a person. Both the trial judge and the Court of Appeal found this to be constitutional and convicted Mr. M for not taking reasonable steps to ascertain Ms. M's age.

Third, the luring provision contains a mandatory minimum sentence of one year if the Crown proceeds by way of indictment, which Mr. M argued violated his right not to be subject to cruel and unusual punishment. Both the trial judge and the Court of Appeal found that this was grossly disproportionate and violated Mr. M's constitutional rights.

At the Supreme Court, the Crown appealed the Court of Appeal's conclusion on the presumption of belief of age and mandatory minimums. Mr. M cross appealed the Court of Appeal's decision on the expectation to take reasonable steps to ascertain the complainant's age.

Discussing the luring offence, the majority stated:

> In today's information age, Canadian life is increasingly playing out in the digital realm. The Internet, social media, and sophisticated mobile devices — now fixtures in our everyday lives — have transformed the way in which we live, work, and interact with one another. This opens up a world of new opportunities and allows us to connect instantly with friends and family across the world, whenever and wherever we want, and at relatively little cost.
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> But the Internet revolution — and the Internet itself — has a darker side. Increasingly, sexual predators are using electronic means to prey upon one of the most vulnerable groups within Canadian society: our children. Access to the Internet among Canadian children is now almost universal, and many are continuously connected, whether through a computer, a smartphone, or another device. This has led to the new and distressing phenomenon of predators lurking in cyberspace, cloaked in anonymity, using online communications as a tool for meeting and grooming children with a view to sexually exploiting them.[8]

On the first issue, the majority of the Supreme Court held that the presumption of belief of the complainant's age was unconstitutional and was of no force and effect. It violated the accused's right to be presumed innocent. The Court stated that even if a complainant represented him or herself as a particular age online, a trial judge could be left with a reasonable doubt about whether the accused actually thought the person was underage, noting that "deception and deliberate misrepresentations are commonplace on the Internet. [...] On the Internet, it may simply be expected that true personal identities are concealed, even when there is no evidence suggesting a misrepresentation in the particular case."9 It found that the luring provision could operate effectively without this subsection, as a judge could "draw a logical, common sense inference that the accused believed that representation"[10] based on the context and content of the communication without the need for the presumption dictated in this subsection.

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[8] 2019 SCC 15 paras 1-2.
[9] 2019 SCC 15 at para 58-59.
[10] 2019 SCC 15 at para 69.

On the second issue, the majority of the Supreme Court held that the expectation that the accused take reasonable steps to determine the age of the complainant if he or she wishes to raise the defence that accused thought the complainant was of age was constitutional and did not violate the accused's right to life, liberty and the security of the person. However, it found that the lower courts did not properly outline what the requirements would determine whether a person had taken reasonable steps. Therefore, a new trial should be ordered for Mr. M.

The defense was outlined as follows:

> (1) The trial judge must determine whether there is an "air of reality" that that the accused took reasonable steps to ascertain the other person's age. This can be done by providing evidence that supports findings that:
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> a. the accused took steps to ascertain the other person's age;
> b. those steps were reasonable; *and*
> c. the accused honestly believed the other person was of legal age.
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> (2) if the accused discharges his or her evidentiary burden, the defence is left with the trier of fact, and the Crown then bears the persuasive burden of disproving the defence beyond a reasonable doubt; and
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> (3) regardless of whether the defence can be considered, the trier of fact must ultimately determine whether the Crown has proven beyond a reasonable doubt that the accused believed the other person was underage.
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> Thus, whether the accused is convicted or acquitted does not hinge on whether the accused took reasonable steps; it hinges on whether the Crown can prove culpable belief beyond a reasonable doubt. Where an accused has failed to take reasonable steps, the trial judge must instruct the jury that the accused's evidence that he or she believed the other person was of legal age cannot be considered in determining whether the Crown has proven its case beyond a reasonable doubt. Where reasonable steps have not been taken, an accused's evidence that he or she believed the other person was of legal age is without any value, and the jury cannot rely on that evidence when assessing the strength of the Crown's case. In that event, the sole question the jury must consider is whether — on the whole of the evidence, includ-

> ing the evidence relating to the accused's failure to take reasonable steps — the Crown has established, beyond a reasonable doubt, that the accused believed the other person was underage.[11]

The Crown must prove the accused's belief in the complainant's age, or that the accused was wilfully blind to that age. Negligence or recklessness to the persons age will not suffice. The accused cannot raise the defence of believing the person was of legal age unless he or she took reasonable steps to ascertain that age. The reasonable steps will be the steps a reasonable person under the circumstances of the accused would take to ascertain the other person's age. This is an ongoing expectation but the accused is not expected to exhaust every reasonable step in order to make the defence.

On the third issue, the majority of the Supreme Court held because the conviction was set aside and a new trial was ordered that the constitutionality of the mandatory minimum sentence was to be remitted to the trial judge if Mr. M was convicted a second time.

Justice Karakatsanis agreed with the majority on the first two issues, but stated that the constitutionality of the mandatory minimums should have been addressed by the court and would have found the mandatory minimum for this provision to be a cruel and unusual punishment that violates the accused's *Charter* rights.

Justice Abella disagreed with the majority's finding on the Court's determination on the constitutionality of the reasonable steps provision and found that subsection should be declared unconstitutional because it "render[s] illusory the accused's ability to allege an honest but mistaken belief in age."[12] She agreed with Justice Karakatsanis' conclusion on mandatory minimums.

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[11] 2019 SCC 15 at headnote and paras 118-133.
[12] 2019 SCC 15 at para 223.

Also see: [2017] SCCA No 290 (Leave to appeal); 2017 ONCA 582 (Appeal); 2015 ONCJ 599 (Trial); 2015 ONCJ 598 (Sentence); 2014 ONCJ 774 (Charter s 8); 2014 ONCJ 673 (Charter s 7, s 11(d)).

iii. 2010 SCC 25

In **2010 SCC 25**, Mr. L, a 46-year-old man, communicated with an undercover police officer posting as a 13-year-old boy, "Mr. G", over the internet. While chatting with Mr. G, Mr. L stated that he wanted to perform oral sex on Mr. G. They arranged to meet to engage sexually and Mr. L was arrested upon arrival at the meeting place.

The question at trial was whether Mr. L indeed believed he was communicating with a person who was under 18 or not. At trial, Mr. L was acquitted because he stated he thought he was communicating with an adult because the profile listed the age of Mr. G as 18 even though Mr. G said he was 13 years old. Mr. L also argued he was reasonable in this belief that there were moderators in the public chatrooms that would remove children, however, his conversations with Mr. G occurred in a private chatroom. At the Court of appeal, the acquittal was overturned and convictions entered because Mr. L had not taken reasonable steps to ascertain Mr. G's actual age.

The Supreme Court upheld the acquittal finding that:

1) Where it has been represented to the accused that the person with whom he or she is communicating by computer (the "interlocutor") is underage, the accused is presumed to have believed that the interlocutor was in fact underage.

2) This presumption is rebuttable: It will be displaced by evidence to the contrary, which must include evidence that the accused took steps to ascertain the real age of the interlocutor. Objectively considered, the steps taken must be reasonable in the circumstances.

3) The prosecution will fail where the accused took reasonable steps to ascertain the age of his or her interlocutor and believed that the interlocutor was

not underage. In this regard, the evidential burden is on the accused but the persuasive burden is on the Crown.

4) Such evidence will at once constitute "evidence to the contrary" under s. 172.1(3) and satisfy the "reasonable steps" requirement of s. 172.1(4).

5) Where the evidential burden of the accused has been discharged, he or she must be acquitted if the trier of fact is left with a reasonable doubt whether the accused in fact believed that his or her interlocutor was not underage.

The Court stated that the luring provision was adopted by Parliament to:

> […] identify and apprehend predatory adults who, generally for illicit sexual purposes, troll the Internet to attract and entice vulnerable children and adolescents.
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> In structuring the provision as it did, Parliament recognized that the anonymity of an assumed online profile acts as both a shield for the predator and a sword for the police. As a shield, because it permits predators to mask their true identities as they pursue their nefarious intentions; as a sword (or, perhaps more accurately, as a barbed weapon of law enforcement), because it permits investigators, posing as children, to cast their lines in Internet chatrooms, where lurking predators can be expected to take the bait — as the appellant did here.[13]

If there is evidence that person the accused was communicating with was under a specified age it is assumed the person believed the person was underage unless there is evidence to the contrary. The accused must have taken reasonable steps to ascertain the age of the person.

The Supreme Court dismissed the appeal.

Also see: 2009 ABCA 359 (Appeal).

iv. 2009 SCC 56

[13] 2010 SCC 25 at paras 24-25.

In **2009 SCC 56**, Mr. L, a 32-year-old man, claimed to be a 17-year-old boy and began chatting with a 12-year-old girl, who claimed to be 13-years-old girl, on the internet. They moved from a public chatroom to a private one where the communication was sexual in nature and both parties expressed an interest in engaging with sexual activity with each other. Mr. L requested photos from the girl which she unsuccessfully tried to email. She provided Mr. L her phone number, when he called, he used sexually explicit language and said he wanted to perform oral sex on her, after which the girl hung up. The girl's older sister had answered one of the calls Mr. L made and told their father who notified the police.

At trial Mr. L was acquitted of both invitation to sexual touching and internet luring, and the Court of Appeal set aside the acquittal of luring finding the trial judge had misdirected himself as to the essential elements of the offence and ordered a new trial, it's acquittal on invitation to sexual touching was affirmed. At the Supreme Court, the appeal was dismissed and a new trial ordered, finding that the trial judge had taken an unduly restrictive construction of the luring offence and misapprehended essential elements of the offence.

Beginning its decision with the statement "[t]he Internet is an open door to knowledge, entertainment, communication — *and exploitation*,"[14] the Court stated that internet luring legislation was adopted to:

> shut that door on predatory adults who, generally for a sexual purpose, troll the Internet for vulnerable children and adolescents. Shielded by the anonymity of an assumed online name and profile, they aspire to gain the trust of their targeted victims through computer "chats" — and then to tempt or entice them into sexual activity, over the Internet or, still worse, in person.[15]

[14] 2009 SCC 56 at para 1.
[15] 2009 SCC 56 at para 2.

Mr. L admitted to the communication but claimed he did not intend on meeting with the girl for the commission of a sexual offence and did not take any action to do so. The trial judge found that a person needed to actually intend to lure the child for the sexual purpose, demonstrated by an action such as arranging a meeting, which Mr. L had not done.

The Supreme Court noted that luring is an "inchoate" offence that is meant to capture preceding behaviour meant to assist in the commission of or attempt to commit a future crime. It stated: "those who use their computers to lure children for sexual purposes often groom them online by first gaining their trust through conversations about their home life, their personal interests or other innocuous topics."[16] For child luring, it does not require that a person meet or intend to meet the person to facilitate the crime only that the communication helps bring about or makes it easier to facilitate the crime. The Court stated: "[t]his is in keeping with Parliament's objective to close the cyberspace door before the predator gets in to prey." Both sexual and non-sexual communication can contribute to luring as long as it is for the purpose of facilitating the secondary offence. This is a subjective determination.

It stated the elements of the test for subsection (c) of the luring offence were:

1) an intentional communication by computer;
2) with a person whom the accused knows or believes to be under 14 years of age;
3) for the specific purpose of facilitating the commission of a specified secondary offence.

His appeal was dismissed.

[16] 2009 SCC 56 at paras 29-30.

II. ALBERTA

i. 2016 ABQB 648

In **2016 ABQB 648**, Mr. A, a 19-year-old male, was convicted of multiple counts of possession of child pornography, luring a child, criminal harassment, uttering threats and sexual interference. He had contacted multiple children and young adults through various websites including meetme.com, tagged.com, facebook.com, KIK and Skype to engage in explicit sexual discussions with apparently underage individuals and share pornographic images, including child pornography. 39 complaints were reported to the US based, National Centre for Missing and Exploited Children. That organization found the IP address associated with those victims were associated with an account located in Canada. It passed this information on to the Canadian National Child Exploitation Coordination Centre, which is operated by the RCMP. Not all of the communication was criminal but search of Mr. A's electronic devices revealed communication with 12 underage girls, who are the complainants in this case.

During these conversations Mr. A, depending on the girl he was communicating with, expressed desires to make pornographic films with the girl, manipulated the girl by telling him he loved her, attempted with some success to arrange to meet with the girl for sexual encounters (some consensual, some non-consensual), requested sexual images, claimed to be a pedophile, discussed watching child pornography, masturbated on Skype, sent nude photos, sent child pornography, made derogatory and sexist comments about the girl, threatened rape and other forms of violence, and threatened their family members. He primarily communicated with the girls via social media sites, but also called at least one of the girls on the phone. One girl blocked him on social media and told him that she did not want further communication with him, but Mr. A switched platforms to continue the unwanted communication with the girl. Two girls threatened to call the police. Several girls explicitly told him that they were fearful of him and were very uncomfortable with his communication. He also posted racist comments about one girl's boyfriend on Facebook.

Mr. A was found guilty of multiple charges of criminal harassment, uttering threats, possessing child pornography, sexual interference, and child luring.

Mr. A brought several constitutional challenges including seeking a stay of proceeding due to his treatment in custody, and *Charter* challenges against the minimum punishments for sexual interference and corrupting children, and on the limits on credit for time served while on remand. The court held that there were some instances where Mr. A's treatment was constitutionally impermissible, but that a stay of proceedings not an appropriate remedy and the violation of his rights was addressed in sentencing instead. The constitutional challenges respecting credit for time served and minimum sentences were also dismissed.

Taking the *Charter* violation into account, Mr. A was sentenced to 12 years and three months' incarceration, and additional orders including DNA sample, registration as a sex offender, no-contact orders with the victims, 10-year limitation on his ability to work or volunteer, communicate with people under 16, limitations on his use of the internet or internet connected devices while on parole, and limitations on using the internet anonymously or with encryption.

ii. 2016 ABCA 302

In **2016 ABCA 302**, Mr. H, a 28-year-old man, had been convicted of sexual interference and luring and sentenced to two years' imprisonment. The Crown appealed his sentence.

Mr. H met a 13-year-old girl while volunteering at an Army Cadets program. He did not train her directly, but he had direct military experience and was a volunteer with the organization, which would lead some cadets to see him as a mentor. He began communicating with the girl through instant messages, text messages and emails. The communication was of a sexual nature. Mr. H requested nude photographs, and pressured the girl into sending images and engaging in sexual communication with him. He also sent the girl a photograph of his genitals. Using online communication, he was able to arrange to come to her home when her foster parent was not

home, where he had sexual intercourse with the girl. He was not aware of her exact age and did not take all reasonable steps to ascertain her age.

The girl's foster parent discovered the messages on the girl's cellphone and contacted the police. Mr. H confessed to having sexual intercourse with the girl. Her foster father noted that the girl changed her behaviour since interacting with Mr. H and has since acted inappropriately with older peers and was more willing to spend time with adult males that she does not know well.

Reports of Mr. H showed a lack of remorse for his behaviour and his concerns were to the impact to his wife and family, rather than the impact on the girl.

Mr. H received a 2-year sentence and three years' probation. Aggravating factors included "the manipulative and degrading nature of his electronic communications to the child" and pressuring the girl for nude images, and his position of authority. On appeal, the Crown argued that the court should have begun with 3-year starting point for a major sexual assault, which was noted as sexual interference involving sexual intercourse with a minor, regardless of the complainant's '*de facto* consent' as per 2016 ABCA 222. The appeal court held that the trial judge had erred in principle not because she did not begin with the 3-year starting point from 2016 ABCA 222 (which had not been released at the time of sentencing), but because the sentencing judge failed to give a sentence that reflected the serious harm of this offence and Mr. H's planning and effort to commit it. The court stated:

> [Mr. H] deliberately targeted a child victim. His deplorable conduct included verbally degrading communications, degradation caused in the victim's sending, and receipt of, pornographic photographs, and engaging her in non-consensual sexual intercourse. For most of a year, [Mr. H] contemptuously disregarded the victim's privacy rights, personhood, self-esteem, personal security, ability to trust, autonomy and confidence by engaging in a sustained attack on her emotional, psychological, and

> physical well-being. He incontestably caused her to suffer profound adverse psychological sequelae, from which actual harm the complainant had not recovered at the time of sentencing.[17]

His sentence was increased to a three years' imprisonment for sexual interference, and one year each of the two counts of child luring. His probation was set aside.

Also see: 2015 ABPC 228 (Sentencing)

iii. 2016 ABCA 222

In **2016 ABCA 222**, Mr. H, a 20-year-old man, pleaded guilty to luring and sexual interference. He met a 14-year-old girl on Facebook and Live Messenger. Mr. H convinced the girl to send topless photos and engage in sexual conversation. The two met in person and engaged in sexual activity, that the girl alleged was non-consensual. He was sentenced to 15 months' incarceration for the sexual interference and 3 months' imprisonment for luring, as well as three years' probation. The Crown appealed and the accused cross appealed. The cross appeal was dismissed.

The court discussed rape myths and the harms of sexual activity between adults and children, even when the child does consent to the activity. It found that the starting point for major sexual interference involving an adult was three years' imprisonment, and a fit sentence in this case would be two and a half years imprisonment for the sexual interference conviction, and one year for luring for a global three-and-a-half-year sentence, but did not impose the altered sentence and dismissed the appeal.

Also see: 2014 ABQB 550 (Application for judicial release pending appeal); 2014 ABCA 341 (Sentencing)

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[17] 2016 ABCA 302 at para 31.

iv. 2016 ABCA 75

In **2016 ABCA 75** the Crown appealed the sentence of the accused, Mr. V, who pleaded guilty to sexual exploitation, production of child pornography, and child luring.

Mr. V was 34 years old and married when he began a sexual relationship with a 15-year-old girl, Ms. P, who was basketball player on a team he coached. He described himself as a life coach and mentor to her. He initiated the relationship by using her contact information from the basketball team records. What began as sexual communications progressed to regular and repeated sexual touching, and Mr. V and Ms. P had sexual intercourse shortly after her 16th birthday. Regular sexual incidents occurred until Ms. P ended their relationship when she was 18.5 years old. Mr. V isolated her from her friends and family, made her break up with her boyfriend, and guilted her into the relationship.

Mr. V sent her daily, highly sexualized emails and text messages throughout their relationship and bought her a cellphone when she lost hers. At his request, she or he would take sexual images of her and once he made a video of them having sex. Mr. V's wife found one of these photos and he pushed Ms. P to lie to his wife to cover it up.

The appeal court stated:

> Misuses of the Internet allow predators […] virtual access into the homes and minds of vulnerable adolescents in a manner which precludes intervention and protection by parents or others. He used email and text messaging as a private means of communication with the goal of isolating and manipulating the complainant. This harmed her over and above the harm caused by the resulting sexual contact.[18]

The appeal was granted and the sentence changed from 3.5 years' incarceration to 5.5 years' incarceration.

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[18] 2016 ABCA 75 at para 23

v. 2015 ABCA 45

In **2015 ABCA 45**, Mr. T, a 27-year-old man, posed as a 19-year-old man online. He met a 14-year-old girl, Ms. S, in a chatroom where they could exchange messages and video chat. Their conversation was sexual and he convinced Ms. S to take her clothes off and touch herself. Ms. S later introduced Mr. T to her friend Ms. H, a 13-year-old girl. Mr. T also engaged in private sexual conversations with Ms. H, including mutual masturbation over video chat. The two arranged to meet and had sexual intercourse.

Mr. T's behaviour was reported to the police and Ms. S allowed a police officer to pose as her online and engage in conversations with Mr. T, including having Mr. T show himself on video so the officer could identify him. The police also obtained Mr. T's IP address during this time, which was then used to identify him via his internet service provider. This information was used to obtain a search warrant for Mr. T's vehicle and home. He arrived home during the search and was allowed to speak with counsel, after which Mr. T gave a statement of admission that include acknowledgement that the girls were under age. At trial he argued that his rights against unreasonable search and seizure, and his right to counsel under the *Charter* were violated, but his arguments were dismissed.

He was later convicted of multiple counts of child luring, invitation to sexual touching, sexual interference and sexual assault of a child. He committed these offences over a five-month period.

Mr. T appealed his convictions, arguing the trial judge erred in failing to find Mr. T's *Charter* rights were violated. The trial judge had made his decision before the release of *Spencer*, which held that an ISP subscriber has reasonable expectation of privacy in their identifying information related to their IP address. The court held that there was enough information without the IP information to obtain a search warrant and that even if his rights had been breached, the evidence would have been admitted either way.

