TECHNOLOGICALLY-FACILITATED VIOLENCE:
CHILD PORNOGRAPHY

A. OFFENCE ELEMENTS

Child pornography

163.1 (1) In this section, child pornography means

(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 or is depicted as being under the age of eighteen years and 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 sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

(3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

(4) Every person who possesses any child pornography is guilty of

> **(a)** an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or
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> **(b)** an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

(4.1) Every person who accesses any child pornography is guilty of

> **(a)** an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or
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> **(b)** an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

(4.2) For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself.

(4.3) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the offence with intent to make a profit.

(5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

(6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence

> **(a)** has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and
>
> **(b)** does not pose an undue risk of harm to persons under the age of eighteen years.

(7) For greater certainty, for the purposes of this section, it is a question of law whether any written material, visual representation or audio recording advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

B. SELECTED CASE LAW.

I. SUPREME COURT OF CANADA

i. 2018 SCC 56

In **2018 SCC 56**, Mr. R was charged with possessing and accessing child pornography.

Mr. R shared a home and computer with his spouse, Ms. G. Following a domestic assault against Ms. G, a no-contact order prevented him from visiting the couple's home without Ms. G's revocable consent. At one point, Ms. G withdrew her consent to have Mr. R at the home, and called his probation officer to tell him she had. On the call, she also informed the officer that Mr. R had child pornography on their computer.

Upon being informed of this, a police officer came by the home and Ms. G signed an agreement that said she gave the police permission to take the computer. The police officer did not have a warrant to take the computer and did not believe he had "reasonable grounds" to seize the computer for an offence. The officer did not follow the rules that required them to report that they took the computer to a justice. Four months later, the police obtained a warrant and conducted a search of the computer and discovered 140 images and 22 of videos of child pornography saved on it.

Mr. R argued that his right to be free from unreasonable search and seizure was violated when the police officer took the computer without a warrant and that the child pornography images and videos should be excluded from evidence.

At trial, the application judge decided that Mr. R's privacy rights were violated and that the police should have had a warrant to search his computer. Mr. R's wife could not waive his privacy rights to their shared computer and give it to the police without a warrant. It was also noted that the

police did not report the seizure of the computer to a justice and the search warrant was misleading and should not have been granted. The evidence was excluded and Mr. R was acquitted at trial.

The Crown appealed the acquittal.

The Court of Appeal did not find Mr. R's privacy rights had been infringed. The appeal court found that because he shared his home and computer, his privacy rights were greatly diminished. The Court of Appeal set aside the exclusionary order and ordered a new trial.

The majority of the Supreme Court of Canada restored the original acquittal. It stated that even though the computer was shared and Mr. R didn't have current access to it, Mr. R had reasonable privacy rights associated with the computer. He used the computer and stored personal data on it, and the computer was password-protected. His privacy expectations were lowered because it was shared, but his spouse could not nullify his reasonable expectation of privacy and permit the police to search it without a warrant simply because he shared the computer with his spouse. The violations of his rights were considered serious and entering the evidence at trial would have brought the administration of justice into disrepute.

In regards to Ms. G waiving Mr. R's privacy rights, the majority of the Supreme Court held that she could not consent to the seizure and waive Mr. R's rights, even if she was the partial owner and user of the computer. It stated: "Waiver by one rights holder does not constitute waiver for all rights holders."[1]

The Supreme Court excluded the evidence, finding that Mr. R's rights had been seriously violated. To allow the evidence would bring the administration of justice into disrepute. The seizure of his

[1] 2018 SCC 56 at para 52.

computer, the failure to report the seizure as required to a justice as soon as possible, and the warrant for the subsequent search of the computer was misleading.

The Court also noted that this privacy analysis was only applicable when police take evidence from someone. The issue of whether the same privacy rights are engaged when a person voluntarily brings evidence to the police was not addressed in this case. They said it was more appropriate for that issue to be decided on a case that directly addressed the issue.

The majority of judges did not address the issue of the spouse allowing the police to enter the home, however Justices Moldaver and Côté did. Justice Moldaver found that entering a home to take a witness statement was appropriate under particular circumstances. Justice Côté found that one person can give permission to enter the common area of a home. She also found that Mr. R's spouse did have a right to give the police the computer to preserve evidence before seeking a warrant to search it. However, she still would have excluded the evidence because the police failed to report their possession of the computer to a justice.

Also see: 2017 ONCA 365 (Appeal), [2017] SCCA No 275 (Leave to appeal), 2015 ONCJ 724 (Search and seizure).

ii. 2016 SCC 33

In **2016 SCC 33**, Mr. V was convicted of possessing and distributing child pornography.

Mr. V had brought his computer to a retail repair shop. When testing the computer by opening random files, technicians at the shop found a number of video files that appeared to be child pornography on the computer and contacted the police. The police obtained a warrant, searched the computer, and found 36 photos and 35 videos of child pornography.

Mr. V admitted that he was the owner of the computer and the files were child pornography, however, he denied having knowledge or control of the images.

At trial, the judge found that most of the evidence was circumstantial: No one had seen Mr. V download or view the child pornography but Mr. V was the owner of the computer; he had dropped it off for repairs; he came to pick it up; there was a user name that reflected Mr. V's name on the computer; that username had been created the same day the filesharing program was installed; the child pornography files were on downloaded onto the computer by the filesharing program; files must be actively downloaded on that type of program; the user had used the computer on the dates that the images were downloaded; the user had configured the files to be downloaded into a particular file folder; the files had been actively opened; the files had names indicating they were child pornography; the files were in a folder configured to share with other file sharing users; and, there was no evidence anyone but Mr. V had the opportunity to download the files on this computer. However, the judge determined that the evidence was strong enough to find Mr. V guilty.

At the Court of Appeal, the court found that the trial judge had misstated the law regarding circumstantial evidence. It found that because Mr. V was not always around his computer it was possible other people had access to it, as such there was reasonable doubt as to whether Mr. V knew the child pornography was on the computer, and reversed the decision, acquitting Mr. V.

The Crown appealed that decision to the Supreme Court of Canada, arguing that the Crown did not have the responsibility to disprove all possibilities of why the child pornography may have been on the computer, regardless of how speculative they are.

The Supreme Court agreed with the trial judge's analysis of circumstantial evidence, found the guilty verdict reasonable, and restored the conviction of guilt.

The Supreme Court also clarified the laws around circumstantial evidence: It held that judges must instruct the jury about how to interpret circumstantial evidence, but they don't have to use the same language every time. Judges can use a variety of language to instruct the jury, as long as they explain the difference between direct and circumstantial evidence (making an inference);

the relationship between circumstantial evidence and proof beyond a reasonable doubt (not taking an inference too far to "fill in the blanks" or "jump to conclusions"); and describe it as "rational" and "reasonable" inferences (reasonable is preferred language).

The Court also found that alternative conclusions that suggest something other than guilt do not have to be based on proven facts. However, these inferences do need to be reasonable. The Crown needs to disprove all of the reasonable alternatives to guilt, but doesn't need to disprove every possible explanation. The reasonable doubt cannot be based on "speculation or conjecture."

The Supreme Court held that the hypothetical alternative explanations proposed by Mr. V's were speculative. The circumstantial evidence provided was enough to prove Mr. V's guilt. It set aside the acquittal.

However, the issue of whether the search of Mr. V's computer violated Mr. V's rights was returned to the Court of Appeal to address those issues.

Back at the Court of Appeal, Mr. V appealed his conviction, arguing it was based on evidence that had been obtained by the police under a faulty warrant, breaching his right to be free from unreasonable search and seizure.

The Court of Appeal dismissed his appeal. The computer technician had properly informed the police about the potential child pornography and the breach to Mr. V's rights were technical. A police office seized the computer and made an application for a general search warrant, which was a mistake because he should have applied for a computer detention warrant. This incorrect general warrant was used to search the computer. However, the resulting search would have been the same under either warrant and the proper warrant would have been allowed by a judge.

Balancing Mr. V's rights and the interests of the public to see this case adjudicated, the evidence was included and the appeal was dismissed.

Also see: 2016 SCC 33 (Appeal), [2015] SCCA No 196 (Leave to appeal), 2015 ABCA 104 (Appeal), 2013 ABQB 279 (Trial), 2012 ABQB 630 (Evidence)

iii. 2016 SCC 31

In **2016 SCC 31** Mr. J, a 38-year-old man, pleaded guilty to incest and making child pornography.

He had sexually abused his three-year-old daughter and filmed and photographed the abuse. His computer also had over 900 child pornography images of other children, including his step-daughter.

Prior to his sentencing but after he committed the offence, the *Criminal Code* was changed to allow sentencing judge's orders prohibiting sexual offenders from contacting people under the age of 16 or using the internet.

At trial, the trial judge held that he could not give Mr. J orders under the new prohibitions as they were punishments and Mr. J was protected by his *Charter* rights to be free from retrospective harsher punishments. He only applied prohibitions that existed at the time of the crime.

The Crown appealed, arguing the new prohibitions should apply. On appeal, Mr. J argued that by applying the new rule retrospectively to him the court would violate his *Charter* right. The *Charter* right in question states: "if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, [the offender will get] the benefit of the lesser punishment."

At the Court of Appeal, the court found that that the new prohibitions were not punishments, because they were meant to protect the public rather than punish the offender, so they didn't qualify as punishment within the meaning of Mr. J's *Charter* rights, and applied them to Mr. J for seven years.

Mr. J then appealed to the Supreme Court of Canada, arguing this violated his *Charter* rights.

The Supreme Court reformulated a test for determining if the new prohibitions could be counted as a punishment. It would be considered a punishment if:

> (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either:
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> (2) it is imposed in furtherance of the purpose and principles of sentencing, or
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> (3) it has a significant impact on an offender's liberty or security interests.[2]

The majority of the Supreme Court held that new prohibitions that are meant to protect public safety can be counted as punishments, impacting Mr. J's *Charter* rights. The ones in question were punishments because they would be imposed as part of Mr. J's conviction– it is in the arsenal of choices a judge can make upon sentencing, they would be imposed to further the purpose and principles of sentencing – "to protect children by separating offenders from society, assisting in rehabilitation, and deterring sexual violence"; and they could have a significant impact on Mr. J's liberty and security-limiting where he can go and who he can interact with, particularly because being disconnected from the internet is "is tantamount to severing that person from an increasingly indispensable component of everyday life."

The Court found that retrospective imposition of the no contact prohibitions was not reasonably justifiable but the retrospective imposition of the internet prohibition was reasonably justifiable, in part due to the rapid change of technology, the increase of technology-facilitated sexual crimes, and the effectiveness of controlling an offender's access to the internet in preventing future harm.

[2] SCC at para 41.

The court commented:

> The rate of technological change over the past decade has fundamentally altered the social context in which sexual crimes can occur. Social media websites (like Facebook and Twitter), dating applications (like Tinder), and photo-sharing services (like Instagram and Snapchat) were all founded *after* 2002, the last time prior to the 2012 amendments that substantial revisions to s. 161(1) were made. These new online services have given young people — who are often early adopters of new technologies — unprecedented access to digital communities. At the same time, sexual offenders have been given unprecedented access to potential victims and avenues to facilitate sexual offending.
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> The legislative record before this Court speaks to this rapid evolution and shows that, in enacting s. 161(1) (d) and giving it retrospective effect, Parliament was attempting to keep pace with technological changes that have substantially altered the degree and nature of the risks facing children.[3]

One dissenting judge would have found that the new prohibitions were a punishment and applying them to Mr. J was a violation of his *Charter* rights, but the retrospective limitation of *both* the no contact provision and the internet prohibition were not reasonably justifiable.

A second dissenting judge would have found that the new prohibitions were a punishment and applying them to Mr. J was a violation of his *Charter* rights, but the retrospective limitation of both the no contact provision and the internet prohibition were reasonably justifiable and should be upheld.

Also see: 2014 BCCA 382 (Appeal); [2014] SCCA No 536 (Application for Appeal)

iv. 2015 SCC 29

In **2015 SCC 29,** Mr. B had been acquitted of making and possessing child pornography. The Crown appealed the acquittal of Mr. B to the Supreme Court of Canada, arguing that the lower

[3] SCC at paras 102-103.

court made a mistake in allowing the defense of "private use". The appeal was allowed, and a new trial ordered.

From March to April 2008, Mr. B and Mr. R photographed and filmed sexual acts between two 14-year-old girls, Ms. D and Ms. K, and between Mr. R and the girls. The police began investigating the activity when a sexually explicit photo of the two girls was published online on Nexopia. The trial judge determined that, although Mr. B and Mr. R were not involved in, nor knowledgeable of, the making or distribution of this specific image, they were involved in the making and possessing of other still photos and videos involving Ms. D and Ms. K. These photos and videos were found on Mr. R's computer, on a DVD kept in his living room, and another in his bedroom. There was no evidence that this material was distributed. Mr. B, in his 50s at the time, primarily participated in the recording of the material.

Legal age to consent in sexual activities was 14 years old at the time, and both Ms. D and Ms. K were aware of and consented to the video recordings and still photos. They participated in directing and recording, with and without the involvement of Mr. B and Mr. R. However, the court found them both highly vulnerable given their age, lack of a stable family or home life, alcohol and drug abuse and dependency, and, for Ms. K, her history of prostitution.

The Supreme Court held that the private use defense is limited to three elements:

> (1) the recording must depict lawful sexual activity;
> (2) the persons depicted must consent to the recording; and
> (3) the recording must be held for private use. Lawfulness requires valid consent, which cannot be established where consent is vitiated by age or where there is exploitation. The accused need not be charged with sexual exploitation for the judge to evaluate it in terms of lawfulness.

The trial judge had not assessed whether the sexual activity was lawful or exploitative, as required. Focusing too much on the girls' consent to the activity and not enough to the nature of the relationship between the girls' and the accused. A new trial was ordered.

Also see: [2014] SCA no 319; 2014 ABCA 126; 2012 ABQB 99.

v. 2014 SCC 43

In **2014 SCC 43**, Mr. S was charged with possessing child pornography and making child pornography available.

The police had linked an IP address to someone who was accessing and storing child pornography through an online file-sharing program. The police asked the Internet Service Provider associated with the IP address to provide them with the account holder's identifying information. The ISP provided the police with subscriber information, including the name, address, and telephone number associated with the IP address. Mr. S shared a home with his sister and his sister was the subscriber of the internet account. The police used that information to obtain a warrant and searched Mr. S's computer and found the child pornography images and folders on it.

Mr. S argued that the police's request for the information associated with the IP address was an unconstitutional search and that they should have had to get a production order (like a warrant) to get his information from the internet company. He also argued that he did not realize the folders he downloaded child pornography into were making those files available to others.

At trial, the judge did not find the police's request for the ISP user's information to be a search. The trial judge also found that there needed to be some "positive facilitation" of making the child pornography available in order for Mr. S to be convicted of making the child pornography available to others. The judge believed Mr. S's evidence that he did not know other people could access his files. Therefore, Mr. S was convicted of possessing child pornography, but acquitted on making it available.

The Court of Appeal dismissed Mr. S's appeal, also finding that the request for the IP information was not a search or if it was, it was reasonable. However, it found that the trial judge was incorrect in requiring "positive facilitation" of the offender to show he was providing access to the files, and allowed the Crown's appeal and ordered a new trial.

Mr. S appealed that decision to the Supreme Court of Canada.

The Supreme Court found that the request for the subscriber information related to the IP address was a search and it was unconstitutional. ISP subscriber information is private information and Mr. S had a reasonable expectation of privacy in the information. The court looked at:

> (1) the subject matter of the alleged search;
> (2) the claimant's interest in the subject matter;
> (3) the claimant's subjective expectation of privacy in the subject matter; and
> (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.[4]

The subject matter was not just the name, phone number and address of the person who had subscribed to the internet, it was the "identity of an Internet subscriber which corresponded to particular Internet usage". In this case, the use of the internet to access and share child pornography.

The Supreme Court held that the courts must look to the nature of the privacy interests in the subject matter. The nature of the privacy interest compromised by the police search was related to whether "people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes". Highlighting the anonymity aspect of informational privacy interests, which engages a high level of informational privacy, the Court found: "the police request to link a given IP address to subscriber information was in effect a

[4] 2014 SCC 43 at para 18.

request to link a specific person (or a limited number of persons in the case of shared Internet services) to specific online activities."[5]

In relation to a reasonable expectation of privacy, the court found that Mr. S had a reasonable expectation of privacy in the subscriber information and it should not have been released without a production order. The ISP contract did state that the company could cooperate with law enforcement investigating a crime, as long as it complied with the law and their privacy policies which is subject to Canada's privacy laws (PIPEDA). However, there was no lawful authority under PIPEDA or otherwise for the company to disclose the information to the police.

The Court found that the police request for the IP information was a search and it was not lawful. It was a warrantless search and unreasonable. The IP information was private information, protected by privacy laws, and could not be disclosed without a warrant. The police used the unlawfully obtained information to then get a warrant to search Mr. S's home and violated his rights to privacy.

However, the court found that although Mr. S's privacy rights had been violated by the search, the evidence was still admissible. First, the police believed they were acting lawfully, which was incorrect, but reasonable at the time. The conduct of the police would not bring the administration of justice into disrepute. This weighed in favour of including the evidence. Second, the privacy interests that were breached were serious. It was a violation of Mr. S's anonymity online. This weighed in favour of excluding the evidence. Third, society had a strong interest in adjudicating the crime of child pornography to protect the safety of children and the evidence was reliable. This weighed in favour of including the evidence.

The evidence was included and Mr. S's conviction on possessing child pornography was affirmed.

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[5] 2014 SCC 43 at para 50.

In regards to making child pornography available conviction, the Supreme Court held that the trial judge made a mistake in his analysis. A positive act was not required to find someone guilty of making child pornography accessible to others. Mr. S had been willfully blind. He knew the program was a file sharing program that displayed information about it being a file sharing program when opened, the program has visual signals that show when files are being uploaded by others, and Mr. S had changed the default settings on the program. The Court ordered a new trial on this issue.

At the retrial, Mr. S was convicted and sentenced to one-year in jail, to be served with his one-year sentence for possessing child pornography. Additional orders in that sentence included a 20-year registration as a sex offender, forfeiture of the computer used, and a DNA order. However, Mr. S appealed his conviction and sentence. The Court of Appeal ordered a new trial. Mr. S had made an application for a stay of proceedings, which the judge refused, stating:

> The strongest factor weighing against imposing a stay in this case is the nature of the charge against [Mr. S]. Making child pornography available is a serious charge. Child pornography fuels an industry that has, at its heart, significant abuse of the most vulnerable individuals in our society.[6]

Also see: 2017 SKCA 54 (Appeal), 2015 SKQB 149 (Sentencing); 2015 SKQB 62 (Re-trial); 2011 SKCA 144 (Appeal); 2009 SKQB 341 (Charter).

vi. 2012 SCC 53

In **2012 SCC 53**, Mr. C was convicted of possessing child pornography.

During routine maintenance on a high-school teacher's employee laptop a technician found sexually explicit nude images of a grade ten girl on a hidden folder on the hard drive of the computer.

[6] 2017 SKCA 54 at para 105.

The teacher, Mr. C, had access to all of the students' school laptops and had copied the pictures from a student's laptop onto his workplace laptop. After discovering the images, the technician reported the images to the principal, who instructed the technician to copy the images onto a compact disc. The school then seized the laptop and had the technician copy the temporary internet files onto a second compact disc. The police were contacted. They seized the computer and CDs, and made a mirror image of the hard drive for forensic purposes.

Mr. C was charged with possessing child pornography and the unauthorized use of a computer, however, Mr. C argued that the evidence should be excluded because the police had violated his *Charter* right to be protected from unreasonable search and seizure when the police seized and searched the CDs and laptop without a warrant.

At the trial level, 2008 ONCJ 278, the judge found that Mr. C's *Charter* rights were infringed and excluded all of the computer material pursuant to section 24(2) of the *Charter*.

The appeal court, [2009] 190 CRR (2d) 130 (ONSC), did not find a breach and reversed the decision of the trial judge.

The Court of Appeal, 2011 ONCA 218, set aside the decision of the appeal court and excluded the CD with the temporary internet files, the laptop and the mirror image of the hard drive.

The Supreme Court held that Mr. C did have a reasonable expectation of privacy in his work computer because it contained information that was meaningful, intimate and touching on the user's biographical core. The school board's workplace policies and practices were found to diminish his expectation of privacy on the device, but not remove it completely. Mr. C's employer had lawful authority to seize and search the laptop but could not provide third party consent for the police to search the laptop, even though the device and the data contained on it were property of the schoolboard. In failing to obtain a warrant prior to searching the laptop, the police infringed Mr. C's rights against unreasonable search and seizure. The CD containing the photos

were not disputed as admissible evidence, however, the Court held that admitting the other disputed evidence would not bring justice into disrepute and did not exclude the evidence from the second CD, laptop or mirror image of the hard drive.

Also see: 2011 ONCA 218 (Appeal), 2008 ONCJ 278 (trial), [2009] 190 CRR (2d) 130 (ONSC) (Appeal).

vii. 2011 SCC 48

In **2011 SCC 48**, Mr. K was found guilty of possessing child pornography. He had 567 unique images of child pornography in his possession, some of which included babies being abused. He claimed he had intended to create an art show depicting child pornography from a child's perspective and had downloaded the images for research purposes related to his art. He wanted to create art that evoked "the sense of emotional upset that the images had on him."

The question at the heart of this case was whether the possession of child pornography could serve a public good. The courts looked at what defences could be used by Mr. K. This was complicated in the case because the law had changed during the time when he had committed the offence. Due to changes in the law, the defences available prior to 2005 were different than those after November 1, 2005, when the laws to child pornography changed.

Mr. K admitted he possessed the child pornography during a period ranging over 7 years from 1999 to 2006.

The defences available *prior* to November, 2005, included the defence of artistic merit and the public good defence. After that date, a defence was available if the act:

> (1) has a legitimate purpose related to the administration of justice or to science, medicine, education, or art; and,
>
> (2) does not pose undue risk of harm to persons under the age of 18.

At trial Mr. K was acquitted of the offence finding he had met the artistic defence test both before and after the 2005 changes.

At the Court of Appeal, the court found that Mr. K could would fail on both the defence pre and post-2005, as well as the public good defence. It entered a conviction for possessing child pornography.

Mr. K appealed the case to the Supreme Court of Canada.

The Supreme Court found that the trial judge had made a mistake, because although Mr. K may have possessed the images for an artistic purpose, as under the pre-2005 defence, the images themselves had no artistic merit or purpose as required. The trial judge also made a mistake in finding Mr. K had a legitimate artistic purpose, as under the post-2005 defence. She should not have focused on Mr. K's own opinion of its purpose of the child pornography, but on whether there was an objective legitimate artistic purpose for the child pornography.

The Supreme Court found that the Court of Appeal was correct in setting aside Mr. K's acquittal, but it was a mistake to convict Mr. K. The trial judge had made mistakes in deciding on the facts of the case, so the case should have been sent back for a new trial.

The Supreme Court ultimately decided that the pre-2005 artistic merit defence was not applicable, as it only applied to the artistic merit of the actual images, not the purpose of using the images. The images Mr. K possessed had no artistic purpose.

Further, the pre-2005 defence of "public good" was not properly applied. For that defence, the focus must be on the effect of the activity not the intention of the accused. The Supreme Court of Canada had previously defined public good as "necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects

of general interest".[7] Examples included those in the legal system possessing child pornography images when investigating and prosecuting a case of child pornography. The court must also look to see if the actions of the accused went beyond what serves the public good. However, the trial judge only looked to the purpose of Mr. K's actions. It concluded that an acquittal couldn't be restored but there were not adequate findings of fact to convict Mr. K. Instead a new trial needed to be ordered.

The Supreme Court also found that the post-2005 "legitimate purpose" defence was not properly applied by the Court of Appeal. The act must have a legitimate purpose, in this case related to art, and must not pose an undue risk of harm to a child. The Supreme Court stated: "the legitimacy requirement is met when there is an objectively verifiable connection between the impugned act and the accused's stated purpose."[8] It was not clear that Mr. K had an objectively legitimate artistic purpose for his collection, as the trial judge only looked to his personal opinion on why he had the collection. For the second step, related to harm,[9] the court must determine that there is "a significant risk of objectively ascertainable harm".[10] The trial judge had not adequately assessed the evidence when taking this test into consideration, so the Court of Appeal could not have convicted Mr. K. again. Instead a new trial should have been ordered.

The Supreme Court ordered a new trial.

Also see: 2010 ONCA 411 (Appeal), 2010 SCCA No 266 (application for appeal)

viii. 2010 SCC 8

[7] 2001 SCC 2 at para 70.
[8] 2011 SCC 48 at para 60.
[9] One judge would have assessed "undue harm" differently.
[10] 2011 SCC 48 at para 67.

In **2010 SCC 8**, Mr. M argued that the search warrant used to locate child pornography on his computer was invalid for breaching his right to be free from unreasonable search and seizure.

When an internet technician, Mr. H, visited Mr. M's home, he noticed child and adult pornography icons and information related to child pornography websites featuring children 15 and under on Mr. M's computer screen, as well as a webcam pointed towards toys in the room. The technician, Mr. H, had experience with child pornography websites as he had expertise in blocking pornographic websites from school computers, he had a list of sites that needed to be blocked from the schools' computers. Mr. H also noticed there was a three-year-old child in the home with Mr. M.

