

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

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A. OFFENCE ELEMENTS

Making sexually explicit material available to a child

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

- (a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155, 163.1, 170 or 171 or subsection 212(1), (2), (2.1) or (4) with respect to that person;
- (b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or
- (c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person.

Punishment

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

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years and to a minimum punishment of imprisonment for a term of 90 days; or
- (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months and to a minimum punishment of imprisonment for a term of 30 days.

Presumption

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

No defence

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

Definition of "sexually explicit material"

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

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

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

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

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

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

B. SELECTED CASE LAW

I. ALBERTA

i. 2017 ABQB 193

In **2017 ABQB 193**, Mr. H was charged with sexual assault, touching a person under the age of 16 for a sexual purpose, exposing his genital organs for a sexual purpose to a person under the age of 16, and making sexually explicit material available to a person he believed was under the age of 16 for the purpose of facilitating an offence.

Mr. H showed his 7-year-old daughter pornographic videos involving both children and adults, calling them “love videos”, and taught her that what was occurring in the videos were acts of love and that the people in the video were learning how to love each other. On several occasions he abused her by either exposing his penis, masturbating in front of her, having her masturbate him, using sex toys on her, or fondling her. He told her not to tell anyone about their “love acts” because they may call the police on him.

The trial judge found Mr. H guilty of all of the offences, save making sexually explicit material available to a person he believed was under the age of 16 for the purpose of facilitating an offence, stating that:

I accept the evidence of the complainant and find as a fact that the accused made sexually explicit materials available to her by way of love videos. I am not persuaded, however, that the Crown has proven beyond a reasonable doubt that the accused made these materials available to the complainant "for the purpose of facilitating an offence" under s. 151, 173(2) and/or s. 271 of the Criminal Code . It may well be that by showing the love videos to her the accused was grooming the complainant, or "normalizing" his own behavior, for the purposes of one or more of the offences under ss. 151, 173(2) or 271. However, there is little if any direct evidence to support

that conclusion, and whatever inferences arise from the facts in this case fall just short in my view of proving the offence under s. 171.1(b).¹

The applicant is seeking appeal, arguing that the judge had incorrectly discounted contradictions in the child's statements, erred in finding there was no challenge or cross examination in regards to core allegations raised against him, erred in declining to assess the credibility of those allegations that had not been challenged or cross examined, erred in failing to recognize or consider inconsistencies in the child's evidence; and erred in failing to stay the prosecution for unreasonable delay.

He was denied bail pending appeal due to the seriousness of his crime.

Also see: 2017 ABQB 193 (Trial decision); 2016 ABQB 610 (Charter challenge – 11(b)); 2017 ABCA 337 (Bail)

II. BRITISH COLUMBIA

i. 2016 BCPC 241

In **2016 BCPC 241**, Mr. M, a diagnosed pedophile, was on parole for sexual offences against multiple preteen and early teen boys over a five-year period. Under the conditions of his parole he was prohibited from being in the company of people under the age of 16. While on parole, he befriended a woman and her 10-year-old son, informing them he was a trained teacher and tutor and introducing himself by his middle name. This relationship led to multiple incidents where Mr.

¹ R v H(DA), 2017 ABQB 193, para 125.

M was in the company of people under the age of 16. Over a 10-month period he manipulated the mother and son into trusting him to tutor the boy while his school was on strike. Instead of tutoring the boy, Mr. M let the boy play video games and showed him adult pornography on the internet. During each tutoring session, he would pat the boy's back while masturbating and tried to get the boy to masturbate as well, but the boy declined to do so. At one point he offered the child liquor, which the child also declined.

At a later date, the child saw Mr. M's real name on his credit card, which led him and his mother to discovering Mr. M's history of sexual offences.

Mr. M pleaded guilty to invitation to sexual touching, making sexually material available to a person under the age of 16 for the purpose of facilitating an offence, and two probation violations. The trial judge sentenced Mr. M to 7 and a half years of incarceration, and additional orders including a lifetime registration as a sexual offender, a DNA order, and lifetime limitations on being near persons under the age of 16.

Also see 2017 BCCA 141 (Application for leave to appeal sentence).

III. MANITOBA

i. 2017 MBQB 197

In **2017 MBQB 197**, Mr. M, a 34-year-old man, was charged with sexual assault, sexual interference, invitation to sexual touching, exposing his genital organs to a person under the age of 16, and making sexual material available to a person under the age of 14 for the purpose of facilitating an offence.

While he was babysitting two girls, Ms. A who was 6 years old and Ms. O who was 4 years old, Mr. M showed Ms. A online videos of adults and teens engaging in sexual acts. Ms. A said that

they should not be watching the videos, but Mr. M assured her it was alright, but told her not to tell anyone. Later while all three were in the kitchen, Ms. O pulled Mr. M's penis from his pants and began masturbating him. At trial Ms. O described touching Mr. M's penis on multiple occasions. Mr. M denied this and claimed that Ms. A had looked up an online home birth videos and that Ms. O had seen his penis while he was peeing in the bathroom.

The sexual assault charge against Mr. M was stayed, and Mr. M was found guilty of the other offences. He was sentenced to 44 months of incarceration, and additional orders including a 10-year weapons probation, a DNA order, a lifetime registration as a sexual offender, no contact with the complainants of their parents while in custody, and a 10-year limitation from being near people under the age of 16.