In relation to Mr. T's right to counsel, Ms. C's name had been crossed off on one count of his list of charges. He asked the detective why it was, but the detective did not know and offered to allow Mr. T to speak to counsel again, which he declined. Mr. T later gave several admissions about knowing the complainants' ages. He argued that this was a violation of his right to counsel. The police must give the accused an opportunity to speak with counsel if the investigation takes on a new and more serious turn that would require legal advice. Ms. S' name had been crossed out on that charge because Mr. T had been speaking with an officer during the time period alleged on the charge. The Court of Appeal agreed with the trial judge that this change would not cause a reasonable person to seek additional legal advice as it actually lessened the jeopardy he was faced with and he was provided with an opportunity to contact counsel a second time, which he declined.

The appeal was dismissed.

Also see: 2013 ABQB 223 (Evidence).

vi. 2014 ABCA 221

In **2014 ABCA 221**, Mr. M, appealed his 11-year imprisonment sentence. He had pleaded guilty to 39 criminal charges against 21 victims between the ages of 11 and 16 which the court described as "cyberbullying and online sexual exploitation".19 Charges included multiple counts of internet luring, extortion, child pornography offences, fraud and unauthorized use of computer with intent to commit mischief in relation to data. While committing his offences over roughly five years, Mr. M worked as a security guard.

Mr. M used Facebook and Nexopia to contact children and request nude photographs and sexual performances on webcam. He also communicated with children—the majority of whom

[19] 2014 ABCA 221 at para 2.

were boys and girls between the ages of 11 and 16—using MSN Messenger and through text messages. If his victims refused to send him nude photographs, Mr. M would use information he had learned about the children in past conversations to hack into their email and social media accounts (for example, by asking questions related to common password reset security questions such as pet names and birthdays). On more than one occasion, Mr. M impersonated his child victims in order to solicit nude photographs from their friends. In other instances, after hijacking his victims' online accounts, he told children they could only regain access to their accounts if they sent him nude photographs. When one child sent Mr. M photos of her in her underwear, he threatened to distribute the photos unless she sent him a fully nude photograph. Mr. M also distributed photos of a naked boy on Tinypic.com. He also manipulated photos to make it appear as though some of the children were naked in the photos.

At sentencing, the Court noted that Mr. M's actions were deliberate, persistent, and aggressive. The offences were also sexually motivated, and the Court found that they were "calculated to intimidate, manipulate and psychologically and socially harm the vulnerable child and youthful victims."[20] The only mitigating factors on sentencing were the facts that Mr. M pled guilty to all charges and had cooperated with police.

The Court considered some of Mr. M's conduct "cyberbullying," and cited *AB v Bragg Communications* **2012 SCC 46** to describe the harm that cyberbullying can do to children. The Court noted that "[Mr. M's] use of the internet, to commit his numerous sexually based criminal offences involving children and young adults, have elements of disturbing online sexual harassment - an adult criminally cyberbullying and cyberstalking, calculated to randomly choose youthful victims to emotionally harass, threaten, intimidate and manipulate in furtherance of his criminal objectives."[21] Mr. M was sentenced to 11-years imprisonment, along with several

[20] 2013 ABPC 116 at para 34.
[21] 2013 ABPC 116 at para 62.

ancillary orders including 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. His appeal of this sentence was dismissed, with the court stating:

> […] We know better now than we did then. We have come to understand the full magnitude of the impact such crimes have on children and that some have even resorted to suicide to find relief from online tormentors. In fact, one of the victims here reported having thoughts of suicide to escape the appellant. This and the other victim impact statements provided in this case are poignant reminders of the trauma and suffering caused by these crimes.
>
> Society cannot tolerate such offences and we are determined to do what we can to protect children from cyberbullying and exploitation. In cases such as that before us, we must resort to imprisonment, emphasizing the sentencing objectives of protection, punishment and deterrence.[22]

Also see: 2013 ABPC 116 (Sentencing).

vii. 2014 ABCA 409

In **2014 ABCA 409**, the Court of Appeal found the one-year sentence imposed by the trial judge was unfit. The trial judge had imposed concurrent sentences for three counts of luring that occurred over two separate series of communication that occurred over 18 months. Mr. M, a 37-year-old man, had been communicating with two individuals who he believed to be a 15-year-old and a 12-year-old girl living in the United States, but were actually police officers posting as the girls. He engaged in sexually explicit communication over text and sent both girls images of his genitals via webcam, including images of him masturbating. He pleaded guilty to the charges. The Court of appeal changed the sentence to a two years' incarceration and maintained the three-year probation period.

[22] 2014 ABCA 221 at paras 17-18.

viii. 2013 ABCA 112

In **2013 ABCA 112**, Mr. C was charged with multiple counts of luring, two of sexual assault, sexual interference, one of abduction, possessing child pornography and making child pornography. 10 of the convictions related to two teenagers. Ms. P and Ms. C. Mr. C had met Ms. P when she was 12 years old and Ms. C when she was 13 years old. Mr. C told Ms. P he was 23 years old. Mr. C would communicate with the two girls through Nexopia, and text messages. He later met them in person and had sexual interactions with them. At one point, he drove Ms. P to his home in another town to have sexual encounters with her. He used a Blackberry to take multiple nude photos and videos of Ms. C, which he stored on his computer.

At trial, he was acquitted of one of the counts of luring and two of the sexual assault convictions. One of the luring convictions was stayed under the Kineapple principles.

His appeal was allowed for the sexual assault and interference charges related to Ms. C and to the luring of Ms. P. It was dismissed in relation to the creation and possession of child pornography, sexual assault and abduction of Ms. P.

Mr. C argued the private use defence for the child pornography offences and also argued that it was not clear in the images whether the girl was 13 or 14 years old at the time (if she was 14 years old, she could consent to the sexual activity). Ms. C's statements and testimony were unclear about her age at the time of the offence, she had contact with Mr. C for around 2.5 years during which she was both under and over 14 years old. The meta data on the photos showed they could have been taken before her 14th birthday or just after, leaving reasonable doubt as to when the two first had sexual contact. Ms. C testified that she was a willing participant in the videos and photographs, but legally could not consent to them until she was 18. As for the private use defence, the court held that although Ms. C may have been old enough to consent to the sexual activities at the time of the image, there was still an element of exploitation due to the age difference between the two and the fact that he had other child pornography on his devices. Evidence showed that some of the images were taken with the intention of pleasing

Mr. C and that he had control over the images and devices they were stored on, suggesting that there was not a mutual benefit, but a benefit for Mr. C alone.

In relation to the luring offences, Mr. C successfully argued that a Blackberry is not a computer system and thus his behaviour could not be considered luring by a computer system as required by the provision. Text messages were considered data and were the main means of communication related to the luring offences, but there was no other evidence presented that the Blackberry was a computer system nor was there evidence that the sexual offences were connected to the communication on Nexopia or MSN. The luring offence has since been amended to substitute communication via computer system to communication via telecommunication.

276 photos and 66 videos of child pornography were found on Mr. C's computer, including those of Ms. C. Some of the videos had been downloaded on Limewire and three other users had password protected accounts to access the computer. However, it was held that there was sufficient evidence that Mr. C owned and controlled the computer which amounted to possession of the images. Many of the images were in a folder under the password protected account that Mr. C had access to. The Court ruled that it was acceptable to infer that he had possession of the child pornography. The appeal on this count was dismissed.

In **2013 ABCA 223**, Mr. C's sentence was reduced to nine months to reflect the acquittals.

Also see: [2013] SCCA No 309 (Application to appeal); 2013 ABCA 223 (Appeal); 2012 ABQB 149 (Trial)

ix. 2013 ABCA 41

In **2013 ABCA 41**, the Crown appealed Mr. P's sentence of 90 days' imprisonment served intermittently for accessing child pornography and an 18 months' conditional sentence for child luring. Mr. P pleaded guilty to both offences. Mr. P, a 41-year-old man, began communicating with a 15-year-old girl, the communication continued over several months and after she turned 16 years old. He told the girl that he was 20 years old, sending her photos of his daughters 20-year-

old boyfriend claiming that they were photos of him. They would chat on webcam, but he never appeared in the video. He convinced the girl to appear naked and masturbate over the webcam, which she did around 10 times. The court stated that: "[w]hen she discovered the respondent's true identity she became anxious, depressed and continues to suffer serious psychological harm. She maintains a fear that computer images of her, and the behaviour induced by the respondent, exist, although no such images have been found."[23]

On the luring offence the court noted:

> Luring is dangerous and, as the Crown points out, serious. It involves pre-meditated conduct specifically designed to engage an underage person in a relationship with the offender, with the goal of reducing the inhibitions of the young person so that he or she will be prepared to engage in further conduct that is not only criminal but extremely harmful. Parliament has recognized that the internet has infinitely expanded the opportunity for predators to attract or ensnare children. The anonymity of the internet allows the predator to hide his or her true identity, to mask predatory behaviours through seemingly innocuous but persistent communication, and to count on the victims letting their guard down because the communication occurs in the privacy and supposed safety of their own homes. A proportionate sentence for internet luring must recognize the serious nature of this offence.[24]

The Court of Appeal found that the trial judge focused almost entirely on the potential rehabilitation of the accused, rather than the impact on the complainant. The complainant suffered serious psychological damage following the offence and engaged in self harm and self-medication. The sentence did not reflect the seriousness of the offence. The sentence was increased to 12 months' incarceration for luring and 6 months, served consecutively, for accessing child pornography, along with three years' probation.

x. 2012 ABCA 179

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[23] 2013 ABCA 41 at para 4.
[24] 2013 ABCA 41 at para 12.

In **2012 ABCA 179**, Mr. D was charged with child luring, invitation to sexual touching, and the distribution of child pornography. He was found guilty of two counts of luring and not guilty of one count of distributing child pornography.

Mr. D sent sexual messages to children in order to facilitate sexual activity, although he claimed it was sent as a joke, which the trial judge found "absurd", "preposterous" and "ridiculous". Mr. D appealed the decision, challenging the trial judge's finding of credibility and application in assessing whether Mr. D had the requisite intent required to be found guilty, due to his intellectual limitations. The appeal court found that the trial judge had confused capacity with intent and allowed the appeal.

xi. 2011 ABPC 354

In **2011 ABPC 354**, Mr. M, a 26-year-old man, pleaded guilty to 16 counts of internet luring, sexual interference, invitation to sexual touching, extortion, counselling individuals to commit sexual interference, and possessing, accessing, making, and distributing child pornography. Over a 16-month period Mr. M would meet prepubescent and teen girls on the internet and ask them to send videos and pictures of themselves to him, either nude or engaging in sexual activity. He tried to convince them to have unprotected sex with him so he could get them pregnant. There was evidence that he had interacted with over 300 girls during that time period, but the police could only identify nine of them. The girls that were identified were between the ages of 10-15 years old. His conversations included sexually graphic and violent language. Two of the girls he communicated with he convinced to have unprotected sex with him. He also asked the girls he chatted with online to find girls as young as 7-years-old, so he could drug them and have sex with them. If he received nude or sexual pictures, he would threaten to distribute the pictures to the girl's parents unless they sent more pictures of themselves or other girls, or engaged in sexual activity with him.

Aggravating factors included the girls young age (10-15 years old), the length of the time the offences occurred (over a 16-month period), the level of deliberation and persistence, the dis-

regard for the impacts on the victims psychological and sexual integrity, his attempts to access even younger girls, his diagnosis as a pedophile and a paraphile with a high risk of re-offending, the unprotected sexual assaults of the two girls, and the child pornography in his possession related to his interests in prepubescent girls were aggravating factors.

He was sentenced to a 10-year period of incarceration, as well as ancillary orders to provide a DNA sample, be registered as a sex offender for life, and a prohibition on being near young people or places with young people.

xii. 2013 ABPC 116

In **2013 ABPC 116**, Mr. M pleaded guilty to 39 criminal charges against 21 victims. Charges included multiple counts of internet luring, extortion, child pornography offences, fraud and unauthorized use of computer with intent to commit mischief in relation to data. While committing his offences over roughly five years, M worked as a security guard.

M used Facebook and Nexopia to contact children and request nude photographs and sexual performances on webcam. He also communicated with children—the majority of whom were boys and girls between the ages of 11 and 16—using MSN Messenger and through text messages. If his victims refused to send him nude photographs, M would use information he had learned about the children in past conversations to hack into their email and social media accounts (for example, by asking questions related to common password reset security questions such as pet names and birthdays). On more than one occasion, M impersonated his child victims in order to solicit nude photographs from their friends. In other instances, after hijacking his victims' online accounts, he told children they could only regain access to their accounts if they sent him nude photographs. When one child sent M photos of her in her underwear, he threatened to distribute the photos unless she sent him a fully nude photograph. M also distributed photos of a naked boy on Tinypic.com.

At sentencing, the Court noted that M's actions were deliberate, persistent, and aggressive. The offences were also sexually motivated, and the Court found that they were "calculated to intimidate, manipulate and psychologically and socially harm the vulnerable child and youthful victims." The only mitigating factors on sentencing were the facts that M pleaded guilty to all charges and had cooperated with police.

The Court considered some of M's conduct "cyberbullying," and cited *AB v Bragg Communications* **2012 SCC 46** to describe the harm that cyberbullying can do to children. The Court noted that "[M's] use of the internet, to commit his numerous sexually based criminal offences involving children and young adults, have elements of disturbing online sexual harassment - an adult criminally cyberbullying and cyberstalking, calculated to randomly choose youthful victims to emotionally harass, threaten, intimidate and manipulate in furtherance of his criminal objectives." M was sentenced to 11-years imprisonment, along with several ancillary orders including 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.

xiii. 2010 ABCA 157

In **2010 ABCA 157**, the Crown sought leave to appeal Mr. H's sentence of two years less a day and two years' probation. Mr. H had pleaded guilty to four counts of luring a child and four counts of counselling the children he lured to make child pornography. While in his mid-twenties, Mr. H began online relationships with four girls aged 14 and 15 that he met on social networking sites. He would speak with the girl for long periods of time and eventually convinced them to appear naked and masturbate in front of a web camera or to send him similar types of photos. He told the girls he had deleted some of the photos when he did not, used the images to extort more images from one of the girls, and used the two of the girls' nude images as his profile photo, which they had to ask him to take down. His behaviour lasted over a period of about three years.

He was caught when he tried to engage with a fifth girl, whose mother reported him to the police. Upon arrest, the police found 35 folders labelled with female names, some contained web camera images, others included child pornography downloaded from the internet.

The court held that the trial judge had given an unfit sentence considering the highly aggravated factors of the case, and had also underemphasized the severity of Mr. H's actions, but dismissed the Crown's leave to appeal the sentence because Mr. H was doing well in his sexual offender programming at his current institution. It stated that Mr. H would be best served to continue his rehabilitation in the program and additional programming once released on probation.

xiv. 2009 ABCA 74

In **2009 ABCA 74**, Mr. J appealed his 15 months' sentence for possessing child pornography and child luring, arguing he should have received a conditional sentence. Over a four to five-month period, he made over 5,000 internet communications with teenage girls, requesting sex in exchange for alcohol and money. His accounts were closed by moderators for his abusive behaviour, but Mr. J would open new accounts using a new name and continue his problematic behaviour. He had 260 photos and 24 movies consisting of child pornography in his possession. His appeal was dismissed.

xv. 2009 ABPC 45

In **2009 ABPC 45**, Mr. A pleaded guilty to multiple charges of breaching a recognizance and luring. Mr. A was under recognizance requiring him not to use or possess a device that could access the internet or communicate with females under 18 by telephone when he communicated girls between the ages of 13-16 to meet for sexual purposes. He met the girls mainly on Nexo-

pia and also used MSN Messenger to communicate with them. Some of the girls had lied about their age and one was actually 11 years old. He had been arrested in 2006 for luring, sexual assault, sexual interference and abduction in relation to a girl he met on Nexopia. He was later acquitted on all charges but had been on recognizance with internet and phone restrictions when he communicated several girls.

One was a woman posing as a 13-year-old girl, who Mr. A tried to get her to meet him for a sexual encounter, acknowledged doing so was against the law, and told her about the other charges he was facing. She reported this to the police and a police investigation found that Mr. A had 570 contacts on his friend list. By adding a female email to Mr. A's list, Mr. A began communicating with an undercover officer who claimed to be 13 years old and engaged in sexual communications. He was arrested in the internet café where he was communicating with the officer and had several ongoing conversations and messages with girls aged 14-25 at the time. While in remand, Mr. A phoned a 14-year-old girl he had met on TeenChat.com, had her send nude images via webcam, and had unprotected sex with her. The police obtained a protection order to access Mr. A's Nexopia chats. His chat record demonstrated a pattern of contacting girls and young women aged 12-23 on the internet and some by phone for sexual purposes. He contacted over 100 girls in a one-week period. Mr. A denied that he had a problem with his sexual behaviour and did not express remorse for his actions.

The Court considered Mr. A's medical condition (a neuromuscular disorder that affects his social behaviours and intelligence) into account at sentencing, but did not find that would not alter his sentence. The Court noted that for cases of luring, it is quite rare to have a conditional sentence and sentenced Mr. A to two years less a day incarceration and three years' probation. Additional orders included a DNA order, a 20-year sexual offender registration, weapons ban, a drug and alcohol consumption ban, limitations on being near people under the age of 16, and a prohibition from using a computer to communicate with a person under 18.

xvi. 2008 ABCA 129

In **2008 ABCA 129***,* 24-year old man, Mr. I, had pleaded guilty to two counts of luring a child, one count of counselling someone to make child pornography, and two counts of extortion. Mr. I had solicited sexually explicit images and videos from 12 and 13-year-old girls he met on Nexopia, including recording live sexual video chats without the girls consent or awareness. He was persistent, threatening, and in some cases, had established long term friendships with his victims to gain their trust by making up fake accounts and striking up a friendship. He sometimes played his fake accounts off of each other to try and solicit more photos and manipulate the girl. In one case, he threatened to share the images he obtained with the victim's friend list.

The court noted the internet is being used as a tool to exploit children:

> As recognized by the courts, the internet has provided a means by which individuals like [Mr. I] may now easily solicit children to engage in online conversations. The Crown makes the point that years ago, someone like [Mr. I] would have had to approach a child, say, on a playground, face-to-face, in order to engage that child in conversation. Being propositioned by [Mr. I] in such circumstances might result in extreme alarm, as in a face-to-face context a number of factors, particularly age, would be readily apparent to the child. The internet, however, deprives these children of the protection that their senses would ordinarily provide to them. This makes them particularly vulnerable to internet predators.[25]

It further noted that girls are not to blame for their victimization and that "[t]een girls, who are subjected to peer pressure, and exposed regularly to media images glorifying a specific body image, and sexuality, are entitled to use the technology that is presented to them, the same way that they are entitled to attend school grounds and shopping malls."[26]

The judge stated that, "the circumstances of the present case are characterized by such aggravating factors that the level of abuse invokes a sentence approaching that imposed for a major

[25] 2007 ABPC 237 at para 64.
[26] 2007 ABPC 237 at para 80.

sexual assault."[27] Mr. I was sentenced to 7-years imprisonment, along with several ancillary orders including prohibitions on possession of firearms and attending places where persons under 16 are present, an order to provide a DNA sample, an order to comply with the Sexual Offender Information Registry Act, and an order to forfeit any computer equipment used in committing the offences for which he was convicted.

At his appeal the court noted:

> Each victim was told that the accused had a very compromising recorded video of her which he threatened to publish more or less to the world. (In one case, he said that it was going to be displayed all over the victim's school.) Publication does not seem to have happened in either case, and in one case probably it was technically impossible. In the other case, the offender did have such a recording and it is likely impossible to be certain that it will never happen. In both cases, this fear must have consumed the victims for some time. Even public defamation stings in a way that those who have not experienced it cannot understand; what this sort of public degradation and exposure would have done to a young teenage girl we can scarcely imagine. The mere threat of it would be almost as bad, especially when the offender was pretending to be two people while working his sinister game. This was premeditated torture, and no less so for being mental.[28]
>
> Mr. I's appeal of his sentence was dismissed and his sentence was confirmed.

xvii. 2006 ABCA 92

In **2006 ABCA 92**, Mr. D, a 37-year-old man, appealed his six-year sentence for sexual interference arguing the judge erred for using four years as starting point, not assessing aggravating/mitigating factors appropriately, and imposing a demonstrably unfit sentence. He was also sentenced to a one-year sentence for luring that he did not appeal.