On the technicians second visit to the home, the icons were deleted, the toys were cleaned up, and the camera was moved.

After speaking with someone about what he saw, the technician later reported this information to the police.

Mr. M argued there was not enough evidence to issue a search warrant on his house for child pornography. He argued that: the icons were not sufficient evidence; the icons were deleted on the second visit so the content was deleted; Mr. H had not made his statement to the police until several months after the installation; and, that the presence of a child, webcam and toys was not sufficient evidence to allow for a warrant for the search.

On the privacy interests in computers, the Supreme Court noted:

> [c]omputers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interests, likes, and propensities.[11]

[11] 2010 SCC 8 at para 105.

The Supreme Court firstly found that the icons did suggest that there was child pornography on the computer. In order for icons to appear on Mr. M's computer, someone would have had to install them there. The purpose of desktop icons like those are to access websites. This evidence was enough to reasonably conclude Mr. M had child pornography on his computer and that a search was warranted. Secondly, the Court found that the deletion of the icons did not mean that child pornography did not exist on the hard drive or other storage disks. Thirdly, the delay in Mr. H's reporting what he saw and the police taking Mr. H's statement did not mean that the child pornography did not exist. Finally, Mr. H's observations of the child, camera, and toys were not used to influence the Justice of the Peace issuing the search warrant but were pieces of information relevant to a full disclosure of the facts.

The elements key to possession were knowledge and control. The court stated:

> In my view, merely viewing in a Web browser an image stored in a remote location on the Internet does not establish the level of control necessary to find possession. Possession of illegal images requires possession of the underlying data files in some way. Simply viewing images online constitutes the separate crime of accessing child pornography, created by Parliament in [accessing child pornography].[12]

Possession of the file, not just a display of the image was needed. The data file needed to be stable and have "some sort of permanence." A computer automatically saving images was not enough to be considered possession. The file had to be knowingly saved and retained.

Looking at the evidence the Court determined the search warrant was valid.

Also see: 2008 SKCA 62 (Appeal), 2005 SKQB 381 (Charter – search and seizure)

ix. 2008 SCC 31

[12] 2010 SCC 8 at para 14.

In **2008 SCC 31**, Mr. M, a 31-year-old man, was found guilty of making child pornography, distributing child pornography, possessing child pornography, and sexually assaulting his daughter when she was between the ages of 2 and 4.

He was initially flagged by a Swiss police investigation into an international ring of pedophiles, of which he was a suspect. The Canadian police found him in possession of over 5,000 photos and 500 videos of child pornography. This material included bestiality, static and animated content, with children generally around ten years old. It also included sexually explicit photos of his own daughter and a daughter of a family friend, who was 4 years old. In one series of images, he made and distributed 33 photos of his daughter in a princess costume with her genitals exposed for profit.

It was revealed through the investigation that Mr. M sexually assaulted his daughter for 2 years, through sexual touching and penetration. They would spend the night together in a room he referred to as "the love room."

Mr. M has three other children, was previously arrested as a minor for sexual assault of a child, and was arrested as an adult for sexual assault of a minor. He suffered sexual abused as a child.

He was sentenced to 15 years in jail, which was reduced to 9 years on appeal, and finally restored to 15 years at the Supreme Court. Additional orders included a 10-year-long term offender supervision order.

Also see: 2006 QCCA 735, 2005 CanLII 39982, 2005 CanLII 39983, 2005 CanLII 24988.

x. 2001 SCC 2

In **2001 SCC 2**, Mr. S was charged with possessing child pornography and possessing child pornography for the purposes of distribution.

Mr. S was caught bringing CDs into Canada with child pornography on them. A subsequent search of his home resulted in a collection of books, manuscripts, stories and pictures that consisted of child pornography. Most of the images involved young boys. The stories were "extremely violent", mainly with very young male and female children and adults, often describing the children as desiring the violence.

Mr. S challenged the constitutionality of the child pornography provision, arguing it impacted his freedom of expression and that the provision is overly-broad because it captured material that did not pose a risk to children, thus unjustly impacting his right to life, liberty and security of the person.

The Court held that child pornography is a form of expression and a prohibition against it limits a person's freedom of expression, as protected by the *Charter*. The court then asked: was the limit imposed on free expression by prohibiting the possession of child pornography justified when balancing other interests of a free and democratic society? The question of over-breadth was also addressed when answering this question.

The majority of the Supreme Court found that the child pornography provision was constitutional, but read in two exceptions to the rule.

It summarized some of the government's reasons for justifying prohibiting the possession of child pornography, stating:

> This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between possession of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and

> grooming of victims and may break down inhibitions or incite potential offences. Some of these links are disputed and must be considered in greater detail in the course of the [constitutional] justification analysis. The point at this stage is simply to describe the concerns that, according to the government, justify limiting free expression by banning the possession of child pornography.[13]

The Court noted that:

> Parliament's main purpose in passing the child pornography law was to prevent harm to children by banning the production, distribution and possession of child pornography, and by sending a message to Canadians "that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners." […] Parliament set its targets principally on clear forms of 'child pornography': depictions of explicit sex with children, depictions of sexual organs and anal areas of children and material advocating sexual crimes with children.[14]

In its decision, the Supreme Court defined certain terms of the provision:

Person

For victims, it defined "person", stating:

> Moreover, with the quality of contemporary technology, it can be very difficult to distinguish a "real" person from a computer creation or composite. Interpreting "person" in accordance with Parliament's purpose of criminalizing possession of material that poses a reasoned risk of harm to children, it seems that it should include visual works of the imagination as well as depictions of actual people.[15]

The court noted that the provision included images a person has taken of themselves.

For offenders, "person" referred to a "flesh-and-blood" person.

Depicted

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[13] 2001 SCC 2 at para 28.
[14] 2001 SCC 2 at para 34.
[15] 2001 SCC 2 at para 38.

"Depicted" was defined as what was objectively depicted by a reasonable person, not what the producer or possessor believed was depicted.

Explicit sexual activity

"Explicit sexual activity" was defined as:

> […] acts which viewed objectively fall at the extreme end of the spectrum of sexual activity — acts involving nudity or intimate sexual activity, represented in a graphic and unambiguous fashion, with persons under or depicted as under 18 years of age. The law does not catch possession of visual material depicting only casual sexual contact, like touching, kissing, or hugging, since these are not depictions of nudity or intimate sexual activity. Certainly, a photo of teenagers kissing at summer camp will not be caught. At its furthest reach, the section might catch a video of a caress of an adolescent girl's naked breast, but only if the activity is graphically depicted and unmistakably sexual.[16]

Dominant characteristic

The court held that a "dominant characteristic" would be determined by considering "whether a reasonable viewer, looking at the depiction objectively and in context, would see its 'dominant characteristic' as the depiction of the child's sexual organ or anal region."[17]

Sexual purpose

The court held that "sexual purpose" would also be determined by considering whether a reasonable viewer, looking at the depiction objectively and in context would see whether the content was for a "sexual purpose".[18]

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[16] 2001 SCC 2 at para 49.
[17] 2001 SCC 2 at para 50.
[18] 2001 SCC 2 at para 50.

It noted that family photos of naked children would typically not be included as child pornography. However, if those same images were included in an album or collection of sexual images, it may change their contextual meaning and be considered child pornography to a reasonable viewer.

Advocates or counsels

The Court also assessed what was meant by written material that "advocates or counsels" sexual activity with a person under the age of 18. This definition relies on an objective interpretation of whether material "sends the message that sex with children can and should be pursued."[19] It only captures content that advocates or counsels sexual activity with a person under 18 that would be an offence under the criminal code. Legal sexual activity with people under 18 years old is not captured.

The majority also reviewed the defenses of artistic merit; educational, scientific or medical purposes; and public good that existed at the time.

The majority found that the government's objective in making this law was pressing and substantial, as it was meant to protect children from harm. It was reasonable for the government to assume the possession of child pornography could contribute to the harm of children because it could change someone's thoughts on whether child sexual abuse is appropriate, it fuels fantasies that incite people to abuse children, it is used to groom children, and some child pornography uses real children.

On the use of real children, it stated:

> Production of child pornography is fueled by the market for it, and the market, in turn, is fueled by those who seek to possess it. Criminalizing possession may reduce

[19] 2001 SCC 2 at para 56.

> the market for child pornography and the abuse of children it often involves. The link between the production of child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact. The child is traumatized by being used as a sexual object in the course of making the pornography. The child may be sexually abused and degraded. The trauma and violation of dignity may stay with the child as long as he or she lives. Not infrequently, it initiates a downward spiral into the sex trade. Even when it does not, the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be being watched and enjoyed by someone.[20]

However, the majority did find the provision to be overly broad, covering some forms of sexual material that they stated posed little or no risk of harm to children. This included self-created, privately held expressive materials, such as: journals, diaries, writings, and drawings; and, "visual recordings of lawful sexual activity made by or depicting the person in possession and intended only for private use,"[21] such as material taken by and for a teenager or a teenaged couple's sexual activity.

The Court found that the benefits of protecting children from harm outweighed the negative effects of the accused's freedom of expression but the law as it currently stood was too broad. It made exceptions to the law for the two categories listed above, in what is now known as the "private use" exception. These exceptions are also applicable to the "making child pornography" offence. The exceptions were for:

> (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and,
>
> (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use. The constitutional questions should be answered accordingly.[22]

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[20] 2001 SCC 2 at para 92.
[21] 2001 SCC 2 at para 76.
[22] 2001 SCC 2 at para 129.

In the minority decision, the judges agreed that the child pornography offence was constitutional, but would not have read in the exceptions to the offence. They noted the equality considerations the courts should consider when protecting vulnerable people such as children.

On the harms of child pornography, they stated:

> The very existence of child pornography, as it is defined by s. 163.1(1) of the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows directly from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. The harm of child pornography is inherent because degrading, dehumanizing, and objectifying depictions of children, by their very existence, undermine the Charter rights of children and other members of society. Child pornography eroticises the inferior social, economic, and sexual status of children. It preys on preexisting inequalities.[23]
>
> […]
>
> Child pornography also undermines children's right to life, liberty and security of the person as guaranteed by [the *Charter*]. Their psychological and physical security is placed at risk by their use in pornographic representations. Those children who are used in the production of child pornography are physically abused in its production. Moreover, child pornography threatens the physical and psychological security of all children, since it can be encountered by any child.[24]

In addition to noting the inherent harm in child pornography, the minority also commented on the further harms, including privacy harms, resulting from dissemination and the evolution of technology:

> In addition to the types of harm discussed above, child pornography creates a risk of harm that flows from the possibility of its dissemination. If disseminated, child pornography involving real people immediately violates the privacy rights of those depicted, causing them additional humiliation. While attitudinal harm is not dependent

[23] 2001 SCC 2 at para 158.
[24] 2001 SCC 2 at paras 147-148.

> on dissemination, the risk that pornographic representations may be disseminated creates a heightened risk of attitudinal harm.[25]
>
> […]
>
> It should be emphasized that some of the material in the respondent's possession was on computer disk and capable of instantaneous distribution, creating a risk that this material might in fact be disseminated. The widespread availability of computers and the Internet has resulted in new ways of creating images, and has facilitated the storage, reproduction, and distribution of child pornography.[26]

The appeal was allowed and the charges against Mr. S for possessing child pornography were submitted for a re-trial.

In **2002 BCSC 423**, Mr. S was re-tried for possessing child pornography and possessing child pornography for the purpose of distribution.

Mr. S possessed photos and stories of young boys naked or engaged in sexual activity.

The court dealt with the photos seized at the border first. Mr. S agreed that the photos were child pornography but because they were private and of lawful sexual activity and only for his private use, he could use the private use defence. The first set of photos were of boys showing their genitals, anal area, and some were of boys engaged in explicit sexual activity. Mr. S claimed they were 14 years old or older (legal age for sexual activity with adults at the time). The court found that there was no evidence that Mr. S kept the images private, nor that the photos were for the private use of the boys. He did not fit within the private use defence.

At a voir dire, the trial court found that the search warrant did not violate Mr. S's right to be free from unreasonable search and seizure and the evidence collected from the search was admissible

[25] 2001 SCC 2 at para 164.
[26] 2001 SCC 2 at para 166.

for the trial. Following that decision, Mr. S pleaded guilty to possessing the second larger set of photographs, approximately 400, of underage boys seized from his apartment.

The court then dealt with the written material.

The stories were about "boyabuse" and sexual activity with children. One story was written by Mr. S and others were written by another author.

It held that the stories glorified and described sexual activity with children but did not objectively actively advocate or counsel the reader to engage in sexual activity with children. It also found that the stories met the artistic merit threshold. They were not considered child pornography.

Also see: 1999 BCCA 668 (Appeal), 1999 BCCA 416 (Appeal), 1999 BCCA 191 (Appeal), 2002 BCSC 213 (Voir Dire), 2002 BCSC 423 (re-trial).

II. ALBERTA

i. 2018 ABCA 235

In **2018 ABCA 235**, the Crown appealed Ms. W's, a 42-year-old woman, sentence for sexually assaulting her four-year-old son and making and distributing pornography of him. She had plead guilty to the offences. The Crown argued she should have had a longer sentence imposed.

Ms. W met her boyfriend Mr. C, who lived in the United States, on the internet. He pressured her to sexually assault her son, take photographs of the assault and send them to Mr. C. The police found 26 images of sexual exploitation and assault of the boy, along with other forms of child pornography on Mr. C's computer. Following Mr. C's grooming, Ms. W expressed willingness to participate in sexual abuse against her child and told Mr. C she was reading stories about pedophilia. The two discussed involving the child in their sex life and shared child pornography with each other, involving both boy and girl children. Police in the United States found Mr. C had been

uploading child pornography files and arrested him, where they discovered the images of Ms. W's abuse of her son. Ms. W attempted to delete the images from her devices, but the police were able to recover some of the files.

The majority in the appeal described the case as "another tragic case where a mother was induced to abuse her young child to satisfy her boyfriend's perverse sexual urges" (para 1). At trial, the judge found mitigating factors to include her social isolation due to physical disfigurement and psychological vulnerability, the losses she experienced including having her child removed from her care, the loss of her career in child care, public shame and notoriety. Psychological reports found she had an extremely low risk of committing similar crimes in the future. However, the offences were egregious and serious, particularly because Ms. W was in a position of trust. Aggravating factors included the abuse happening in the home, the young age of the child, the likelihood of serious harm to the child, and Ms. W's attempts to destroy evidence.

At trial, she was sentenced to three and a half years in jail, additional orders included a lifetime registration as a sex offender, a 10-year ban on being near children, limitations on using the internet, and a no contact order with her son, unless he was with his guardian.

On appeal, her sentence was not found to be disproportionate. However, the judge had erred in describing the separation of Ms. W from her child as mitigating, but this error did not impact the sentence. The sentence was not changed.

ii. 2018 ABPC 36

In **2017 ABCA 187,** Mr. K, a 39-year-old man, pleaded guilty to multiple accounts of sexual interference, multiple sexual assaults, producing child pornography, possessing child pornography and voyeurism.

Mr. K was a teacher, coach and mentor for Big Brothers and Big Sisters. Mr. K gained access to one of the children, Mr. JF, through his affiliation with Big Brothers as a mentor. Mr. K's sexual interference with Mr. JF began when Mr. JF was nine years old and occurred over several years, continuing after the Big Brothers program terminated their official mentorship. This included multiple sexual assaults when Mr. JF was between the ages of 11 and 15, occurring at times when Mr. K was providing child care or playing other supportive roles for Mr. JF. The occurrences of interference increased in severity over several years and included producing child pornography.

The sexual assault and producing child pornography charges were in relation to a second child, Mr. JTE. Mr. K took photos of the child's penis and anal area and touched the child to greater expose his anus while he was sleeping.

There was one incident of sexual interference when Mr. K was babysitting a third child, Mr. JY, when the child was nine years old.

Mr. K was in a position of trust and authority with Mr. JF, Mr. JTE and Mr. JY at the time of the abuse. Mr. K further admitted to voyeuristically filming three change rooms approximately 20 times in 2012 which included 45-50 videos that were considered child pornography.

The trial judge sentenced him to a 12-year global sentence. Additional orders included an order to provide a DNA sample, be registered as a sex offender for life, a twenty year limitation on his contact with children, the victims, and from working or communicating with children, as well as a ban from using the internet or other digital networks unless supervised by an adult; a communication ban with the complainants, a weapons prohibition, and a victim surcharge fee.

At the court of appeal, Mr. K appealed his global sentence of 12 years' imprisonment, arguing it failed to reduce his sentence for "his early guilty plea, remorse, counselling, favourable FAOS and

Pre-Sentence Report. [The trial judge] also failed to deduct the 6 months he allowed for the period that the appellant was on virtual house arrest for the 2 years prior to sentencing."[27] The court's majority, Justice Merger and Justice O'Ferall, held that the trial judge properly accounted for most of the disputed factors, however, they found the trial judge did not fully account for the time Mr. K was on virtual house arrest while on bail, therefore imposing an unduly harsh sentence. Taking these factors into account, as well as the lack of additional violence in Mr. K's actions, the court reduced the global sentence to 9 years. Justice Martin, in dissent, would have called for a global sentence of 10 years, taking into consideration Mr. K's early guilty plea, remorse, and the trial judge's failure to consider the totality of the final sentence, stating:

> […]in my view, the global sentence of 12 years is unduly harsh and long in the circumstances. I say this after considering the numerous cases identified by the Crown and appreciating society's growing recognition of the seriousness of sexual offences against children as reflected through this court's admonishment of child pornography and sexual interference, which activities are inherently harmful and impose clear and present danger to children.[28]

In **2018 ABPC 36**, the complainant, Mr. JF, applied to have the publication ban in relation to the charges against him rescinded. He argued it would help him with his rehabilitation and help other victims of sexual assault who could then identify him and contact him for support if his name was known publicly. The court held that it did not have the jurisdiction to remove the ban on the child pornography offences, as it is mandatory and non-discretionary, but could rescind the ban on the sexual assault charge related to Mr. JF if there was a material change in circumstances. Counsel for the accused argued that rescinding the ban could hurt its client, however, the court noted that the ban was not to protect the accused but the victim. The ban for the sexual assault charge

[27] 2017 ABCA 187 at para 6.
[28] 2017 ABCA 187 at para 39.

was lifted because Mr. JF was an adult now and wanted the ban rescinded so he could "tell his story".

Also see: 2016 ABPC 158 (Trial); 2018 ABPC 36 (Application to have publication ban rescinded).

iii. 2017 ABQB 357

In **2017 ABQB 357,** Ms. E pleaded guilty to the making, possessing, and distributing child pornography and the sexual exploitation of her 17-year-old daughter, Ms. M. The offences only stopped when Ms. M moved out and disclosed the abuse to other family members.

Ms. E, under the guise of sexual education, committed several sexual offences against her daughter, including soliciting her daughter to masturbate so she could watch, sexually touching her daughter, having the daughter sexually touch her, grooming her daughter to be in subordinate/dominant sexual relationships with men, touching her daughter on camera for men watching, practicing bondage on her daughter for men watching, and sending sexually explicit photos of her and comments about her to men. She made her daughter listen repeatedly to a hypnosis audiotape entitled "Be Obedient", had her call a man involved in these sexual offences "daddy", and told her she needed to find a "master".

Ms. E was a school bus driver with no previous record. She was sexually abused as a child.

As the mother and immediate caregiver of the complainant, the court found she was in a position of authority during the abuse.

She was sentenced to 6 years in jail. Additional orders included registration as a sex offender for life, a 10 year weapons ban, a DNA order, forfeiture of items used in the offences, a communication ban, and limitations on being near people under the age of 16.

iv. 2017 ABCA 212

In **2017 ABCA 212**, the trial judge had found Mr. K, a 54-year-old man, guilty of possessing child pornography and failing to comply with his probation orders by accessing the internet, pornography, and possessing a device capable of accessing the internet. He was sentenced to 28 months in jail and three years' probation. He appealed the conviction and sentence.

At trial, Mr. K was found guilty of possessing around 9,000 images of child pornography, some showing serious sexual abuse of children. His probation order prohibited him from accessing the internet. He was on probation for his offence when he was caught a second time in possession of child pornography, which consisted of a 128-page fictional story of the sexual abuse of a 6-year old boy that met the definition of child pornography. The court found Mr. K had been using the internet to engage in sexually explicit chatrooms.

The appeal of his conviction was dismissed. Mr. K unsuccessfully argued that his Charter rights to be protected from unlawful search and seizure were breached.

The appeal was allowed in part. The appeal court reduced the sentence to 15 months because the trial judge had not fairly considered the totality principle.

Also see: 2016 ABCA 364.

v. 2016 ABQB 648

In **2016 ABQB 648**, Mr. A, a 19-year-old man, 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, which found that the IP address associated with the complaints was 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 complaints were criminal. A 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 her 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 the girl's 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 and told him that she did not want further communication with him, but Mr. A switched platforms to continue his 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 was not appropriate and the violation 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 of incarceration. Additional orders included providing a DNA sample, registration as a sex offender, no-contact orders with the victims, a 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.

vi. 2016 ABCA 287

In **2016 ABCA 287**, Mr. L was convicted of possessing and accessing child pornography.

There was one child pornography image on his cell phone and several deleted images. There was also evidence of visits to a website known for hosting child pornography.

Mr. L had twice previously been convicted of possessing child pornography and once breached his probation for possessing a mobile phone, possessing child pornography, and having contact with a child under the age of 14, as prohibited by his probation orders.

He appealed his conviction, arguing that others may have used his phone and there were gaps in the evidence about who had handled his cell phone from when it was taken by the police and when a forensic analysis was done on it. However, the possible alternative arguments were not accepted by the trial or appeal judges.

The appeal was dismissed.

Also see: 2014 ABCA 351 (Appeal).

vii. 2016 ABCA 139

In **2016 ABCA 139**, Mr. W pleaded guilty to possessing and distributing child pornography. At trial, he was sentenced to one-year imprisonment and three years' probation.

Mr. W was between 33 and 35 at the time of the offences and admitted to possessing 318 images of child pornography and 99 videos of young boys. He had distributed the images to a limited number of people via a file sharing site.

He appealed his sentence, challenging the constitutionality of the one-year minimum sentence. Regardless of the mandatory minimum the trial judge would have imposed the same sentence. While waiting for the appeal to proceed he sought bail until the appeal was decided. The court did not find he had a strong enough appeal case to be released and denied his application for bail.

Also see: 2016 ABPC 57

viii. 2016 ABCA 194

In **2013 ABQB 546,** Mr. S was convicted on 23 counts of sexual offences against his biological daughter, Ms. P, from when she was 11 years old to 16 years old. This included sexual interference, invitation to sexual touching, sexual exploitation, incest, child pornography offences, and sexual assault.

Mr. S would sexually touch his daughter and have intercourse with her. In one incident, shortly before the victim turned 15, Mr. S learned that his daughter was sending nude photographs of herself to online contacts. After that point Mr. S then demanded that his daughter send him the nude photos and took nude photos of her. When Ms. P's mother moved out, Mr. S became the sole guardian and the sexual assaults became much more frequent. At one point, Ms. P tried to report the abuse and then recanted her statement, for which Mr. S punished her with a serious sexual assault on the side of the road on the way home from school. Ms. P and her younger sister were removed from his care in 2009 but Ms. P still sent him nude photos to his cellphone. Ms. P and Mr. S also had one unsupervised visit at a gas station where additional child pornography of Ms. P was created.

At trial, Mr. S claimed that his daughter fabricated stories and set him up by placing pornographic images of herself on his cellphones and in his online album. He argued that she did this because he had cut off her phone use. The Court noted, "As [the victim] had very few friends at school her phone was her only connection to the outside world, and she relied on it for the ability to phone, text, gain access to the internet, Hotmail, Facebook, and online friends. [She] had her phone with her at all times, and considered it her lifeline."[29] Photos of Mr. S's daughter, which met the definition of child pornography under the Criminal Code, were found on Mr. S's phone and the Court rejected his claims that he was unaware of the photos.

In **2013 ABQB 506**, 10 of these convictions were stayed due to the *Kienapple* principle.

Mr. S was sentenced to 12 years' imprisonment and the sentencing judge stated:

> […] the initial sentencing response of the courts to the child pornography provisions was relatively lenient. As the courts and society as a whole are increasingly becoming aware of the extent and effects of such abuse of children, the level of sentencing should be responsive to the gravity of the crime thus revealed.[30]

Aggravating factors included Mr. S being in a position of trust, the age of his daughter, the abuse occurring in the home, the length of the abuse, the unprotected sexual intercourse, the continuation of the abuse after she had been put in foster care, the large number of abusive images that were created and retained, the accused's punishment of the complainant for attempting to report the abuse, and Mr. S' failing to take responsibility for the abuse. In regard to the photographs the court noted:

[29] 2013 ABQB 322 at 38.
[30] 2013 ABQB 546 at para 15

> Parliament and recent authorities are constantly cautioning the Courts not to take the seeming innocuous acts of taking and storing photographs lightly. Sentences for these offences truly need denunciation as the primary objective.[31]

Due to procedural issues a new trial was ordered in **2016 ABCA 194.** The defense counsel had refused to conduct a judge and jury trial due to the financial state of his client despite his client wanting to.