Also see: 2017 MBQB 129 (Trial decision).

ii. **2014 MBPC 63**

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

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

eventually sent photographs of herself, Mr. FG and Mr. NG distributed those photos to people in her community, including her classmates. The photographs showed her face, as well as her genitals and breasts.

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

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

The psychological damage to the victim is long-term and profound. Her reputation in the community has been damaged and she has been ridiculed at school. Given the difficulty in controlling the use of images, once they enter cyberspace, the harmful impact on the victim may well be long-term.²

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

[...] the moral culpability of the appellants in this case is on the high end of that spectrum. First, there was a significant age difference between the appellants and the victim. Second, the conduct engaged in by the appellants was not childhood exploration. It was aggressive, relentless, sexually abusive and humiliating. The images were extracted from the victim in a systematic manner by the appellants causing her to

² 2014 MBPC 63 at 41.

virtually break down. Third, the images included the victim's face, breasts and vagina. They were distributed by way of social media to her community. Fourth, as can be expected, the victim and her family continue to suffer the effects from the commission of these offences.³

Also see 2015 MBCA 81 (Appeal decision).

IV. ONTARIO

i. 2018 ONCJ 302

In **2018 ONCJ 302**, Mr. B, a 56-year-old man, pleaded guilty to making sexually explicit material available to a person he believed was under the age of 16.

He thought he was communicating with a 15-year-old girl and later her 14-year-old friend on the internet over a two-week period, however, he was in fact communicating with a police officer posing as the girls. Mr. M directed the conversation to sexually explicit topics and sent photos of his erect penis to the girl. He arranged to meet with the girl, but didn't go. At one time he tried to get her to download Skype to video chat with her. When he told the girls he had communicated with an 11-year-old girl, the police cut off their operation, as a real child may have been in danger and arrested Mr. B. Under a search warrant, the police seized various electronic devices containing child pornography.

Commenting on the benefits and challenges of internet use and anonymity the judge stated:

Over the last quarter century, nearly every facet of modern life has been affected by the Internet. Today, the Internet has become the principal means by which we access

³ 2014 MBPC 63 at 37.

news, music, movies, and other forms of entertainment, engage in all aspects of commerce and conduct research. The Internet has also quickly developed into one of our primary means of communication.

Some degree of anonymity is a feature of much Internet activity. In fact, the anonymity of online activities can sometimes be essential to an individual's personal growth and the flourishing of an open and democratic society. Consequently, the Supreme Court of Canada has acknowledged that, depending on the totality of the circumstances, anonymity in a person's online activities may be subject to a reasonable expectation of privacy and therefore enjoy constitutional protection under section 8 of the Charter.

That said, Internet anonymity also has its dark side. Like the law-abiding, those with nefarious purposes have also flocked to the Internet. Children, too, are voracious Internet users. The vulnerability of children when they go online is obvious. The Internet, especially social media, provides an all too easy point of contact between children, the most vulnerable members of our society, and those bent on exploiting them as objects of their sexual gratification.⁴

Mr. B acknowledged he was responsible for child luring and possessing child pornography but was not charged with those offences. They were considered aggravating factors in his sentencing. Mitigating factors included the 26 hours of sex offender counselling Mr. B had participated in prior to sentencing, his remorse, and his recognition that his behaviour was inappropriate.

He was sentenced to 12 months of imprisonment, three years of probation, and various orders including a 20 year ban on communicating with persons under the age of 16 online, 20 year ban on any internet use that violates the law, a 20 year ban on using social media or chat forums other than 50+ dating sites, 10 years registered as a sexual offender, a DNA order, and the forfeiture of the devices used to facilitate the offence.

⁴ 2018 ONCJ 302 at paras 1-3.

ii. 2015 ONSC 2853

In **2015 ONSC 2853**, Mr. N, was charged with sexual assault, sexual interference, invitation to sexual touching, making sexually explicit material available to a person under the age of 16 to facilitate the commission of an offence, and exposing his genitals to a person under the age of 16 years old. The charge of sexual assault was stayed and he was convicted of the other offences.

Mr. N had shown his wife's granddaughter pornographic images and videos of children and adults engaging in sexual activity while she was sitting on his lap. She was 10 or 11 years old at the time. He would use graphic language to describe what was occurring in the images while he rubbed her chest and vagina. He showed her his penis on one occasion and invited her to touch it. He told her not to tell anyone about these things because he would get in trouble. Mr. N denied this, stating that the girl once snuck in while he was watching pornography, but that he did not otherwise abuse her. The girl eventually told her mother about the incidents who went to the police, she was able to describe the names of the file folders where the pornography were stored on Mr. N's computer.

Mr. N had a history of sexual offences from the 1970s. He was sentenced to 6 years of incarceration, as well as orders including to have no contact with the victim or her mother while incarcerated, a DNA order, lifetime limitations of being near people under the age of 16, including online, 10-year weapons prohibition, and a lifetime registration as a sex offender.

An appeal on his sentence was dismissed.

Also see 2015 ONSC 5046 (Sentencing); 2018 ONCA 149 (Appeal - sentencing).

iii. 2017 ONSC 3798

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. He had 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. We could not locate a sentencing decision.

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).

iv. 2016 ONSC 6283

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 explicitly 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 or 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).

v. 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. It was ordered that he be registered as sexual offender for life, provide a DNA sample and forfeit 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.”⁵

vi. 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

⁵ 2014 ONCJ 543 at para 8.

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."⁶

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.

V. 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 offence. 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 con-

⁶ 2013 ONCJ 801 at para 5.

tacted 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.