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[27] 2007 ABPC 237 at para 60.
[28] 2008 ABCA 129 at para 7.

Mr. D began speaking with a 13-year-old girl in a chatroom. She had a disorder that impacted her social judgement and reasoning skills. He later arranged to meet her and have sex with her on multiple occasions. He did not use protection during some of their sexual activity and suggested that he help her get on birth control.

The court noted that adverse publicity can be a mitigating factor and discussed some of the negative publicity Mr. D faced, but found there was no evidence on the effect of the media attention on Mr. D. It found the court had erred in starting at a four-year sentence when there was no near-trust relationship, but ultimately concluded the sentence was not demonstrably unfit.

When discussing the four-year starting point for sentencing, the court noted the vulnerability of children on the internet, stating "[t]he internet has opened a new window into that environment, part of the reason why internet-originating offences are especially frightening."[29]

His appeal was dismissed.

Also see: [2004] AJ No 1503 (APBC) (sentencing).

xviii. [2005] AJ No 743 (ABCA)

In **[2005] AJ No 743 (ABPC),** Mr. C, a 39-year-old man, pleaded guilty to luring. He had communicated with a 13-year-old boy in a sexually suggestive manner and sent images of his genitals to the boy. He was sentenced to 18 months' imprisonment and two years' probation, additional orders included a 10-year registration as a sex offender, limitations on his interactions with people under the age of 16, a no contact order with the victim, a prohibition from accessing a device that could access the internet, and consent for the police to search his residence to en-

[29] 2006 ABCA 92 at 23.

force the prohibition on the computers and internet. A conditional sentence was rejected because of the difficulty of controlling Mr. C's access to the internet, as he is a truck driver on the road for long periods of time. He was considered at moderate to low risk of reoffending.

III. BRITISH COLUMBIA

i. 2018 BCSC 2286

In **2018 BSCS 2286**, Mr. S was charged with sexual interference, child luring, sexual assault and criminal harassment. Mr. S was more than 25 years older than Ms. J and was a member of her extended family. She described him as her uncle. He had been acquitted of sexually assaulting Ms. J several years earlier. Ms. J stated that Mr. S would visit her home where she lived with her grandmother and try to kiss her, undress her and touch her sexually, with some success. Mr. S denied this, which the court did not accept.

Evidence of their text messages showed the Mr. S called Ms. J "babe", referred to her "cute butt" and invited her to spend time with him. He also messaged her on Facebook and Kik, which he acknowledged was inappropriate. Ms. J mainly responded about 20 times to his approximately 100 messages with brief one-word answers. Ms. J's brother told Mr. S to stop messaging Ms. J. The court found that the purpose of the messages was to facilitate visits so he could have sexually contact with Ms. J.

Mr. S was found guilty of sexual assault, sexual interference and child luring involving Ms. J. The sexual assault charge was stayed based on the Kienapple principle. He was not found guilty of the harassment offence. It was clear that his communication made Ms. J uncomfortable, but did not amount to the level of harassment. The court noted Ms. J had blocked him, but then unblocked him, responded to some of his messages, and did not "unfriend" him on Facebook.

Mr. S was sentenced to 12 months' incarceration and 24 months' probation for the sexual interference, and 6 months' incarceration for the luring to be served consecutively. The Court found

the mandatory minimum sentence for indictable offences under the luring provision violated Mr. S' right to be free of cruel and unusual punishment. The Crown argued that although it was not saved by section one of the *Charter*, that the court should read in a 90-day minimum sentences. The court disagreed, finding that including a new mandatory minimum would be better addressed by Parliament. Additional orders included a DNA order, a lifetime registration as a sex offender, a no-contact order, and limitations on internet use and being near persons under 16 while on probation.

Also see: 2018 BCSC 2044 (Sentencing); 2016 BCSC 2468 (Trial).

ii. 2018 BCPC 187

In **2018 BCPC 187**, Mr. B, a 36-year-old man, was original charged with several counts of child luring and child pornography offences. Mr. B created written child pornography with the messages he exchanged with other people on messaging apps, including KIK, that discussed the abuse of children and "incest families". He shared that content and other child pornography with others and was an active participant in this community. He also tried to lure a child on the internet to facilitate a child pornography offence by engaged in sexual communication with a child from the Philippines, Ms. S. He convinced her to send him images of her in her bra and requested more images.

Mr. B's distribution of child pornography came to the attention of the Integrated Child Exploitation Unit. A search of devices in his home resulted in both child and bestiality pornography, including child pornography at the more harmful end of the spectrum. Mr. B admitted his interest in this type of pornography, but claimed he would never hurt or touch his young child or animals. He also admitted to accessing, possessing, and distributing child pornography. He pleaded guilty to child luring and the making, possession and distribution of child pornography.

The court noted the impact of internet luring on child victims, stating (citations removed):

> The effects of internet luring on a child victim can be catastrophic, and the seriousness of the offence is recognized in the case law, as "presenting a high risk of causing both physical and mental harm to the potential child victims". The offender's culpability is high given the planning and premeditation that is inherent in these types of offences. The case law is comprised of two types of cases: those with actual child victims, and those with apparent child victims (usually undercover officers). Where there is an actual child victim, the case law recognizes this as significantly more harmful.[30]

Mr. B expressed some remorse, but did not fully accept the harms he caused. The court noted that one day he wore a shirt stating "In my defence I was left unsupervised" to court, which didn't impact his sentence but was considered when assessing Mr. B's accountability for his actions. Aggravating factors included his significant involvement in child pornography chat communities, the type of content in the images, the amount and frequency he distributed child pornography, among others.

He was sentenced to one-year incarceration for internet luring and two years for the child pornography offences. Additional orders included registration as a sex offender, a DNA order, forfeiture of his smartphone, and a 20 year prohibition from being in contact with young people, no contact orders with several people; an internet prohibition that prohibited accessing illegal content or pornography, communication with a person under 16 through social networks, instant messaging, and chatrooms, peer to peer file sharing, and encryption software; access to the internet was only permitted with supervision and permission by the Court or for employment. Peace officers were permitted to monitor his compliance with these orders.

iii. 2018 BCPC 77

In **2018 BCPC 77**, Mr. S, a 33-year-old man, pleaded guilty to child luring. On sentencing Mr. S argued that he should not be sentenced to the minimum sentence due to his rare circumstanc-

[30] 2018 BCPC 187 at para 43.

es. Mr. S was an Indigenous drag performer and gay rights activist who had been adopted into a Caucasian family as an infant. He had experience racism and homophobia in his youth. He had a brain tumor that caused pain and interference with his life, and a significant head trauma could put him at risk, which there was concerned that may occur if he was imprisoned.

The complaint was an underaged boy with neurological and mental health issues. The two met at an event the complainant's mother organized. Mr. S then added the boy on his social media. Mr. S was aware of the boy's age. He began communicating with the boy, including sending 31 sexually explicit photos of himself, sending pornographic images, and making sexually explicit comments about sexual acts he would like to do to the boy and would like the boy to do to him. The boy sent Mr. S several photos, including a few that showed his exposed penis. The boy's mother discovered the communication and reported it to the police. A search of Mr. S' devices did not find any other victims. Mr. S did claimed the sexual photos and requests were sent to groups of contacts on social media and he did not realise the boy was on that list, which was contravened by evidence. He also minimized his behaviour.

Aggravating factors included the length of the communication (over one year), the persistence of Mr. S' grooming, the vulnerability of the complainant, the sexually graphic nature of the conversation, convincing the child to make child pornography of himself, the suggestions of meeting in person, and the significant emotional and psychological trauma the boy faced. Minimizing factors included Mr. S' experiences with bullying. His health condition was considered manageable while incarcerated.

Mr. S was sentenced to 14 months' imprisonment, and 36 months' probation. Additional orders include a non-contact order, a DNA order, a forfeiture of devices used in the offence, a 10-year limitation on being near people under the age of 16, a 10-year sexual offender registration, and a 10-year limitation from accessing pornography, content that violates the law, communicating with persons under the age of 16, and subscribing to peer to peer file sharing programs.

iv. 2017 BCPC 85

In **2017 BCPC 85**, Mr. G, a 56-year-old man, pleaded guilty to child luring, making written child pornography, and breaching his recognizance for possessing a computer. Mr. G began speaking with a 45-year-old woman online who had two children, aged 10 and 6 years old, who was looking for an "open family" on an internet channel for called "Dad-Daughter Sex". This channel was known to be frequented by people who wanted to were interested in sex with children. Mr. G was actually speaking with an undercover police officer.

Mr. G inquired about whether all four of them would all engage in sexual activity and stated that he preferred real life and not role playing. He describes sexual encounters and discussions he had with children, tells the woman that he had been convicted of a child pornography offence, and sent her a picture of a naked man. In their online conversation he offered grooming advice to the woman to facilitate sexual activity with the children. He also sent lengthy emails describing sexual encounters he had thought about having with her and her children.

Mr. G arranged to meet Ms. V and her children, and was arrested at the meeting place. A cell phone, sex toys, children's toys and a hotel key were located in his car, and his computer was seized from the hotel room. Evidence of the chatroom conversation with the woman was discovered on his cellphone and computer, as well as communications with other persons, including children. Mr. G had a history of child pornography offences for which he had been prohibited from contacting people under 14 for a period of time, including the time of his more recent offences. After his arrest for the current offence, he was released on bail and prohibited from possessing any wireless handheld devices that could access the internet and was banned from using the internet for any purpose. On several occasions he was found to have access to these types of devices, breaching his bail conditions.

Mr. G's history of sexual interest in children had not diminished from his earlier offences, but instead escalated. He re-offended after taking sex offender treatment, and he had little accountability for the impact of his actions. He was sentenced to 40.4 months' incarceration, 3 years' probation, and additional orders included a prohibition on owning or possessing any device that can access the internet unless approved by a parole officer for the purposes of com-

municating with family or for employment, limitations on being near or communicating with anyone under the age of 16, registration as a sex offender, and forfeiture of items used in the offence. The court determined that this was "one of those rare cases in which an almost total ban on Internet access is required" and prohibited him from using the internet for reasons other than counselling and employment when supervised.

v. 2016 BCPC 150

In **2016 BCPC 150,** Mr. O, a teacher and house leader at a boarding school, was found guilty on four counts of sexual exploitation and one count of child luring but acquitted on a charge of sexual assault. Mr. O, who was 34 years old, started a sexual relationship with a 17-year-old student, Ms. A, using Facebook messenger. Although he was not her teacher, he occupied a guardianship role at the boarding school and his wife was a teacher, academic coordinator and vice principal at the school Ms. A had attended. The couple were friends with her mother, who was terminally ill and a single-parent.

He communicated with her through Facebook and by text, where he made sexual advances, expressed worry and care for her and her family, discussed the consequences of them having a relationship, and planned where and when they would have sexual interactions. However, the interactions were initiated by Mr. O in his role as a school employee, she referred in the messages and in the court by his professional title (Mr. O), and they had conversations which reflected their student/teacher relationship. They had sexual intercourse on two occasions.

Based on these factors of authority and trust, the court found him guilty of sexual exploitation and luring. However, the sexual intercourse, although rough in nature, was found consensual given their Facebook conversations following the incidents and therefore not sexual assault.

vi. 2016 BCCA 154

In **2016 BCCA 154**, Mr. C appealed his convictions for internet luring and sexually touching a minor. At trial, a conditional stay of proceeding was entered for one count of sexual assault. For the convictions, Mr. C was sentenced to 15 months' imprisonment, two years' conditional propagation, and additional orders included a no-contact order, and a lifetime registration as a sex offender.

The appeal was brought on the question of whether the search of the private online messages between Mr. C and the girl, as well as the girl and her friends, violated Mr. C's *Charter* rights against unreasonable search and seizure.

Mr. C was 22 years old when he began communicating with Ms. V over Nexopia. They would chat on in private messages and later arranged to meet in person, where she told him she was 13 and he brought a bottle of liquor that she drank some of. Their online conversations became increasingly sexual and they eventually met again and had sexual intercourse. Ms. V believed that Mr. C told several of her friends that they had had sex and so she ended communication with him. He tried to contact her again under his primary account as well as another account he made up.

Some girls at school heard Ms. V talking about the sexual encounter and reported it to the school authorities who contacted the police. Ms. V provided the police with print offs of their conversation, her friend Ms. C also printed off pages of messages between Mr. C and herself that contained admissions that Mr. C had sexual intercourse with Mr. V. The police later obtained a warrant to request information from Nexopia, which was sent to Detective W. There were spelling mistakes in the names on the warrant (Ms. V and her friend Ms. P). Detective W called Nexopia to ask them to revise the search with the proper spelling, but he did not amend the warrant, which had expired by that time, and the information provided by Nexopia was not limited to the dates in question, but provided all messages sent from when their accounts were open until when they were closed.

Mr. C argued that he should have the same reasonable expectation of privacy as Ms. V and other witnesses, and should have been granted standing to challenge the search warrant under s. 8 of the *Charter*. The court framed its analysis as such:

> Before commencing the analysis, it is important to set out precisely what the Crown tendered in evidence in the trial. The Crown did not tender any messages seized directly from [Mr. C's] account. The messages were all from the accounts of E.V. and the witnesses, C.C. and H.P., who testified and who did not object to the use of their messages. The evidence tendered certainly contained messages sent by [Mr. C] to these witnesses, but were not seized from his account.
>
> […]
>
> The primary issue on appeal is whether Mr. Craig had a reasonable expectation of privacy in these messages, and therefore standing to challenge the search and seizure.[31]

The warrant was for messages contained in Mr. C's Nexopia account, as well as Ms. V and several of her friends. The court stated:

> While recognizing that electronic surveillance is a particularly serious invasion of privacy, the reasoning is of assistance in this case. Millions, if not billions, of emails and "messages" are sent and received each day all over the world. Email has become the primary method of communication. When an email is sent, one knows it can be forwarded with ease, printed and circulated, or given to the authorities by the recipient. But it does not follow, in my view, that the sender is deprived of all reasonable expectation of privacy. I will discuss this further below. To find that is the case would permit the authorities to seize emails, without prior judicial authorization, from recipients to investigate crime or simply satisfy their curiosity. In my view, the analogy between seizing emails and surreptitious recordings is valid to this extent.[32]

In order to establish his right to challenge the legality of the search, Mr. C had to establish that his rights to privacy were violated. He claimed a privacy interest in the messages he sent to Ms.

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[31] 2016 BCCA 154 at para 42-44.
[32] 2016 BCCA 154 at para 63.

V and her friends. The court held that Mr. C did have privacy interests in the messages but the police had a warrant to obtain the information in question and the failure to renew the warrant was not a serious example of police misconduct. The societal interests in adjudicating the serious charges against a young teenaged girl weighed in favour of admitting the evidence, despite the violation of Mr. C's privacy rights.

The appeal was dismissed.

Also see: 2013 BCSC 2098 (Sentencing); 2013 BCSC 1562 (Determination of factual issues prior to sentencing); 2012 BCSC 2188 (Ruling re: cross-examination topics); 2012 BCSC 2206 (Application for Adjournment); 2012 BCSC 2207 (Admissibility of Evidence).

vii. 2015 BCCA 455

In **2015 BCCA 455**, Mr. R, a 41-year-old man, had been in possession of about 5,400 images and videos of child pornography that the trial judge described as "horrific". They contained prepubescent, infant and baby girls being sexually assaulted by males. Mr. R sent emails along with lurid commentary to individuals, including an 8-year-old that he had met through her mother. He had stolen some of the girl's underwear and told other people online that he planned to groom the girl with the intention to sexually assault her. He told another person he wanted to find a woman to have a child with so he could sexually assault the child from birth and he told another man how to have sexual intercourse with his six-month-old daughter.

There were 10 complainants that Mr. R had chatted with using a false name, all of whom Mr. R believed to be under 16 years old. He requested nude photographs from them and/or asked them to touch themselves sexually. Once complainant sent him nude photos that he disseminated to others. He sent some of the complainants a video of himself masturbating.

The court stated that the child luring offence "obviously seeks to protect children from predatory adults such as the appellant who use the anonymity of the Internet to entice them into sexual activities."[33]

Mr. R appealed his four-year consecutive sentences for possession of child pornography, distribution of child pornography, and child luring, arguing that the consecutive sentences fell out of the range of sentences for similar offences. He had pleaded guilty to the offences. Orders included the forfeiture of property used to commit the crime, and 10-year limitations from being near underage people or communicating with them online. Mr. R had multiple previous related convictions out of the United Kingdom.

The Court of Appeal did not find that his sentence was excessive, the appeal was dismissed.

Also see: 2013 BCPC 279 (Sentencing).

viii. 2014 BCPC 94

In **2014 BCPC 94**, Mr. B, a 19-year-old man, was charged with sexual assault for engaging in sexual activities with Ms. K, who was 13 or 14 years old. Mr. B knew Ms. K from a cricket club. He was given a suspended sentence, and probation for 12 months. Additional orders included a no contact order with Ms. K, a DNA order, and a 10-year registration as a sex offender.

In the same judgement, Mr. S, a man in his mid-twenties, pleaded guilty for luring Ms. K when she was 13 or 14 years old. Their online conversations included exchanging intimate images and sexual conversations over Facebook. Mitigating factors included his remorse, guilty plea, apology, humiliation experienced, and lost employment, among others. The adverse publicity that Mr. S experienced was not considered a mitigating factor. He was sentenced to a 90 days condi-

[33] 2015 BCCA 455 at para 19.

tional sentence and 18 months' probation, additional orders included a 10-year registration as a sex offender, a no contact order, and a DNA order.

ix. 2013 BCCA 535

In **2013 BCCA 535**, a high school teacher, Mr. C, was charged with sexual exploitation and luring a child in relation to his 17-year-old student, Ms. M. Over a 36-hour period, the two parties exchanged text messages via Ms. M's personal cellphone and a cellphone registered to Mr. C's wife, who was also a teacher of Ms. M at the same school. The exchange began as a channel for Ms. M to ask questions related to her upcoming history exam but became sexually explicit at the initiation of Mr. C and continued as such over a lengthy exchange.

The trial judge analyzed whether the text messages alone could constitute sexual exploitation and determined they could as they satisfied all the elements of the offence. He added that "Ms. M.'s status as a victim is not reduced to any extent by her degree of participation in the communications, nor does that participation detract from his responsibility for what occurred."[34]

In determining the sentence, the judges emphasized this was on the low range of seriousness for this offence but that the text messages also required deliberate and sustained efforts to conceive, type, and send, which must be contrasted to the greater spontaneity of spoken conversation.

Mr. C was sentenced to 60 days in prison.

He appealed his conviction and the appeal was dismissed.

See also: 2011 BCSC 1833; 2012 BCSC 918 (Sentencing).

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[34] 2012 BCSC 918 at para 32.

x. 2013 BCPC 421

In **2013 BCPC 421**, Mr. R was charged with possessing child pornography and sexually interfering with a minor. During the investigation, an undercover police officer had posed as a 14-year-old girl on Nexopia, and had chatted with Mr. R on MSN Messenger. Mr. R said he always wanted to take a girl's virginity, and asked if the undercover officer ever needed someone to help her babysit. He later tried to find out whether she was going to be home alone that evening and whether he could come by.

The police later discovered child pornography on Mr. R's laptop, and learned that he had a profile on an adult site for members only. He had uploaded 31 images of his ex-girlfriend to online sites — at the times the photos were taken, his ex-girlfriend was 16-17 years old. Mr. R also distributed intimate videos using MSN Messenger. Mr. R had no criminal history, demonstrated remorse, and was noted as presenting a low risk of future offenses. The Court sentenced R to 90 days imprisonment for possessing child pornography, and 12 months imprisonment for luring, followed by 3-years' probation.

xi. 2013 BCCA 372

In **2013 BCCA 372**, Mr. L appealed his sentence of 30 months' incarceration and three years' probation, arguing the sentences were excessive and should be served concurrently not consecutively. Mr. L, a 24-year-old man, pleaded guilty to child luring and sexual interference. Mr. L met Ms. M, a 15-year-old girl, on a bus soon after he had been released from a previous sentence for sexual interference with a different 15-year-old girl.

Ms. M ran away to stay with Mr. L. She was vulnerable, had attempted suicide shortly before meeting Mr. L, and was drug involved during the relationship. Ms. M's father moved with Ms. M to Mexico to try and keep her away from Mr. L, who she claimed to be in love with. Her father later discovered sexually explicit Facebook messages between the two that indicated the relationship was sexual and continuing, and reported Mr. L to the police. Mr. L showed a lack of

insight to his behaviour and its impact on the victim. He was later convicted and sentenced. Additional orders included a DNA sample, a 10-year weapons prohibition, a 10-year registration as a sex offender, limitations from being around minors, a pornography prohibition, a no contact order, and a prohibition from using a computer system capable of accessing the internet.