Also see: 2016 ABCA 194 (appeal); 2014 ABCA 67 (application for judicial interim release pending appeal); 2013 ABQB 546 (sentencing); 2013 ABQB 506 (Kienapple application); 2013 ABQB 322 (trial).

ix. 2016 ABCA 75

In **2016 ABCA 75,** Mr. V pleaded guilty to sexual exploitation, production of child pornography, and child luring. He was sentenced to three and a half years in jail.

Mr. V was 34 and married when he began a sexual relationship with a 15-year-old girl, Ms. P, who was a player on the basketball 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 years old. Mr. V isolated her from her friends and family, made her break up with her boyfriend, and guilted her into staying in 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

[31] 2013 ABQB 546 at para 26.

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 Crown appealed Mr. V's sentence of 3.5 years imprisonment.

The appeal court stated that:

> 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.[32]

The appeal was granted and the sentence was changed from 3.5 years in jail to 5.5 years in jail.

x. 2014 ABCA 221

In **2014 ABCA 221**, Mr. M, a security guard, pleaded guilty to 39 criminal charges, including multiple counts of internet luring, extortion, child pornography offences, fraud and unauthorized use of a computer with intent to commit mischief in relation to data. He was sentenced to 11 years in jail.

Mr. M used Facebook and Nexopia to contact children and request nude photographs and sexual performances on webcam. He also communicated with 21 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, 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

[32] 2016 ABCA 75 at para 23

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 a file sharing site. 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."[33] The only mitigating factors on sentencing were the facts that Mr. M pled guilty to all charges and had cooperated with police.

The courts described some of his actions as "cyberbullying and online sexual exploitation"[34] and cited *AB v Bragg Communications* **2012 SCC 46** to describe the harm that cyberbullying can do to children. The Court noted:

> [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.[35]

Mr. 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,

[33] 2013 ABPC 116 at para 34.
[34] 2014 ABCA 221 at para 2.
[35] 2013 ABPC 116 at para 62.

an order to provide a DNA sample, and an order to comply with the Sexual Offender Information Registry Act.

He appealed sentence.

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.[36]

Also see: 2013 ABPC 116 (Sentencing).

xi. 2014 ABCA 112

In **2014 ABCA 112**, Mr. L pleaded guilty to possessing and making child pornography and a weapons offence at trial. He was sentenced to 18 months and one day in jail and two years' probation. Additional orders included a DNA order, forfeiture of items seized by the police, and registration as a sex offender.

The police traced online child pornography from a file sharing site to Mr. L's computer. An undercover police officer engaged in an online chat with him and Mr. L shared various child pornography images with the officer, including a video of a four-year-old child being sexually assaulted.

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[36] 2014 ABCA 221 at paras 17-18.

A search of Mr. L's home and computers revealed over 4,000 images and 400 videos of child pornography, mainly of girls aged two to 14 years old, as well as a sawed-off shotgun.

He appealed his sentence, but the appeal judge did not find an error with the sentence.

The appeal was dismissed.

xii. 2013 ABCA 188

In **2013 ABCA 188,** Ms. B, a 65-year-old woman, had been convicted of sexual assault, inviting sexual touching of a child, sexual interference, sexual exploitation, making child pornography, possessing child pornography and administering a stupefying drug with intent to assist the commission of a sexual assault.

At trial, she was sentenced to seven years in jail.

Between 1998 and 2003, Ms. B and her husband committed sexual offences against two female minors who were their neighbours' daughters. They were charged jointly but her husband died by suicide prior to the conviction.

Ms. B did not sexually assault the girls, but participated in grooming and photographing the girls, either posing them or recording her husband committing sexual acts against them. As family friends and neighbours, she and her husband were given the opportunity to be alone in the house with the children, either individually or together. The photographing of the older girl occurred when she was 12 to 13 years old and when the younger girl was between nine and ten years old. It continued for at least five years. These photos were stored on their home computer and presented as evidence at trial. The offences only stopped when the mother of the victims smelled alcohol on the younger complainant's breath and the relationship between the couples broke down. The court found Ms. B 's moral culpability high. She never admitted guilt or expressed remorse.

The appeal of her convictions was dismissed, as was the appeal of her sentencing. Her application for leave to appeal at the Supreme Court of Canada was dismissed.

Also see: 2012 ABCA 238 (Appeal of conviction); 2012 ABCA 108 (Judicial interim release); [2013] 456 NR 394 (Motion for extension of time to serve application for leave to appeal); [2013] SCCA No 83 (Notice of appeal).

xiii. 2013 ABCA 140

In **2013 ABCA 140**, Mr. L pleaded guilty to accessing, possessing and making child pornography of female friends of his daughter, and of sexually touching the two eight and nine-year-old girls. He was between 49 and 50 years old at the time of the offences.

Mr. L's behaviour escalated from accessing child pornography to making it to sexually touching the girls. He invited the girls to his house when his daughter wasn't there, but they did not go. He told the girls to keep his actions a secret or he would lose his daughter. The girls eventually disclosed his behaviour, leading to his arrest.

A search of his computer resulted in a large collection of child pornography and over 6,500 internet searches for child pornography. He did not express remorse or take full responsibility for his crimes, instead he claimed he was exploring his sexuality.

He was sentenced to two years in jail and three years' probation.

The Crown appealed Mr. L's sentence and the appeal court found the trial judge had erred in deciding on the totality of the sentence. Mr. L's sentence was increased to four years' imprisonment.

xiv. 2013 ABCA 112

In **2013 ABCA 112**, Mr. C was charged with multiple counts of luring, two of sexual assault, sexual interference, abduction, possessing child pornography and making child pornography.

Ten of the convictions related to two teenagers, Ms. P and Ms. C.

Mr. C 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 Black-berry 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* principle.

He appealed his conviction.

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 a filesharing website 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).

xv. 2013 ABPC 66

In **2013 ABPB 66** Mr. A, a 40-year-old man, pleaded guilty to voyeurism for surreptitiously videotaping his 15-year-old step-daughter getting dressed on two occasions. Mr. A was also found guilty of voyeurism with the intent to possess child pornography. He hid his cellphone in the victim's bedroom in a plastic box with a hole in it in order to secretly film her. He initially denied the filming was for a sexual purpose, telling his wife and his step-daughter he was trying to film the dog, and later told the police he was trying to view "possible apparitions" in his step-daughter's room. Two videos were located on Mr. A's phone's SD card, one of which was hidden by a "KeepSafe" app so it would not display in the normal gallery of the phone. Mr. A was sentenced to five months' incarceration, two years' probation, and was ordered not to possess or use any electronic equipment capable of capturing a digital image.

xvi. 2013 ABCA 41

In **2013 ABCA 41**, Mr. P pleaded guilty to accessing child pornography and luring.

He was sentenced to 90 days in jail served on weekends for accessing child pornography, and 18 months served in the community for child luring.

The Crown appealed his sentence.

Mr. P, a 41-year-old man, began communicating with a 15-year-old girl on the internet. The communication continued over several months after she turned 16 years old. He told the girl that he was a 20 year old man. He faked this by sending her photos of his daughter's 20-year-old boyfriend, claiming that they were photos of him. The two 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."[37]

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.[38]

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 appeal court found sentence did not reflect the seriousness of the offence. The sentence was increased to 12 months in jail for luring and 6 months in jail, served consecutively, for accessing child pornography, along with three years' probation.

xvii. 2012 ABCA 384

In **2012 ABCA 384**, Mr. C, a 29-year-old man, had been sentenced to three years' imprisonment for possessing, accessing and distributing about 4,600 pieces of child pornography.

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[37] 2013 ABCA 41 at para 4.
[38] 2013 ABCA 41 at para 12.

Some of the pornography involved aggravated assault and violence and involved very young children and babies. Mr. C had also chatted with 213 people, including undercover police officers, about child pornography preferences and trading child pornography with them. The child pornography file sharing was associated with his work and home's IP addresses. The activity occurred over several years.

Mr. C denied downloading the images onto his computer and tried to argue a hacker was responsible for them. There was evidence that Mr. C had downloaded the child pornography and no evidence of a hacker. Mr. C's testimony was inconsistent and often contradicted.

He was sentenced to three years' imprisonment. Additional orders included limitations on being near or communicating with children, a DNA order, a lifetime registration as a sex offender, and a forfeiture order of the two computers used in the offences.

The Crown appealed Mr. C's sentence but the appeal judge did not find the sentence was too harsh. A dissenting judge would have increased the sentence to five years.

Also see: 2012 ABQB 333 (Sentencing); 2012 ABQB 196 (Trial)

xviii. 2012 ABPC 338

In **2012 ABPC 338**, an 18-year-old woman, Ms. D, was charged with criminal harassment, possessing, accessing and distributing child pornography after distributing the nude photos of a 14-year-old female acquaintance.

Pursuant to a plea bargain, Ms. D pleaded guilty to criminal harassment and the Crown withdrew the other three charges. Ms. D and her 17-year-old male friend (the original recipient of the nude photos) disseminated the victim's photos together. Ms. D encouraged her friend to distribute the photos by text, gave him the phone numbers of who he should send them to, and "thereafter

attended at the complainant's school to bully her by taunting and calling her names."[39] The fear of her psychological safety resulting from the bullying, including not wanting to attend school anymore, was agreed to meet the fear element in the criminal harassment charge.

Ms. D received a suspended sentence and 12-months' probation, while her 17-year-old male accomplice received a conditional discharge. Aggravating factors on sentencing included the fact that the victim was underage, the fact that the crime was vindictive, planned and deliberate, and the fact that the offence had a serious impact on the victim. Mitigating factors included the fact that Ms. D was a youthful first offender and otherwise of good character.

xix. 2012 ABCA 148

In **2012 ABCA 148**, Mr. A pleaded guilty to one count of possessing child pornography and was sentenced to one-year imprisonment, and three years' probation. Additional orders included a DNA order, a 10-year registration as a sex offender, and a forfeiture of the equipment used in the offence.

He appealed the sentence, arguing the sentence should have been a 90-day sentence served intermittently.

Mr. A's son discovered the child pornography on his computer and reported it to the police. The police found dozens of unique photos and videos of child pornography, including sadistic sexual abuse of children.

[39] 2012 ABPC 338 at 24.

Mr. A argued that the trial judge had erred by finding Mr. A did not show genuine remorse and for not considering Mr. A's personal circumstances, including his past sexual abuse. The Court of Appeal held that the judge had not erred and dismissed his appeal.

xx. 2012 ABCA 74

In **2012 ABCA 74**, Mr. W, a 62-year-old man, was convicted of possessing and accessing child pornography. He was sentenced to two years less a day in jail and three years' probation at trial.

The police had found 27,048 images of underage girls wearing little clothing and provocatively posed. Software on his computer hid his historic use of the computer and internet searches.

He appealed his sentence.

The appeal was allowed and the sentence was reduced to 265 days in jail. The sentencing judge had not granted any credit for the time spent in detention before the sentencing.

Also see: 2011 ABQB 310 (Trial).

xxi. 2012 ABCA 57

In **2012 ABCA 57**, Mr. T pleaded guilty to making, possessing, and distributing child pornography, and sexually touching a child in order to make child pornography.

Mr. T had amassed an "extensively large" collection of child pornography – more than 16,000 images and movies – over a three-year time frame by trading images online. He also had videos and written stories he traded with other child pornography consumers. He also took photos of his friend's son in the nude when the boy was between seven and nine years old, including an image where the boy's penis was touching Mr. T's. Mr. T shared those images online, along with the child's name.

At trial, Mr. T was sentenced to six years in jail, two years for each offence, but the sentence for possession would be served at the same time as the other sentences so not to offend the totality principle. Additional orders included a DNA sample, forfeiture of the computer equipment, registration as a sex offender, and a lifetime ban on being near children.

The Crown appealed the sentenced.

The appeal court found that the trial judge had not explained why an eight-year sentence would offend the totality principle, and that Mr. T had a high moral blameworthiness, requiring a lengthy sentence. It found the trial judge made a mistake when misapplying the totality principle to reduce Mr. T's sentence.

The appeal court increased the sentence to eight years and eight months in jail.

xxii. 2012 ABCA 14

In **2012 ABCA 14**, Mr. K, community youth worker, was convicted of voyeurism and possession of child pornography.

Mr. K allowed teenagers to drink and have sex in a spare bedroom of his apartment. He let three young men use his video camera to film their sexual encounters. The young men then sold the footage to Mr. K without the girls' knowledge or consent.

One of the victims, 16-year-old Ms. JW, read her victim impact statement in court. The court found that her statements were, "to say the least, disturbing and epitomized that of a young teenage girl, whose trust was abused and has literally been scarred for life." Ms. JW told the court that she "finds it extremely hard to trust another person and that is the most disgusting feeling,

almost like you shower and shower but you can never really get clean." She further stated that, "[Mr. K] has taken a part of me that should never be taken from a person: my self-worth."[40]

Although the Crown recommended a global 15 to 18 months' sentence, the trial judge sentenced Mr. K to 27 months in jail. The trial judge found the use of sophisticated camera equipment to be an aggravating factor on sentencing, writing:

> Modern camera and telecommunication technology potentially allows a voyeur to use much more sophisticated mechanical and electronic tools that would be far more difficult for a complainant or other person to detect. I believe I may take judicial notice that commercial sources have developed in the past decade that provide to the public highly sophisticated surveillance and recording apparatus, such as pinhole cameras, cameras disguised to appear to be innocuous objects such as pens, or smoke detectors, and wireless communications systems to connect cameras to recording devices and computers. There are no doubt legal and valid reasons for a person or business to employ these kinds of technologies, but their potential for misuse is easily understood when one reviews the instances where voyeuristic activities led to criminal convictions. I think it is a strongly aggravating factor that a voyeur uses sophisticated and difficult to detect technologies for illegal purposes for the simple fact of reducing the probability that the person being observed would detect that they were observed surreptitiously. Deployment of that kind of technology also indicates the voyeurism was a highly planned and premeditated activity. That is not to say that use of a 'low-tech' approach is a mitigating circumstance, rather that an unsophisticated observation scheme would be a neutral factor.[41]

At trial, Mr. K was found guilty of two counts of possession of child pornography, one count of voyeurism, and one count of making voyeuristic materials.

On appeal, the Alberta Court of Appeal found that the sentence imposed was not unfit but reduced it to 18 months' imprisonment because the nine-month sentence for child pornography

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[40] 2011 ABQB 312 at para 115.
[41] 2011 ABQB 312 at paras 208-211.

offences should have been served concurrently with the sentences for other offences, rather than consecutively. However, the court of appeal also imposed an additional two-year probation.

Also see: 2012 ABQB 312 (Sentencing); 2011 ABQB 48 (Trial); 2010 ABQB 736 (Evidence); 2010 ABQB 640 (Amendment to indictment).

xxiii. 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 seven 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 girls' 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 disregard 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.

xxiv. 2011 ABPC 9

In **2011 ABPC 9,** Mr. M was found not guilty of sexual assault, sexual interference, invitation to sexual touching, and making child pornography relating to his 13-year-old stepdaughter.

His stepdaughter stated that Mr. M took photos of her in her mother's lingerie. She sent these photos to boys in her school, claiming that she wanted to be popular.

There were some problems with her testimony. She had cognitive difficulties that posed problems for her ability to retain and communicate evidence. Further, the court found that credibility was a key issue. The court noted that the victim's credibility "must be considered in relation to the evidence presented. Her disclosure arose when she and her mother wanted the accused, her stepfather, out of their residence. Further, her evidence is in conflict with other evidence."[42]

The Court ultimately held that the Crown did not discharge its burden of proof and accordingly found Mr. M not guilty.

xxv. 2010 ABPC 395

In **2010 ABPC 395**, the Crown was seeking detention of the accused pending trial.

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[42] 2011 ABPC 9 at 199.

Mr. L allegedly took surreptitious photos of a child's vagina. Mr. L was accused of voyeurism, sexually assaulting a child and creating, possessing and transmitting child pornography. There were two known victims who were aged five and six in which the accused was in a relationship of trust. Mr. L allegedly possessed 819 unique images of child pornography, including the images he took of the two victims, images downloaded from the internet, and a video of children aged four to twelve stored on a digital camera and SD card.

The court ordered that Mr. L be detained prior to trial.

xxvi. 2010 ABCA 157

In **2010 ABCA 157**, Mr. H pleaded guilty to four counts of luring a child and four counts of counselling the children he lured to make child pornography at trial.

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 Crown sought leave to appeal Mr. H's sentence of two years less a day and two years' probation.

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.

xxvii. 2009 ABCA 415

In **2009 ABCA 415**, Mr. H pleaded guilty to accessing hundreds of images and videos of child pornography.

Mr. H collected the images over several years via a file sharing program. The images were of preteen and teen children in the nude or being sexually assaulted by adult men, including "brutal sexual violence." He was acquitted of distributing child pornography as there was no evidence that he shared the files.

At trial he was sentenced to a 90-day intermittent sentence and three years' probation. Additional orders included a DNA order, registration as a sex offender and limitations on being near children, working with them or communicating with them via a computer. The computers used to access the child pornography were forfeited.

The Crown appealed the sentence, arguing it was not fit for the offence in question. The appeal court agreed and increased his sentence to 12 months in jail.

Also see: 2009 ABPC 153 (Sentencing).

xxviii. Unreported (Noted in 2013 ABPC 66)

In this **unreported case** Mr. R was convicted of making and possession child pornography, and voyeurism.[43]

One of the victims was Mr. R's niece, and the other was a girl he coached on a hockey team. He took surreptitious photos of the girls while they were sleeping in a way that was described by the court as "very perverse." He later printed copies of the photos on a school printer and left them for other people to discover. He was also found to have a digital camera with 284 pictures and 92 video clips of young girls' breasts and groin areas who appeared to be asleep or unconscious. He was sentenced to 18 months in jail.

xxix. 2009 ABCA 74

In **2009 ABCA 74**, Mr. J was convicted of possessing child pornography and child luring. He was sentenced to 15 months in jail.

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 of the websites 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.

He appealed his sentence, arguing he should have received a conditional sentence. His appeal was dismissed.

xxx. 2008 ABQB 679

[43] Noted in 2013 ABPC 66.

In **2008 ABQB 679**, Mr. S, a 22-year-old man, pleaded guilty to distributing child pornography. At sentencing he challenged the constitutionality of the mandatory minimum sentence and sought an exemption from being registered as a sex offender, arguing the content of the photos were sexual but the intention for posting them were not.

Mr. S was 20 years old when he began speaking with a 16-year-old girl online, who claimed to be over 18 years old. They eventually met and had consensual sex and took photos of each other having sex. At that time Mr. S was aware of the girl's actual age. After the couple broke up, Mr. S posted comments about her on his Nexopia page listing her full name, age and offering her photos to anyone who asked for them. He also posted images of his own wrists with cut marks on them. Ms. X reported this to Nexopia, who took the text down. Two days later Ms. X found Mr. S had posted nude images of her on Nexopia and offered to post more "showing more." She again contacted Nexopia, who took the images down. Mr. S posted the images up again along with Ms. X's personal information. Ms. X contacted the police and told Mr. S not to contact her. He sent her threatening messages to her and posted threatening messages on his Nexopia page and posted a link to more nude photos of her. A search of Mr. S' computer uncovered the images that had been posted on the Nexopia profile. Including her full name and age was considered an aggravating factor.

The court also stated:

> In the present case there was planning and deliberation. [Mr. S] acted with intention to embarrass, humiliate and intimidate the complainant. He succeeded. He also exposed her to repeated redistribution of the images and a possible risk of danger from those who viewed them. [Mr. S] has not demonstrated a true understanding of the harm to the complainant which he has caused.[44]

Considering the seriousness and deliberateness of Mr. S' actions, as well as his lack of remorse, the court did not find the mandatory minimum sentence to be unconstitutional and

[44] 2008 ABQB 679 at para 92.

sentenced Mr. S to one-year imprisonment and two years' probation. It also found that his registration as a sex offender was appropriate as registration does not depend on the seriousness of the crime, it is mandatory for certain offences save certain exemptions. Mr. S' interests were not grossly disproportionate to the public interest of investigating sexual crimes and he was not exempted from registration. It was also ordered that Mr. S submit a DNA sample, that the computer equipment used in the offence be forfeited, and the photographs be destroyed.

xxxi. 2008 ABCA 129

In **2008 ABCA 129**, 24-year-old Mr. I had pleaded guilty to two counts of luring a child, one count of counselling making 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.[45]

[45] 2007 ABPC 237 at para 64.

It further noted that girls are not to blame for their victimization and that "Teen 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."[46]

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 sexual assault."[47]

Mr. I was sentenced to seven years imprisonment. Additional orders included prohibitions on possession of firearms and attending places where persons under 16 are present, an order to provide a DNA sample, registration as a sex offender, and an order to forfeit any computer equipment used in committing the offences for which he was convicted.

Mr. I's appeal of his sentence was dismissed and his sentence was confirmed. In 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.[48]

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[46] 2007 ABPC 237 at para 80.
[47] 2007 ABPC 237 at para 60.
[48] 2008 ABCA 129 at para 7.

xxxii. 2008 ABCA 39

In **2008 ABCA 39**, Mr. G, a 42-year-old man, pleaded guilty to possessing child pornography.

Mr. G was found with 2,000 photographs and 100 videos of child pornography on his computer and CDs. The children in the images were aged 4 to 10 years old and were nude or engaged in "every manner of sexual activity", mostly with adult men.

At trial he was sentenced to 12 months in jail and 3 years' probation. Additional orders included a 10-year registration as a sex offender, 10-year limitations on being near children, and a DNA order.

He appealed his sentence but the appeal court found no problem with the sentence. His appeal was dismissed.

xxxiii. 2007 ABCA 135

In **2007 ABCA 135**, Ms. B, a 36-year-old woman, pleaded guilty to sexually touching a child and distributing child pornography.

Ms. B had cerebral palsy and low self-esteem that made her vulnerable to exploitation. Ms. B had met Mr. T through a BDSM (bondage-discipline sadism-masochism) themed chatroom. She entered into the role of Mr. T's submissive, while he was dominant and groomed her over time. She performed sexually via webcam for Mr. T. He lived in a different province but he would visit her once a year. Mr. T eventually suggested that they add children to their sexual activity, which Ms. B initially resisted but feared being punished if she didn't comply with him. Mr. T began sending her images of child pornography and told her to make up stories involving sexual contact with children. She said she complied because did not want the relationship to end. Mr. T convinced her that she should provide her son with oral sex to help him release sexually, stating the boy

would seek release elsewhere and "could be harmed in the process." On one occasion she placed her son's penis in her mouth. She also sent nude and exploitative images of her son to Mr. T via a webcam.

Mr. B eventually told someone about this who reported it to the police.

At trial, she was sentenced to two years less a day served in the community and three years' probation.

The Crown appealed the sentence.

The appeal court found the sentence to be unfit, noting the trial judge under-emphasized certain factors and didn't properly characterize other factors. The court found that Ms. B had committed crimes that "are serious in their own right in terms of the harm caused because both involve abuse of one of the most vulnerable groups in our society, children", and that her behaviour was at the higher end of the seriousness of each offence, particularly as the parent of the abused child. Conversely, the court recognized her unique personal circumstances and the degree of responsibility was not at the high end.

The defence argued that because Ms. B had not engaged in the oral sex for her own gratification, it should mitigate the seriousness of the offence. However, the appeal court stated:

> […] since the mother pled guilty to sexual interference, it follows that she accepts that her actions were "for a sexual purpose". Whether the gratification was her own or that of her boyfriend is essentially irrelevant. Certainly, from the perspective of the victimized child, it makes little difference that someone is perpetrating the abuse at the behest of another. Indeed, it arguably makes it more harmful knowing that the mother had a choice and chose to do this for the sexual gratification of a man living thousands of miles away.[49]

[49] 2007 ABCA 61 at para 23.

The Crown also appealed the decision to exempt Ms. B from being registered as a sex offender, which is mandatory except under special circumstances, but it was dismissed.

The Court held that registering her as a sex offender would increase her vulnerability to exploitation and was grossly disproportionate to the public interest in protecting society from Ms. S, due to her personal circumstances. The court stated:

> An exceptional aspect of this case is the vicious circle that arises from the respondent's psychological profile. Her feelings of worthlessness and anticipated negative evaluation cause her to isolate herself. Yet that very isolation makes her vulnerable to the kind of exploitative relationship that eventually led to her crimes. Her tendency to feel rejected, combined with the stigma attached to a 20 year reporting requirement, could foster her lack of self-esteem, making her vulnerable to the very sort of relationship she must avoid. This unusual psychological dimension demonstrates the disproportionate impact of a [sex offender registration] order on her. It also detracts from her potential rehabilitation and reintegration into the community.[50]

In regards to the distribution of child pornography, the court stated:

> […] The sexual exploitation of children through child pornography and the use of the Internet to distribute it constitute a profound and present danger to children around the world. Canada, as part of the world community, must do its part in ensuring that appropriate sentences are imposed on those who choose to exploit children in this fashion. This offence is difficult to prosecute given the relative degree of anonymity offered through the use of the Internet. And the ease with which images of sexually exploited children can be transmitted through this instant, worldwide network adds to the gravity of the offence and the degree of victimization of the children. It takes only a click of a mouse for one child pornographer to spread graphic images of child sexual abuse internationally in seconds. Thus, the primary sentencing principles that apply in sentencing those convicted of distributing child pornography must be deterrence and denunciation.