The appeal of his sentence was dismissed due to his high risk to re-offend, his lack of responsibility and history of a criminal lifestyle.

Also see: 2013 BCPC 138 (SOIRA Order); 2013 BCPC 137 (Sentencing).

xii. 2012 BCCA 94

In **2012 BCCA 94**, Mr. Q, a 24-year-old man, met Ms. L, a 12-year-old girl, on a website when she responded to a profile he had posted. Mr. Q claimed that Ms. L said she was 16 years old both on the internet and when they met in person, he claimed to be 17 or 18 years old. They engaged in sexual intercourse between the summer of 2007 and the beginning of 2008 and a video was made of them having sex. At one point, Mr. Q received an email from one of Ms. L's former boyfriend's telling him that she was in the 6th grade, which Ms. L denied that she was when he asked her about it. Ms. L's mother also told Mr. Q it was illegal for him to engage with Ms. L sexually and that Ms. L was 12 years old, which Ms. L again denied she was that age.

Mr. Q had been charged with child luring, sexual interference, making child pornography, abduction, and obstruction of peace officers. He was acquitted of luring and abduction. He appealed the three other convictions, arguing that his acquittal on the luring offence should result in a not guilty verdict on the other charges because the same analysis of taking reasonable steps to determine the girl's age should be applied across the other offences. However, the jury had acquitted him on different elements of those offences' and had found that he failed to meet even the lowest test (honest belief) in taking steps to determine Ms. L's age.

xiii. 2009 BCCA 289

In **2009 BCCA 289**, Mr. C, a 34-year-old man, was charged with luring and the invitation of a person under the age of 16 to touch a person for a sexual purpose. Mr. C was chatting with a 12-year-old girl he knew over the internet through a friend of his. The conversation became sexually explicit, including he suggested she engage in oral sex with him. She testified that she did not think the conversation was serious but that they were simply joking around. Her mother discovered the chat and posed as her daughter to ask if Mr. C had asked the girl to give him oral sex, after which Mr. C abruptly ended the conversation. The trial judge noted that the girl used "LOL" and "ROFL" during the conversation, suggesting that she may have thought it was a joke and Mr. C did not intend it to be serious. The trial judge held that there was reasonable doubt as to whether Mr. C had the requisite mental intent requirement for the offence and acquitted him. The Crown appealed the decision and sought a new trial.

At the Court of Appeal, the court held that the trial judge failed to consider whether he was asking for the girl for oral sex for his sexual gratification rather than a joke and allowed the appeal for the count of invitation to sexual touching, which lead to the approval of the appeal for the count of luring as well. A new trial was ordered.

Also see: [2009] SCCA No 358 (Leave to appeal)

IV. MANITOBA

i. 2016 MBQB 130

In **2016 MBQB 130**, Mr. V, a 25-year-old man, was convicted of sexual interference and luring, and a stay of proceedings was entered for a sexual assault charge. Mr. V was a friend of the complainant's mother. The complainant was a 13 years old girl. Mr. V communicated with the girl and their conversations led to an incident in the back of Mr. V's truck where he kissed the girl and touched her breast. The complainant stated that she was physically resisting his advancements and eventually left. The incident had a significant impact on the girl and she

threatened suicide, engaged in self harm following the incident, and has become more socially isolated.

Mr. V was sentenced to two years less a day incarceration and two years' probation. Additional orders included a DNA test, a 20-year registration as a sex offender, a 10 year firearms ban, a no contact order with the complainant, and a 10 year limitation on using social media sites to communicate with underage persons.

ii. 2009 MBCA 107

In **2009 MBCA 107**, Mr. G, a 23-year-old man, pleaded guilty to luring and making child pornography in relation to three girls aged 14 and 15, two of whom were sisters and the third was a cousin of the sisters. Mr. G had met the girls on a photosharing site and told them he had a modeling website and would pay them for modelling for nude photographs that would be shared with a group of frat boys in Texas. He rented a hotel room where he engaged in sexual activity with the girls and took 226 photos of two of them, the third girl changed her mind about being photographed but stayed in the room.

Mr. G was sentenced to 12 months' imprisonment for luring and 18 months' for making child pornography, for a 30-month total sentence. Mr. G appealed his sentence arguing that the judge had not given proper weight to Mr. G's progress in counselling, ordering consecutive rather than concurrent sentences, and that the sentences were unduly long. The Court of Appeal found that the trial judge had not given appropriate consideration to the principle of totality and ordered the sentences to be served concurrently, reducing the total sentence to 18 months' imprisonment.

V. NEW BRUNSWICK

i. 2014 NBCA 71

In **2014 NBCA 71**, a 41-year-old elected municipal officer, pastor, community activist, and outreach worker who worked with under privileged youth and acted as a foster parent pleaded guilty to 46 offences including child pornography offences, sexual interference, invitation to sexual touching, sexual exploitation, child luring, sexual assault and extortion against young boys, including one of his foster children. A police investigation into online child exploitation led to Mr. S's collection of thousands of unique child pornography images and evidence of other abuse. The police were able to identify 17 young boys in their investigation.

Beyond his collection of child pornography, Mr. S engaged in a campaign of abuse. Mr. S allowed young boys to consume alcohol and marijuana and engage in sexual activity at his home, including sexually abusing the boys himself. The boys were between 6 and 15 years old, and some were paid for their sexual activity. He also used the internet to live stream his sexual offences and to view young boys acting sexually, videotaped their sexual activity, and used images he had of the boys to extort them. At times he posed as a teen girl to engage boys in sexual chats online and obtain sexual images and to extort more images from them. His interactions with them show a callous disregard for the boys and their well-being and an abuse of his position of power and trust. One child was ostracized from his social group for complaining of the abuse and he was not believed.

He was sentenced to 18 years of imprisonment, which was on the high end of the spectrum of sentences for this type of offence, but the sentence was affirmed as reasonable upon appeal, largely due to the court's belief that adult sexual predators of children should pay a "heavy price" for their offences.

Also see: 2013 NBPC 17 (Sentencing).

ii. 2014 NBBR 261

In **2014 NBBR 261**, Mr. A, 45-year-old man, was convicted of luring a child, Ms. A, who was 14 years old. He met her on an adult meet-up website where she pretended to be 24 years old.

They communicated over many months, and their conversations included sexual content and they discussing meeting up. After deciding on a local motel to meet at, she revealed to Mr. A that she is 14 years old. She says she wants to have sex for money, but then retracts the request for money when he is not interested in procuring sexual services. They organize meeting at the motel the next day. Prior to meeting Mr. A she was contacted by the police because she allegedly falsely accused a boy her own age of sexually assaulting her. In their investigation, the police found evidence of her conversation with Mr. A and arrested Mr. A at the motel.

He was sentenced to 23 months' incarceration.

iii. 2012 NBCA 79

In **2012 NBCA 79**, Mr. C pleaded guilty to sexual assault and luring. He was sentenced to three years' incarceration, and a 20-years' registration as a sex offender. The appeal was related to whether Mr. C should have received a mandatory lifetime order to register as a sex offender due to the multiple convictions for sexual assault. However, the court held that there was no right of appeal against such an order and quashed the appeal.

VI. NEWFOUNDLAND AND LABRADOR

i. 2018 NLCA 19

In **2018 NLCA 19**, Mr. G, a 29-year-old man, saw his ex-girlfriend's younger sister Ms. B at the mall and later texted her. Ms. B, a 14-year-old girl, assumed he got her cellphone number from her Facebook page. During their texting, Ms. B told him that she was 14 years old and Mr. G sent sexually suggestive texts and invited her over to his house. Ms. B went to Mr. G's house where Mr. G began touching her sexually and she asked him to stop but he did not, including unprotected sexual intercourse. Mr. G claimed he thought he was texting with an older girl and when Ms. B arrived at his house, he let her in and she sexually touched him without consent and he denied intercourse had occurred. However, medical evidence confirmed there had been

intercourse. The Judge did not find Mr. G's story credible, and noted that regardless of actually consent, Ms. B was too young to legally consent to sexual activity with Mr. G at the time due to her age.

During the examination and cross-examination of Mr. G, the Judge asked him several questions that Mr. G claimed to be extensive and improper questioning. The Court found that the questions were clarifying and appropriate, with some exceptions of a sarcastic comment by the judge that did not lead to unfairness in the trial. The Court also found that there was no misapprehension of evidence in relation to Ms. B's level of intoxication.

Mr. G was found guilty of sexual assault, sexual interference and luring and was sentenced to four and a half years' imprisonment. Additional orders included a DNA order, limitation on being near people under the age of 16 for life, prohibition from using a computer to communicate with people under the age of 16 for life, a no contact order, a firearms ban for 10 years, and registration as a sex offender for life. He appealed his conviction, arguing that his trial had not been fair due to the trial judge's questioning of him and a misapprehension of evidence.

His appeal was dismissed.

Also see: 2017 NLCA 11 (Application for legal aid); 2016 NLTD(G) 160 (Sentencing); 2016 NLTD(G) 149 (Trial).

ii. 2018 CanLii 116038 (NLPC)

In **2018 CanLII 116038 (NLPC)**, Mr. C had been sentenced to 8 years' incarceration for multiple counts of child luring, transmitting sexual material to a child, and accessing child pornography related to four identified girls ranging from 12-14 years old over a year and a half. Mr. C, a 65-year-old man, created false Facebook account and Skype of a teenage boy in order to communicate with young girls.

His luring behaviour had been reported to Facebook in the past and the fake account had been linked to Mr. C. The police seized Mr. C's computer and found 3,000 images of young unidentified females between 10-16 years old. Many were sent to him by the girls he lured. Some of the girls Mr. C communicated with sent him one or two photos, others sent him over 100 images of themselves. Constable D recognized a 14-year-old girl, Ms. A's, picture from the images found on the computer when he was investigating another matter on Facebook. Upon interviewing Ms. A he found that she had been in contact with Mr. C's fake account and had communicated with him via Facebook and Skype when she was between the ages of 14 and 16 years old. In relation to this trial, he had contacted four underage girls via his fake accounts, including preteen and teenaged girls, two from the United States. Some of the girls had engaged sexually with him via webcam.

The court noted:

> The use of fake identities on Facebook provides child molesters with ready access to children. It allows older offenders, like [Mr. C], to hide their ages from their victims. Thus, the use of the Internet allows older offenders a type of access to children that they would not have through personal contact.
>
> These types of offences are particularly worrisome because of the importance that social interaction through electronic means plays in the everyday life of children. Justice Alito of the Supreme Court of the United States pointed out in *Packingham v. North Carolina*, 137 S.Ct. 1730 (U.S. Sup. Ct. 2017), that several factors "make the internet a powerful tool for the would-be child abuser" including the ability to "create a false profile that misrepresents the abuser's age and gender":
>
> The State's interest in protecting children from recidivist sex offenders plainly applies to internet use. Several factors make the internet a powerful tool for the would-be child abuser. First, children often use the internet in a way that gives offenders easy access to their personal information — by, for example, communicating with strangers and allowing sites to disclose their location. Second, the internet provides previously unavailable ways of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser's age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child's location posts on the internet to determine the pattern of the child's day-to-day activities — and even the child's location at a given moment. Such uses

> of the internet are already well documented, both in research and in reported decisions.[35]

Mr. C had a previous child pornography and luring conviction related to an 11-year-old girl he had contacted using the fake account and convinced her to send him sexually explicit images and sent three images of adult penis. He was sentenced to 24 months' imprisonment. He had another conviction for luring a 14-year-old girl with development delays over a two-year period that resulted in 18 months' imprisonment. These convictions were considered in the case.

Mr. C's loss of his business, social standing, and related financial losses were not given significant weight in his sentencing. The court stated:

> I agree that collateral consequences which arise from the commission of an offence can be considered in imposing sentence (such as loss of employment, for instance). However, this is a factor which must not be overstated. Offenders who attempt to lure children on the Internet know that if caught there will be consequences aside from the sentence imposed. That individuals like Mr. Clarke are willing to risk both their liberty as well as their financial and social standing illustrates the extent of their desire to have sexual contact with children.[36]

Mr. C was sentenced to periods of incarceration above the prescribed mandatory minimums. The court stated:

> Mr. Clarke is a serial child sexual offender. He constitutes a significant danger to children in his community. Because of the manner in which he utilizes the Internet, he constitutes a significant danger to children on a worldwide basis. No sentence other than the imposition of a significant period of incarceration fits his crimes. Mr. Clarke illustrates the need for mandatory minimum periods of incarceration. A judge should not have the discretion to impose a non-custodial sentence in a case such as this. [37]

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[35] 2018 CarswellNfld 97 (NLPC) at paras 4-5.
[36] 2018 CarswellNfld 97 (NLPC) at para 34.
[37] 2018 CanLII 116038 at para 1.

> His eight-year sentence was to be served consecutively with the sentence he was serving for the previous luring offences. Additional orders included a DNA order, a lifetime prohibition from contacting people under the age of 16 including via the internet or other digital networks, and a lifetime registration as a sex offender and weapons ban for life. It noted that his offence involved the use or threat of violence, including psychological violence against the child.

Also see: [2018] NJ No 364 (Sentencing); [2018] NJ No 92; [2017] NJ No 230

iii. 2018 NLCA 8

In **2018 NLCA 8**, the Crown appealed Mr. K's successful application for a stay of proceedings. Mr. K was charged with two counts of child luring. The children involved were from different communities and the second charge of luring occurred a year after the first. The appeal was allowed, with the appeal court finding the court did not consider each charge on its own merits. Had both been considered independently, the delay would not have reached the required threshold to be considered a violation of Mr. K's Charter rights to a prompt trial.

Also see: 2017 CanLII 7095 (NLPC) (Charter application s 11).

iv. 2018 CanLII 3121 (NLPC)

In **2018 CanLII 3123 (NLPC),** Mr. C, a 34-year-old man, pleaded guilty to distributing child pornography, attempting to transmit sexually explicit material, transmitting sexually explicit material, and luring. During his online conversations with young girls, he had threatened all four of his victims who were aged 11-14 years old and were living in the United Kingdom. One was a special needs child with developmental delays. He chatted with them via Instagram, Kickchat, and ooVoo. He engaged in sexual conversations with them and exchanged sexual images with them. Many of the messages were unwanted, including images of his genitals and requests for nude images. One girl sent him sexual images and videos. He requested images of girls between the ages of 10-13 years old. One child's parents intercepted one of these images. A police search of four of his digital devices found he had been involved in 137 interactions with teenage

girls, 115 images of child pornography of girls between 3-16 years old, and 52 videos of child pornography.

Victim impact statements by the girls and their parents showed the profound impact of his behaviour on them, including a violation of sexual integrity, lack of trust, loss of privacy, and fear, including that the images would be shared online and that Mr. C would hurt them.

Discussing sexual offences facilitated by the internet the court stated:

> How does a person in Newfoundland and Labrador commit sexual offences against four children living in another country without having ever met them? The Internet. The Internet provides sexual abusers of children with world wide access to children and a degree of anonymity which their predecessors could never have imagined. How is the judiciary to respond?
>
> In my view, Canadian judges must recognize that they are dealing with a type of sexual abuse of children which is unprecedented, ongoing, and worldwide: a form of sexual abuse never imagined by our predecessors. A request by a sexual offender that a child in his presence perform a sexual act should no longer be seen as any different as a request to do so online. In many instances the latter is worse because of how difficult it is to prevent. Thus, we must recognize that the online sexual abuse of children can at times be as serious as the personal sexual abuse of children.[38]

He was sentenced to 7 years' incarceration, a DNA order, a lifetime registration as a sex offender, a no contact order, a forfeiture order, a limitation on being near a person under the age of 16, including not using the internet for communication for 20 years unless under particular circumstances.

In relation to the internet ban, the court stated:

[38] 2018 CanLII 3123 at paras 1-2.

> I understand the importance of the Internet to people's every day actions and occurrences. However, those who would use the Internet to abuse children must understand that their subsequent use will be curtailed and controlled.[39]

v. 2017 CanLII 38344 (NLPC)

In **2017 CanLII 38344 (NLPC),** Mr. C, a 65-year-old man, was charged with possession of child pornography and luring.

Mr. C created a fake Facebook page, presenting himself as a 12-year-old junior high school student. He used this account to persuade an 11-year-old girl to engage in sexually explicit conversation and to send sexual photos to him. He sent three photos of an adult's penis to the girl. He showed some remorse for making a stupid decision, but did not acknowledge the seriousness of his crime, stating it was just a fantasy. The Court noted that Mr. C had used "a medium in which children are particularly susceptible to influence because of the importance it plays in their daily lives: Facebook."[40]

He was sentenced to 20 months' incarceration and three years' probation. Additional orders included a no contact order, a DNA order, registration as a sex offender, and limitations on being near young people. Limitations on communicating with a person under 16 included a prohibition to communicate with any person under 16 using the Internet or other digital networks.

vi. [2017] 136 WCB (2d) 218 (NLPC)

In **[2017] 136 WCB (2d) 218 (NLPC)**, Mr. D, a 26-year-old man pleaded guilty to luring and sexual interference. He had been texting, chatting and webchatting with a 14-year-old girl. There was evidence of 271 texts, thousands of instant messages, and multiple Skype communications.

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[39] 2018 CanLII 3123 (NLPC) at para 146.
[40] 2017 CanLII 38344 (NLPC) at para 88.

He was aware of the girls' age and sent her pictures of his genitals. They met on several occasions and engaged in sexual touching.

Mr. D was sentenced to 14 months' imprisonment and 12 months' probation. The fact that the luring led to sexual touching was an aggravating factor.

vii. 2016 CanLII 6260 (NLPC)

In **2016 CanLII 6260 (NL PC),** Mr. B, an 18-year-old man, was found guilty of possessing child pornography and luring. Mr. B had been texting with a 14-year-old girl and persuaded her to send nude images of herself to him. The photos were discovered by the police who were searching his phone in relation to another offence. The court noted Mr. B did not distribute the images on the internet or show them to anyone else, although an image of the girl's vagina was set as the background wallpaper on his cellphone. After his arrest, he took steps to maintain employment, attend Narcotics Anonymous and Alcoholics Anonymous meetings and had a supportive family. He was sentenced to 90 days' incarceration, two years' probation, and additional orders included a 10-year registration on the sex offender list, a DNA order, and forfeiture of his cellphone.

Also see: [2015] 375 Nfld & PEIR 232 (NLPC) (Trial); [2015] 370 Nfld. & PEIR 223 (NLSC) (Sentencing)

viii. [2016] 127 WCB (2d) 435 (NLPC)

In **[2016] 127 WCB (2d) 435 (NLPC)**, Mr. C, a 39-year-old man, pleaded guilty to child luring. He had initiated contact with a 14-year-old girl on Facebook, communicated with her over a long period of time, made sexual comments towards her, and told her he wanted to have sex with her. She stopped contact but Mr. C created three other false identities to continue communicating with the girl and tell her that if she didn't love Mr. C he would kill himself. He was sentenced to nine months' imprisonment, 2 years' probation, additional orders included a DNA or-

der, 10 years registered as a sex offender, and limitations on being near people under the age of 16, including communicating with them via the internet.

ix. 2013 CanLII 1909 (NLPC)

In **2013 CanLII 1909 (NLPC),** Mr. N, a 24-year-old man, was charged with sexual interference and child luring. He had groomed a 13-year-old girl, Ms. P, who he knew through his common law spouse via Facebook, persuaded her to send nude photos, and to have sexual intercourse with him, which she described as "giving in" to, due to his pressure. Between September 2011 and April 2012, they exchanged approximately 1,100 messages, many of which were sexually explicit. The court found that the intention to have penetrative sex and the exchange of sexual images were aggravating factors, citing the Sentencing Council for England and Wales report *Sexual Offences: Guideline Consultation*.

The Court stated:

> The Internet provides access to information in a manner and to a degree which would have been unfathomable to our ancestors. However, the Internet also has a darker side. It provides easy and concealed access to children, by those who would lure and sexually abuse them, in a manner which would have been unfathomable and horrifying to our ancestors.[41]

The Crown had proceeded by way of summary conviction, which limited the maximum sentence to 18 months for each offence. The court determined that the sentences should be served on a consecutive basis. He was sentenced to 30 months' imprisonment (15 months for each charge) and three years' probation. Additional orders included a no contact order, limitation on being near females under the age of 16 (including communicating with them via a computer system), a DNA order, a 10-year sex offender registration, and a 10-year weapons ban.

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[41] 2013 CanLII 1909 (NLPC) at para 1.

x. 2010 CanLII 22966

In **2010 CanLII 22966 (NLPC)**, Mr. P, a 37-year-old man, met a 13-year-old girl, Ms. M, on an internet teen chatroom. They engaged in conversation that Mr. P intended to facilitated sexual contact and were aware of each other's ages. The communication lasted about a year. When the girl was 14 Mr. P traveled from Australia to Newfoundland to have sexual intercourse with the girl. When they met, he gave her alcohol and some jewellery. He tried to kiss her but she would turn away. Someone reported seeing an adult man kissing a young girl and reported it to the police.

Mr. P pleaded guilty to luring and sexual assault. A joint submission of 15 months' incarceration was requested, the court found this was inadequate due to the seriousness of the offences. The court stated:

> the sentences imposed in this country upon such offenders have failed to keep pace with and to recognize the reality and scope of the present environment in which child sexual predators operate and the danger they now pose to children all over the world. This case is an excellent example.[42]

Noting that a judge does have discretion to decline to endorse a joint submission, but it is almost never done. The court stated:

> In this case, I believe a reasonably informed member of the public would be alarmed; dismayed; and concerned to learn that a child sexual predator who committed the type of offences which [Mr. P] has committed would receive the type of sentence recommended here. But, such a person would not see the end result sought here as proof that our legal system has malfunctioned. One single case is unlikely to ever have such a dramatic impact upon a reasonable person. As a result,

[42] 2010 CanLII 22966 (NL PC) at para 19.

> there is no basis in law which would allow me to reject the joint submission presented.[43]

As a result, the judge accepted the joint submission but sentenced Mr. P to 14 months' incarceration for luring and one month for the attempted sexual assault. Additional orders included a 10-year registration as a sex offender and prohibitions from being in contact with young people.

VII. NOVA SCOTIA

i. 2018 NSCA 18

In **2016 NSPC 19,** the accused, Ms. H, was exempt from all mandatory minimum sentences on crimes she was convicted of, including child luring, sexual exploitation, and sexual touching of two teenage boys, Mr. L and Mr. G, given that she was experiencing a period of mania due to her bipolar disorder. Ms. H was an elementary school teacher who sent sexually explicit messages, videos, and photos to two former students over many months. She performed sexual acts on one of the students.

Given her mental illness, she was found less morally culpable and given a 15 months' conditional sentence, additional orders included a lifetime registration as a sex offender, a weapons prohibition, restrictions of being near children under the age of 16, and a no contract order with the victims. She had been acquitted previously of sexual interference and sexual assault. The appeals of the sentence and convictions were dismissed.

Also see: 2018 NSCA 18 (appeal); 2016 NSPC 78 (sentencing and Charter challenge).

ii. 2016 NSSC 29

[43] 2010 CanLII 22966 (NL PC) at para 31.

In **2016 NSSC 29**, Mr. B, a 26-year-old man, pleaded guilty to sexual interference with a minor for having sexual relations with a 14-year-old girl. He was also charged with touching a person under the age of 16, sexual assault, and luring, which the Court anticipated the Crown would discontinue the prosecution of those offences.

Mr. B met Ms. M on the internet using an anonymous video chat service called Omegle that randomly pairs people together. Mr. B stated that he was 25 years old and Ms. M, who was 13 years old at the time, lied about her age and said she was turning 18 soon. They later began chatting on MSN Messenger and Ms. M revealed her actual age which caused Mr. B to stop communicating with her. Ms. M persisted with communication and Mr. B eventually began communicating with her again over the internet and phone. Mr. B later traveled to the city where Ms. M lived and had sexual contact with her several times, including sexual intercourse. Both Ms. M and Mr. B initiated the sexual contact. Due to an unrelated incident, the police became alert to the relationship and arrested Mr. B.

Mr. B was sentenced to 12 months' incarceration and two years' probation. Additional orders included a 20-year registration as a sex offender, a DNA order, forfeiture of the items seized, a no contact order with Ms. M, and a 20-year limitation on being near people under 16 years old, including a prohibition from communicating with a person under the age of 16 via the internet or other digital networks.

iii. 2010 NSSC 253

In **2010 NSSC 253**, Mr. S was charged with unlawfully using a computer to communicate with a person believed to be under the age of 14 for the criminal purpose of luring a child and inviting the child to sexual touching. He was also charged with unlawfully obtaining a computer service without a colour of right by accessing his neighbour's wifi without consent.

An undercover police officer acting as a 13-year-old boy began communicating with Mr. S in a teen chatroom where Mr. S sent sexually explicit messages and images and encouraged the boy

to touch himself sexually. After his arrest, Mr. S claimed that he believed he was role playing with another adult man pretending to be an underage boy and argued he thought he was using the wifi from his landlord's router in his building.

He was found guilty of unlawfully using a computer to commit offences against the child, but was acquitted of the unlawful use of his neighbour's wifi.

iv. 2007 NSCA 21

In **2007 NSCA 21**, Mr. S' conditional sentence had been converted into a custodial sentence for breaching a term of his conditions by driving under the influence. Mr. S had pleaded guilty to exposing himself to a person over the internet that he believed was a 13-year-old girl, but was actually an undercover police officer. He had been sentenced to a one-year conditional sentence. On appeal, the court accepted a joint recommendation that Mr. S' penalty should be time served following his arrest and that he should continue to serve his conditional sentence in the community.

VIII. ONTARIO

i. 2019 ONCA 22

In **2019 ONCA 22**, Mr. S appealed his convictions of child luring, sexual assault, sexual interference, and invitation to sexual touching involving Ms. S, a 15-year-old girl. He was sentenced to 5.5 years' incarceration at a second trial of the offences. During the first trial, Mr. S pleaded guilty to possessing child pornography and was convicted of sexual offences related to a girl, Ms. M, in which he was sentenced to 4.5 years' incarceration and was acquitted of the offences related to Ms. C. Mr. S appealed his convictions against Ms. M, which were dismissed. The Crown appealed the acquittal of the offences related to Ms. S, which resulted in a new trial,

where he was convicted of the offences involving Ms. C. He had communicated with the girls to prepare them for sexual activity.

Mr. S met both Ms. M and Ms. C on an adult chat site called MocoSpace and later engaged in sexual activity with them. Both girls listed their ages as 18 on their online profiles, but were actually 14 years old and 15 years old, respectively. Mr. S was 38 years old. He stated that he thought they were between 16 and 18 years old when he saw them in person, but made no effort to determine their actual ages. Arguments that the judge had erred using similar fact evidence, refusing to stay one of the counts of sexual interference based on the Kienapple principle, finding some of the sexual acts were non-consensual, and finding Mr. S' calculated grooming to be an aggravating factor were unsuccessful. The appeal judges found no reason to interfere with the sentence.

The appeal to the conviction and sentence were both dismissed.

Also see: 2013 ONCA 661 (Appeal); 2013 ONCA 660 (Appeal).

ii. 2018 ONCJ 616

In **2017 ONCJ 525**, Mr. H contacted who he thought was a 15-year-old girl, "Jamie", via an online Backpage ad. After making contact with her, Mr. H texted her to arrange purchasing sexual services from her. He was actually communicating with a police officer. Backpage does not allow users to post ads if the person is under 18, so the ad the officer created stated that the girl was 18, but it contained other indicators that she was likely underage. In the chat, "Jamie" stated she was actually 15 years old and Mr. H described the sexual services he was interested in purchasing. Mr. H was suspicious about being set up and asked if she was a police officer several times but still arranged to meet with her. He was arrested when he went to their ar-

ranged meeting place and was charged with communicating with an underage person for the purpose of purchasing sexual services, and luring with the intent to obtain sexual services from a minor and inviting a person under 16 to sexually touch him. Mr. H claimed he thought he was talking to a police officer or a pimp trying to extort him because of the language used. However, there was no evidence that he tried to find out if he was actually communicating with an adult.

He was found guilty of two counts of luring and one count to communicating with a person to purchase sexual services from a minor.

Applications and motions to reopen the case, arguing that that Mr. H was entrapped, and that there should be a stay of proceedings due to a delayed trial infringing on Mr. H's *Charter* rights were unsuccessful.

Also see: 2018 ONCJ 615 (Charter application s 11(b)); 2018 ONCJ 616 (Application to reopen); 2017 ONCJ 844 (Ruling on the effect of a SC declaration of invalidity); 2017 ONCJ 780 (Ruling on entrapment application); 2017 ONCJ 781 (Charter application s 11(b)) .

iii. 2018 ONCA 677

In **2018 ONCA 677**, Mr. H was convicted of child luring for communicating with a 15-year-old friend of his daughters, Ms. K. He had been charged with luring and exposing his genitals to a person under 16, but the trial judge was not satisfied beyond a reasonable doubt the photos were of Mr. H's penis. Mr. H had communicated with the girl over Facebook including sending pictures of penises, sexually graphic messages, and images of people having sex. He knew the girl through his daughters, their religious group, and the had lived in the same building for three years. Ms. K was one year older than his 14-year-old daughter. Mr. H tried to deny that he was

the owner of the Facebook account that sent the messages, but his email was associated with the account.

He appealed his conviction arguing that there was insufficient evidence that he had a subjective belief that the girl was 16 years old, that he had not been supported as a self-represented accused, and that his sentence was unfit.

The Appeal Court held that there was sufficient evidence that Mr. H would know Ms. K was under 16 due to his long term relationship with her and her family, that the court did not have a duty to raise issues for the accused, and that Mr. H's behaviour was abhorrent and he showed no regret for his offences. It upheld his 15 months' incarceration sentence and dismissed the appeal of the conviction.

Also see: 2016 ONSC 6364 (Sentencing); 2016 ONSC 3709 (Trial)

iv. 2018 ONSC 4388

In **2018 ONSC 4388**, Mr. M, a man in his 40s, invited 16 young boys from the age of 10-18 years old to spend time in his home, paying some of them to work in his garage. This occurred between 2007-2014 in a rural town. He groomed the boys by giving them access to alcohol, tobaccos, electronic media, quads, moto-cross bikes, and a rifle range. He met the boys using two different Facebook accounts and an MSN profiles offering money, drugs, and alcohol in exchange for sex acts. One account was of a man named TB, another was pretending to be a woman named JJ, and another pretending to be a woman HC. After they met in person, he continued to communicate with them over social media. Several of the boys lived with Mr. M when they were in precarious housing situations. He had targeted vulnerable boys with unstable homes, substance use, and mental health concerns. Mr. M had some of the boys recruit other young boys for him. 12 of the 16 boys were touched by Mr. M or touched Mr. M sexually in "dares" Mr. M set up in exchange for money, drugs and alcohol. Some performed sex acts filmed over webcam. The court found that Mr. M was in a position of trust with several of the

boys as their employer or for providing them a place to live. It was also found that Mr. M had threatened the boys to stop them from exposing him or for not complying with his requests. The court noted that a particularly aggravating was "a threat to rape the younger brother of one of the boys, if he did not comply with a request to recruit younger boys and a threat to distribute a compromising video of another boy."[44] He did not express regret or remorse to the court.

Mr. M was found guilty of multiple counts of sexual interference, child luring, procuring a minor for sexual services, indecent exposure, and invitation to sexual touching. He was sentenced to 17 years' incarceration, he was not permitted to apply for parole until half of his sentence had been served, and was ordered to provide a DNA sample, be registered as a sex offender for life, a lifetimes weapons ban, a lifetime of restrictions for being around minors, and a no contact order with the complainants or witnesses.

Also see: 2017 ONSC 4019 (Trial).

v. 2018 ONSC 2119

In **2018 ONSC 2119**, Mr. B was charged with luring for making arrangements to have sexual intercourse with a person he believed to be under 14 years old, including two 14-year-old girls and an 8-year-old girl who were actually police officers posing as the girls' parent. The question at trial was whether he had the requisite intention to sexually assault these individuals when arranging to meet with them. Contact between Mr. B and the officer began on Chatstep, a file sharing and chat site, where Mr. B asked if the person he was chatting with had sexual contact with his three children aged 8 and 14 and asked if he could engage in sexual activity with them.

[44] 2018 ONSC 4388 at para 38.

The two arranged a time over email for them to meet to discuss arranging sexual activity with Mr. B and the children.

The court held Mr. B expressed uncertainty about following through with the sexual activities throughout two-week email communication, and there was reasonable doubt about whether he had intended to sexually assault the minor children. He was acquitted of the offences.

vi. [2018] 146 WCB (2d) 537(ONCJ)

In **[2018] 146 WCB (2d) 537(ONCJ)**, a 57-year-old man, Mr. T, pleaded guilty to luring. An undercover police officer posing as a 14-year-old girl, Ms. A, responded to an ad that Mr. T had posted on Craigslist. The two chatted online and over text and he told Ms. A that he was over 50 years old. Mr. T sent two images of pornography to Ms. A and would regularly steer the conversation to a sexual nature, suggesting that they engage in sexual activity. They scheduled a meeting to engage in sexual activity and Mr. T was arrested upon just before he arrived at the address. He had a beverage that Ms. A had requested he purchase. He had used his work computer to communicate with Ms. A and lost his job as a result.

He was sentenced to 12 months' imprisonment and two years' probation. Additional orders while on probation included a prohibition from possessing a device capable of accessing the internet, storing data and transmitting telecommunications unless for employment; and communicating with a person under the age of 18 with an electronic device unless under supervision; limitations on being near people under 18 years old. He was also required to provide his probation officer with his ISP information and the username of any email account he uses and not to create any new email account. He was also prohibited from being near underage people for 20 years, register as a sex offender for 20 years and to provide a DNA sample. This included limitations on using and communicating with electronic devices, not accessing software that could scrub or encrypt data, and not accessing child pornography or adult sexual services.

vii. 2018 ONSC 1479

In **2018 ONSC 1479**, Mr. C, a 46-year-old man, was convicted of possessing child pornography and luring a child. Mr. C had been good friends with the complainant's father and met the complainant, Mr. D, when visiting Newfoundland. Mr. D was 13-year-old boy. After meeting Mr. D, Mr. C sent him a Facebook friend request and began chatting with Mr. D. Mr. D did not always reply to the persistent messages Mr. C sent, which became sexual over time. Mr. C offered to send pictures of his genitals over MSN. He also sent a video of himself masturbating via email. Their conversation shifted to MSN where Mr. D told Mr. C how old he was and Mr. D sent sexual images of himself to Mr. D, requesting that Mr. C delete the photos so he would not get in trouble. Mr. C also requested pictures of Mr. D's penis, which he reluctantly sent. Mr. D also requested the Mr. C engage in sexual acts with him and his dog.

Mr. D's mother discovered the messages and called the police about the messages. She also checked her son's Facebook and saw the video of Mr. C masturbating.

Prior to the first trial, the charges against Mr. C were stayed due to an unreasonable delay, which was appealed and a new trial was ordered. Mr. C was convicted on two offences at the trial. *R v Jordan* was released during this time, and Mr. C brought a second application for an unreasonable delay of his trial, which was dismissed. The court took into consideration the fact that this was a retrial when calculating the presumptive ceilings set out in *Jordan* for an unreasonable delay, noting that the presumptive ceiling for a retrial should be longer. It found that this case had exceeded that ceiling but due to the exceptional circumstances of the case, there hadn't been a significant enough delay to be violate his rights. The other aspects of the appeal, including the stay of proceedings due to allegedly lost evidence, the defence of mistaken belief in Mr. D's age, and the question of whether Mr. C in fact possessed the child pornography, were found to have no merit. The appeal was dismissed.

Mr. C was sentenced to a 9 months' conditional sentence for the luring and 60 days' incarceration for the child pornography offence served intermittently.

Also see: 2017 ONCJ 192 (Sentencing); 2017 ONCJ 32 (Motion for stay of proceedings/Charter rights); 2014 ONSC 6233 (Trial)

viii. 2018 ONSC 252

In **2017 ONSC 3798**, Mr. A, a 50-year-old tool and die maker, was charged with luring and making sexually explicit material available to a person under the age of 16. He began communicating with a police officer posing as a 14-year-old girl who had replied to an ad Mr. A posted on Craigslist looking for a young woman who was preferably under 110 pounds. During their conversation Mr. A told the girl about two adult pornography websites that were not password protected and did not require proof of age. He also engaged in sexually explicit conversation, requesting nude photographs and offering to tell her how to masturbate. The court held he sent information about the pornography websites to lower the child's inhibition and desensitized the child in order to facilitate a sexual assault and sexual interference. The court stated: "sexually explicit material available to children is an adjunct to, and part of, the grooming process inherent in child luring. The same considerations with respect to the need to protect children from predators apply to this offence. The nature of this offence is such that predators can have access to children away from the public and their parents".[45] He later arranged to meet with the girl, but had to cancel because of work.

Mr. A challenged the 90-day mandatory minimum sentence for making available offence but was unsuccessful.

Also see: 2018 ONSC 252 (Charter rights – section 12); 2017 ONSC 6398 (Entrapment); 2017 ONSC 405 (Charter rights – section 12); 2017 ONSC 1712 (Charter rights – section 8, evidence).

ix. 2017 ONSC 7182

[45] 2018 ONSC 252 at para 20.

In **2017 ONSC 7182**, Mr. R, a 43-year-old man, had a long history of sexual interference, sexual assault, luring, possessing child pornography, forcible confinement, and failure to comply with recognizance in relation to offences against boys as young as four and as old as fourteen, beginning when Mr. R was 17 years old and continuing into his 40s. Many offences occurred while Mr. R was on probation or recognizance, attending sex offender treatment, and on a course of sex drive reduction medication. While in sex offender treatment he admitted to dozens of additional undetected sexual assaults. His offences included luring children from the internet, accessing child pornography online, and engaging in sexual conversations with people he thought were underage, often using a fake name.

Mr. R was a diagnosed pedophile with high risk of reoffending. A psychiatrist found that he minimized his motivations and denied some of his behaviours.

The Crown sought to have him designated as a dangerous offender. The court found that Mr. R's behaviour was repetitive, aggressive, and harmful, and that he lacks the ability to restrain himself. He had used a false name to conduct his abusive behaviour online and had a collection of child pornography.

He was declared a dangerous offender by the court. He was sentenced to 7 years for child luring and child pornography offences, most of which was already served in pretrial custody. Following his release, he would be placed in a long-term supervision order for 10 years subject to the conditions in the psychiatrist's report including prohibitions from using the internet, chemical control of his sex drive and sex offender treatments.

x. 2017 ONCJ 770

In **2017 ONCJ 770**, Mr. G, a 60-year-old man, pleaded guilty to luring. Mr. G was chatting with a 14-year-old girl online who responded to Mr. G's personal ad on Craigslist. He communicated with her over email and text over a three-week period. He requested sexual photos of the girl, sent a video of himself masturbating, and expressed his desire to engage with her sexually.

They eventually planned to meet and Mr. G sent an instructional sex video made for teenagers and acknowledged he could go to jail for having sex with her. He was actually speaking with an undercover police officer and was arrested when he arrived at the agreed upon location. He had some candy that the girl had asked him to bring.

After his arrest he undertook extensive group, individual, family and couple's therapy, in which he acknowledged his behaviour was inappropriate. However, evidence showed that he believed he was speaking with a 14-year-old girl, deliberately groomed her for sexual activity, and traveled a long distance for his encounter with the girl.

He was sentenced to 12 months' imprisonment, three years' probation, and additional orders included he continue with sex offender therapy, a DNA order, a 20 year registration as a sex offender, a 20 year prohibition from using a computer to communicate with people under 16 (other than family members), and a prohibition "from using the Internet, or any similar communication service, to access any content that violates the law or to directly or indirectly access any social media sites, social network, Internet discussion forum or chatroom, or maintain a personal profile on any such service (for example Facebook, Twitter, Tinder, Instagram or any equivalent or similar service)."

xi. 2017 ONSC 207

In **2017 ONSC 207,** Mr. C was charged with 19 counts of sexual offences against minors. Mr. C was 23 years old at the time of the offences, the coach of a high school basketball team and helped run a summer basketball program. Under the guise of "locker room talk", Mr. C solicited sexual photos from boys in these programs to "prove" they did not have small penises, enticing them with financial wagers. Although only three victims were formally presented by the Crown, 10 similar fact witnesses were also presented, who, although over 18 at the time, recounted similar exchanges with the accused.