The appeal court held that the sentencing judge did not properly take this into account. The trial judge had also made a mistake finding the lack of commercial gain as a mitigating factor, treating

[50] 2007 ABCA 135 at para 16.

the two offences as part of a single event, and over-emphasizing her disability as a reason she could not be imprisoned.

The sentenced was increased to 18 months in jail. Additional orders included a weapons prohibition, a DNA order, and a prohibition from being near children.

Also see: 2007 ABCA 61 (Appeal), [2007] SCCA No 136 (Leave to Appeal), 2006 ABQB 533 (Sentencing).

xxxiv. 2006 ABCA 190

In **2006 ABCA 190**, a 23-year-old man, pleaded guilty to possessing and distributing child pornography.

Mr. S had a large collection of child pornography. The police located somewhere between 4,000 and 10,000 images and around 1,000 videos on Mr. S's computer. Around 500 movies and 500 images were determined to be child pornography. The collection including images of children mostly between six and eight years old, but as young as nine months old, some of whom were in obvious pain during the sexual abuse. He began downloading pornography, including child pornography, when he was 14 years old.

Mr. S also operated a website where other child pornography consumers could upload their own images in exchange for some of Mr. S's images. There was evidence the website had been visited 3,915 times from people from 52 different countries, and around 75,000 trades had occurred. Mr. S ran the website in order to collect more images, rather than to gain a profit. Users were expected to upload three images for every one they downloaded. Undercover police officers were able to download child pornography from Mr. S's website.

He was sentenced to two years less a day served in the community and two years' probation.

The Crown appealed his sentence, arguing Mr. S should have served his sentence in jail and that the sentence should have been longer.

The Court of Appeal agreed that his sentence was too lenient and that the trial judge had focused too much on Mr. S's personal circumstances and not enough on the factors that made this a serious offence. The court stated:

> In our view, the sentencing judge erred by failing to properly consider the following highly relevant and aggravating factors, and thereby greatly minimizing [Mr. S's] culpability:
>
> (i) Mr. S used the Internet to collect and distribute, on a worldwide basis, some very extreme child pornography;
> (ii) he operated a computer server on which he stored this material;
> (iii) his contacts were permitted to download files, but only provided they first uploaded new material to the server;
> (iv) the sheer volume of material and trades;
> (v) his conduct was planned and sophisticated;
> (vi) the offence only ceased when [Mr. S] was caught;
> (vii) the pre-sentence report said his sexual compulsivity was moderately high and he suffers from cognitive distortions; and
> (viii) [Mr. S] meant to, and did, enhance his own collection, which was massive and extremely disturbing, thereby creating a market for and potentially encouraging the creation of new images or movies.[51]

The court noted that sentences served in the community were rare for child pornography distribution offences. It also noted that Mr. S did not limit who could visit his website, it was open to the public as long as they uploaded new material. It found his style of distribution as reprehensible as a commercial enterprise, because it encouraged additional production of new material and more exploitation of children.

[51] 2006 ABCA 190 at para 11.

The appeal was allowed, and Mr. S's sentence was changed to 15 months in jail and a two-year probation. Internet restrictions and prohibitions on being near children were added to his probation order.

xxxv. 2005 ABCA 423

In **2005 ABCA 423**, Mr. F, a 39-year-old man, pleaded guilty to making child pornography of a 14-year-old girl.

Mr. F had bought the girl cigarettes and then told her she could make thousands of dollars selling sexual images of herself on the internet. On the pretext of her starting a modelling career, he showed her some images online that he claimed to have taken and then took 41 pictures of her in a motel and paid her $40 for the session. There was no sexual activity in the images, but the images were sexual and of the girl in various stages of undress. The girl's mother discovered the girl was not at school at that time and reported it.

After Mr. F was arrested, he asked his girlfriend to delete the images from his computer and to get the camera. She did not and cooperated with the police.

At trial he was sentenced to 14 months in jail and 18 months' probation. He appealed his sentence first, arguing the trial judge did not properly consider the type of pornographic images when deciding on the seriousness of the offence and second, that the principles of denunciation and deterrence were overemphasized. On appeal, Mr. F argued his sentence should be served in the community rather than in jail.

The appeal judge rejected his first argument, having viewed the images and properly assessed them, and found that the sentence was fit for the crime. The appeal was dismissed.

Also see: [2005] AJ No 1077 (ABPC) (Sentencing).

xxxvi. 2002 ABCA 179

In **2002 ABCA 179,** Mr. He was found guilty of making and possessing child pornography. A possession charge was stayed due to the *Kienapple* principle.

Mr. He was sentenced to five years' imprisonment at trial. Additional orders included a DNA sample.

Mr. He appealed both his sentence and the DNA order. He argued that his co-accused, Mr. T and Mr. Hu, had pleaded guilty as well and but were only sentenced to a 15 months conditional sentence and 18 months in jail respectively. Therefore, on the principle of parity he should have received a similar sentence.

The three men had begun an internet pornography company. They had placed an ad looking for models who were 18 or over. Three teenaged roommates, aged 15, 16, and 17, were in financial need and replied to the ad. Mr. He did not verify their ages and arranged for Mr. Hu to take photographs of them in the nude and engaging in sexual activity. Several hundred photographs were taken. At one-point Mr He became aware of the age of the roommates. Mr. T provided the space for the photos to be taken. The Court found that Mr. He was the primary actor in the arrangement. The two other co-accused cooperated with the authorities, which was a mitigating factor in their sentence, while Mr. He did not.

Mr. He tried to argue the complainants' ages should be taken into consideration. The Court state:

> […] and we also acknowledge that the young persons are not at the extremely young age of the spectrum, that is less than 12 for example. Were this the case, those would be aggravating factors. But the reverse does not follow. Simply because the young persons were at the higher end of the protected age category does not make this a mitigating factor. The protection afforded by the legislation extends to all children under 18, no matter their age, and rightly so. Society has recognized the legitimate need to safeguard all children in this category from exploitative conduct. Children are

> not adults and cannot be expected to exercise judgment as if they were. We recognize this in many other instances where Parliament and provincial Legislatures have drawn lines to protect those in a certain age category.

A higher sentence than his co-accused was warranted but the Court of Appeal found a five-year sentence was too harsh and reduced it to three and a half years.

xxxvii. 2002 ABCA 155

In **2002 ABCA 155**, Mr. Hu pleaded guilty to making child pornography. Mr. Hu owned an erotic photography business. He was hired by Mr. He and Mr. T to take photos of some individuals to be posted on a pornography website. Mr. Hu was going to receive some of the profit generated from the website. He was told there would be "no snuff, bestiality, or kiddie porn". However, three of the people he photographed were 15, 16, and 17 years old. Mr. He told Mr. Hu that the individuals were of legal age.

Mr. Hu photographed 549 images of pornography, including scenes where one of the girls was made to look even younger than she actually was. Mr. Hu did not ask for the models' ID. After the photos were taken, Mr. Hu was told that the three individuals were underage. After finding this out, he did not destroy the photos. Before the photos could be posted on the website, the police seized them.

At trial Mr. Hu was sentence to a 18 months to be served in the community, of which only 9 months included a curfew. The Crown appealed the sentence, arguing because the judge did not view the photos, he did not consider the evidence properly, and that the sentence was not fit for the offence.

The appeal court reviewed the photographs. It found that the trial judge had made a mistake by not viewing the photographs in order to determine how graphic they were, and failing to ade-

quately consider the large-scale commercial activity the photographs were for, Mr. Hu's involvement in creating the images, including making one of the girls look even younger, the length of time the photos were taken over, and the number of photos taken. The Court of Appeal stated that Mr. Hu did not have diminished responsibility because he did not recruit the young people.

His sentence was increased to 18 months' incarceration.

Also see: 2003 ABCA 200 (Appeal).

xxxviii. 2001 ABCA 181

In **2001 ABCA 181**, Mr. W was convicted of possessing child pornography.

Mr. W's internet service provider was conducting routine repair on Mr. W's email inbox. The ISP opened some emails that they believed contained child pornography and informed the police. It also provided the police with Mr. W's billing address.

The police used this information to obtain a warrant. They searched his home and found child pornography in emails and attachments found on Mr. W's computer and diskettes.

At trial, Mr. W argued that the ISP was acting as an agent of the state when it read and forwarded his emails to the police, but the trial judge disagreed, finding the ISP was not performing a government function. He also argued the information used to obtain the warrant was insufficient, which the trial judge also disagreed with. The trial judge did not find that Mr. W's privacy rights were violated. She also found there was enough evidence to demonstrate possession of the images, the photos had been emailed to other people from his email account. Mr. W was convicted.

Mr. W appealed the decision, but the Court of Appeal agreed with the trial judge's decision and dismissed the appeal.

Also see: 1999 ABCA 275 (Appeal).

III. BRITISH COLUMBIA

i. 2018 BCCA 416

In **2018 BCCA 416**, Mr. S, a 23-year-old man, pleaded guilty to possessing child pornography.

During a police investigation into the file sharing of online child pornography, the police found a large number of child pornography images that had been downloaded to Mr. S's IP address. A search warranted was issued and a search of his home resulted in 400 video files of child pornography on his computers. Some of the videos contained adults sexually abusing very young children, voyeuristic videos, as well as sadistic sexual acts on children. 480 photos and cartoons of child pornography were also discovered.

Mr. S claimed he had used an acronym commonly used for finding child pornography and understood he was seeking out child pornography. He claimed he downloaded it because he was "bored" and enjoyed the "shock value" of the videos, but he also acknowledged he masturbated to the images.

Mr. S had mental health issues, including suicidal behaviour and ideation, depressed mood, and had auditory hallucinations in the form of a voice who he called his best friend "Chris." Two psychologists did not think that Mr. S would be able to mentally tolerate incarceration.

The child pornography provision required a 90-day mandatory minimum sentence upon conviction. However, the sentencing judge found that this mandatory minimum sentence violated Mr. S's right to be free from cruel and unusual punishment. Considering Mr. S's personal mental health circumstances, a 90-day jail term would have been grossly disproportionate, even if served intermittently.

Mr. S was sentenced to four months to be served in the community and two years' probation at trial.

The Crown appealed the court's finding that the mandatory minimum sentence was unconstitutional, but it was dismissed.

The appeal court found that while "[e]xcept in exceptional cases, those who possess child pornography will be incarcerated," the mandatory minimum sentence would violate some people's right to be free of cruel and unusual punishment, both in respect to Mr. S and to some other hypothetical offenders. Mr. S had exceptional circumstances due to his cognitive difficulties that reduced his moral blameworthiness, and his severe mental health issues that would be made worse if he were to be put in jail.

Also see: [2019] SCCA No 17 (Application for leave to appeal), 2018 BCCA 416 (Appeal), 2018 BCCA 35 (Appeal), 2017 BCSC 2020 (Appeal), 2016 BCPC 478 (Charter).

ii. 2018 BCCA 409

In **2018 BCCA 409**, Mr. W was convicted of possessing, accessing and making child pornography available to others.

The police were investigating IP addresses that had accessed child pornography on a file sharing program and found an IP address located in British Columbia. The police looked at the files this user was sharing on the program and found child pornography images in their shared folder. The IP address was associated with Mr. W's girlfriend's home, who he lived with.

When police obtained a warrant and seized and searched Mr. W's computer, they found a large collection of child pornography photos and videos. Many of the files were given names that suggested they were of child pornography, including sexual images involving animals. The file sharing

program was also found on this computer, along with information that linked it to the folder the police had viewed the images on online.

Mr. W shared his home with his girlfriend and her daughter. There was evidence that images had been repeatedly accessed, downloaded and shared, and one of the folders contained a file of a void cheque with Mr. W's name on it, along with the images. The trial judge found that there was no evidence to show that another person had used the computer to repeatedly download child pornography.

Mr. W was convicted.

He appealed the conviction, arguing that the judge had made a mistake when assessing the evidence and did not give adequate reasons in the decision. However, the appeal judge disagreed and dismissed the case.

Also see: 2016 BCSC 2607 (Trial), 2017 BCSC 2692 (Sentence).

iii. 2018 BCCA 346

In **2018 BCCA 346**, Mr. W pleaded guilty to sexual interference and child pornography.

Mr. W abused his step-daughter, who was between 11 and 12 years old during the offences.

Mr. W had separated from the girl's mother, but continued to visit her as a step-parent. On an overnight visit where Mr. W took her to a hotel, someone reported that Mr. W was inappropriately touching the girl. The police found Mr. W in his hotel room, sexually abusing the girl. A search of his camera and computer resulted in 129 images and eight videos of the girl, as well as three written stories of sexual activity between children and adults. The videos were described as "[b]reathless in their brutality, there are no words to describe the despair one felt for the child or the loathing for [Mr. W], except a deep and abiding sadness" by the trial judge.

Mr. W was sentenced to seven years in jail.

After four years of delays between the charge and sentencing, Mr. W sought a stay of proceeding for unreasonable delay. Mr. W had switched counsel many times and failed to appear for psychological assessment appointments. The sentencing judge dismissed the application, stating that a delay between the charge and sentencing was different that a delay pre-trial or pre-conviction (Jordan Principles).

Mr. W argued that the trial judge made a mistake in addressing the Crown's contribution to the delays and incorrectly applied the Jordan principles about restrictions on delays in trials.

The appeal court found that there were some mistakes in the trial judge's calculations, but overall the decision was correct.

The appeal was dismissed.

Also see: 2017 BCCA 137 (Appeal).

iv. 2018 BCCA 339

In **2018 BCCA 339**, Mr. F, a 63-year-old man, was found guilty of sexual interference, sexual exploitation, sexual assault causing bodily harm and distributing child pornography.

One of the abused children, Mr. F ,was Mr. C's great uncle and acted in the role of a grandparent in his life. Mr. F also abused the boy's friend, Mr. G. He sexually abused Mr. C between the ages of 6 to 15 and Mr. F when he was 14 years old. He was acquitted of two sexual offences and two were stayed.

Mr. F groomed the boys for sexual activity by showing them pornography and giving them marijuana. The sexual activity during this time consisted of masturbation, oral sex and anal sex. Mr. F would often photograph or film the sexual activity between them. Mr. F would email

the images to Mr. C. Mr. G's anus was damaged during the sexual activity. The boys reported the abuse several years after it stopped.

At trial, Mr. F was sentenced to 12 years in jail. Additional orders included prohibitions from being near children, working with children, communicating with children, and using the internet.

He appealed his conviction, his sentence and the lifetime restriction on communicating with children. The appeal court found that the trial judge had failed to properly consider the *Gladue* factors, and made a mistake when applying the totality principle. Mr. F had been forcibly removed from his home as a young child and forced to attend residential school where he was sexually abused.

Mr. F tried to argue the private use defence for the child pornography images, but it did not apply in this case because the sexual activity was unlawful.

His sentence was reduced to eight years in jail. The restrictions on communicating with children was removed.

Also see: 2018 BCCA 81 (Appeal); 2016 BCPC 173 (Sentencing); 2016 BCPC 157 (Trial).

v. 2018 BCCA 74

In **2018 BCCA 74**, Mr. W, a 72-year-old man, was convicted of possessing child pornography.

The British Columbia Child Exploitation Unit investigated a report of someone downloading child pornography onto a storage server. The IP address associated with the images was located in BC. The police obtained a search warrant to search Mr. W's home. They found CDs, DVDs, USBs and a CPU, which contained over 220,000 images of child pornography and several videos. The images were sorted into file folders and included images of nude children, children engaging sexually, and adults sexually abusing children.

Mr. W was arrested and given an opportunity to speak with his lawyer prior to being interviewed by the police, which he did. His lawyer advised him not to speak to the police, which he told the police, but then he made several admissions, including that he was the owner of the computer, that he was looking at images from his USB the morning the search had taken place, that he could not stop himself from looking at them, and that he collected them for a sexual purpose. The judge did not find Mr. W was pressured to make these admissions.

The trial judge found some of the images were child pornography, but some of the video clips were such low quality, she couldn't conclude that they were child pornography. The people in the higher quality images were clearly children, due to their features and lack of physical development.

He was sentenced to one year in jail and three years' probation.

In regards to whether the images were of children or were a representative sample, the appeal court stated:

> Cases of child pornography pose particular challenges for counsel and the court. Where tens of thousands of images are collected, as here, there is a practical problem of how to receive them into evidence in a form that is manageable. It is for that reason one would expect the admissibility of such evidence to be dealt with at the trial court, as part of the disclosure process or in objections to admissibility of certain summary type evidence.[52]

He appealed his conviction, arguing the statement he made to the police was not voluntary, the people in the images weren't minors, and that the images and videos shown to the court were not representative of the larger collection of images.

The appeal of his conviction was dismissed.

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[52] 2018 BCCA 74 at para 20.

He also appealed his sentence, arguing the trial judge had made a mistake in applying the sentencing principles and that the sentence was demonstrably unfit, although it was actually on the lighter side of what could have been imposed.

The Court of Appeal disagreed with his arguments. The appeal of his sentence was dismissed.

Also see: 2018 BCCA 329 (Appeal).

vi. 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 engaging 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.[53]

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 on 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.

vii. 2018 BCCA 81

In **2018 BCCA 81,** Mr. G was charged with sexual exploitation, sexual interference, sexual assault, distribution of pornography, and invitation to sexual touching.

[53] 2018 BCPC 187 at para 43.

He committed these offences against his niece's son, Mr. J, between 1997 and 2008, and against Mr. J's friend, Mr. D, between 2004 and 2006.

Mr. G acted as a grandparent to Mr. J, who referred to him as "grandpa". Mr. G cared for him in his home regularly, feeding and clothing him. Mr. J was between 4 and 16 years old at the time of the offences, which included Mr. G masturbating Mr. J, performing fellatio on Mr. J, possibly procuring prostitutes for Mr. J, taking sexually explicit photos of Mr. J, transmitting these photos to Mr. J, along with other pornographic material, by email, and sent Mr. J sexually explicit messages by email. Mr. G also sexually assaulted Mr. D during family powwow outings.

Mr. G was convicted of sexual interference, sexual exploitation, distribution of child pornography, and sexual assault causing bodily harm. He was acquitted on one count of sexual interference and one count of invitation to sexual touching. He was sentenced to 12 years' incarceration. One count of sexual assault was stayed under the *Kienapple* principle.

The appeal court allowed "transmission" of child pornography to one individual to qualify under the "distribution" provision.

See also: 2016 BCPC 157 (Evidentiary Hearing).

viii. 2017 BCSC 1868

In **2017 BCSC 1868**, Mr. P was convicted of sexual assault, invitation to sexual touching, sexual interference, and possession of child pornography, related to sexual offences against five young victims who were between the ages of four and nine years old at the time of the abuse.

Four of the girls were Mr. P's nieces. The abuse occurred at various points over a 12-year period. He talked to the girls about sex, showed them his genitals, touched them sexually, and demonstrated pedophilic abuse. He also showed some of the girls pornography on his computer.

He argued that the sexual abuse was not for a sexual purpose, but was to educate the girls. He claimed that he was engaging in appropriate methods of sexual education to protect the girls from pedophiles. He adopted this concept after engaging in discussions on child sexual abuse, childhood development, and child sexual abuse on a website that advocated for this method. He believed he had superior knowledge about childhood sexuality and had a right to teach children about their sexuality in the way he believed would "pedophile-proof" the children. The court found that is behaviour violated the girls' sexual integrity and were for the purpose of dominating her sexually, and were thus done for a sexual purpose.

Mr. P tried to argue the girls consented to the sexual activity, but consent is not a defence for children under the age of 16.

He was declared a dangerous offender. The court determined that sexual interference and invitation to sexual touching were serious personal injury offences. The sexual assault charges were conditionally stayed to avoid multiple convictions for the same wrongdoing. He was sentenced to 11 years' imprisonment followed by a 10-year Long Term Supervision Order. Additional orders included a weapons' ban for life, a DNA order, and a lifetime registration as a sex offender.

Also see: 2015 BCSC 618 (Trial).

ix. 2017 BCCA 354

In **2017 BCCA 354,** Mr. S was convicted at trial of sexual exploitation and making child pornography.

Mr. S abused his step-daughter from the age of 12 to 17, including frequent instances of forced sexual intercourse which he was secretly photographing and filming. At 17, she became pregnant and had to have an abortion which she kept secret from her mother.

The trial judge found Mr. S expressed no remorse, nor did he recognize the harm caused to the victim, nor provide any insight into the underlying cause for his actions. Mr. S was sentence to 7 years and 6 months in jail at trial.

Mr. S appealed his sentence. He was granted leave to appeal but the appeal was dismissed.

x. 2017 BCCA 350

In **2017 BCCA 350**, Mr. A pleaded guilty to making and possessing child pornography and for sexual interference with a child under the age of 16 at trial.

Mr. A had abused his neighbour's child, Ms. M, when she was between the ages of four and six years old. He was between the ages of 40 and 43 when he abused her while he was babysitting her and in a position of trust. Her parents were very close with Mr. A and his wife and viewed them as family. A Danish police detective who found the child pornography online reported Mr. A's IP address to the RCMP who searched his computer and located 2,300 images and 27 videos of child pornography, over 200 were of Mr. A abusing Ms. M. Mr. A admitted to trading these images online for other images of adults abusing children.

He was sentenced to eight years' imprisonment.

Mr. A appealed the sentence, arguing that the trial judge had not properly assessed the *Gladue* factors.

The appeal court found that the trial judge had properly assessed the *Gladue* factors, including Mr. A's own history of sexual abuse, finding the "depravity and cruelty" of Mr. A's conduct overwhelmed the *Gladue* factors. The court noted Mr. A "assured the continued victimization of J.M. by distributing her photos on the internet, which photos will likely circulate indefinitely."[54]

Mr. A's sentence was varied in respect to the court orders prohibiting his access to the internet. It was reduced from 20 years to 10 years and he was allowed to use the internet for employment purposes and to communicate with his family.

Also see: 2016 BCSC 1449 (Sentencing); 2017 BCCA 85 (Appeal), 2016 BCSC 144.

xi. 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 so-called "Dad-Daughter Sex". This channel was known to be frequented by people who were interested in having 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 sexual activity and not just role playing. He described sexual encounters and discussions he had with children, told 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

[54] 2017 BCCA 25 at para 34.

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 cellphone, 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 communicating 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.

xii. 2016 BCCA 476

In **2016 BCCA 476**, Ms. B constitutionally challenged her convictions of distributing and possessing child pornography and appealed those same convictions along with a conviction for uttering threats to cause death or bodily harm.

Ms. B made many emotional and physical threats over text message to a new female student at her high school who was pregnant at the time. Additionally, she contacted the student's ex-boyfriend who sent her privately exchanged sexual images of the student from when she was 14 to 16 years old. Ms. B then distributed these photos over Facebook messenger to a friend.

Due to legal errors at trial concerning her constitutional challenge, the child pornography charges were set aside, and a new trial was ordered. All other grounds of appeal were dismissed.

xiii. 2016 BCCA 86

In **2016 BCCA 86**, Mr. R appealed his sentence for convictions of sexual interference, sexual exploitation, sexual assault, uttering threats, and making child pornography.

He was acquitted on one count of inviting sexual contact and one firearms offence. A conviction of possessing child pornography and an additional conviction of sexual assault were stayed under the *Kienapple* principle.

Mr. R had sexually interfered with and sexually exploited his step-daughter, Ms. M, from the age of 10 to 16, and had sexually interfered with and sexually assaulted her friend, Ms. D, when she was 16 years old. He uttered threats against Ms. M's biological mother.

Ms. M considered Mr. R to be a parent since he had lived with her and assumed that role since she was two years old. Mr. R and her mother also had a son together. Although Mr. R moved out when the relationship with the mother ended, Ms. M continued to see Mr. R regularly.

When she began visiting him at 10 years old, Mr. R had her perform oral sex on him. They started having sexual intercourse, vaginal and anal, when she was 13 years old. On Mr. R's computer, police found 34 photos of Ms. M naked at 14 and 15 years old and one video of Ms. M and Mr. R having sexual intercourse when she was 16 years old. The sexual touching of Ms. D occurred when Ms. M had her over for a sleepover at Mr. R's home.

Mr. R argued that the sexual activity was consensual, which the judge rejected stating Mr. R "no longer wish[ing] to parent MH did not entitle him to have sex with her" but that, on the facts, he had maintained his parenting status after the breakup and Ms. M was only sent to him under that premise. There was no air of reality to a defence of honest and mistaken belief in this case, and even if there were, that is not a valid defence against sexual exploitation.

Mr. R was sentenced to seven years, two months, and seven days' incarceration.

Also see: [2016] SCCA No 174 (Application to appeal), 2016 BCCA 86 (Appeal), [2014] SCCA No 485, 2014 BCCA 349 (Appeal), 2013 BCCA 176 (Application for appointment of counsel), 2011 BCSC 1152 (Trial), 2011 BCSC 1158 (Voir Dire).

xiv. 2015 BCCA 455

In **2015 BCCA 455**, Mr. R, a 41-year-old man, pleaded guilty to possessing child pornography, distributing child pornography, and child luring

Mr. R was found 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 adult 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. One 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."[55]

Mr. R was sentenced to four years in jail. Additional 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.