Mr. C admitted to the behaviors of the charge but denied that it was for sexual purposes. However, records show he solicited sexual content over text message and social media. Throughout 2012, he asked for and received photos or videos from Mr. B, 17 years old, Mr. P, 16 years old, and Mr. M, 17 years old. The photos showed their genitalia, being flaccid, erect, or masturbating.

The defense of "private use" from *Sharpe* failed because the sexual conduct was unlawful, as it was sexually exploitative. Any consent given was vitiated by Mr. C's relationship to the complainants.

Mr. C was found guilty on two counts of luring a child, one count of making child pornography, one count of possessing child pornography, one count of accessing child pornography, and one count of sexual exploitation. He was acquitted on four other counts of child luring, one count of making child pornography, and one count of sexual exploitation, and one count of child pornography was stayed due to the *Kienapple* principle.

Mr. C's s. 11(d) *Charter* application failed but his s. 12 *Charter* application was granted in part, finding the mandatory minimum sentence of 1 year for child luring and sexual exploitation unconstitutional.

Also see: 2017 ONSC 4246 (Charter Challenge); 2016 ONSC 6923 (Charter Challenge).

xii. 2017 ONSC 3583

In **2017 ONSC 3583**, Mr. L was charged with invitation to sexual touching and luring a child. Mr. L met Mr. E, a 14 year old boy, through a cadets program. Mr. L was a senior officer within the cadets program and was in a position of authority over Mr. E. Mr. L chatted with Mr. E on MSN including the use of webcam for approximately 30 minutes. Mr. L showed Mr. E what he claimed was $21,000 in cash and asked how much it would cost to pay him to spend the night alone in a hotel with him or show him his penis and masturbate in front of him. Mr. E ended the conversation shortly after the questioning. Mr. E told his friend Mr. B who reported it to a sen-

ior cadet officer who referred it to the police. Mr. L claimed the conversation was a joke and that he didn't know the Mr. E was under 16 years old at the time. However, Mr. E explicitly stated he was 14 years old in the chat and Mr. L did not take any reasonable steps to ascertain Mr. E's age if he did think Mr. E was older. The content of the conversation was clear that it was not a joke, particularly when Mr. L expressed concern for getting in trouble if Mr. E told anyone about it. The court found him guilty of both offences.

xiii. 2017 ONSC 940

In **2016 ONSC 6283**, Mr. H, a 57-year-old man, was charged with luring and making sexually explicit material available to a person under the age of 16. Mr. H had posted two ads on Craigslist looking for a young girl who was interested in engaging in sexual activity with an older man. A police officer posing as a 14-year-old girl responded to the ad and began communicating with Mr. H online, who responded with sexually explicit messages and proposed sexual activity. The officer also sent a separate response claiming to be a second person, the stepfather of a 14-year-old girl, who could offer his step-daughter for sexual activity for a fee. Mr. H responded he didn't want to pay and inquired if the girl would be interested in doing it "just for fun".

The officer had long history of working with youth and used language that a 14-year-old would use when messaging Mr. H, he referenced gymnastics, her mother, and school. While speaking with what he thought was a 14-year-old girl, Mr. H asked if she wanted to meet sometime, either at his house of the library. The girl said she would meet him at the library and that she was hungry. She asked Mr. H to bring a sandwich. An undercover officer posed as the girl and Mr. H was arrested when he came to the library, he had a sandwich in his bag.

Mr. H claimed he knew the whole time he was communicating with a middle-aged man, providing several examples of why this could be true, and he had not been looking for a girl when he posted the ad, but a woman in her 20s or 30s. However, the court did not accept any of these claims. He also tried to argue that "written material" did not include messages sent over a computer, which the court did not accept.

He was found guilty of both offences, but the charge for making sexually explicit material available was conditionally stayed. Mr. H was sentenced to 18 months of imprisonment, and 3 years of probation, including orders limiting his internet use, a ten-year weapons prohibition, a DNA order, a 20-year prohibition of attending public places where people under 16 are expected to be, and 20-year registration as a sex offender.

Also see: 2017 ONSC 940 (Sentencing).

xiv. 2016 ONCA 989

In **2016 ONCA 989**, Mr. G was convicted of luring a 15-year-old boy on the internet. A charge of aggravated sexual assault was withdrawn. Mr. G was a youth pastor who posted a personal ad on Craigslist seeking men who wanted to receive oral sex. An undercover police officer responded to the ad, posing as a 15-year-old boy. Mr. G arranged to meet with the boy to perform oral sex on him and another 15-year-old boy. He was arrested when he arrived at the agreed upon location. The police found medical evidence of Mr. G's HIV status in his vehicle, questioned him about his HIV status and sexual history, and demanded access to the contact information of people he had been in sexual contact with.

A media release by the police contained medical information about Mr. G's HIV status, his full name, home address, occupation, and church affiliation, which Mr. G argued violated his Charter rights to security of the person. The trial judge noted that the release of Mr. G's HIV status was not permitted under the *Municipal Freedom of Information and Protection of Privacy Act* nor the *Police Services Act*. The court agreed that Mr. G's *Charter* rights were violated but refused to enter a stay of proceedings, but instead imposed a lower sentence than is required by statute (two years less a day). He also unsuccessfully argued entrapment.

Mr. G appealed his conviction, arguing the judge had erred in failing to enter a stay of proceedings, and the Crown appealed the length of his sentence. Three interveners made arguments in the case including the Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario,

the Canadian Civil Liberties Association, and the Criminal Lawyers Association. The Appeal Court noted that a stay of proceedings for an abuse of process is allowed when the state's conducts risks undermining the integrity of the judicial process, but it is very rare (*Babos*). If the state's conduct is sufficiently prejudicial, the court will assess whether a stay of proceeding or another remedy is appropriate to redress the prejudice, while balancing the seriousness of the violation and the interests of society having the charge determined on its merits.

The Appeal Court held that the trial judge erred in deciding that the media release infringed Mr. G's *Charter* rights, but treated the infringement finding as correct and assessed the stay of proceedings on that basis. The Court stated that a stay of proceedings is to deter future bad behaviour of the state, not necessarily to remedy the harm experienced by the individual impacted. It held that the information was found during a legal search, the media release solicited responses from people Mr. G had sexual contact with, and the release was not a pattern of an ongoing problem by the police. Mr. G's appeal of his conviction was dismissed.

In regard to the Crowns' appeal, the court considered whether Mr. G's privacy rights under section 7 of the *Charter* were violated and if there was serious psychological stress imposed by the police's actions. The Crown argued that for there to be a violation of this section of the *Charter* a person's physical or psychological integrity must be impacted, and that the disclosure of Mr. G's HIV stats didn't have an impact on his psychological integrity. Mr. G argues that a privacy violation would violate his section 7 rights. The Court noted that section 7 does not protect a person against all deprivations or intrusions on their security, only those that are sufficiently serious and have a profound impact on the person's psychological integrity. It found that the psychological impact of the police conduct could not be distinguished from the impact of charge of same-sex internet luring. It did find that the police did not have authority under the PSA to release the information, but was permitted under the consistent purpose of MFIPPA.

He was granted leave to appeal the sentence and it was varied to one-year imprisonment. But he had completed two years of a strict conditional sentence so did not order his arrest or committal.

Also note: [2017] SCCA No 105 (Leave to appeal); 2014 ONCJ 696 (Sentencing); 2014 ONCJ 592 (Trial).

xv. 2016 ONSC 7099

In **2016 ONSC 7099**, Mr. J, a police officer in his 30s, pleaded guilty to child luring. For around two and a half months, Mr. J had a personal and online relationship with a 15-year-old girl. He had met her at a mall and agreed to give her and her friends a ride home and got her contact information to stay in touch. He was off duty at the time but her later told the girl he was a police officer. He began texting her and they exchanged about 1,300 nearly daily messages, some were sexual. In person, he would drive her places, buy her alcohol, give her money and once bought her an iPad, but there was no evidence of sexual touching. She turned 16 soon after meeting Mr. J.

The girl's aunt reported the girl missing and provided the police with a cellphone number of a man named "M" who turned out to be Mr. L who admitted with communicating with the girl, but claimed to have stopped texting her when he found out she was under 18. When the girl came home the next day the police took the texts from her electronic devices and she told the police she told Mr. L she was 18 but later admitted her actual age. The court found that Mr. L knew that the girl was "at risk" and the gifts and rides were aimed at gaining a sexual relationship with the girl. Mr. L admitted it was a mistake but did not take full accountability for committing the offence.

He was sentenced to one-year imprisonment and three years' probation. Additional orders included registration as a sex offender and limitations on being in contact with young people.

xvi. 2016 ONSC 6384

In **2016 ONSC 6384**, Mr. C was charged with luring for arranging to sexually assault a child, as well as a breach of probation. A detective from the Internet Child Exploitation unit posted an ad

on Craigslist offering to connect people with his "very young" daughter. He received 57 replies to the ad, including one from Mr. C inquiring if it was real. For several days afterwards, Mr. C communicated with the detective, who had intended to be posing as the girl's father, but Mr. C assumed he was the mother of the child, so the detective assumed that role. He had a female officer pose as the mother on a telephone conversation to arrange an in-person meeting. Based on Mr. C's telephone number, the police were able to identify his address and began to monitor his house. Notes from the in-person meeting with the female detective and the online text and emails with the original detective were introduced at trial. The conversations included graphic discussions about sexual interactions Mr. C would have with the child, who was stated as being four years old. Upon arranging a meeting for the sexual encounter, Mr. C was arrested. A teddy bear, personal lubricant, condoms, a key to a hotel room, and the phone he had used to text the detective were located in his car.

Mr. C stated he had flagged the ad when he saw it on Craigslist and intended to set up a situation where he could contact the police with proof of the intended offence and the child could be rescued from the parent. He provided some information that would substantiate this claim, for example the post was flagged by at least one person, but there was also corresponding information that suggested he intended to engage in sexual activity with the child, for example sending an image of his genitals and asking the mother to show it to the child.

The Court did not believe that he had not intended to engage sexually with the child. It held that he had committed the three elements required of the offence: 1) an intentional use of telecommunication (using computer/cellphone); 2) with a person (talking to detectives); 3) to agree or make an arrangement to commit a sexual assault against the child (a sexual encounter with the daughter). He was found guilty on both counts.

xvii. 2016 ONCA 724

In **2016 ONCA 724**, Mr. B, a 35-year-old man, pleaded guilty to sexual assault, obtaining sexual services of a person under 18, failure to comply with a recognizance and child luring. He expressed remorse, took full responsibility for his behaviour, and had no previous criminal record, but his behaviour was considered "predatory and egregious". He had contacted teenaged children over social media to lure them into having sex with him for money. He also reoffended while on release pending trial, committing similar offences.

Mr. B appealed the sentencing judge's order that restricted him from using the Internet except when "at employment" and prohibiting Mr. B from owing or using "any mobile device with internet capabilities", arguing that it was demonstrably unfit and overbroad. These types of orders are discretionary and are intended to protect children. The parties were waiting on a decision by the Supreme Court on the constitutionality of these types of orders applying retrospectively. Once **2016 SCC 31** was released (which declared the retrospective operation of the prohibition not to contact a person under 16 using a computer was not a reasonable limit, where the retrospective operation of the prohibition not to use the internet or other digital networks, unless in accordance with the court order, was reasonable), the Court of Appeal heard Mr. B's appeal.

The parties agreed that a prohibition on any future contact with young people via the internet should be imposed. The second order that prohibited Mr. B from owning or using an internet connected device was meant to prevent perpetrators for sharing child pornography or communicating with people who wanted to facilitate offences against children. There was no evidence Mr. B posed a risk of doing these things and the order forbidding him from owning these devices was removed.

The court stated:

> The sentencing judge's prohibition on Internet use except when "at employment" assumes that he can seek and obtain employment upon release without the need to access the Internet. Although the sentencing judge noted that the appellant has employment to which he can return, this position may not be available upon release and, in any event, he may also wish to advance his career and seek alternative em-

ployment. Increasingly, applying for employment requires access and use of the Internet and many positions require use and access of the Internet even when not at the employer's premises. Moreover, given the appellant's age, education and occupational history as a computer science specialist and IT technician, the dangers of inhibiting his search for employment and rehabilitation by way of such a broad Internet prohibition appear particularly acute.

In modern life, at least some form of access to the Internet is simply unavoidable for innocent purposes such as accessing services and finding directions. In many homes the telephone operates using the Internet, rather than traditional telephone wires. Simply placing a phone call from one such residence would put the appellant in breach of the s. 161(1)(d) order. Further, as Karakatsanis J. stated in *K.R.J.,* at para. 54, "depriving an offender under s. 161(1)(d) of access to the Internet is tantamount to severing that person from an increasingly indispensable component of everyday life". Internet is used for such commonplace activities as shopping, corresponding with friends and family, transacting business, finding employment, banking, reading the news, watching movies, attending classes and so on.

[…]

In the present case, I agree that because of the nature of the offences and [Mr. B's] conduct, the imposition of a s. 161(1)(d) order is warranted to minimize the risk [Mr. B] poses to children. Imposing strict limits on [Mr. B's] Internet use will reduce the likelihood of his offensive conduct occurring again in the future. However, given the myriad of innocent and perhaps unavoidable activities for which some Internet use may be required, the virtually unconditional prohibition on any Internet use imposed by the sentencing judge for a period of 20 years is, in my view, demonstrably unfit and unreasonable in the circumstances. I do not view a total prohibition on all Internet use other than "at employment" as being necessary to advance the objective of protecting children, nor will it meaningfully assist in preventing the conduct already captured by the order imposed under the former s. 161(1)(c). This court is reluctant to impose a prohibition so harsh as to unreasonably hinder [Mr. B's] rehabilitation efforts and so broad as to make a breach almost inevitable with the attendant criminal consequences under s. 161(4).

Further, I agree with the appellant's submissions that the sentencing judge erred in imposing a prohibition on owning or using a smart phone, tablet or any mobile de-

> vice with Internet capabilities. Section 161(1)(d) permits the courts to prohibit Internet use but does not provide the court with the power to restrict ownership of such Internet capable devices. Nor should such a power be inferred.[46]

The appeal judge substituted the order with a 20-year order that prohibited Mr. B from accessing any illegal content and using social media, including online forums and chatrooms, as well as prohibiting any contact with a person under 16 using a computer system. The court specifically noted Facebook, Twitter, Tinder, Instagram as programs Mr. B was prohibited from using.

Also see: 2016 ONCA 734 (Sentencing); 2014 ONSC 4291 (Pre-trial motion)

xviii. 2016 ONSC 5675

In **2016 ONSC 1324** Mr. G, a 26-year-old medical student, was convicted of luring a child. Mr. G, under the username "respect_power" was communicating with a girl "mia_qt98" who he believed was 14-years-old on a private chatroom. He asked her "asl" (age, sex, location) and sexually explicit questions, including questions about her sexual experience and whether she masturbated. After three conversations he agreed to meet her at her apartment building. However, "mia_qt98" was actually a police officer conducting an undercover investigation and Mr. G was arrested.

Mr. G challenged the conviction on the grounds that it violated *Charter* rights to life, liberty, and security of the person, and right to be presumed innocent of the *Charter*, and that it constituted entrapment. Even though "mia_qt98" was in fact an adult, it is presumed in the absence of evidence to the contrary that the accused believed the age the person represented themselves as. The court dismissed both appeals.

[46] 2016 ONCA 724 at paras 23-28.

Also see: 2016 ONSC 5675 (entrapment ruling); [2016] OJ No 7161 (ONSC) (Trial); 2016 ONSC 1324 (Charter application); [2015] OJ No 7253 (ONSC) (Evidence); [2015] OJ No 7328 (ONSC) (Evidence).

xix. 2016 ONCJ 325

In **2016 ONCJ 325,** a 17-year-old youth offender, Mr. R, pleaded guilty to multiple counts of internet luring, possessing child pornography and extortion. Using a fake Facebook account, he contacted three girls between the ages of 12 and 13 asking for naked photos, all three girls reported the incident to the school, who later referred the incidents to the police. Using the same profile, he asked another 13-year-old girl for nude images that included her face, she sent him a picture with her breasts. Once her received it, he demanded more images and nude images of her older sister. Her sister was able to identify who he was. He also contacted a 15-year-old autistic girl, and demanded nude pictures from her and then used those images to try and extort her for more images. He went on to contact nine other people, requesting images and threatening to post them when he received them from four out of the nine. The last girl he contacted was babysitting a 7-year-old, and he directed her to take nude photos of the child and photos of her engaging sexually with the child, she sent a non-sexual picture of the child, which Mr. W threatened to post unless she sent nude pictures.

Mr. W was diagnosed with defiant disorder as a young person and had said he posted the images because he was angry his girlfriend had broken up with him and he wanted others to experience the pain he felt. He showed little empathy for his victims and breached his recognizance while on bail. He received a 6-month custodial sentence, was ordered to not contact the victims or be near females under the age of 16 and not to possess or access any form of pornography. He was ordered not to possess a computer or electronic device without permission from his youth worker, nor contact anyone via a computer or device without using his full name and to ensure he knows the age of the person he is contacting.

xx. 2015 ONCA 768

In **2015 ONCA 768**, Mr. R, a 24-year-old man, pleaded guilty to child luring and was sentenced to a conditional sentence of two years less a day. The Crown appealed his sentence arguing that he should not have received a conditional sentence but should have been incarcerated.

Mr. R had communicated with a 12-year-old American girl, Ms. F, instructing her on sexual activities, sending her pictures of his genitals, persuading her to send nude photos, and requesting that she masturbate at the same time as he did. He had met Ms. F through an internet tennis game. He claimed to be 22 years old and used a false name. She initially claimed to be 18 years old but later admitted that she was 12 years old. Their communications occurred over several months over email and instant messenger. She sent 38 nude photographs to Mr. R, some of which he had instructed her to pose or engage in specific sexual acts for. At times she expressed reluctance about sending photos. Mr. R tried to convince her to say she was 18 in the online conversations. Ms. F's parents discovered the conversations and reported them to the police. The police also found five child pornography on Mr. R's computer that were not of Ms. F, which he claimed to inadvertently downloaded.

The Court of Appeal allowed the appeal and ordered that Mr. R serve the remaining time of his sentence incarcerated.

xxi. 2015 ONSC 4051

In **2015 ONSC 4051**, Mr. L was charged with luring a child from the internet. An officer with the Internet Child Exploitation Team replied to an ad on Craigslist's "Men Seeking Women" section that stated "age is not important". Posing as a 14-year-old girl named Ms. L the officer sent a message to Mr. L and began communicating with him over email. 76 emails were sent to her Hotmail account, along with 12 phone calls between Ms. L's and Mr. L's phone. The two arranged to meet at a McDonald's so he could pay her for sex and bring her a gift of perfume.

At trial Mr. L testified that he discovered the emails in his account and went to the McDonald's to find out what they were all about, but claimed not to have written them. He had a piece of

paper on him that listed five nearby hotels with their room prices written on them, some chocolate, a gift bag, a bottle of perfume, and several hundred dollars in cash when he was arrested. He claimed to have personal or business uses for all of the items. He also denied being the person on the phone calls with Ms. L. However, evidence contradicted this and the court did not find his explanations credible. His claims at trial also contradicted what he had said to the police upon arrest.

He was found guilty of luring.

xxii. 2015 ONSC 2590

In **2015 ONSC 2590**, a 52-year-old man, Mr. G pleaded guilty to 21 offences of a sexual nature that occurred over three years against girls under the age of 16 including internet luring, invitation to sexual touching, sexual interference, possession of child pornography, extortion, and breaches of recognizance. The girls were located in Ontario, Scotland and the United Kingdom.

Mr. G communicated with the girls over the internet and asked them to perform sexually online and exposed his penis to them via webcam. He had used multiple fake accounts to lure the girls, a search of his home led to the discovery 16 different email addresses and 18 different aliases that he had used to contact 2295 unique email addresses. Mr. G created a spreadsheet to keep track of who had contacted, what alias he was using, whether he had web-cammed with the particular person and other details. He often posed as a teenager to begin talking with the girls. He had developed a pattern to gain the girls' trust to get nude photos, have them engage sexually online, and to try and convince them to meet him in person for sex. He used the images he received to threaten and extort the girls for more images and sexual favours. He was able to convince some of the girls to meet him in person and engaged in inappropriate sexual contact with them, sometimes forced. The girls he communicated with were as young as 10 years old.

Mr. G had above average computer knowledge and was using tactics to conceal his activities. There was evidence of this abuse occurring over 7 years. Most contact was initiated over the internet, but there were cases in 2004 where he had sought out victims in a public library and picked them up from their school. Those offences, led to an order a no-contact order and Mr. G was not allowed to possess or access internet enabled devices, which he ignored and continued to talk sexually with girls online.

Mr. G also possessed child pornography with images of very young children, including toddlers.

Victim impact statements show that that some victims faced severe psychological trauma, low self-esteem, depression, and post-traumatic stress disorder. One victim has attempted suicide multiple times and had to be hospitalized. The mother of one girl stated that it is difficult to feel safe even in their own home.

He was designated as a dangerous offender, who was diagnosed with pedophilia with a high risk to offend. The court noted that this offender would need a complete prohibition on accessing and using the internet to prevent his behaviour but that this would be difficult, if not impossible to control in the digital age.

xxiii. 2014 ONCA 840

In **2014 ONCA 840**, Mr. B hid a video camera in his bathroom to film his 13-year-old niece as she changed her clothes. He also lured a 16-year-old girl off of the internet using Facebook, grooming her over time and taking advantage of her poverty by offering to pay her to pose nude for him. He took over 600 photos of the girl that constituted child pornography. He pleaded guilty to voyeurism, producing child pornography, and luring off the internet. He was sentenced to four-years' incarceration, which he appealed. The sentence was seen as fit and the appeal was dismissed.

xxiv. 2014 ONCJ 543

In **2014 ONCJ 543**, Mr. A, a 25-year-old man, pleaded guilty to child luring. He posed as a 19-year-old teen in a chatroom dedicated for teens. He began speaking with a girl from the United States, who he claimed he thought was 16 years old, but was in fact only 13 years old. He had taken no steps to ascertain her age. During their conversations he persuaded her into masturbating while on webcam and took screen shots of her in the nude.

He was sentenced to four months of incarceration, three years of probation, which included orders that prohibited him from accessing or possessing pornography or naked or sexualized images of children, as well as limitations on possessing or using digital devices and accessing social networking sites. Additional orders included being registered as sexual offender for life, providing a DNA sample and forfeiting the devices used in the offence.

The sentencing judge stated: "Children deserve to live their lives on and offline as children, free from sexual exploitation by anyone. Clearly the message has to be stated loud and clear to this defendant and to other like-minded individuals that society finds such behaviour directed as here against children abhorrent, and that a sentence of jail is unavoidable when caught."47

xxv. [2014] 116 WCB (2d) 432 (ONCJ)

In **[2014] 116 WCB (2d) 432 (ONCJ)**, Mr. B, a 50-year-old man, pleaded guilty to child luring and possessing child pornography. He communicated with a police officer posing as a 14-year-old girl in a chatroom. He requested sexual images of the girl, offered to engage sexually with her, and sent sexual images of himself. After his arrest, the police searched his computer and discovered a video containing child pornography.

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[47] 2014 ONCJ 543 at para 8.

At sentencing, the Court noted without his pro-social behaviours following his arrest and his compliance with his strict bail restrictions the sentence would have been three to four years. He was sentenced to 30 months' imprisonment, a 10-year prohibition from contacting people under the age of 16, a 15-year prohibition from contacting people under the age of 16 via the internet, a DNA order, and a lifetime registration as a sex offender.

xxvi. 2014 ONSC 3794

In **2014 ONSC 3794**, Mr. D, a self-diagnosed 35-year-old hebephile and former theatre director, used various social media platforms to contact, groom, and exchange sexually explicit photos and conversation with children aged 12-15 that he met through his theatre work. Mr. D exchanged sexually explicit instant messages and photographs with three teenage boys and girls. He also videotaped a former adult girlfriend during sex, without her knowledge or consent. He was charged with 29 different counts and all dealt with some area of sexual exploitation. He pled guilty for 12 of these counts (sexual assault, sexual interference, luring, making child pornography, possessing child pornography, and mischief) and was subsequently convicted. There were six named child victims and two unnamed victims. His interactions included sexual touching, intercourse, sexual chats, and sexual images.

The Court imposed a 7-year and 7-month global sentence for luring, child pornography, sexual interference and other offences. He was also given a five-year long-term supervision order that limited his interactions with children under the age of 16 and limited his use of computers and other devices to using the internet for business and research purposes at his place of employment.

Also see: 2014 ONSC 3281 (Opinion evidence).

xxvii. 2013 ONCJ 801

In **2013 ONCJ 801**, Mr. M, a 30-year-old man, pleaded guilty to sexual touching, sexual interference, possession of child pornography, making sexually explicit material available to a child, and luring a child. Over a three-week period, Mr. M had misrepresented his age to a 15-year-old girl and convinced her to send sexually explicit photos and videos. He sent her sexually explicit photos of himself. He repeatedly asked the girl to meet for sex, saying he was going to "rape" her. She refused, and he then threatened to send her sexual images to her mother unless she had sex with him. He wrote her an essay and persuaded her to perform oral sex on him. When the police seized his cellphone, computer and other electronic devices they discovered 30 unique images of child pornography, nine containing child nudity and four videos with child pornography, including the ones of the girl. They also located two hard drives with additional images of child nudity and child pornography. The audio and video components were viewed in the judge's chambers to "prevent the further victimization of the young persons depicted."[48]

Following the offence, the girl's family blamed her for what happened, and the girl engaged in self-harm.

Mr. M was sentenced to three years of incarceration, and additional orders including a DNA order, registering as a sex offender for life, a 10 years weapons prohibition, a 20 years prohibition from being near people under the age of 16, a forfeiture of devices used in the crime, and a no contact order with the victim and any member of her immediate family.

xxviii. 2013 ONCA 374

In **2013 ONCA 374**, the Crown appealed Mr. H's acquittal of luring and sexual interference. Mr. H, a 21-year-old man, met a 15-year-old girl on the internet. He claimed that he believed she was 16 years old and had taken reasonable steps to ascertain her age by making a fake internet

[48] 2013 ONCJ 801 at para 5.

profile using the name "Jerome" and communicating with the girl, and the girl told Jerome she was 16. They later met and engaged in sexual activity that the girl says was non-consensual and Mr. H claimed was consensual. The trial judge held that he had taken the reasonable steps necessary to determine her age and acquitted him. At appeal, the court found that the trial judge had failed to consider other factors such as her appearance and reluctance to engage in sexual activity, and ordered a new trial.

xxix. 2012 ONCA 538

In **2012 ONCA 538**, Mr. D, a 24-year-old man, was convicted of luring, sexual interference, sexual assault, invitation to sexual touching and indecent exposure and pled guilty to possession of child pornography. The convictions on sexual touching and sexual assault were stayed based on the *Kienapple* principle. Mr. D met a Ms. B on MSN. She said was 14, but was actually 13 years old. Mr. D claimed to be 18 years old. They chatted by webcam where he requested that she expose her breasts while he masturbated, showed her his genitals via the webcam, and recorded the images.

The girl's mother discovered the two had communicated by phone and told Mr. D that her daughter was "way underage" and she would contact the police if he continued communicating with her daughter. After this conversation, Mr. D arranged to meet the girl in a hotel room where they engaged in sexual activity. He was sentenced to 23 months' incarceration and three years' probation.

On appeal, he argued that the judge erred in rejecting his defence of mistaken age and also appealed the length of his sentence. He unsuccessfully argued that the trial judge did not differentiate between the standard of taking "all reasonable steps" required for several of the sexual offences and "reasonable steps" required for the child luring offence. The appeal court found that trial judge correctly found Mr. D had not taken reasonable steps to ascertain the girl's age after she said she was 14 years old to meet either of those tests and that Mr. D should have been suspicious about the girl's claimed age considering her very young appearance, immaturi-

ty, the way in which they met, and the communication he had with the girl's mother. His sentence was also deemed reasonable, and the court noted that the possession of child pornography is an aggravating factor based on a case called *Jarvis*.

The appeal was dismissed.

Also see: 2011 ONSC 183 (Sentencing); 2010 ONSC 3093 (Trial); 200 CRR (2d) 227 (Charter issue/Search and Seizure).

xxx. 2011 ONCA 610

In **2018 ONCA 610**, Mr. W, a 30-year-old man, was convicted of child luring, sexual interference, sexual touching, attempting to obtain sexual services of a person under the age of 18 for consideration, and sexual assault. He was sentenced to 6.5 years' incarceration.

He appealed his sentence and the conviction of internet luring.

The complainant was 12 years old and used her cellphone to access the internet. She met Mr. W on a chatroom called Airdate after he sent her a private message offering to pay her $57 million to have sex with him. She did not reply to the message. Mr. W sent a second message using a fake name and age, posing as a man between 18-20 years old. He suggested that the girl send him a text if she ever changed her mind. The two sent hundreds of text messages back and forth over several days, including discussions of sexual acts he would like them to engage in, some of which she did not understand. She had initially stated she was 14 years old and later told Mr. W she was 12 years old, which he said did not matter. He said he was interested in taking her virginity. He offered her $200 million dollars to have sex with him. He set up a conversation with someone purportedly from the Bank of Montreal to prove he had $300 million dollars in his account. The girl's family was having financial problems at the time and she agreed to

meet Mr. W with the promise she would be paid the money. When they did meet he made a phone call pretending to transfer the money into an account in her name.

She was convinced that she received the money and agreed to engage in sexual acts, including intercourse. She later went to the bank and discovered there was no account in her name. She did not tell anyone about the incident for six months. Following a sexual education discussion where her teacher told her class that child sexual abuse is never the fault of the child, she told her mother what had happened. Mr. W was arrested when her mother reported the abuse to the police.

On appeal, Mr. W argued that a cell phone was not a "computer system" and texting via a phone was not communicating via a computer system. The child luring offence requires that a person communicate via a computer system in order to be charged with the offence. The court held that sending text messages involves computer systems used by the cell phone company.

Mr. W also sought to reduce his sentence, but the court did not find it to be an excessive sentence. Mr. W argued that counting grooming as an aggravating factor was double counting. The trial judge had noted the frequency of communication, the distance Mr. W had to travel to meet the complainant, and his access to her away from her parents by using the internet to communicate with her to gain her trust when discussing aggravating factors. However, the appeal judge did not find that she had increased Mr. W's sentence for his efforts to groom the complainant. Mr. W also argued that the trial judge had erred for taking into account his previous fraudulent criminal history, but the Court of Appeal found that this was appropriate as Mr. W had misled the complainant in order to engage in sexual conduct with her.

Finally, his sentence was not considered manifestly excessive.

The court stated:

> […] if it is shown through the introduction of properly tendered evidence that the offence of luring has become a pervasive social problem, I believe that much stiffer sentences, in the range of three to five years, might well be warranted to deter, de-

> nounce and separate from society adult predators who would commit this insidious crime.[49]
>
> […]
>
> when trial judges are sentencing adult sexual predators who have exploited innocent children, the focus of the sentencing hearing should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it. While the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives of denunciation, deterrence, and the need to separate sexual predators from society for society's well-being and the well-being of our children must take precedence.[50]

His appeal was dismissed.

xxxi. 2011 ONCA 778

In **2011 ONCA 778**, the police were informed by a high school vice-principle that Mr. B, a 22-year-old man, had sex with a 16-year-old girl. Mr. B filmed the sexual encounter with the girl and shared the video with other people. The two had met on the internet. The sexual acts were legal, but the filming of the sexual activity created child pornography, which is illegal. However, the girl in the video and the people the video was shared with would not cooperate with the police. An officer obtained Mr. B's email address and sent a friend request to his MSN account posing as a 13-year-old girl, engaging in non-sexual conversation, that Mr. B turned sexual and asked to meet with the girl, which led to the child luring charge. At trial, he was found guilty but the charge was stayed on the basis of entrapment.

This decision was reversed on appeal, the Court held that the officer did not initiate the sexual aspect of the conversation and provided several opportunities for Mr. B to leave the conversa-

[49] 2018 ONCA 610 at para 58.
[50] 2018 ONCA 610 at para 76.

tion, but Mr. B continued with the conversation. As it was Mr. B who turned the conversation sexual. Entrapment could not be made out because the police officer did not offer the opportunity to commit the offence.

Also see: 2010 ONSC 5606 (Application for stay of proceedings).

xxxii. 2011 ONCA 237

In **2011 ONCA 237**, Mr. P appealed his sentence of child luring. The court had determined that the accused had not taken reasonable steps to ascertain the complainants age, despite her claims to be 16 years old.

The appeal was dismissed.

xxxiii. 2011 ONCA 31

In **2011 ONCA 31**, Mr. S appealed his conviction of two counts of sexual assault, two counts of sexual intercourse and one count of child luring involving a 12-year-old child. Mr. S argued that the judge failed to address inconsistencies in the complainant's testimony. The court did not accept his argument. His 21-month sentence was considered an appropriated sentence. The appeal was dismissed.

xxxiv. 2010 ONCA 575

In **2010 ONCA 575**, Mr. E, a 24-year-old man, pleaded guilty to possessing child pornography and luring. He had used an internet chatroom to lure what he believed to be two 12 and 13-year-old girls to meet him for sexual activity but was actually communicating with an undercover police officer posing as the girls. Mr. E also had child pornography images stored on his computer. He was sentenced to 45 days' imprisonment for the child pornography charges and a one-year conditional sentence for the luring conviction. The sentencing judge noted that condi-

tional sentences for luring offences should only be imposed in the rarest of cases (*Folino*) and permitted it in this case. Mr. E had a young family, maintained employment and was attending counselling regularly. Additional conditions included house arrest and prohibitions from using a computer. The Crown appealed the conditional sentence, but the majority found that it was reasonable to go outside the normal sentencing range in this case and pose a conditional sentence.

xxxv. 2009 ONCA 223

In **2009 ONCA 223,** Mr. T was convicted of internet luring. He was sentenced to 9 months' imprisonment and appealed both his conviction and sentence. Over a four-month period, Mr. T engaged in sexually explicit conversations with an undercover police officer posting as a young girl on the internet. The chatroom was titled "#0!!!!!!!!!younggirlsex" and the officer used the handle "mandy13". Their communications happened over email and MSN and Mr. T suggested that the girl masturbate and gave her instructions on how to do that. A female officer posed as the girl and the two spoke on the phone and Mr. T suggested they meet for a sexual encounter. Mr. T was arrested at their pre-arranged meeting spot.

Mr. T claimed he thought he was speaking with an adult male posting as a young person online and that he believed they were role-playing. The court did not believe this and found that Mr. T took no reasonable steps to ascertain the actual age of the person he was chatting with and "Mandy" had told him she was 14 when he asked. The recording of the telephone call and the MSN chat records were lost and not available at the trial.

On appeal the central question was whether the trial judge had erred in his assessment of Mr. T's credibility. The court found that the judge had erred in noting that Mr. T's statement came long after discovery, shifting the burden of proving he was innocent to Mr. T, and saying that witnesses are presumed to be telling the truth. The appeal judge noted that Mr. T believed the person he was speaking with was an adult because:

1. the chat-room was designated as adult-only;
2. his observation before saying anything to mandy13 that she was logged into a pornographic website unlikely to be frequented by a child;
3. when he asked her about her age, she stated that she was 13 but added "lol", slang for "laugh out loud", suggesting a joke;
4. mandy13 used what he regarded as a joke e-mail address
5. mandy13 purported not to have a photo available;
6. mandy13 was familiar with a "blush" command, causing his screen to turn pink, despite claiming to be new to the chatroom.[51]

The trial judge had not rejected this evidence but stated that Mr. T seemed to be trying to extricate himself after receiving disclosure, which the Court of Appeal found was an error.

The appeal was allowed and a new trial was ordered.

xxxvi. 2009 ONCA 133

In **2009 ONCA 133**, Mr A began chatting with what he thought was a 13-year-old girl in an internet chatroom, but was actually an undercover detective posing as the girl. Mr. A made the conversation sexual and asked for pictures of the girl. Mr. A told the girl he was 69 years old and also offered to send her nude photos of himself. The "girl" said she was worried her mother might see and that she was only 13 years old. He tried to send her a nude picture of himself but was not successful, he then sent a video focused it on his genitals in which he masturbated to ejaculation.

At trial he argued that it was not him in the video, but later acknowledged that it was. He also claimed that the girl's online profile stated she was 18 and only people 18 years and older were

[51] 2009 ONCA 223 at para 34.

permitted on the site, and as such he thought she was at least 18, despite her telling him that she was 13. He claimed that everyone, including him, lies about their age in chatrooms. The trial judge rejected this argument and found that Mr. A made no effort to determine her real age.

Mr. A was found guilty of child luring for the purpose of exposing his genitals to a person under the age of 14. He was sentenced to 90 days' incarceration and two years' probation. Additional orders included registering as a sex offender.

Mr. A appealed both his conviction and sentence. Mr. A argued that because the person he sent the video to was not actually under 14 years old, he should not be found guilty of child luring. Under the offence of child luring, the accused must only believe the complainant is under age for the purpose of facilitating an offence, whereas the offence of exposing genitals to a person under the age of 14 requires that the person actually be under 14 years old. The court engaged in a statutory interpretation of the child luring provision and stated that the child luring provision criminalizes communication by a computer with a person who is below a certain age with the intention to facilitate a particular offence listed in the child luring provision. All of the listed offences potentially involve sexual exploitation. This includes exposure of genitals to a person under the age of 14. The purpose of the child luring offence is to intervene in behaviour before a child is harmed by criminalizing the intention to commit the crime. This is known as an inchoate crime. The guilt is found in the guilty mind of the offender who intends to commit the crime, not in the actual act of facilitating the future crime. The act required to find guilt is communicating with a person who is or they believe to be under 14 via a computer.

The Court noted that it does not matter whether it was possible for the intended offence to be committed, only that the accused believed he could. Mr. A's inability to actually commit the offence of exposing his genitals to someone under the age of 14 (because he was actually talking to an adult) was no defence to the charge of luring. The offence of luring is made out so long as Mr. A believed he could facilitate the other crime by communicating with the complainant. If

the complainant had to actually be under a certain age for the offence to be made out, it would render much of the child luring provision meaningless, in so far as the offence includes communication with a person the accused believes is under a certain age.

The court rejected Mr. A's argument. It also noted that many of the child luring cases include undercover police officers posing as children in order to fulfil the state's role to protect children, none of which would be possible if his argument was accepted.

On the purpose of the child luring the court stated:

> The language of s. 172.1 leaves no doubt that it was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems. The Internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The Internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults. One author has described the danger in these terms:
>
> For those inclined to use computers as a tool for the achievement of criminal ends, the Internet provides a vast, rapid and inexpensive way to commit, attempt to commit, counsel or facilitate the commission of unlawful acts. The Internet's one-too-many broadcast capability allows offenders to cast their nets widely. It also allows these nets to be cast anonymously or through misrepresentation as to the communicator's true identity. Too often, these nets ensnare, as they're designed to, the most vulnerable members of our community — children and youth.
>
> . . . . .
>
> Cyberspace also provides abuse-intent adults with unprecedented opportunities for interacting with children that would almost certainly be blocked in the physical world. The rapid development and convergence of new technologies will only serve

> to compound the problem. Children are the front-runners in the use of new technologies and in the exploration of social life within virtual settings.[52]

An additional argument made was that the offence of exposing one's genitals to a person under the age of 14 could only be committed in person, it could not include images of genitals sent over the internet. The Criminal Code defines the offence as "Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction." Mr. A argued that the phrase "in any place" means that the victim and the offender must be in the same physical place when the offence occurred. The court disagreed and found that the phrase "speaks to the location where the perpetrator exposes himself" and does not require the two to be in the same physical space. This is different than another subsection the offence of indecent acts, that requires the act to be done in a "public place". The court rejected Mr. A's argument and found that the exposure of genitals over the internet was included in the offence, stating to do otherwise would fail to protect children from internet predators sexually exploitative behaviour and children should be expected to police the internet themselves.

The court stated:

> [The exposure provision] was enacted to protect children against sexually exploitive conduct. That object is not advanced by an interpretation which requires that the victim be in the same physical place as the perpetrator. The harm caused by the prohibited conduct and the danger it poses to young persons flows from the conduct and the sexual purpose with which the conduct is done. Neither the harm nor the danger depends upon the victim being in close proximity to the perpetrator. Indeed, it could well be argued that the modern day "flasher" surfing the Internet for vulnerable children poses a more significant risk to children than did his old fashioned raincoat clad counterpart standing on some street corner.[53]

Both the appeal from the sentence and the conviction were dismissed.

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[52] 2009 ONCA 133 at 36.
[53] 2009 ONCA 133 at para 45.