Mr. R appealed his sentence 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.

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

Also see: 2013 BCPC 279 (Sentencing).

xv. 2015 BCPC 417

[55] 2015 BCCA 455 at para 19.

In **2015 BCPC 417**, Ms. F, a 17-year-old girl, was found guilty of possessing and distributing child pornography.

Ms. F had taken a video of Ms. K, a 15-year-old girl, giving oral sex to Ms. F's abusive boyfriend. The court noted that Ms. F did this out of jealousy and intended to hurt Ms. K, but later expressed remorse for her actions. Ms. F created a fake Facebook account in order to post the image on Ms. K's Facebook page so those on her friend list could see the video. The Court noted that Ms. K experienced extreme emotional distress following the distribution. It stated:

> The result of [Ms. F.'s] conduct has been devastating upon [Ms. K]. The impact of its distribution caused extreme emotional distress. It had been sent to those in her school, friends and relatives. As she comments, there are likely countless others whom she does not know who have seen the image. At one point she describes schoolmates making derogatory comments to her while she was out walking. She felt overwhelmed as she experienced confusion, embarrassment and shame. There was a deep sense of personal violation as she had lost the respect of others. In her depressed state she did not leave her room for several days and contemplated suicide. She remains anxious and has lost trust in others.[56]

Ms. F's case was differentiated from a similar case in BC where the perpetrator received a conditional sentence. In that case the photo taken did not depict sexual activity and was only shared with the person in the image and another friend. In regards to Ms. F the court stated:

> For this youth, her offending conduct is not a set of circumstances that can be categorized as impulsive or unsophisticated. Her creation of a fake account and distribution of an image of a child performing a sexual act to the victim's contact list on Facebook was a planned offence that was vengeful and intended to degrade the victim's personal self-worth. It is a form of bullying that society condemns. This was an intentional act, with the objective of emotional harm. Her degree of culpability is high in this serious offence. While there is no doubt a discharge would be in this youth's best interest, it would be contrary to the public interest to allow such a sentence. One does not have to look very far in this electronic age to see the abuse that has grown from technology. The image of [Ms. K] is forever available. Its distribution through

[56] 2015 BCPC 417 at para 6.

> the anonymity of the internet is an aggravating feature. The public has a keen interest in ensuring that offences involving child pornography are prohibited.[57]

Ms. F was sentenced to one year probation, additional orders included a no contact order and a DNA order.

xvi. 2015 BCCA 374

In **2015 BCCA 374**, Mr. C was convicted of possessing and distributing child pornography and breaching his recognizance. He was acquitted of child luring, invitation to sexual touching, and breaching his recognizance for those offences. He appealed this conviction arguing the search of his computer was unlawful and that he had a reasonable expectation of privacy in his internet service provider subscriber information.

Mr. C had shared child pornography with an undercover police officer using a file sharing program. The officer made a "law enforcement request" to the internet service provider, which gave the officer the subscriber information associated with the IP address of the user who shared the images. The subscriber information was associated with Mr. C's previous roommate Mr. F, who was not aware that Mr. C reinstated his internet and continued to use it after Mr. F moved out and cancelled the account.

A search of Mr. C's residence resulted in a hard drive with thousands of child pornography images and videos being found. The videos were predominately of young boys and included violent and humiliating content, as well as at least one bestiality video involving a young girl. There were also videos of children playing in the snow in the school across from Mr. C's apartment. All the images were well organized in a database. The search also resulted in chats where Mr. C discussed child

[57] 2015 BCPC 417 at para 7.

pornography. There was some evidence of Mr. C talking with young boys on the internet, but not enough to convict him on child luring or invitation to sexual touching.

On appeal, the court found that Mr. C did not have Mr. F's permission to use the internet account and therefore did not have an objectionably reasonable expectation of privacy to the details of Mr. F's account. His appeal was dismissed.

Also see: 2012 BCSC 627 (Trial); 2012 BCSC 525 (Charter – search and seizure); 2012 BCSC 482 (Evidence).

xvii. 2014 BCCA 251

In **2014 BCCA 251**, Mr. B appealed his conviction of possessing and distributing child pornography.

Mr. B had used file sharing programs to download and share child pornography images. At trial he argued that someone else was responsible for the images on his computer. The images were discovered by an electronics shop employee who was repairing his computer. A search of his computer resulted in the discovery of the images hidden on his computer and evidence of various file sharing programs. Evidence showed Mr. B had downloaded the images at the same time as he was using an email account or online bank account affiliated with his name. There was no evidence anyone tampered with the files. Mr. B argued that he had been in Ontario when he shared the files and was not resident in British Columbia. However, the court argued that he had made the images available in BC.

The court found that the internet was not defined by provincial boundaries. The appeal court agreed with the trial judge's finding stating:

> In my view, reasonable persons generally accept that file-sharing programs operate across provincial boundaries. Further, such programs are well-known to the courts

> given their frequent appearance in cases concerning child pornography and intellectual property and courts, in turn, have accepted that files shared by one user of a specific file-sharing program are available to another user of that program regardless of geographic location.[58]

On appeal, Mr. B argued that the trial judge has misapprehended the evidence about the case, but the appeal court disagreed. His appeal was dismissed.

He was sentenced to a suspended sentence, two years' probation, and additional orders including a DNA order and registration as a sex offender. Mr. B requested a stay of his registration as a sex offender while he appealed his conviction. On appeal he argued that his job in the military required him to be deployable anywhere in the world and the reporting requirements of the sex offender registration would be too difficult to comply with because some of the locations he travelled to were to be kept secret. The appeal court noted the sex offender registration was mandatory and could not be stayed. It dismissed his appeal.

Also see: 2013 BCCA 164 (Appeal).

xviii. 2013 BCPC 421

In **2013 BCPC 421**, Mr. R was charged with possessing child pornography and luring a child.

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.

[58] 2014 BCCA 251 at para 19.

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 offences.

The Court sentenced Mr. R to 90 days imprisonment for possessing child pornography, and 12 months in jail for luring, followed by three years' probation.

xix. 2013 BCCA 97

In **2013 BCCA 97**, Mr. M, an elementary school principle, appealed his conviction for accessing child pornography.

An international investigation into child pornography found that child pornography had been downloaded from an IP address associated with Mr. M's home. A search warrant for his home located deleted child pornography images on his computer. Without a warrant, the police then asked the School District for Mr. M's work laptop. According to the school's policies Mr. M was allowed to use the computer for personal use. A search revealed that child pornography had been accessed and deleted from this computer. Over 100 images were discovered.

At trial the evidence from the school computer was found to be admissible because there was no password protection and because Mr. M had deleted the content. The court found that Mr. M did not have any privacy interests in the evidence. Mr. M was found guilty of accessing child pornography.

After this decision, the Supreme Court released a decision on a different case that held that employees do have some privacy interests in their work computers.

Mr. M appealed the trial decision. On appeal, the court found that Mr. M did have a privacy interest in his work computer and his privacy rights were breached by the warrantless search. Where the trial judge interpreted the deleting of the files as abandonment, the appeal court stated: "deletion of the files is more consistent with an intention on the part of the user to destroy the information, or at least to conceal it from view by anyone else, including himself."[59] However, the evidence was still allowed to be used because the law was unsettled at the time, the breach was not "the most serious kind", and society's interest in the case weighed heavily in favour of admitting the evidence.

Also see: 2013 BCCA 98 (Appeal), 2010 BCSC 1544 (Application).

xx. 2013 BCCA 50

In **2013 BCCA 50**, Mr. W, a 27-year-old man, was found guilty of sexual assault causing bodily harm, uttering threats, possessing child pornography, and breaching his bail terms.

Mr. W was in a relationship with Ms. N, a 21-year-old woman. Ms. N tried to end the relationship but Mr. W refused to give Ms. N his copy of her key to her apartment. Mr. W convinced her to come back to his home. Ms. N had hoped that his father would be home and would help her get her key back.

When they entered Mr. W's home, he became violent and forced Ms. N to take her clothes off. He then threatened to kill her if he found out that she had cheated on him. Mr. W made Ms. N have anal sex and threatened to rape her without a condom if she refused. He forced her to give him oral sex and forced her to watch child pornography while she was doing it. During the

[59] 2013 BCCA 98 at para 52.

abuse, he used her necklace and hair to force her into various positions. He also bit her several times.

After the assault Mr. W apologized and wrote her a note that admitted his substance use had impacted his actions and that he had raped her and forced her to watch child pornography. Ms. N reported the assault to the police and had a nurse examine her. The nurse found multiple swollen areas, abrasions, and bite marks.

When Mr. W was arrested, the police searched and seized his computer. The found over 200 child pornography videos of infants and young teens, including videos where adults were committing violent or sexual assaults on children and one video involving bestiality.

He was found guilty and sentenced to six years and seven months in jail. Additional orders included a 10-year firearm prohibition, a DNA sample, 20-year registration as a sex offender, forfeiture of some items used in the offence, and a 10-year limitation on being near children, including using the internet.

He appealed his sentence on the sexual assault and child pornography convictions, arguing that the judge failed to take into account the appellant's personal circumstances and Aboriginal background in sentencing; that the possession of child pornography was wrongly considered an aggravating circumstance; and that the length of sentence was excessive.

The appeal court found that the trial judge had taken Mr. W's personal circumstances and Aboriginal history into account in sentencing, including his *Gladue* report and the lack of alternative sentencing programs in Mr. W's Nation. He was assessed as having a high risk for reoffending, including with children and for violent sexual activity. Further, the type of child pornography was aggravating and the overall sentence was on the high end of the range of available sentencing, but was not considered excessive.

The appeal was dismissed.

Also see: 2011 BCSC 1363 (Sentence).

xxi. 2012 BCCA 405

In **2012 BCCA 405**, Mr. K pleaded guilty to 15 sexual offences, 14 offences involved complainants from Columbia and Cambodia. The 15th was for the importation of child pornography.

Mr. K unsuccessfully challenged the constitutionality of the section of the Criminal Code that allows for Canadian citizens and permanent residents to be charged with crimes against children committed in other countries. At trial, he was sentenced to 11 years in jail.

Mr. K had mailed himself 65 DVDs from the Philippines. 35 contained adult pornography, eight contained bestiality, and 10 contained clips of child pornography. The covers of the DVDs containing child pornography made it clear that it was child pornography on the DVDs. The police subsequently searched Mr. K's home and storage locker and found additional DVDs, magazines, and tapes containing child pornography, some of which were films of Mr. K engaging sexually with prepubescent and teenage girls in Cambodia and Columbia. He had paid someone to edit the videos so his face was blurred out. Mr. K had been living in Columbia on and off for 20 years and had visited Cambodia. He showed little remorse and argued that it was legal for him to have sex with the children in that country, that the girls were already in the sex trade so the effect of his abuse was lessened, that "women are ready when they are ready" and he "is guilty of loving women too much". The police located some of the underage girls, who testified that Mr. K filmed them, directed their sexual activity, had them engage sexually with each other and himself, and sometimes threatened them with violence.

The content of the other child pornography that Mr. K was not featured in contained images of children and toddlers. The trial judge noted that "his purchase of the videos represents a transaction fueling the child pornography industry, which I have noted is dependent on horrendous child abuse as its subject matter."[60]

Mr. K appealed his sentence, but it was dismissed. The court of appeal found that the sentencing judge had properly noted Mr. K's guilty plea and the particular vulnerability of the children Mr. K had exploited when purchasing them for sex while overseas. The sentence was proportionate and fair. His restrictions from being near people under the age of 16 or communicating with them via a computer were upheld.

Also see: 2008 BCSC 1762.

xxii. 2012 BCCA 377

In **2012 BCCA 377**, Mr. A pleaded guilty to possessing child pornography for the purposes of distribution and sexually assaulting Mr. R.

He was sentenced to 42 months' imprisonment. Additional orders included a 10-year registration as a sex offender.

A report to the Toronto police by the FBI identified Mr. A, a 51-year-old man, as possessing an extensive child pornography collection on a peer-to-peer website. An undercover police officer from Toronto began communicating with Mr. A who sent the officer 6,700 images of child pornography.

[60] Trial decision at para 71.

Upon a police search, 880,000 individual images, videos, online chat conversations, and written child pornography were found on Mr. A's computers. Most of the content fell into the extreme side of child pornography, including content of babies, infants and young children being brutally sexually assaulted, content that was "nothing less than torture" and conversations about brutally abusing young children and purposely spreading HIV to his victims. One internet chat led to Mr. R, a 14-year-old boy, who had been sexually assaulted by Mr. A.

The Crown appealed the sentence and argued the sex offender registration should have been for life. The Court of Appeal increased the sentence to 6 years and Mr. A's sexual registration was made for life.

Also see: 2012 BCSC 215 (Sentencing).

xxiii. 2012 BCCA 100

In **2012 BCCA 100**, Mr. A had been convicted of possessing child pornography and the charge was stayed on the *Kienapple* principles.

Ms. T, Mr. A's common-law partner, found child pornography on Mr. A's computer. A police search of the computer found "overwhelming evidence" that the computer was used to access child pornography, including videos on the hard drive, file folders with names suggesting child pornography had been stored on the computer, internet searches, and file sharing software that had been used over several years.

The question at trial was who accessing the child pornography. Mr. A, Ms. T and her nine-year-old child were the people who had access to the computer. Ms. T had reported the child pornography and the court found that it was Mr. A who had accessed it.

He appealed his conviction and challenged the validity of the search warrant.

The court found that Mr. A could not raise the issue of the validity of the search warrant upon appeal if he did not raise it at trial. It also found that the trial judge had not erred in finding that Mr. A was the one who accessed the child pornography and dismissed his appeal of his conviction.

Also see: 2009 BCSC 1949 (Trial).

xxiv. 2012 BCCA 94

In **2012 BCCA 94**, Mr. Q, a 24-year-old man, was convicted of sexual interference, making child pornography, and obstruction of peace officers at trial.

Mr. Q 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 had told her he was 17 or 18 years old. They engaged in sexual intercourse between the summer of 2007 and the beginning of 2008 and made a video 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.

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.

xxv. 2011 BCSC 1397

In **2010 BCPC 182**, Mr. R was convicted of voyeurism and possessing child pornography at trial after surreptitiously recording people at a park from his van.

Police discovered Mr. R in his vehicle, half-naked and surrounded by wadded tissues. Mr. R told police that he was filming "yummy mummies." After reviewing the camera and recorded footage, police discovered that Mr. R has actually been filming young (sometimes naked, mostly female) children at the playground. Some footage showed close up images of the genitals of young girls either clothed or when their diapers or clothing were being changed at that park.

At trial, the court found Mr. R guilty on all counts.

Mr. R appealed the conviction, asserting that the trial judge erred in finding that video subjects had a reasonable expectation of privacy at the lakefront park.[61] The British Columbia Superior court rejected this argument, stating:

> Technology has the potential to dramatically change the reality of all such considerations and expectations. In this case the videotape dramatically magnifies and permanently captures the genital areas and buttocks of the young girls who were photographed. It is as though, as I have said, an individual was positioned but a few feet away from these children. Thus, each reasonable expectation is altered. Observations are not fleeting, they are extended in the sense that the video is more than 40 minutes long and permanent in the sense that a recording has been made. Observations are not muted, they are enhanced. Furthermore, the observer is not removed or distant but is, in real terms, immediately adjacent to the child being observed. There are few privacy interests which are more personal and more intimate or which impinge on personal dignity more forcefully than those captured on this videotape.[62]

[61] 2011 BCSC 1397.
[62] 2011 BCSC 1397 at s 110-111.

The court also rejected Mr. R's other grounds for appeal: (i) that the trial judge erred by admitting the video into evidence under s 24(2) of the *Charter,* and (ii) that the trial judge erred by finding that the recordings constituted child pornography.

The appeal was dismissed.

Also see: 2010 BCPC 182.

xxvi. 2011 BCCA 221

In **2011 BCCA 221**, Mr. B was found guilty of accessing and possessing child pornography at trial.

A joint effort among police agencies in several countries resulted in the arrest of a person who was producing and distributing child pornography of young girls in Italy. A search of that person's records showed a Canadian man, Mr. B, had ordered 25 videos of child pornography by email and that email was connected to Mr. B's IP address. A police search of his computer resulted in many child pornography videos and evidence he had visited child pornography websites.

At trial Mr. B challenged the legality of the search warrant but it was upheld.

He later appealed his conviction and again challenged the legality of the search warrant. His arguments failed and the Court of Appeal dismissed the appeal.

xxvii. 2010 BCCA 313

In **2010 BCCA 313**, Mr. D was convicted of possessing and accessing child pornography.

Mr. D's wife found pornography on their home computer of girls who appeared to be "just old enough to be legal." At a later date, their two daughters found an icon on the family computer called "Teens", when they clicked on it, they found a picture of a naked girl. They then looked at the history of the computer's internet searches and found in it a pornography site with a girl they

thought was around 12-14 years old on it. They told their mother about this and she confronted Mr. D, who apologized and said he wouldn't do it again. Mr. D later moved out of the home.

Sometime later, the girls' mother found sexual online conversations between one of the daughters and males. The mother was concerned her daughter's sexual conversations were connected to the girl finding the sexual content on the family computer.

At a later date, Mr. D came to the home to use the computer. His wife was worried he was deleting content from the computer so she took it to a computer company to examine the hard drive. Many pornographic images were discovered, as well as evidence of someone visiting websites for teen pornography, and the computer was turned over to the police. 140 images were identified as potentially being child pornography, the Crown agreed that 10 were not and the trial judge found that two were not. None of the images had been intentionally saved on the computer, but had been saved by the computer when pornographic websites or ads had been accessed.

Mr. D appealed the conviction.

First, he argued that the trial judge had not properly analyzed the images to determine if they were child pornography or not. However, the judge identified and applied the tests for determining if a person is under 18 in the images, for identifying explicit sexual activity, and determining the dominant characteristic and sexual purpose of the images. The appeal court did not find the trial judge had made a mistake in his analysis of the images.

Second, Mr. D argued that there was not sufficient evidence to show he was in control of the child pornography. Although the images had been saved by the hard drive of the computer, there was no evidence Mr. D had intentionally saved them or could access them. Mr. D was aware that images would be automatically saved on his hard drive, but he could not access them without

special software and so they were not available for his use. He was acquitted of possession of child pornography.

Third, Mr. D argued that there was not sufficient evidence to show he knowingly accessed child pornography. The images that were on the hard drive were not associated with any email Mr. D sent, website he subscribed to, or purchase he had made. They had been unintentionally down-loaded. Further, there was evidence that someone visited teen pornography websites, but there was no evidence that Mr. D accessed child pornography from them at the times in question. Despite the large number of images that had been unintentionally downloaded, there was no clear evidence that Mr. D had accessed child pornography. The images could not be linked back to any particular website. Further, there wasn't enough evidence to show the images the wife and daughters had found on the computer were, in fact, child pornography. He was acquitted of accessing child pornography.

He was acquitted of both convictions.

xxviii. 2008 BCSC 737

In **2008 BCSC 737**, Mr. P, a 39-year-old man, pleaded guilty to possessing and accessing child pornography. He was also charged with mischief for hiding a video camera in the bedroom of his wife and step-daughter, but the charge was stayed.

Mr. P's stepdaughter found a video camera hidden on a bureau in the room she shared with her mother. She pretended to be asleep and Mr. P removed the camera and brought it to his com-puter. A search of the computer located several hundred images of his partially nude wife and stepdaughter that had been surreptitiously recorded. His wife took the computer to the police department but requested that they not charge him, simply assure her that the images would not be distributed on the internet. The police searched the computer and found several images of child pornography on the computer.

Several months later, the Manitoba Integrated Child Exploitation mailed a letter to the department noting that Mr. Pommer had purchased access to a child pornography database from a website . A second search of the computer led to the discovery of more images and subscriptions to child pornography websites. A search of his laptop found hundreds of additional images of child pornography and evidence of accessing child pornography websites. There was evidence that Mr. P had been accessing this material over a long period of time – some of the content was of children in depraved circumstances – and had tried to delete traces of his searches on his computer.

The court noted the filming and downloading of the images of his stepdaughter and wife, but because the offence occurred prior to the introduction of the voyeurism provision, the court was cautious in taking his actions into consideration during sentencing. His actions were not considered an aggravating factor but as "additional evidence of the depravity of his character at the time of his offence."

He was sentenced to a nine-month conditional sentence to be served in the community. Additional orders included: a no contact order with his ex-wife and stepdaughter; a prohibition from possessing unlawful pornography; a prohibition on possessing any encryption software, electronic device such as a Blackberry or cell phone, or utilities program that erases a program on a computer, or any other devices capable of downloading pictures from the Internet (other than for supervised employment purposes); a prohibition from using computers to communicate with anyone under 18; a DNA order; and, the forfeiture of all of the pornographic material.

Also see: 2008 BCSC 423 (Voir dire).

xxix. 2008 BCCA 365

In **2008 BCCA 365**, Mr. M, a 41-year-old man, pleaded guilty to sexual touching, and possessing and making of child pornography of his two step-daughters, who were six and eight years old at the time the abuse started. The abuse occurred over two years.

Mr. M's relationship with the girls' mother was highly sexualized and he encouraged the girls to be comfortable with their nude bodies. This included Mr. M bathing with the girls, showing them pornography, swimming in the nude, and taking photos of them nude. He began sexually abusing the two middle children, took photos of him sexually abusing one of the girls, and told the girls to keep the abuse a secret. The mother discovered a sexualized photo of one of the girls and confronted the girls and Mr. M, who admitted to abusing one of the girls, but the incident was not reported to the police, despite one of the other daughters wanting to take the matter to the police. The abuse continued and on a later occasion Mr. M took the girls swimming and took close-up photos of their genitalia.

After the relationship between Mr. M and the mother broke down, the mother told the girl's father about the abuse and they reported the abuse to the police. Mr. M allowed the police to search his computer which resulted in the discovery of the images of the girls being abused as well as several hundred photos and videos of child pornography. Mr. M tried to minimize the abuse, saying the girls were willing participants. The girls' victim impact statements stated that Mr. M's offences had a devastating impact on their home life and emotional well-being.

He was sentenced to six years' imprisonment. Additional orders included a forfeiture of the evidence, a 10-year registration as a sex offender, a 10-year weapons ban, a 10-year prohibition on being near young people or communicating with them via the computer, and a DNA order.

He sought leave to appeal his sentence, arguing the trial judge had made a mistake assessing the facts and determining his sentence. The appeal judge found that the trial judge was correct in finding that Mr. M had intended to groom the girls and that the judge did not make a mistake in her sentencing decision. The court also noted:

> The sentencing judge in this case considered the gravamen of making the pornographic videotape and photographs of the victims, and whether they were simply an extension of the ongoing offences of sexual touching. She decided they were not. At para. 41 of her reasons, she found that they represented an elevated level of abuse and exploitation, and that the videotape further degraded and dehumanized the second daughter by using her as a prop or toy and in creating permanent pornographic images. Immediately before she imposed sentence she made these comments at paras. 83 and 84 of her reasons:
>
> The offence of making child pornography involves distinct elements, separate and apart from those in the sexual exploitation offences. At some point the accused determined to obtain a video camera and a tripod. He considered the view he wished to portray, the lighting required, and the best angle to capture the victim while disguising his own identity. He planned the actions the victim would undertake and that he would undertake in order to satisfy his idea of the kind of sexually-arousing interaction he wished to capture on film. He then prepared the victim to comply with his plan and direction. She was clearly not surprised by the presence of a camera when she entered the room. He then sexually abused her and intentionally made a permanent record of same. All of this was done for the sole purpose of providing him with a perverse form of entertainment to which he could repeatedly resort. The victim would have been aware and doubtless is aware that her abuse was to be repeatedly viewed by the accused for his sexual satisfaction.[63]

The appeal was dismissed.

Also see: 2007 BCPC 438 (Sentencing), 2007 BCPC 443 (SOIRA).

xxx. 2005 BCCA 584

In **2005 BCCA 584**, Mr. I was convicted of possessing child pornography. He had secretly filmed four teenage girls and one adult woman who were using his bathroom to shower in his home. The girls were friends of his teenage daughter. They were clearly nude in the images and their

[63] 2008 BCCA 365 at para 58.

sexual organs were exposed but there was no sexual activity in the images. The filming would stop when the girls were dressed.

At trial, he was sentenced to a nine-month sentence served in the community and two years' probation.

He appealed his sentence, arguing the videos were not child pornography because he did not take them for a sexual purpose.

In assessing whether the images were taken for a sexual purpose, the appeal court noted:

> In this case, it is not determinative that the images depict only nude teenage girls and do not display overt sexual acts. Photographs of nude children may well constitute child pornography depending on their context. Part of the relevant context of these images is the surreptitious taking of the images, which resulted in the "unguarded depiction of the sexual organs and nudity of the subject". These images were not taken innocently. They constitute a serious violation of the privacy and dignity of these four young women. As the trial judge noted, the images resulted in the "sexual embarrassment" of the subjects.[64]

It was further noted that the interest in the videos was filming the girls while they were naked and they were placed on a video with more graphic images of the adult woman. Given both the content and the context of the videos, the court of appeal found "the only reasonable and objective conclusion is that the dominant characteristic of these videotapes was for a sexual purpose."

Mr. I's appeal of his conviction was dismissed.

Also see: 2003 BCSC 1992 (Trial).

xxxi. 2002 BCCA 248

[64] 2005 BCCA 584 at para 17.

In **2002 BCCA 248**, Mr. H, a 51-year-old man, pleaded guilty to sexual assault and making child pornography.

He was sentenced to nine months in jail and two years' probation. He appealed the sentence.

Mr. H had hidden a camera in his 13-year-old step-daughter's bedroom and bathroom and had filmed her both dressed and nude. He also came into her room and fondled her breast once until she asked him to stop. She had not been aware of the hidden cameras, but Mr. H's overly attentive behaviour towards her made her uncomfortable. The girl had emailed her friend about the assault and the friend's mother reported it to the girl's parents. The girl's mother found several video tapes that Mr. H had made of her daughter.

The court of appeal changed the sentence to 9 months served in the community rather than in jail, with the same two years' probation and 120 hours of community service. Orders included a no contact order, prohibition from accessing any form of pornography, prohibition form possessing a video recorder, and the requirement that his probation officer have access to his computer.

Also see: 2001 BCPC 413 (Sentencing).

xxxii. 2000 BCCA 554

In **2000 BCCA 554**, Mr. S, a 50-year-old artist, was convicted of making and possessing child pornography related to Ms. S, and also for invitation to sexual touching.

Ms. S was between 11 and 12 years old when the video tapes were made. She met Mr. S through a friend of her sisters. She went to his home where Mr. S showed her videotapes of the content he would like to make of her. He told her he would not show anyone and it was for his own personal pleasure. He then filmed her posing in clothing, including in the shower where her clothing was soaked and you could see her breasts and pubic hair. In the second video, she went to

Mr. S's home alone and he filmed her in her clothing posing on a rock with sexually explicit messages on it. He told her to make herself "sensous and sexy" and used other sexually explicit language when talking to her on film. Part of the film was missing, but Ms. S testified that Mr. S instructed her to touch her breasts to make her nipples hard during that portion of the filming. Mr. S testified he did not instruct her to do that for a sexual purpose but to capture a physiological response, which the judge did not accept. Ms. S also testified that Mr. S had her remove her clothing, spread her legs and "spread your lips" which Ms. S understood as her labia. At which point, Ms. S began to cry. Mr. S testified he had meant her mouth but the trial judge did not accept this. The trial judge found the video's content, the girl's poses, and Mr. S's instructions to be suggestive and sexual, including discussing the girl's lack of previous sexual experience.

At trial, he was sentenced to two years less a day in jail plus three years' probation.

He appealed his conviction, arguing that the trial judge had made a mistake when he found that Mr. S made the videos and asked Ms. S to touch herself for a sexual purpose.

In regards to the invitation to sexual touching charge, the appeal judge took into account the content and language of the video and agreed that Mr. S had asked Ms. S to touch herself for a sexual purpose, not an artistic purpose.

The conviction of possessing child pornography was dropped due to changes in the law in British Columbia at the time, that found this provision to be unconstitutional.

In regards to the making child pornography conviction, the trial judge found that the videos had been made for a sexual purpose. The appeal court dismissed the appeal on this conviction.

The convictions for making child pornography and inviting a child to touch herself for a sexual purpose were upheld, and the conviction for possessing child pornography was dropped.

IV. MANITOBA

i. 2017 MBCA 78

In **2017 MBCA 78,** Mr. A, a 42-year-old man, was convicted of sexual assault, living on the avails of prostitution, attempting to live on the avails of prostitution, living on the avails of prostitution of an underage person, making child pornography, and invitation to sexual touching of a child.

Mr. A started an escort business in 2011 and placed ads for sexual services online. He found young women and underage girls to perform sexual services for his clients in exchange for money. He would arrange for the girls and young women to meet with his clients and would drive them to the clients. Mr. A would typically keep half of the money the women were paid. In 2012, a police sting led to his arrest when Mr. A offered to sell the sexual services of an underage girl to an undercover police officer.

There were seven complainants in total, including Ms. A, an 18-year-old woman, who believed Mr. A drugged her and filmed her performing sexual acts on Mr. A. Mr. A left her $100 and his business card. Mr. A was convicted of sexually assaulting Ms. A.

Ms. DA was an 18-year-old woman who Mr. A found while selling sexual services. Mr. A convinced her to sell sexual services for him and kept the majority of the money she was paid. He filmed her in sexually compromising positions and posted the video online. Mr. A was convicted of living on the avails of prostitution.

Ms. D, a 14-year-old girl, was in the care of Child and Family services. Mr. A had sex with Ms. D while someone else filmed it. Mr. A was convicted of living on the avails of prostitution of an underage person, sexual assault, and making child pornography.

Ms. MS, a 16-year-old girl in the care of Child and Family Services, provided sexual services for money for Mr. A. Mr. A also filmed her performing sexual acts on him in front of Ms. B. Mr. A was

convicted on living on the avails of prostitution of an underage person and making child pornography.

Ms. JM was a 16-year-old girl in the care of Child and Family Services. Mr. A had her perform sexual services for money which Mr. A kept. Mr. A was convicted of living on the avails of prostitution of an underage person.

Ms. B was a 14-year-old girl who Mr. A photographed in sexual positions and had sexual intercourse with, which she said was non-consensual. He tried to sell Ms. B for sexual services. She was offered money for sexual services but the client declined to sexually engage with her, paying Mr. A either way. Mr. A was convicted of attempting to live on the avails of prostitution of an underage person, sexual assault, and making child pornography.

Ms. S a 14-year-old drug user who helped Ms. MS "finish" a client on one occasion and was paid to strip at a bachelor party on another occasion. Mr. A was convicted of living on the avails of prostitution of an underage person and invitation to sexual touching.

A police search of Mr. A's home led to videos of him having sex with several of the complainants and the discovery of over $15,000 in cash.

The courts found no link between the deaths by suicide of Ms. JM and Ms. D prior to the trial, and their interactions with Mr. A, but both were unable to testify at trial due to their deaths.

Mr. A was given a cumulative sentence of 15 years' imprisonment for living and attempting to live on the avails of prostitution, making child pornography, sexual assault, invitation to sexual touching, and possessions of the proceeds of crime over $5,000. Additional orders included a lifetime registration as a sex offender, a DNA order, a 10-year weapons prohibition, not to contact the victims or certain witnesses, and a 15-year limitation on being near people under the age of 16.

He appealed his convictions from living and attempting to live on the avails of prostitution, and his application to appeal his sentence. Both appeals were dismissed.

Mr. A argued that following the decision in 2013 SCC 72, which struck down the living on the avails of prostitution of adults provision for non-parasitic persons, he should not be convicted of living on the avails of prostitution. His trial was taking place at a time after 2013 SCC 72 was decided but prior to Parliament enacting new laws on living on the avails of prostitution. However, the court held that 2013 SCC 72 did not apply to cases related to minors, only adults and did not apply to his convictions involving underage girls. In regards to the one charge of living on the avails of prostitution involving an adult, Mr. A's conviction still stood as both the old and the new legislation included Mr. A's parasitic actions, regardless of the suspension of the living on the avails of prostitution during Mr. A's proceedings.

The sentence was also considered fit when taking into account the number and seriousness of the offences.

Also see: 2016 MBQB 109 (Sentencing).

ii. 2017 MBCA 13

In **2017 MBCA 13**, Mr. J, a 38-year-old man, pleaded guilty to sexual interference and making child pornography.

He had previously been convicted for sexually touching his 9-year-old stepson and had continued to abuse him after the conviction.

The offences related to this case involve the same stepson, and two eight and nine-year-old girls, his daughter and her friend. He sexually penetrated his son while he slept and sexually abused the boy in the shower. He sexually abused the girls over a nine-month period while they were sleeping and took photos the girls naked or being sexual abused. He used these images for the

purpose of masturbation. The sentencing judge stated "The fact that the abuse was photographed served to allow [Mr. J] to re-victimize each of the two girls repeatedly at his whim. This is always the case in respect of the offence of making child pornography."[65] There was also evidence on his computer searching for child pornography of unconscious girls.

The court discussed the long-term impact of the abuse on the children stating:

> The harsh and grim reality of child sexual abuse is that the sentence of the victim is always longer than that of the perpetrator. The consequences of the accused's crimes will affect his victims for the rest of their lives, well after the accused has completed any punishment that the courts can mete out.[66]

He was sentenced to 14 years in jail. Additional orders included a DNA order, a lifetime weapons prohibition, a lifetime registration as a sex offender, a lifetime limitation on being near children or using the internet.

Mr. J appealed the sentence, but it was dismissed. The appeal court held that Mr. J's offences were major sexual assaults and the sentence was fit for the offences.

Also see: 2016 MBPC 25 (Sentencing).

iii. 2016 MBCA 49

In **2016 MBCA 49,** Mr. C, plead guilty to sexual touching a child, invitation to sexual touching, and child pornography offences at trial.

Mr. C had abused his five children over a three-year period. His children were aged four to nine years old at the time of his arrest and the abuse had been occurring over two years. He had one daughter and four sons. He sexually abused all five, and made and distributed child pornography

[65] 2016 MBPC 25 at para9.
[66] 2017 MBCA 13 at para 11.

of his daughter. An undercover investigation by Australian police found that Mr. C had posted the sexual abuse images of his daughter on a website that pedophiles visit. Mr. C also posted images of his sons. On his posts on the website, he offered to make more homemade sexual abuse content of the children upon request.

At one point, Mr. C agreed to trade additional sexual abuse images of his daughter and to create images of his sons for the undercover officer. Mr. C emailed some images to the officer. The officer alerted police in Canada about Mr. C, which led to his arrest. A search of his phone resulted in the discovery of 489 child pornography images, around 70 were of his daughter. Many images were of the most serious form of child pornography. His daughter was not aware that her father was selling and trading the images online.

He was sentenced to 16 years in jail. Additional orders included a DNA order, a lifetime registration as a sex offender, a weapons ban for 10 years, lifetime limitations on being in contact with children, a no contact order, and forfeiture of the cellphone containing the child pornography.

He appealed his sentence.

The appeal court found that the sentence was not unfit and the trial judge had not erred in ordering some of the sentences to be served consecutively. The offences were against multiple children, who each experienced individual harm and the child pornography offence was required to be served consecutively.

The appeal was dismissed.

Also see: 2015 MBPC 16 (Sentencing).

iv. 2015 MBCA 103

In **2015 MBCA 103**, Mr. M, a 40-year-old man, pleaded guilty to making and possessing child pornography, sexual interference, voyeurism, and criminal harassment.

An allegation of industrial espionage led to the police searching Mr. M's computer. They discovered 6,935 unique images of child pornography and 134 unique videos of child pornography of girls aged eight and thirteen-years-old. Some of the videos he made himself, surreptitiously recording the genitalia of his two twin eight-year-old daughters and their friend while they were in the bathroom. Other images were altered to make it appear as if his friend's prepubescent daughter was performing sexual acts on him. Other photos and videos included acts of sexual interference with one of the victims. The computer also contained information related to the accused's historic sexual interference of his friend's daughter when she was eight years old and one of his daughter's friends.

The accused also surreptitiously filmed sexual acts between himself and his girlfriend. His girlfriend ended their relationship upon the discovery of the videos and the child pornography. Mr. M "then began to incessantly contact her and follow her, despite her moving residences." He was later arrested in her apartment and charged with criminal harassment.

He also failed to comply with an undertaking when the police found nude or partially nude photos on his iPad, which he was prohibited from possessing at the time. He also failed to comply with a recognizance that prohibited contact with his ex-girlfriend and his access to the internet when he sent her three emails.

The trial judge sentenced him to a combined total of 105 months incarceration.

Mr. M appealed his sentence.

On appeal, the judge ordered some of his sentence be served concurrently, not consecutively, and his global sentence was reduced to 87 months. In deciding this the judge stated:

> The judge properly recognized the seriousness of the crime of making child pornography. Victims are harmed not only by the initial production of the child pornography, but also perpetually if the material is made available or distributed. Once on the Internet, sexually explicit material is impossible to eradicate and will be used by other offenders domestically and internationally for the purposes of sexual gratification or to exploit other children. Sentences accordingly must be severe for making child pornography to reflect the gravity of this pernicious crime.[67]

However, the judge also noted that the accused did not solicit sexual acts from the children nor make the pornography he made available to others. He was sentenced to 8 years and 9 months of incarceration, and ordered to provide a DNA sample, comply with the sex-offender registration for 20 years, not be near places with children, placed on the Child Abuse Registry, and to not possess firearms.

Also see: 2014 MBPC 57 (Sentencing).

v. 2015 MBPC 20

In **2015 MBPC 20**, Mr. W, who was employed as a clinical foster parent, pleaded guilty to nine counts of voyeurism, one count of making child pornography, one count of possessing child pornography, and one count related to carrying a spring-loaded knife.

Mr. W hosted foster children for sixteen years. In November 2012, one foster child discovered a pen camera in the home. Following this report, police began an investigation and subsequently found numerous voyeuristic recordings among W's possessions, including four videos that were considered child pornography. Mr. W set up a system that he used in his home, his cottage, his workplace – which was a foster home – and the home of a friend to surreptitiously film and photograph people who were using the bathroom facilities and shower. He made these recordings over a two-year period, and the images captured his 14-year-old daughter, her friends, various

[67] 2015 MBCA 103 at para 14.

foster children, family members and colleagues. He later meticulously edited, spliced, compiled, labeled and stored the images, which the court noted as an aggravating factor.

The court found the facts of the case to be "appalling" and sentenced Mr. W to 3 years in jail. Additional orders included a lifetime prohibition on possession of firearms and a 20-year ban from attending places where persons under 16 are present, an order to provide a DNA sample, a 20-year registration as a sex offender, and an order to forfeit all items seized during the investigation of the offences.

vi. 2015 MBCA 81

In **2015 MBCA 81**, two twin male teenagers pleaded guilty to invitation to sexual touching, possession of child pornography, distribution of child pornography, and transmitting sexually explicit material to a child.

Initially, Mr. ZM, an adult man, contacted a 14-year-old girl via the internet. He used threats saying he would "do something to her if she did not comply with his demands" to convince her to send him a photo of her breasts, which he then used to extort her to get additional images of her breasts and vagina.

Two 17-year-old twin boys, Mr. NG and Mr. FG, learned about the victim through Mr. ZM and also began communicating with the girl, using social media to bully her and sexually exploit her. Over a five-day period, the two young men ordered the victim to take sexually explicit photos of herself, directing her to conduct certain sexual acts and sending her explicit messages. They later distributed the photos to people in her community and at her school. Her parents discovered the images on her multimedia device and reported the matter to the police.

The trial judge mistakenly sentenced the boys to a combined sentence of 3 years, when the maximum time for youth offenders was actually two years.

At trial, the Court recognized that the offenders' actions were violent and had caused the victim 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.[68]

The Manitoba Court of Appeal varied this sentence to 12 months of secure custody, 6 months of community supervision, and 6 months of probation to bring the sentence in line with the 2-year maximum sentence available under the *Youth Criminal Justice Act.* The Court of Appeal unanimously held:

> […] the moral culpability of the appellants in this case is on the high end of that spectrum. First, there was a significant age difference between the appellants and the victim. Second, the conduct engaged in by the appellants was not childhood exploration. It was aggressive, relentless, sexually abusive and humiliating. The images were extracted from the victim in a systematic manner by the appellants causing her to virtually break down. Third, the images included the victim's face, breasts and vagina. They were distributed by way of social media to her community. Fourth, as can be expected, the victim and her family continue to suffer the effects from the commission of these offences.[69]

Also see: 2014 MBPC 63 (Sentencing).

vii. 2014 MBCA 97

In **2014 MBCA 97**, Mr. K was convicted of possessing child pornography.

[68] 2014 MBPC 63 at 41.
[69] 2014 MBPC 63 at 37.

Mr. K appealed the conviction arguing the police breached his right to be free from unreasonable search and seizure when they removed a computer from his home, and that the police had misapprehended evidence that led to their search warrant. He argued the evidence found should be excluded from his trial.

Mr. K's girlfriend had found what she thought was child pornography on Mr. K's family's computer. The images had been downloaded when she and Mr. K were housesitting at his parents' home. She had signed into the computer using his username and discovered the images. She then showed her friend to confirm it was child pornography. She reported this to the police, describing the pictures as girls between the ages of six and seven posing sexually in lingerie, along with videos of them performing a strip tease. She provided the police with the file names and the information she had about when they were downloaded. The police obtained a search warrant using this information and found thousands of images of prepubescent girls in three separate folders, 140 of which constituted child pornography as defined by the *Criminal Code*.

The girlfriend later confronted Mr. K about the images and he went to his parents' home to delete some of the images. He did not provide an explanation for having the images.

Mr. K argued that there was insufficient evidence provided to the police to conclude the images were child pornography and to conduct a search.

Some of the videos and images found in the search were described by the police as having been "produced in existence on the fringe of legality." The court noted these type of photos are often called modelling photos, where prepubescent children are not nude but wearing clothing and posing suggestively. They are often posted on websites which have suggestive names that make it clear there will be sexualized child models posted on them.

The trial judge held that the descriptions given by the girlfriend and her friend were enough to create a reasonable ground to believe Mr. K was in possession of child pornography. The appeal court agreed.

The appeal was dismissed.

Also see: 2013 MBQB 200 (Voire Dire), 2013 MBQB 114 (Charter).

viii. 2009 MBCA 107

In **2009 MBCA 107**, Mr. G, a 23-year-old man, pleaded guilty to luring and making child pornography.

The offences were 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 photo sharing site and told them he had a modeling website and would pay them for modelling nude. He told them that the images 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 at trial.

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.

ix. 2007 MBCA 101

In **2007 MBCA 101**, Mr. K, a 21-year-old man, pleaded guilty to distributing child pornography.

Mr. K hosted a server for receiving and transmitting child pornography and advertising the exchange of child pornography. A German police investigation found his advertisement in an internet chat room, contacted Mr. K and received images from him. They then reported Mr. K's IP address to the Winnipeg police.

Aggravating factors included Mr. K's own use of the content for sexual gratification, as well as the sophistication and planning of the crime and the large volume of pornography: over 3,500. The children depicted were between eight months and 14 years old and the images were "graphic and disturbing". However, Mr. K showed remorse for his actions and was actively involved in rehabilitation.

He was sentenced to an 18 month sentence, served in the community and three years' probation. Additional orders included a DNA order, a 20-year registration as a sex offender, a forfeiture of all items seized, a prohibition from using the internet, limitations on being near children under the age of 14, and a prohibition from encrypting any computer storage in his possession.

The Crown appealed Mr. K's sentence, arguing it should have been served in jail, but the appeal was dismissed. The appeal court found that trial judge had properly assessed the sentence addressing the circumstances of the offender and the seriousness of the case.

The appeal was dismissed.

Also see: 2007 MBPC 7.

x. 2002 MBCA 133

In **2002 MBCA 133**, Mr. E, a 39-year-old man, pleaded guilty to distributing child pornography over a period of two years over the internet.

The court described the images as "young children being horribly victimized". He sent some of the images by email pretending to be a teenage girl. He told his wife he was motivated by boredom and curiosity rather than pedophilia when seeking out the images.

At trial, he was sentenced to nine months' imprisonment and three years' probation.

Mr. E appealed his sentence from distributing child pornography, arguing it should have been a conditional sentence served in the community. The Crown appealed the sentencing judge's decision not to make a DNA order.

The appeal judge altered the sentence to be served in the community, but extended the sentence to 15 months as well as three years' probation. Additional orders included the prohibition of owning or using a computer, save for work and education under supervision; limitations on being near children, and a ban on possessing any pornography. A DNA order was made.

V. NEW BRUNSWICK

i. 2014 NBCA 71

In **2014 NBCA 71,** a 41-year-old trusted 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 against various youth 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. He sexually abused some of the boys himself. The boys were between 6 and 15 years old, and some were paid for their sexual activity. He used the internet to live stream some of his sexual offences and to view young boys acting sexually. He 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.

Mr. S 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. 2010 NBCA 71

In **2010 NBCA 71**, Mr. K, a 47-year-old man, pleaded guilty to possessing child pornography.

The images in question were cartoon and pencil drawing of toddlers engaged in "vile" acts and stories that encouraged incestuous sex with children that Mr. K had downloaded from the internet. That content was found alongside other pornography. At trial, he was sentenced to 90 days in jail and three years' probation. Additional orders included a 10-year ban on being near places where children were.

Mr. K appealed the order not to be near children, as he had a three-year-old daughter and the order would prevent him from dropping her off at daycare. He also argued that because no actual children were harmed in his offence, he did not pose a risk to children that would require him to be separated from children. He had also downloaded the images well before the birth of his child.

However, the court found that after viewing the images, and considering the age of the children depicted were the same age as his child, that Mr. K did pose a risk to children, however low. It did not matter that the images were drawings, rather than photographs.

The appeal was dismissed.

iii. 2009 NBCA 59

In **2009 NBCA 59**, a mother and step-father pleaded guilty to possessing, making, and distributing child pornography, and endangering the morals of a child, their 12-year-old daughter, Ms. B.

The two had exposed the girl to pornography and the pornography industry, and taught her how to strip. Ms. B wanted to be a model and her parents took photos of her for a modelling agency. The images showed the girl in various stages of undress in sexualized positions focused on her genitals or breasts. Some of the clothing was wet or see-through so you could see her naked body underneath. Some photos and videos were of Ms. B giving a strip tease. Her parents were paid $10,000 for the photos. They gave Ms. B $7,000 and kept $3,000. The photos were later posted on a website by the modelling agency where people paid to access them. Several of the photos consisted of child pornography.

A search led to the discovery of other child pornography material of Ms. B, as well as other children, including some with the use of animals, in the possession of the couple.

The trial judge made several comments that the appeal judge noted as problematic including the trial judge's comments that the images were at the "lower end of the spectrum" of child pornography images, that "she did not look as a child that felt she was – she was abused", that the creation of the images was a "shared project" between the child and parents, that it was expected that the parents would keep some of the money from the images, that the parents did not mean to exploit the child for financial benefit, and that there was no need to send a message of general deterrence or denunciation because there was not an epidemic of child pornography production in the province.

At trial, the couple was sentenced to 12 months served in the community and three years' probation. Additional orders included prohibition from using computers except at work.

The Crown appealed the community-based sentence, arguing that the trial judge failed to adequately take into account many of the aggravating factors such as the parents' breach of trust and motivation for profit; minimizing the gravity of the offence, and failing to recognize the importance of deterrence or denunciation in crimes like these.

The Appeal judge held that the trial judge had made errors in the decision and minimized the seriousness of the offence. Their sentence was changed to from 12 months served in the community to 12 months in jail.

iv. 2008 NBCA 77

In **2008 NBCA 77**, Mr. P was convicted of possessing child pornography at trial. He was sentenced to 22 months' incarceration.

Hundreds of images were found on hard drives owned by Mr. P, including images of his two daughters and their friend when they were eight or nine years old.

He appealed his conviction and sentence, but none of the issues on appeal had merit and the appeal was dismissed.

v. 2008 NBCP 33

In **2008 NBCP 33**, Mr. A, now 52 years old, pled guilty to possession of child pornography.

Police uncovered 297 photos of young boys, age 7 to 16, in his computer cache which he acquired from a German website. The photos showed boys dressed and nude, doing erotic poses and sexual acts, which included masturbation, sexual acts between children, and sexual acts with penetration by an adult.

He was sentenced to 7 months' incarceration.

VI. NEWFOUNDLAND AND LABRADOR

vi. 2019 NLCA 39 (Appeal)

In **2019 NLCA 39,** 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 various social media sites. 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, which led to his arrest.

A police search of four of his digital devices found he had been involved in 137 interactions with teenage girls. He had 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 trial 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.[70]

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:

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[70] 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.[71]

Mr. C appealed his sentence.

The Court of Appeal allowed the appeal, finding the sentence too harsh, and reduced his sentence to five years and three months.

Also see: 2018 CanLII 3121 (NLPC).

vii. [2018] NJ No 374 (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 conversations 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."[72]

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.

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[71] 2018 CanLII 3123 (NLPC) at para 146.
[72] 2017 CanLII 38344 (NLPC) at para 88.

Mr. C applied to extend his time to file a Notice of Appeal, which was struck out. He had already served his time, would not accept state-funded counsel, could not afford counsel on his own, and did not deal with the matter on his own.

Following this, Mr. C was also convicted of internet luring and was sentenced to 18 months in jail in relation to a 14-year-old girl who had developmental delays.

Following this, Mr. C was also arrested for possessing child pornography. The police found over 3000 images of young girls aged 10 to 16 years old. Some girls sent him the photos when he was posing as a teenage boy. He communicated with at least four underaged girls via Facebook, Skype, and webcam. He asked the girls for photos of them in their underwear or in the nude, and to touch themselves sexually. Two of the girls were from Canada and two were from the United States.

The court stated:

> [Mr. C] 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. C] 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.

He was sentenced to 8 years in jail. Additional orders included a prohibition on weapons for life, a lifetime registration as a sex offender, limitations on being in contact with children, and a DNA order.