Also see: [2009] No 395 SCC (Leave to appeal).

xxxvii. 2006 CanLII 27300 (ONCA)

In **2006 CanLII 27300 (ONCA)**, Mr. J and the Crown appealed Mr. J's sentence of six month's imprisonment and three years' probation for luring a child on the internet. Over 14 days Mr. J, a 22-year-old man, began chatting with a person he thought was a 13-year-old girl, but was actually a police officer. Mr. J almost immediately sent an image of his face and one of his genitals to the girl. He began making sexually explicit comments and requesting that they meet for sexual interactions. He sent another image of him masturbating and other pornographic images. They arranged a time to meet so Mr. J could sexually touch the girl. He was arrested upon arrival. While on bail, Mr. J was prohibited from using computers or the internet, other than for work purposes, and was not allowed to be around children under the age of 16.

The Crown referenced *Young Canadians in a Wired World: The Students' View* to refer to statistics about young people's use of the internet but the trial judge refused to admit the survey but was willing to take judicial notice that children use chatrooms. At appeal, the Crown sought to include the survey and a variety of fresh evidence in the form of additional reports, all of which the appeal court refused to admit.

Mr. J argued his sentence should be reduced to a conditional sentence. The appeal court stated:

> In my view, a conditional sentence will generally be inappropriate for an offence of the nature committed by the appellant in this case. Given the degree of planning implicit in the offence and the seriousness of the conduct contemplated, the objectives of general deterrence and denunciation will rarely be satisfied by a conditional

> sentence of imprisonment. This offence is not committed simply through communication with a child, even communication of a sexual nature.[54]

In regard to the Crown's appeal for a harsher sentence, the court held that the sentence range for an offence like this should like between twelve months and two years, but the trial judge recognized he was ordering a sentence below the usual range due to mitigating circumstances including Mr. J's young age and the impact of imprisonment on his family.

Also see: [2005] OJ No 4143 (ONCJ) (Sentencing).

xxxviii. 2005 CanLII 40543 (ONCA)

In **2005 CanLII 40543 (ONCA),** Mr. F, a 35-year-old man, pleaded guilty to child luring and was sentenced to nine months' imprisonment, three years' probation, and orders limiting Mr. F's ability to be near people under 14, including a prohibition on communicating with young people on computer systems. He was also registered as a sex offender for ten years.

Mr. F had communicated over live chat and emails with someone he thought was 13 years old for the purpose of sexual touching. He was actually speaking with an undercover police officer. The conversation sexually explicit. Mr. F made plans to meet with the girl and told her what sexual acts he would perform on her, told her what to wear, and instructed her to digitally penetrate herself to prepare for their meeting. He drove 22 kilometers to meet her and was arrested when he arrived. A search of his computers did not find any child pornography.

Mr. F appealed the sentence and duration of the limitations on being near young people. The appeal was allowed.

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[54] [2006] 211 CCC (3d) 20 at 27.

Mr. F was a father, had significant support from his community, had taken responsibility for his actions, had mental health conditions that influenced his behaviour, and was seeking psychological therapy and counselling. He did not suffer from pedophilia or hebephilia, had been assaulted in jail when arrested, and a psychiatric assessment indicated that any additional incarceration might put him at risk of suicide. The doctor held that incarceration would have no rehabilitative value on Mr. F and Mr. F posed no risk of repeating his behaviour.

The appeal court noted that:

> Having come to this conclusion, I wish to first make it clear that I fully agree with the sentencing judge that the offence of child luring must be dealt with seriously by the courts. The social policy underlying the enactment of this offence is clear. Many Canadian families have home computers with Internet access. Children are frequent users of the Internet. Children, as vulnerable members of our society, must be safeguarded against predators who abuse the Internet to lure children into situations where they can be sexually exploited and abused. In most circumstances involving the offence of child luring, the sentencing goals of denunciation and deterrence will require a sentence of institutional incarceration. Indeed, it will only be in the rarest of cases that a conditional sentence will be appropriate in a case involving this offence. In my view, however, this is one of those rare cases.[55]

It found that this was one of those rare circumstances and imposed an 18 months' conditional sentence with strict conditions on house arrest, including a prohibition from communicating with any person under the age of 18, other than his own children, unless with another adult. The limitations on being near people under the age of 14 was relaxed to allow him to attend public parts and swimming pools as long as he is accompanied by other adult, and the restriction was limited to 10 years.

IX. PRINCE EDWARD ISLAND

[55] 2005 CanLII 40543 (ONCA) at para 13.

i. 2011 PESC 8

In **2011 PESC 8**, Mr. H, a 23-year-old man, was found guilty of two counts of child luring. The girl was a 14-year-old foster child who had known Mr. H for most of her life, his mother provided respite care for the girl. They began communicating over Facebook where Mr. H stated that he knew the girl was a virgin and proposed sexual intercourse. They sent around 70 messages back and forth over a period of two months, which included sexually explicit content and a plan to engage in sexual activity described by Mr. H along with offers to teach her how to engage sexually. Mr. H unsuccessfully argued that someone was impersonating him online using his Facebook account.

Upon sentencing the judge found that "[i]t is a considerable mitigating factor that he was not on the internet trolling for victims."[56] However, the judge also noted that the luring provision "was enacted to shut the door on predatory adults who for a sexual purpose troll the internet looking for vulnerable children and adolescents. While J.J.H. was not trolling the net, he utilized the net like a dog with a bone once the opportunity presented itself."[57] The fact that there was no evidence of pornography on his computer or communications with other underage people was also a mitigating factor. However, a conditional sentence was not found to be appropriate and Mr. H was sentenced to six months' incarceration and two years' probation. Additional orders included a DNA order, and a 20-year registration as a sex offender. Limitations on being near underage people were not ordered because Mr. H "was not on the internet looking for victims".[58]

X. QUEBEC

[56] 2011 PESC 8 at para 14.
[57] 2011 PESC 8 at para 35.
[58] 2011 PESC 8 at para 49.

i. 2018 QCCA 824

In **2017 QCCQ 8152**, Mr. R, 35-year-old man, was found guilty of luring a 12-year-old child, transmitting sexual material to a child, invitation to sexual touching, possession and production of child pornography, and breaching conditions of his release. He contacted the child, Ms. A, over Facebook, a girl he knew from the community. They spoke regularly online and the conversation quickly escalated to being sexual in nature. Mr. R invited her to masturbate and insisted she send him photos of it, which she sent three or four photos. He also sent her an image of his penis. Mr. R then asks Ms. A to meet in person. Ms. A's mother discovered the conversation and contacted the police.

On appeal, Mr. M was ultimately sentenced to 2 years' incarceration.

Also see: 2018 QCCA 824 (appeal); 2017 QCCA 1811 (application to appeal); 2017 QCCQ 8152 (sentencing).

ii. 2017 QCCQ 1318

In **2017 QCCQ 1318**, Mr. R, an author of children's novels, was found guilty of child luring, sexual touching, invitation to sexual touching, sexual assault, armed sexual assault, possession of child pornography and production of child pornography. Mr. R met Ms. M at one of his book signings when she was 11 years old. They communicated publicly over an online chat forum for his book series and privately over MSN. They met again when she was 13 years old at a similar book signing, and Ms. M was romantically infatuated with the author. Following the encounter, over MSN, he commented on how beautiful and mature she was. The conversation became sexual, and he asked about her breasts, described erotic scenes, sexual acts he wanted to do with her, and masturbated during their conversations. She showed excitement towards the attention.

They exchanged pornographic websites and sexually explicit photos, discussed meeting in person, and discussed having a BDSM relationship. They met 10 times over 2 years during which they had sexual interactions, including ones where foreign objects were inserted into Ms. M, constituting the armed sexual assault convictions.

During this time, Ms. M was struggling with mental health issues and was involuntarily hospitalized on two occasions. They had a highly intimate, sexualized, and emotionally turbulent relationship, and by the end she had become obsessive in regard to their relationship. He knew about the severity of her psychiatric situation, made false promises about ending his marriage, and refuses to visit her in the hospital. After this, at 16 years old, she reports him to the police.

At trial, both parties presented digitally recorded copies of their conversations and had experts testify to the integrity of the documents. The court found the evidence of Mr. R to be falsified.

Mr. R was sentenced to 55 months and 22 days' incarceration.

Also see: 2017 QCCA 2076 (evidentiary application); 2017 QCCQ 1318 (sentencing); 2016 QCCQ 15007 (trial).

iii. 2018 QCCQ 400

In **2018 QCCQ 400**, Mr. A, a 20-year-old man, pleaded guilty to transmitting sexually explicit material to a child, possessing and accessing child pornography, child luring, sexual contact with a person under 16 years of age, and invitation to sexual touching with a person under 16 years of age. Mr. A contacted girls between the age of 9 and 15 on Facebook. He transmitted sexual material to them and requested sexual material from them, including a picture of his penis to a 9-year-old girl and requesting photos of her posing nude. He also had sexual contact with two of these girls, who were 12 and 13 years old. He mostly asked them to meet him at his own residence, where they would have sexual interactions. He pressured one girl into giving him oral sex by saying he was suicidal, after she refused to have intercourse with him. He was flagged by

the police online when he communicated with an undercover police officer, leading to his arrest.

He was sentenced to 42 months' incarceration.

iv. 2017 QCCA 303

In **2016 QCCQ 17287**, Mr. L was previously found guilty of child luring and breach of undertaking. Mr. L contacted a 14-year-old girl over Facebook messenger and complimented her appearance. She was skeptical of his identity and responded to his persistent and sexually explicit comments with hostility. Mr. L was also communicating with a 12-year-old girl over Facebook, similarly complementing her appearance and engaging in sexually explicit conversation. Mr. L knew the girl's phone number which worried her. During this period, Mr. L was also communicating with an undercover police officer posing as a young girl, who he asked to meet up for sex. This led to his arrest for that incident, but he was only later reported for the other interactions.

Mr, L was sentenced to 2 years and 3 months incarceration. His *Charter* challenge and appeal dismissed.

Also see: 2016 QCCA 989 (Appeal); 2016 QCCQ 17287 (Trial).

v. 2016 QCCQ 16698

In **2016 QCCQ 16698**, Mr. A offered the complainant, a 13-year-old girl, five dollars per nude photo and was sent 30 photos and 1 video. The mother of the complainant reported him to the police. Mr. A was sentenced to 30 months' incarceration luring.

vi. 2016 QCCQ 12046

In **2016 QCCQ 12046,** Mr. F, a 30-year-old physical education teacher at two elementary schools, pleaded guilty to 113 counts of sexual offences against children under 16 years of age.

He was convicted of child luring, invitation to sexual touching, extortion, using a stolen or fraudulent identity, possession, production, and distribution of child pornography. These offences were committed against 64 identified victims and 44 non-identified victims, mostly females 10 to 11 years old, and spanned over two years. Police found over 500 photos and videos of child pornography.

Posing as an adolescent, Mr. F used various Facebook profiles to contact the complainants. He would pretend he was mistaken as to knowing them, but then compliment their appearance. He would explain he was a recruitment agent for models and ask if they wanted to join. If they did, he would provide them with a fake website, a questionnaire, and a skype profile to contact. Over skype, he would play a pre-recorded video of a teenage girl in lieu of his own feed and claim his microphone was broken so they had to continue speaking over messenger. As the teenage girl, he would ask them to perform sexual acts on webcam to prove their qualifications for modeling positions. This included masturbating, inserting foreign objects into their vagina or anus, and bestiality. One teenage girl would also show herself performing fellatio, being penetrated, masturbating, and both performing and receiving oral sex from her 8-year-old female cousin, supposedly. He would also show them other sexually explicit child pornography videos. The complainants were enticed to participate through prizes, threats, and friendship.

He was sentenced to 14 years' incarceration.

vii. 2016 QCCQ 9301

In **2016 QCCQ 9301**, Mr. P was found guilty of child luring. Mr. P used Facebook to target young gay boys by identifying the gay flag in their profile photos. His account falsely claimed he was 39 years old when he was 50. He contacted Mr. L, who was 14 years old, and started a sexual conversation where Mr. P described quite vivid sexual acts and Mr. L responded minimally. They exchanged photos of themselves, but Mr. P claimed he was an elementary school teacher and therefore can't send one that too obviously reveals his identity. Mr. P states to Mr. L that if he were only a few years old, then they could have met for coffee.

Mr. L's mother discovered the conversation and contacted the police. Mr. P claimed that it was only virtual and he did not commit a crime in real life. The court responded that:

> À une époque où les moeurs évoluent et où la technologie facilite les relations virtuelles, plusieurs valeurs seront redéfinies. Le droit se doit cependant d'être appliqué dans le contexte de ces nouvelles réalités, en évitant le piège des préjugés et des idées préconçues.
>
> [In an age where social mores are evolving and where technology facilitates virtual relationships, many values will be redefined. The law needs to be applicable to the context of these new realities, avoiding the pitfalls of preconceived notions and prejudice. – translated by the eQuality research team]

The court noted that Mr. P knew Mr. L was 14 and that the age difference was wrong, and discussed being sexually aroused by him and meeting in person. He was found guilty of child luring.

viii. 2015 QCCQ 4509

In **2015 QCCQ 4509**, Mr. S was found guilty of 47 of the 52 offences for which he was charged. He committed these offences against girls aged 12 to 16 across multiple Quebec cities. He was convicted of child luring, inducing a person to prostitute themselves, invitation of sexual touching, sexual touching, sexual assault, kidnapping, accessing, and making child pornography.

Generally, Mr. S would send a friend request over social media to young girls, presenting himself as a young adult. Under the guise of just joining the platform, he would begin banal conversation and slowly work in sexual content. He would eventually explain he was participating in a challenge with a friend to have a sexual relation with the youngest girl possible in order to win a large sum of money. If the girl did not want to participate, he would ask to be referred to a friend. He used a variety of usernames and associated email addresses. Some conversations led to meet ups where there was sexual touching or sexual intercourse, some were consensual and some were not.

He was also searching online for oral sex services being offered in local secondary schools for five dollars and had child pornography images in his cache. This content was flagged by the police, but Mr. S claimed he was doing research into a "social phenomena" and was trying to catch pedophiles online. He also claimed to have offered two girls money in exchange for sex as part of the same study, even though he actually did have sex with them.

He admitted to contacting up to 20 minors online. Ms. Y, who was 12 years old and in foster care, met up with him after being offered $1,200 for a sexual interaction. Even though she did not want to go through with it, he parked in the woods and forced her to give him oral sex, touch him, and he touched her. He did not give her any money. He had a similar interaction with Ms. D who is 15, in which he had aggressive sex with her, gave her oral sex, and ejaculated on her stomach. Again, he did not give her the money she was promised. Ms. I, a 13 years old girl, went to his apartment, was not allowed to leave, and was violently raped by Mr. S. She was also not given any money. He contacted Ms. I's younger sister Ms. T and they had sexual encounters 4-5 times for which he paid her small sums of money or provided her alcohol for. These encounters sometimes also involved the Ms. T's friend, Ms. K, and Ms. T's younger sister Ms. L. Some complainants report being offered up to $4,000.

Mr. S was 23 to 25 years old during the commission of the offences and was a member of the Canadian Armed Forces who served in Afghanistan.

He was sentenced to 9 years' incarceration.

Also see: 2016 QCCQ 7602 (sentencing).

XI. SASKATCHEWAN

i. 2016 SKCA 93

In **2016 SKCA 93**, Mr. M was sentenced to two years less a day incarceration and three years' probation for 11 convictions on child luring, child pornography, extortion, and sexual interfer-

ence offenses related to four girls. Additional orders included a DNA order, registration as a sex offender, and prohibitions from possessing devices capable of accessing the internet (save cell-phones).

When Mr. M was 17 years old he began communicating with four different girls aged 12-14 over the several social media sites and continued talking to them after his 18th birthday. He engaged in sexual conversations with them and convinced them to send him sexual videos and photos over social media and text, despite their initial resistance. Once he received the images from one of the girls, he threatened to distribute the images if she did not send him more. He would insult the girls if they refused to send more pictures. He organized the photos of the victims into file folders on his email account.

The Crown sought leave and appeals the sentence, arguing the sentence did not reflect the gravity of the offence and that due to Mr. M's moral blameworthiness the court should have ordered consecutive sentences. However, the court did not agree with all of these arguments. It did find that the judge had not implemented an appropriate sentence for the sexual inference conviction and increased the sentence to by one year and one day, for a total of three years and set the two years of probation aside. In the appeal, the Court emphasized the special vulnerability of children to internet-based sexual offences.

ii. 2016 SKCA 32

In **2016 SKCA 32**, Mr. M, a 19-year-old man, began communicating with a 13-year-old girl on a website called Tagged. Users of this site could browse each other's profiles and communicate via chat or email. The two later began texting. Some of the communication was sexual, often led by Mr. M. He asked that she pose nude via a webcam, but the girl refused. The two would meet on occasion and drive around in Mr. M's car or meet at various locations. On one occasion he sexually assaulted her. He was convicted of sexual assault and child luring. The court noted that the girl was particularly vulnerable due to her home circumstances.

The Crown appealed the sentence and the sentence was increased to a three-year sentence and the 20-year registration as a sex offender was increased to a lifetime registration. The court stated:

> One cannot overstate the seriousness of luring as an offence. There is sometimes a belief that anonymity merits no consequences and, therefore, any persuasive techniques are acceptable. The manipulation of vulnerable young people through the anonymity of the Internet is a serious societal problem. Such manipulation will often take place in the safety of the victim's home and in the privacy of their own room. Here, anonymity was not a factor but manipulation was. The offence of luring must be assessed as a separate crime and the offender's overall moral culpability for its commission must be reflected in the sentence.[59]

Also see: 2015 SKQB 221 (Sentencing); 2014 SKQB 277 (Charter rights s 11(b)).

iii. 2012 SKCA 18

In **2012 SKCA 18,** Mr. S had been convicted of child luring and invitation to sexual touching but had been acquitted of sexual exploitation and distribution of child pornography. The Crown appealed these acquittals and a new trial was ordered for the child distribution charge given the narrow interpretation of the language of the offence in reference to the "depicted" age of person in the photo.

Mr. S communicated with an undercover officer presenting as a 14-year-old girl on NetLog, and sent ten pornographic photos to the officer. These photos including a girl masturbating, being penetrated, a picture of a penis, and a picture of ejaculation on a girl's body. He claimed it was his step-daughter when she was 16 years old and that they had began having sex when she was 14 years old. He encouraged the undercover officer to masturbate to the photos along with him. This launched an investigation into his relationship with his stepdaughter.

[59] 2016 SKCA 32 at para 23.

Mr. S claimed he was in love with his step-daughter and they started sexual relations when she was 17-18 years-old. The step-daughter claimed it started when she was 18, that she seduced him, and that the photos were taken consensually although she did not know they were being forwarded. She testified for the defense, saying she had initiated sexual contact with Mr. S. There was evidence that was not admitted that Mr. S had been in communication prior to her giving her statement and discussed what evidence she would give at trial.

He had been acquitted on the child pornography charges because it was not clear whether the girl was 17 or 18 years old at the time the images were taken.

The appeal on the sexual interference charge was dismissed but the acquittal on the child pornography was set aside and a new trial was ordered because the judge had failed to consider all evidence, including the statements Mr. S made online about the images being of his 16-year-old step daughter.

XII. YUKON

i. 2015 YKTC 3

In **2015 YKTC 3**, Mr. CS, an 18-year-old man, pleaded guilty to child luring, making sexually explicit material available to a child, and breaching his youth probation orders. Mr. CS was on probation for sexually assaulting three girls at the time of the office. During this time, he contacted a 12-year-old girl, Ms. F, through Facebook and used sexually explicit language, including offering to show her his genitals, which she declined. He also offered her two iPods in exchange for sex which she also declined. He told her not to tell anyone about their conversation. The girls' mother contacted the police and gave them access to her daughter's Facebook so they could read the messages. Mr. CS also messaged a friend of the girl on Facebook, Ms. M, using sexually explicit language, invited sexual contact by suggesting that they be "friends with benefits", sending images of his exposed penis and requesting sexual images from her. Ms. M

blocked him, and Mr. CS made a new Facebook account and began communicating with her again.

Mr. CS was sentenced to one year of incarceration, three years of probation, and additional orders including no contact with the victim, to keep his distance from the victims, and a prohibition from possessing or using a computer or other device that can access the internet without permission from his Probation Officer, prohibitions from being near or in contact with a person under the age of 16, a lifetime registration as a sex offender and a 10 year firearms prohibition.