Also see: [2018] NJ No 374 (Sentencing), 2017 CanLII 38344 (NLPC) (Trial), 2017 NLCA 61 (Appeal), [2016] 128 WCB (2d) 386 (NLPC), [2016] 128 WCB (2d) 66 (NLPC), 2016 CanLII 874 (NLPC), 2017 CanLII 38344 (NLPC) (Sentencing).

viii. 2017 NLCA 69

In **2017 NLCA 69**, Mr. B pleaded guilty to possessing and distributing child pornography.

The police had linked child pornography images in connection with Mr. B's IP address. A search discovered over 100 images and videos of child pornography in Mr. B's possession. The search of a mirrored copy of his hard drive was conducted outside the date of the search warrant and violated Mr. B's search and seizure rights, but the evidence was allowed.

He was sentenced to 12 months' imprisonment and one-year probation. Additional orders included a lifetime registration as a sex offender, a DNA order and a prohibition from using a computer to communicate with people under 16 years old for 5 years.

Mr. B appealed his sentence, and made an application to be released on bail during the appeal due to his mental health conditions. The court denied his application. Mr. B had been transferred from a penitentiary to a mental health facility.

Also see: [2017] NJ No 396 (NLPC) (Trial); [2016] NJ No 71 (NLPC) (Charter).

ix. 2017 NLCA 61

128 WCB (2d) 386, [2016] NJ No 78. [NLPC]; 128 WCB (2d) 66, [2016] NJ No 11. [NLPC],

x. 2017 NLCA 22

In **2017 NLCA 22**, Mr. M pleaded guilty to possessing child pornography.

Mr. M was sentenced to 10 months in jail and three years' probation. Additional orders included registration as a sex offender, a DNA order, orders to forfeit the evidence, and a prohibition from him being near children or using a computer to communicate with people under the age of 16.

Mr. M appealed his sentence, arguing he was not a risk to society and that the trial judge shouldn't have ordered limitations on his being near or communicating with children.

The appeal court found that the volume of child pornography in his possession (65 videos and 481 images), the ages of the children depicted (most between ages 5 to 10 years old), and the content of the images (violent, degrading and humiliating content) demonstrated Mr. M's risk to children. The court found that he "poses a risk of future harm to children" which justified the limitations on being near or communicating with children.

xi. 2017 CanLII 25 (NLPC)

In **2017 CanLII 25 (NLPC)**, Mr. C, a 34-year-old man, had been convicted of eleven counts of sexual interference and sexual exploitation of four young children he was in a position of authority with.

While on probation he pleaded guilty to sexually abusing his niece's two-year old boy and taking photos of the abuse, possessing and distributing child pornography of a 15-year-old girl, breaching his probation, and breaching an undertaking by possessing a device capable of allowing him to access the internet.

He was sentenced to 6 years' imprisonment. Additional orders included a $200 victim surcharge, a DNA order, a lifetime limitation on being near people under 16, no contact with victims, internet ban except for counselling and employment and then only under supervision, lifetime registration as a sex offender, a lifetime weapons ban, and the forfeiture of items used to commit the crimes.

xii. [2017] NJ No 1 (NLPC)

In **[2017] NJ No 1, (NLPC)**, Mr. C pleaded guilty to sexual interference, making child pornography, possessing child pornography, distributing child pornography, violating an order of prohibition, and failure to comply with condition of undertaking.

In 2015, Mr. C was reported to be on a beach which had children, contrary to his probation orders, by an off-duty RCMP officer.

In 2014, Mr. C sent unsolicited sexually explicit messages and an unsolicited nude of a teenage girl to Mr. T over Facebook messenger, which Mr. T reported to the police. The individual in the nude photo was identified by police as a 15-year-old local girl. Production orders were obtained and served to Facebook and an internet service provider to obtain Mr. C's IP address. The police subsequently seized and searched a number of electronic devices, including three cellular phones and one external hard drive. Additional images of child pornography were found on the electronic devices including sexually explicit photos of Mr. C engaging in sexual behavior with a sleeping two-year-old boy, who was identified as his niece's son. The police found that the television in Mr. Campbell's bedroom could access the child pornography through a smart TV set up.

Upon sentencing Mr. C, the judge considered the high level of moral culpability and the gravity of the offences, as well as the fact that Mr. C had previously been convicted of sexual interference and sexual exploitation involving 4 young children in 2003.

He was sentenced to 6 years in prison. Additional orders included a DNA sample, general prohibition from having contact with anyone under 16 years old, prohibition from public spaces where children would reasonably be expected or are present, prohibition from using the internet or other digital networks unless he does so for the purpose of counselling or employment and only if supervised, registration as a sex offender for life, and a 10-year weapons prohibition.

xiii. 2016 CanLII 6260 (NLPC)

In **2016 CanLII 6260 (NLPC),** 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: 2016 CanLII 6260 (NLPC), [2015] 375 Nfld & PEIR 232 (NLPC) (Trial); [2015] 370 Nfld. & PEIR 223 (NLSC) (Sentencing).

xiv. 2011 NLCA 56

In **2011 NLCA 56**, Mr J, a 72-year-old man who was a former senior police officer, pleaded guilty to possessing child pornography.

His IP address had been identified as one that was related to child pornography over 100 times. The images were of pre-teen girls being sexually abused by adult men.

He was sentenced to 15 months' incarceration. Additional orders included a 10-year registration as a sex offender, a DNA order, a forfeiture order for the equipment used in the offence, and a 10-year limitation on being near children.

On appeal, he argued that the sentencing judge had made a mistake by finding the nature of the offence, Mr. J's previous occupation, and the content and quantity of the pornography as aggravating factors, and that the sentence was unreasonable.

The appeal court stated that:

> In principle, the nature of an offender's employment could be regarded as an aggravating factor in sentencing where the existence of that employment background makes the commission of the crime in question all the more shocking, disgusting or horrendous. This is particularly so with respect to persons involved in professions or jobs where the public expects the incumbent to be particularly vigilant in enforcing the law, not breaking it. The job of police officer is one such category of employment. Such a person is a symbol of the integrity of the law and, as such, bears a higher responsibility for rectitude.[73]

However, Mr. J had been retired for 17 years and the temporal link between his employment and the offence was too wide. The nature of the offence was also not allowed to be an aggravating factor.

No mistake was found in noting the nature and quantity of the images was an aggravating factor.

Mr. J's sentence was reduced to 10 months' jail time and three years' probation. The limitation on being near children was removed.

Also see: 2010 NLTD(G) 117 (Sentencing).

xv. 2010 NLCA 4

In **2010 NLCA 4**, Mr. W, a 55-year-old man, pleaded guilty to possessing child pornography.

Police in the Netherlands had been monitoring a chat site known for the distribution of child pornography of girls from six to ten years old. They found that 98 individuals in Canada had downloaded images from the website. An investigation determined Mr. E was one of those individuals. The police searched his home and work and found a large number of child pornography images on his computers. They located 476,704 images of children – most of which being young girls

[73] 2011 NLCA 56 at para 23.

posing in underwear or swimsuits – and child sexual abuse. Many images and videos included infants and some were of extreme sexual violence.

An additional 47,544 videos were found at his home, 289 were of child pornography, 94 were of nude children, five were infant pornography, fourteen were child obscenity and 680 were videos of child sexual abuse. There were also text stories about child pornography and incest. There were additional images on his work computer. Mr. E's daughter testified that she saw her father look at child pornography in the home. Mr. E admitted to watching child pornography over several years.

He was sentenced to four years and nine months in jail, which was much higher than what the Crown sought. The sentencing judge stated:

> [C]onsidering the nature and effects of possession of child pornography and the need to stress deterrence and denunciation, such an offence should normally result in at least a period of incarceration of twelve months being imposed regardless of the amount or nature of the child pornography possessed. Periods of imprisonment in the range of two years imprisonment should be imposed for offences involving moderate amounts of child pornography and the judiciary should not shrink from imposing sentences at the maximum level when appropriate.[74]

The appeal court found that the trial judge had laid out a sentencing framework for child pornography that could not work. The two-year norm for offences involving a moderate number of child pornography images was not supported by other cases.

Mr. W appealed his sentence and it was reduced to 20 months in jail and three years' probation.

Also see: 2009 CanLII 42861 (NLPC) (Sentence),2009 CanLII 31442 (NLPC) (Charter).

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[74] 2009 CanLII 42861 (NLPC) at para 18.

xvi. 2004 NLCA 73

In **2004 NLCA 73**, Mr. D was convicted of importing and possessing child pornography.

He was sentenced to 30 days' imprisonment and one-year probation. On appeal a new trial was ordered but Mr. D had already served his sentence, including probation. A second trial led to the conviction of the offences and one-year probation.

Mr. D had paid for a subscription to a pornography site. He made multiple special requests to the system operator for child pornography files, which he described in graphic detail. He argued that he aborted the download before they were complete and therefore did not possess or import the files. The court held that once the downloading commenced, Mr. D was in control of the file, even if he chose to abort the download at a certain point.

The appeal against the conviction and sentence were dismissed.

Also see: 2004 NLSCTD 27 (Trial); 137 CCC (3d) 527, 177 DLR (4th) 599. [1999 NLCA] (Appeal); [1997] NJ No 242 (NfldSCTD) (Sentencing).

VII. NOVA SCOTIA

xvii. 2017 NSPC 12

In **2017 NSPC 12 (Youth Court)**, six male teenagers were found guilty of non-consensual distribution of intimate images and child-pornography offences.

A high school principal was informed that six male teenage students were sharing nude photographs of young women they had solicited on a shared Dropbox account. Search warrants of the young men's devices confirmed that they had been sharing photos of young women without their consent.

xviii. 2016 NSCA 78

In **2016 NSCA 78**, Mr. P pleaded guilty to possessing, accessing and making child pornography, and conspiring to sexually assault a child at trial.

Mr. P was a pedophile with a previous conviction of sexually touching a child. He collected child pornography. He was in contact with adults from the Philippines who he paid to sexually abuse children. Mr. P would direct and watch the sexual abuse via a live stream and would keep copies of the videos. He had an ongoing exchange with a woman who filmed sexual acts between her and an 11-year-old girl, who she claimed to be her daughter. Mr. P commented about bringing the child to Canada. He was discovered during a larger police investigation of internet child pornography users.

He was sentenced to 7 years in jail.

The sentencing judge stated:

> In terms of the gravity of the offence, which is one of the important aspects of this process which I am required to consider, I can only describe this as being horrendous in its impact. There is really no limit to the negative superlatives that can be used to describe what one can only conclude is depravity. And I am very aware of the risk of attaching too many sensational words to this, for the reasons that Mr. Singleton had correctly pointed out. One cannot be over-sensational in describing how horrendous and negative these images are. Quite frankly, the live shows that [Mr. P] was participating in, and directing, are, quite frankly, at the high end of the scale of child pornography. He is not viewing images that were created by somebody else; he is directly responsible for the abuse of these children, because he was conspiring and agreeing to have these children abused.[75]

He was sentenced to five years for the conspiracy offence. He appealed that part of his sentence.

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[75] 2016 NSCA 78 at para 16.

Mr. P's appeal of his sentence was dismissed. Although there were no cases with similar facts to make a comparable sentence, the sentencing judge had applied the proper rules of sentencing and the five-year sentence was not excessive.

Also see: 2016 NSCA 31 (Appeal), 2016 NSCA 78 (Sentencing), 2015 NSCA 85 (Application for extension), 2007 NSCA 91 (Judicial interim release).

xix. 2016 NSCA 35

In, **2016 NSCA 35**, Mr. S, a 14-year-old boy, pleaded guilty to theft and possessing child pornography.

The trial judge rejected the joint submission that Mr. S be sentenced to 18 months' probation and instead sentenced him to six months' deferred custody, 12 months' probation, a DNA order and orders to give up the items used for the crime.

Mr. S was caught rifling through unlocked cars. Upon searching the boy, the police found several sexual images of young women ranging in age from 14 to 16 on his cell phone. They had been looking for identifying information of the boy on the phone. An additional search turned up a total of 12 photos of three young women. Mr. S had requested some of the photos when one girl asked him to be her boyfriend, which he did not want to be.

On appeal, Mr. S argued that the judge had erred in finding that the victims had been psychologically harmed when determining whether the offence was a violent one, and that the sentence was overly harsh, particularly for a youth offender.

The appeal court found that this was an error. The judge had relied on victim impact statements that showed some harm, but not severe psychological harm and had incorrectly relied on social science research on the topic of sexting. The judge had also erred in suggesting that deterrence was a factor in youth sentencing.

Mr. S's sentence was reduced to 18 months' probation.

xx. 2015 NSPC 66

In **2015 NSPC 66,** a young man, Mr. Y, was found guilty of extortion, possessing child pornography and possessing child pornography for distribution.

Mr. Y induced a teenage girl, Ms. A, to send him nude photographs online. The case is unique because it involved an unknown accomplice, Mr. Z, who Mr. Y allowed to remotely log into his computer to engage with Ms. A. Mr. Y befriended Mr. Z while playing Habbo, an online game, when he was 11 or 12 years old. Both young men were involved in sending deceptive messages to Ms. A from several fake Facebook accounts.

Mr. Y and Mr. Z's online scam had serious real-world consequences. When the young men decided to "kill off" one of their shared fake online personas, someone Ms. A considered a good friend, both Ms. A and her friend Ms. B were so distraught about the alleged death that they tried to kill themselves. Both girls were hospitalized. When Ms. A figured out that she had been catfished, she asked to know who her online friend really was. Mr. Y said he would tell her only if she sent over a picture of her breasts, which she later did. Mr. Z threatened to share the image unless they got more nude content and when Ms. A did not send more images, Mr. Z posted that image to her Facebook account and sent it to several people.

The Court describes Mr. Y's offences as ones which "exploited the murky opportunities afforded by internet anonymity."[76] The court found that even though Mr. Z may have penned many of the messages that would count as extortion and the distribution of child pornography, Mr. Y aided him by opening up the fake accounts, allowing Mr. Z remote access to his computer to use the

[76] 2015 NSPC 14 at 2

fake accounts, and watching Y post harmful messages without stopping him. Mr. Y was to defend his actions but the judge stated:

> "A" sent the "selfies" of her breasts to the L.W. account being controlled, unbeknownst to her, by "Y" and "Z". This falls well outside what is required for the "private use" defence I discussed earlier. These were not photographs that were obtained on the basis of informed consent and kept privately for private use, rendering "the potential for its harmful use by others minimal." (Sharpe, paragraph 105) They were obtained through deceit and misrepresentation and shared by "Y" and whomever "Z" may be. Applying the "private use" defence on the facts of this case would be a distortion of the constitutional protection extended to expressive conduct which underpins the defence.[77]

The crimes were considered "violent offences" for sentencing purposes, and the Court recognized that Mr. Y endangered the life or safety of Ms. A by creating a substantial likelihood of causing psychological harm."[78] However, noting that Mr. Y's "precarious mental health, social dysfunction and isolation" contributed to his actions, the Court ultimately convicted Mr. Y of extortion, possession of child pornography, and the possession of child pornography with the intent to distribute it, and sentenced him to a two-year conditional discharge with strict internet restrictions.[79]

Also see: 2015 NSPC 19 (Application for a psycho-sexual assessment); 2015 NSPC 14 (Trial).

xxi. 2015 NSCA 57

In **2015 NSCA 57**, Mr. K was convicted of possessing child pornography.

[77] 2013 NSPC 98 at para 45.
[78] 2015 NSPC 14 at 53.
[79] 2015 NSPC 14 at 55.

He appealed the decision arguing the Crown had not proven he had been in possession of the files.

The court stated: "The case against the [Mr. K] was circumstantial and depended on establishing that he had exclusive access to a particular piece of computer equipment." Mr. K was acquitted on appeal.

xxii. 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.

xxiii. 2005 NSCA 82

In **2005 NSCA 82**, Mr. M was convicted of possessing child pornography at trial.

His son used a zip drive of Mr. M's and found child pornography on it. When he told his mother, she reported it to the Children's and Family Services, who reported it to the police. Mr. M admit-

ted to frequently downloading adult pornography, but denied downloading the child pornography. A search of his home, computer, hard drives, zip drives and videos resulted in 64 images of child pornography across several locations. A computer forensic expert testified that files can be accidently downloaded along with the files intended to be downloaded. There wasn't any evidence that any other people who accessed the computer downloaded any pornography files.

Mr. M was sentenced to one-year jail time and three years' probation. Additional orders included a DNA order, and limitations on being places where children are.

He appealed his conviction, arguing that the child pornography could have been accidentally downloaded, and that he was not aware the child pornography had been downloaded. Children in the images were as young as three or four. He also appealed his sentence, arguing it was too harsh and that the trial judge had not properly considered the mitigating factors.

The appeal judge found that the trial judge was correct in finding that it was unreasonable to suggest that Mr. M had downloaded the number of images he did, onto multiple devices, into labelled folders by accident. Mr. M admitted to downloading adult pornography and using the discs to store the images, and one was labeled with his name. There was not enough evidence to suggest that anyone else downloaded the child pornography onto his devices.

The court did not address the typed stories, but did find that they were child pornography as they described sex between adults and children.

The judge also found the sentence to be fair.

The appeals were dismissed.

xxiv. 2004 NSCA 154

In **2004 NSCA 154,** Mr. P pleaded guilty to 14 counts of sexual offences.

He had been charged with 47 offences but pleaded guilty to charges of sexual exploitation, keeping a common bawdy house, permitting persons under age of 18 to be inmates of common bawdy house, procuring persons under age of 18 for prostitution, controlling the movement of persons under age of 18 to aid them in engaging in prostitution, possession of child pornography, making child pornography and distribution of child pornography.

In addition to running an elaborate prostitution business with minors, he also operated a pornography website featuring child pornography, composed of photos and videos of the girls under his care, and a live-stream video feature for users to request sexual acts to be performed for a fee. Finally, he had encouraged his 15-year-old daughter, Ms. C, into prostitution and trained her to perform fellatio by having her conduct said acts on himself. He took sexually explicit photos of her, put them on the internet as advertisement, and featured her on the live-stream. In his personal possession he had volumes of child pornography and pictures of other depraved acts stored on his computer.

He was sentenced to nine years and 10 months in jail for 14 counts of sexual offences.

He appealed his sentence.

The sentencing judge imposed a sentence higher than the joint recommendation of the Crown and defence, which was the subject of the appeal. Given sentencing factors which were not supplied to the sentencing judge by counsel, the appeal was allowed, and the sentence set aside. The appeal court imposed a sentence of three years and eight months' incarceration in addition to 28 months served prior to conviction, as recommended in the original joint report.

Also see: 2003 Carswell NS 613 (sentencing).

xxv. 2004 NSCA 7

In **2004 NSCA 7**, Mr. G, a 31-year-old man, pleaded guilty to sexual assault, sexual interference, and possessing and making child pornography.

He committed the offences against children in his care while he was on parole from a previous federal sentence (not of a sexual offence). Ms. B, his girlfriend, found several polaroid photos of nude girls aged approximately 5 to 8 years old, including her own daughter. After confronting Mr. G, he admitted to sexually touching and photographing the girls for a sexual purpose. An investigation resulted in Mr. G confessing to sexually touching and photographing three other children in the neighbourhood. He often used his penis to touch the children or to suggest sexual activity. Over 1,500 photos were located on his computer, the majority of which were of child pornography.

At trial he was sentenced to 8 years in jail, was designated as a long-term offender, and had his parole eligibility delayed until he had served at least half his sentence. He would be subject to 10 years of community supervision upon release.

Mr. G appealed the sentence, arguing it was excessive.

The appeal judge found the sentence to be appropriate for the offences in question and his appeal was dismissed. It was found that he posed a high risk to the community.

VIII. NORTHWEST TERRITORIES

i. 2011 NWTTC 20

In **2011 NWTTC 20**, Mr. D, a 50-year-old man, pleaded guilty to possessing child pornography and two counts of voyeurism.

The police found 1,888 unique images of child pornography on his computer, including violent sexual assaults and adults having sex with young children, and videos of him recording his step-

daughter and her seven-year-old son in the bathroom, which he edited. He was sentenced to 12 months' incarceration for possessing child pornography, three months' incarceration for voyeurism, as well as three-years' probation, orders to attend counselling, not possess or use a computer except for employment, provide a DNA sample, 10-year sex offender registration, as well as orders that limit his contact with people under the age of 18.

IX. ONTARIO

i. 2019 ONCA 135

In **2019 ONCA 135**, Mr. G was convicted of several counts of sexual interference at trial.

Mr. G, a 48-year-old man, was charged with sexual touching, invitation to sexual touching, sexual assault, and child luring of eight underage girls who were friends of his daughter and were between the ages of 12 and 14 at the time of the offences, as well as the possession of child pornography.

He often gave the girls massages and had the girls stretch his shoulders in positions that required their bodies to be up against his. He also touched them and talked to them in inappropriate and sexual ways, including commenting on their bodies, kissing their neck, and spooning them. He sometimes texted some of the girls to invite them over to his house, but many of the girls had deleted the texts. The police found adult and child pornography on his computer. The child pornography was in unallocated spaces and was not clear if Mr. G could access it.

Mr. G was found guilty of multiple counts of sexual interference, but was acquitted of sexual assault, invitation to sexual touching, child luring, and child pornography.

He appealed his conviction and his 36-month sentence, arguing the trial judge violated his presumption of innocence when the trial judge found Mr. G was in a position of authority and that the massages he gave the girls were for a sexual purpose.

On appeal, his conviction and sentence were maintained, along with the lifetime registration as a sex offender. The 10-year weapons ban was removed because the trial judge did not find any violence, threats or aggression in the abuse.

Also see: 2017 ONSC 1676 (Sentencing); 2017 ONSC 1598 (Trial)**;** 2017 ONSC 1436 (Application for stay).

ii. 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.

Mr. S met both Ms. M and Ms. C on an adult chat site 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.

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. The court found he had communicated with the girls to prepare them for sexual activity. He was sentenced to 5.5 years' incarceration at the second trial of the offences.

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).

iii. 2018 ONCA 702

In **2018 ONCA 702**, Mr. J, a 29-year-old man, was convicted of possessing child pornography.

The IP address of his home was associated with several files of child pornography. Mr. J lived with his father and his sister. The police requested the subscriber information from his IP address without a warrant, which was a breach of his *Charter* rights to be free from an unreasonable search.

Upon searching his computer, there was evidence he had deleted a file sharing program and that he had searched for child pornography. Several months later, another search of his computer's video and image files resulted in the police locating dozens of child pornography images and videos, including images of children as young as four being sexually abused.

At trial Mr. J was sentenced to 10 months in jail and two years' probation. Additional orders included a DNA order, a 10-year registration as a sex offender, a 10-year prohibition in being in contact with people under the age of 16, and a forfeiture order.

Mr. J appealed his conviction and sentence. He also challenged the constitutionality of the mandatory minimum sentence for this offence.

The trial judge found that the evidence was admissible despite the *Charter* breach when accessing the IP information. The breach was minor. The search of the computer had been done in a reasonable manner that focused only on the image and video files, as well as his internet search history. The police have a collection of "hash values" of known pornography that they can search specifically for, but the appeal judge stated: "To limit police to searches by hash values, file names and download folders would be to provide a roadmap for concealment of files containing child pornography."[80]

The mandatory minimum sentence was found to be unconstitutional. Using the example of an 18-year-old failing to delete a nude image of his friend's 17-year-old girlfriend that was sent to him, it was found that a six-month minimum sentence could be too harsh. However, Mr. I's sentence was not unreasonable

The appeal was dismissed.

iv. 2018 ONCA 474

In **2018 ONCA 474**, Mr. I, a 51-year-old man, pleaded guilty to possessing and distributing child pornography.

His child pornography collection was described by the police as one of the largest and worst collections they had ever seized. They had identified 28,052 unique photos and 1,144 unique videos before they stopped viewing the images. There were more than 1.2 million images and 40,000 other videos left to review. Most material included explicit sexual activity, bondage and bestiality. Images included those of children as young as one year old. Mr. I shared them on a file sharing

[80] 2018 ONCA 702 at para 24.

program and had organized the images in detailed folders. He was sharing some of the images in his shared folder.

At trial, he was sentenced to two years less a day of jail time and three years' probation. The Crown appealed the sentence.

The appeal court stated:

> The children depicted in pornographic images are re-victimized each time the images are viewed. In amassing, viewing, and making available his vast and terrible collection to others, the respondent participated in the abuse of thousands of children.[81]

Due to the size of the collection, the appeal court increased his sentence to 3.5 years in jail. It also noted that "by making images and videos he downloaded available to others via the internet, the respondent contributed to the further victimization of the children depicted in the pornographic images."[82]

Also see: 2017 ONCJ 574 (Sentence).

v. 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 a 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

[81] 2018 ONCA 474 at para 22.
[82] 2018 ONCA 474 at para 27.

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. C sent sexual images of himself to Mr. D, requesting that Mr. D 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. C also requested the Mr. D 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 served in the community 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).

vi. 2018 ONCA 173

In **2018 ONCA 173**, Mr. C was convicted of possessing child pornography and was acquitted of making child pornography available.

A police investigation discovered child pornography shared on a file sharing program that was associated with Mr. C's IP address. A search of his computer resulted in the location of encrypted files of child pornography, searches for encrypting, and searches for internet sites known for hosting child pornography, including searches looking for underage girls.

In regards to the acquittal, the trial judge found that it was not proven beyond a reasonable doubt that Mr. C knew he was sharing the images with other computers when using the file sharing site.

On appeal, it was found that the search breached Mr. C's right to be protected from unreasonable search and seizure as the police officer did not have the information needed to request his subscriber information from his internet service provider, but it was found not to be a serious *Charter* infringement and the evidence was allowed. It was also found that there was evidence that Mr. C had made the images available on the peer-to-peer sharing site and this was sufficient to find he had shared them, his acquittal on this charge was overturned and a new trial was ordered.

Also see: 2016 ONSC 4615 (Trial); 2015 ONSC 7696 (Charter – search and seizure).

vii. 2018 ONSC 1022

In **2018 ONSC 1022**, Mr. M faced 19 charges of making and transmitting child pornography, uttering threats to cause bodily harm, assault, material benefit of trafficking a person under 18, trafficking a person under 18, purchasing sexual services from a minor, material benefit from sexual services from a minor, and procuring a person for prostitution.

The allegations involved two 17-year-old females, Ms. B and Ms. K, who answered an advertisement to sell sex on Kijiji. Mr. M, 27 years old, was alleged to be the pimp, who would post the advertisements, including sexual images of the girls, and manage the girls' money. It was also

alleged that he threated and assaulted the girls. Although Mr. M's credibility was weak, the testimony of Ms. B was highly problematic, and Ms. K walked out of the court room when faced with a significant contradiction in her account.

Mr. M was acquitted on all counts.

viii. 2018 ONSC 226

In **2018 ONSC 226**, Mr. S was convicted of sexual interference, invitation to sexual touching, and attempting to make child pornography in relation to the children of two women he had been in romantic relationships with at different times.

His stepdaughter, Ms. L, was 11 years old when the abuse began. The abuse occurred over a lengthy period of time. He sexually touched her and used a vibrator during some of the abuse. Mr. S was also convicted of asking another underage step-daughter of his from a previous relationship for sexual images of herself and to touch herself sexually. He made these requests over Facebook. Mr. S lacked accountability for his actions.

He was sentenced to 6 years' incarceration.

Also see: 2017 ONSC 7761 (Trial).

ix. 2017 ONSC 7182

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.

The offences were 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 on 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 ONSC 5940

In **2017 ONSC 5940**, Ms. O, a 21-year-old woman, was charged with making child pornography, possessing child pornography, and child luring.

Ms. O was communicating with Ms. H, a 9-year-old girl, over KIK Messenger over a 24-hour period. Ms. H sent images to Ms. O that constituted child pornography.

Ms. O and Ms. H met on the dating website Plenty of Fish, where Ms. H represented herself as being an adult woman, including showing images of an adult woman drinking alcohol. They switched their conversation to KIK after messaging each other on Plenty of Fish. Ms. H sent several images of a vagina and adult breasts where her face was not showing. They attempted to communicate on Skype but Ms. H's video was not showing the images. Ms. H said she tried to download Tango so they could video chat there, but that it wouldn't work. Ms. H continued to text nude images to Ms. O, upon Ms. O's request, including images where she is sexually touching herself. After receiving a full body image of Ms. H, where she appeared younger than she claimed, Ms. O deleted the conversation and photos and blocked Ms. H. Ms. H's mother later discovered the conversation on Ms. H's computer and reported it to the police.

Ms. O relied on the mistake of age defence under the child luring provision. She stated she met Ms. H on an adult dating website, where Ms. H's profile said she had a job, could drive and contained images of an adult woman. She also stated the conversation was similar to that she would have with an adult, not a nine-year-old child. The images of a vagina with no hair did not trouble Ms. O because many women remove their pubic hair, and the images of Ms. H's breasts looked like adult breasts. She was viewing the images on her cellphone screen. The conversation also happened late into the night, which would suggest she was not talking to young child. However, at one-point Ms. H said she didn't drive and Ms. O told her to ask her parents for money. The full body image was clearly a prepubescent child. Ms. H did not testify at trial.

The court held that Ms. O had a subjective belief that Ms. H was an adult and that she had taken the appropriate steps to ascertain the age of the complainant in the context of their interaction.

The court stated:

> Unlike the majority of the case law dealing with the "mistake of age" defence, the circumstances of this case do not involve an undercover police officer posing as an underage girl on a website or internet chat room known to be frequented by pedophiles. Nor does this case involve a pubescent teenager soliciting the affections of an

> unsuspecting adult. Rather, this case involves a 9 year old child with obvious mental health issues soliciting sexual encounters with adults. This child was able to access the online-world of adults seeking sexual encounters because she was provided with seemingly unrestricted and unfettered access to the internet. The complainant's parents had an obligation to care for and protect this vulnerable child. They - not [Ms. O] - failed in that duty.[83]

Ms. O was acquitted of all charges.

xi. 2017 ONSC 4246

In **2017 ONSC 207,** Mr. C, a 23-year-old man, was charged with 19 counts of sexual offences against minors.

Mr. C was the coach of a high school basketball team and helped run a summer basketball program at the time of the offences. 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 behaviours 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" 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.

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[83] 2017 ONSC 5940 at para 38.

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 presumptions of innocence *Charter* application failed but his *Charter* application in regards to his freedom from cruel and unusual punishment 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 3904

In **2017 ONSC 3904**, Mr. G, a public-school teacher, pleaded guilty to 16 counts of voyeurism, and was charged with two counts of making and possessing child pornography in relation to some of the voyeuristic images.

Mr. G placed a backpack with a hidden camera in a staff change room at the school. It was positioned to capture the genital and buttocks area of the person in the change room, who were typically staff members. Mr. G hired a 16-year-old co-op student, Ms. JT, who was also captured changing in the change room. In regard to the child pornography charges, the court held that a fleeting view of the side of the girls' breasts and vagina did not constitute child pornography, but that the buttocks did meet the definition of "anal region" and was the dominant characteristic of video.

Mr. G pleaded guilty to voyeurism and was found guilty on the counts of making and possessing child pornography.

xiii. 2017 ONCA 913

In **2017 ONCA 913**, Mr. S was charged with possessing child pornography and making it available. He pleaded guilty to making child pornography available.

The police were lawfully searching Mr. S's computer and discovered more than 3,900 unique images of child pornography, and the images had been shared through a file sharing program. However, Mr. S testified that he had accidentally shared the child pornography. He claimed he downloaded various content and deleted the content he didn't want. He stated that the images were on his computer because he "just didn't get around to deleting [them]." The trial judge rejected Mr. S's account and found Mr. S was aware of how file sharing worked and had knowingly shared the images.

Mr. S was sentenced to 12 months in jail and 15 months' probation. The possession charge was withdrawn following Mr. S's sentencing.

Mr. S appealed his conviction and sentence, arguing the sentencing judge incorrectly dismissed his application for a stay of proceedings based on an abuse of process – he argued a breach of his right to life, liberty, and security had occurred, as well as unreasonable delay in his sentencing. He also argued that his application to challenge the constitutionality of the provision was incorrectly dismissed. However, the appeal court found that the trial judge had correctly decided to dismiss these arguments. The Crown had properly brought the cases as an indictment (more serious) case and properly cross-examined witnesses; Mr. S had not properly framed his application to challenge the constitutionality of the provisions; and the delay was reasonable within the legal principles set out in *Jordan*, when taking into account the exceptional circumstances of this case: this case was decided before *Jordan* was released by the Supreme Court, there was minimal prejudice to the appellant because of the delay and much of the delay was due to actions of Mr. S. Additionally, there were significant societal interests in having Mr. S sentenced.

His appeal from conviction and his sentence were dismissed.

xiv. 2017 ONCA 912

In **2017 ONCA 912**, Mr. L, a 65-year-old man, was found guilty of possessing child pornography at trial.

Mr. L had a positive relationship with his community and family, but a psychiatrist found he likely had a sexual disorder and was attracted to images or sexual fantasies of prepubescent children that was likely lifelong.

He was sentenced to nine months in jail and three years' probation. Additional orders included a DNA sample, a 10-year registration as a sex offender, and forfeiture of the devices and images used in the offence.

Mr. L appealed the decision, arguing the trial judge had no basis to find that Mr. L knew about the child pornography. However, the appeal court found that the trial judge accepted the only rational explanation about Mr. L having knowledge of the images on his computer, which had thousands of videos and pictures of child pornography both on the hard drive and the external drive.

The appeal was dismissed.

Also see: 2016 ONSC 1009 (Sentencing).

xv. 2017 ONCJ 733

In **2017 ONCJ 733,** Mr. M pleaded guilty to making child pornography, making child pornography available, possessing child pornography, and to the sexual assault and sexual exploitation of his step-daughter, Ms. K.

Mr. M lived with his wife of 14 years, his step-daughter, and their 9-year-old biological daughter prior to the arrest. He and his wife were in an open relationship. He groomed his step-daughter for sexual interactions from 13 to 17 years old. They would both walk around in their underwear, he and her mother gave her a dildo at 14, he would give her massages on her bed, he admitted he was sexually attracted to her as early as 13, and talked with her about her sexual relations.

During these massages, of which there were about 60, he would secretly take photos of her, as well as touch her sexually and touch his penis to her if she would fall asleep. He belonged to a child pornography chat room, where he would download child pornography photos and videos centered around step-daughter abuse and would also upload the photos of his step-daughter, in which you could see her face.

The court focused on two aggravating factors: (1) the downloaded child pornography included girls performing fellatio as young as 2 years old, and (2) by uploading the photos of Ms. K, Mr. M was "perpetuating the sexual degradation of [Ms. K] in perpetuity. Once these images are on the internet, they are very difficult, if not impossible, to eliminate … this is the grossest breach of trust that a parent can inflict on a child."[84]

He was sentenced to 4.5 years' incarceration.

xvi. Unreported (noted in 2017 ONCJ 377)

[84] 2017 ONCJ 733 para 17.

In **unreported case**,[85] Mr. L hid a camera in his bathroom and surreptitiously filmed his 15-year-old step daughter and her friends as they used the bathroom. He was charged with voyeurism and child pornography offences and received a sentence of six months in jail for the voyeurism conviction.

xvii. 2017 ONCA 434

In **2017 ONCA 434**, Mr. M appealed his conviction of possessing child pornography.

Mr. N's wife discovered child pornography on Mr. N's computer and reported it to the police. By the time the police were able to search the device, they could only locate temporary internet files of child pornography. Mr. N admitted to downloading adult pornography, but claimed the child pornography was unintentionally downloaded when he was drunk.

The trial judge misunderstood evidence about temporary internet files when convicting Mr. N of possessing child pornography. Mr. M appealed that conviction. The appeals judge also misunderstood the evidence and dismissed the appeal.

Mr. N then appealed the conviction based on this misunderstanding. The Crown argued that regardless of whether or not there was evidence that Mr. N possessed child pornography, there was evidence that he accessed it. However, the court found that he had been charged with possessing child pornography, not accessing it. The offence of accessing child pornography was not included in the offence of possession, it was possible to possess child pornography without accessing it. Further, the court held that it was not in the interests of justice to change the charge to accessing pornography.

[85] Noted in 2017 ONCJ 377.

Mr. N was acquitted.

Also see: 2013 ONSC 2808 (Trial)

xviii. 2016 ONCA 920

In **2016 ONCA 920**, Mr. C was convicted of possessing child pornography and making child pornography available.

The police had downloaded child pornography Mr. C was sharing on the internet via a file sharing site. Upon searching his computer, they found that Mr. C had used terms common for searching for child pornography but Mr. C claimed he didn't know he was downloading child pornography, wasn't familiar with the search terms, and deleted the content from his C-drive later. However, there was evidence he used terms related to child pornography and would have had to click on the files to download them. The files had been backed up on other drives, including some folders on the file sharing program that were being shared with others. The court noted that Crown does not need to show active distribution by the accused, only that the files where being shared with others.

At trial, he was sentenced to three years in jail. Additional orders included a lifetime registration as a sex offender, a DNA order, and a 20-year limitation on being near young people, including using the internet. He appealed his conviction and sentence.

On appeal, Mr. C argued that evidence about other content on the computer was improperly used in the trial, but the court found that it had been entered as evidence on consent by Mr. C. He also argued that the trial judge did not consider whether Mr. C had the intent to possess the child pornography, but the appeal court found that the trial judge had addressed the issues of possession and control properly and found that Mr. C had knowledge of the child pornography on his hard drives and had made it available to others on the file sharing site.

He also argued that his sentence was unfair, but the appeal court found that it was within the normal range of sentencing for the offences Mr. C was charged with.

His appeals of his sentence and conviction were dismissed.

Also see: 2015 ONSC 8085 (Sentencing), 2015 ONSC 6070 (Trial).

xix. 2016 ONCJ 827

In **2016 ONCJ 827**, Mr. V pleaded guilty to sexual interference, sexual touching, making and possessing child pornography, and internet luring.

He and his girlfriend, Ms. A, abused Ms. A's four-year-old daughter, Ms. T. Mr. V told someone about the abuse, who reported the abuse to Family and Children's Services. Ms. T reported that both her mother and Mr. V engaged with her sexually.

Electronic devices owned by the couple were searched and revealed child pornography the two had made, possessed, and distributed between each other. The two discussed sexually abusing Ms. T in those communications and shared nude pictures of Ms. T. Mr. V sent a photo of his penis to Ms. A and told her to show it to the child.

In discussing the virtual and physical aspects of the case:

> [The Crown argued that] "what's horrible, offensive and depraved about this case" is that this is an instance of a new brand of sexual offending where there is offending on two landscapes — offending on the computer and offending in the real world." [The Crown] submits that this intersection of computer texts extolling and planning sexual interference that culminated in actual depravity is a form of offending behaviour that needs to be deterred and denounced.

The Court found the planning and deliberation over text an aggravating factor, stating:

> The text messages describe depraved acts desired. Some were carried out. This amounts to the offences being planned and deliberate. The texts are a rehearsal to

> action, to thoughts being given legs. In addition, the persistence in texting permitted [Mr. S] to become desensitized to the perverse nature of the conduct he was relishing and anticipating. All of this can be subsumed as aspects of planned and deliberated upon criminality. This is a seriously aggravating factor to be weighed.[86]

He was sentenced to 6 years' incarceration.

xx. 2016 ONCJ 858

In **2016 ONCJ 858**, Mr. L was charged with 129 adult criminal counts and 88 counts under the Youth Criminal Justice Act. He pleaded guilty to 35 adult charges, including bestiality, compelling to commit bestiality, voyeurism, making child pornography, making available child pornography, possessing child pornography, agreeing to commit sexual assault on a person under the age of 16 years old by telecommunication, communicating with a person under 16 to facilitate bestiality, sexual assault, counsel to make child pornography, counsel to commit bestiality, conspire to administer a noxious substance, conspire to make child pornography and conspire to commit sexual assault, and the Crown withdrew all of the youth charges.

The court relied on an extensive records of text messages with his victims and others, content on his computer that documented his crimes and plans to commit future crimes, and photographs used as evidence in this complicated case.

Mr. L was 22-years-old at the time and was dating a 15-year-old girl. He had sex with her and filmed it and encouraged her to film her 9-year-old sister in the nude. He also encouraged her to babysit young children so he could gain sexual access to these children. He sent her sexual images involving animals. She later went to the police who arrested Mr. L and seized five cellphones, his laptop, a GoPro camera that was positioned above his bed, and small children's underwear. It was discovered that Mr. L was committing sexual offences against young girls, children and young

[86] 2016 ONCJ 827 at para 128.

animals for nearly a decade (when he was between the ages of 14 and 22) and actively planned to sexually assault specific infants, young children, his friend's mother and animals. He counselled young women to take images of children as young as two for the purposes of child pornography. He would use young women to gain access to young children and stated a desire to abduct a young girl for sexual purposes, among other things. Fourteen victims were identified ranging from 2-years-old to adulthood. Two people were involved with Mr. L and assisted him in committing sexual offences against children and animals, which the court noted as "very very unusual" behaviour for a pedophile. Mr. L also secretly filmed sexual acts with young teens and young women and later distributed the images and videos.

Mr. L was designated as a dangerous offender.

xxi. 2016 ONCA 757

In **2015 ONSC 2391**, 56-year-old man, Mr. K, pled guilty to two counts of making child pornography with respect to his common law partner's teenage daughter and her friend. He also pled guilty to possessing child pornography with respect to the same girls, and three counts of voyeurism with respect to one victim, her mother, and 15 other women and girls.

Mr. K secretly filmed people. None of the eighteen individuals captured on the videos were aware they were bringing taped and none consented. Of the eighteen victims, seven were minors.

For years Mr. K was engaged inappropriately with one of his step-daughters, including exposing himself to her, having her watch adult pornography with him, and taking pictures of her naked buttocks. She eventually told her mother, who reported Mr. K to the police. Upon searching the home, the police discovered Mr. K hid a camera in the bathroom of the family home for a number of years. They found 268 unique videos, and 1,814 unique images on his devices which could be classified as child pornography. He edited some of these images he took from the bathroom to

appear as though he was engaging in sexual activity with his youngest step-daughter and/or her friend.

The court listed breach of trust, the length of time of the offences, the sheer volume of images, planning and sophistication of the acts, the number of victims and victim impact statements, as well as breach of recognizance and lack of remorse as the most egregious aggravating factors. It found that while Mr. K was a first-time offender and held a high rank in society, it was clear that his obsessions were in-depth and meticulous enough that it required a severe consequence. Mr. K was ultimately sentenced to 5 years and 3 months in prison (less pre-sentence custody), along with several ancillary orders including prohibitions on contacts with minors and communications with the victims, forfeiture of all items seized during the investigation, prohibition on internet use, possession of firearms and on contacting the victim, an order to provide a DNA sample, and an order to comply with the Sexual Offender Information Registry Act for life.

Mr. K appealed his conviction, arguing that the trial was not completed in a reasonable time, thus infringing his section 11(b) Charter rights. His appeal was dismissed. He appealed his sentence, arguing he should be granted additional pre-trial custody credit and that his lack of remorse should not have been considered an aggravating factor. The court agreed and his sentence was reduced.

Also see: 2015 ONSC 2391 (Sentencing), 2014 ONSC 5709 (Endorsement of pretrial motion), [2014] OJ No 6462 (ONSC) (Endorsement of pretrial motion).

xxii. 2017 ONSC 4380

In **2016 ONSC 5915**, Mr. D, a 58-year-old man, was charged with 13 offences including exercising control over young person, receiving proceeds of crime, living on avails of prostitution, procuring young person to become prostitutes, possession of child pornography, uttering death threats, possession, possession for purpose of trafficking, and firearms offences.

Mr. D allegedly coerced a 17-year-old girl to provide sexual services for money, advertised her sexual services online, and pointed a firearm at her. Several court appearances occurred relating to the admissibility of evidence and the accused's Charter rights.

Mr. D was acquitted on the charge of trafficking, but was convicted for drug possession and possession for the purposes of trafficking.

Also see: 2016 ONSC 6019 (Application re: cross-examination topics), 2016 ONSC 5915 (Evidence), 2016 ONSC 5855 (Charter rights), 2016 ONSC 4294 (Expert evidence), 2016 ONSC 4293 (Charter), 2016 ONSC 2749 (Charter), 2016 ONSC 777 (Joint or separate trial).

xxiii. 2016 ONSC 2589

In **2016 ONSC 2589**, Mr. M was charged with making child pornography, possessing child pornography, sexual assault, sexual interference and invitation to sexual touching.

The complainant, a 15-year-old girl, had run away from home with her boyfriend. They met Mr. M's son in a coffee shop, who invited them to stay with him for a while. She said that Mr. M offered to pay her for some work at his house and when she arrived he showed her nude photos of girls on his computer, asked her to touch herself sexually, and touched her sexually. He had sex with her and took photos of her touching herself sexually. Ms. M later reported this to the police, who located the images on a computer and camera in Mr. M's bedroom. In Mr. M's version of events, he was not in town at the time of the events, that his son had the camera at the time, and he had erectile dysfunction that would not have allowed him to have sex with the girl.

The court was left with reasonable doubt as to whether Mr. M committed the offences and acquitted him of the charges.

xxiv. 2016 ONCJ 209

In **2016 ONCJ 209**, Mr. B, a man in his thirties, pleaded guilty to four counts of sexually touching a minor, invitation to sexual touching, producing child pornography, and possessing child pornography.

Mr. B sexually abused five children, including Ms. M, his niece. Mr. B had made 217 videos of himself assaulting the children and had 1,377 images and videos of child pornography involving adult men and female children and children engaging sexually with other children. There was evidence that he had groomed the five children over time and had a pattern of behaviour in harming children. Mr. B believed that he was not harming the children. He was diagnosed as a pedophile.

Ms. M, Mr. B's niece, was abused between the ages of two and seven. Mr. SS, Mr. CS and Ms. ES, who are all siblings, were six years old, ten years old, and two years old, respectively, and younger when Mr. B abused them. Ms. R was six years old when she was abused.

Ms. R told her parents that Mr. B had pulled down her pants and licked her vagina and that he had done this to Ms. M as well. Her parents reported the abuse to the police. Ms. R reported that Mr. B had shown her an adult movie at one point and asked Ms. R to lick Ms. M's vagina on another occasion, which she didn't.

Mr. B was arrested for sexual assault and admitted that there may be child pornography on his computer. A search of his computer and cell phone resulted in the discovery of the child pornography that Mr. B made with the children as well as child pornography likely downloaded from the internet. The child pornography was well organized and labeled, naming they type of pornography and which child was in it and the age of the child at the time the video was made. The home videos contain explicit sexual acts, including acts of toileting. There was extensive footage of Mr. B abusing his niece. The content of the videos demonstrated that Mr. B had groomed the children, using play and games to normalize the abuse. Ms. M in particular appeared to have normalized and be familiar with the sexual abuse.

Mr. B was also designated as a dangerous offender. He was sentenced to 13 years and 6 months in jail as well as a 10-year long-term supervision order. Additional orders included a DNA order, a lifetime weapons ban, a lifetime registration as a sex offender, no-contact orders, prohibitions from being near minors, and the forfeiture of items used in the offences.

xxv. 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 six-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.

xxvi. 2016 ONSC 713

In **2016 ONSC 713**, Mr. P, a 30-year-old man, was charged with sexual assault, sexual touching, invitation to sexual touching, breach of probation, possession of child pornography, and making child pornography, in relation to Ms. B, a 14-year-old girl.

Mr. P brought an application to exclude evidence seized from his mobile phone, including sexual images of Ms. B, due to an alleged violation of his right to be free from unlawful search and seizure.

Mr. P and Ms. B's sexual relationship had been anonymously reported to the police. A police officer spoke with another person who provided information about the relationship, including information that there may be photos of Ms. B performing sexual acts on Mr. P on Mr. P's phone. Upon speaking with Ms. B the officer learned that Ms. B had deleted similar pictures on her cell-phone and that there had been sexual images of her on Mr. P's phone at one point. The detective constable visited Mr. P's mother's home to see if she had her son's phone. Finding out Mr. P's mother had the phone, the officer told Ms. P she had to turn over Mr. P's cell phone or she would be in possession of child pornography. The detective constable then got a warrant to search the content of the phone for the images, which were located on the phone.

The warrantless and non-consensual seizure of the cell phone was found to breach Mr. P's Charter rights but the court did not find that it was not a very serious infringement, Mr. P's rights were not significantly breached because a warrant still needed to be obtained to access the images on the phone, and that the administration of justice would be brought into disrepute if the evidence was excluded. The evidence was found admissible.

xxvii. 2015 ONCA 663

In **2015 ONCA 663**, Mr. R was convicted of possessing child pornography, failing to comply with a prohibition order, and failure to comply with a probation order.

Mr. R had previously been convicted of making child pornography, sexual assault, child luring, and failure to comply with court orders, including a prohibition from using an internet connected device. One week after being released from jail the police discovered he was using a laptop to chat with underage girls online and possessed a cell phone capable of accessing the internet. After serving his jail time for this breach, he breached his conditions again by collecting child pornography and gathering information about young girls and women he had chatted with online.

He was sentenced to three years in jail, in addition to the two years and 13 days he had already spent in pre-trial jail. He was sentenced to six months in jail for his breaches of probation and prohibition orders. He was declared a long-term offender and was given a 10-year offender supervision order.

Mr. R appealed his sentence for possessing child pornography and the length of this long-term offender supervision order. He argued that the five year and 13-day sentence for the child pornography offence was illegal because it was higher than the five year maximum for that sentence and that the judge had focused too much on protecting the public when making the order.

On appeal, the court reduced his sentence to 4.5 years for the possession of child pornography and that his pre-sentence custody time should be counted on a 1.5 days for each one day served.

The appeal court upheld the 10-year long term offender supervision order. Mr. R had repeatedly offended, breached court orders, did not recognize his behaviour was problematic, and was at high risk of re-offending.

xxviii. 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.

Mr. G communicated with the girls over the internet and asked them to perform sexually online and exposed his penis to them. The girls were located in Ontario, Scotland and the United Kingdom. He had used multiple fake accounts to lure the girls, a search of his home led to the discovery of 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 he had contacted, what alias he was using, whether he had web-cammed with them 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 seven 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 a no-contact order and Mr. G was not allowed to possess or access a device with the internet, 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 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.

xxix. 2015 ONCA 150

In **2015 ONCA 150**, Mr. M was convicted of possessing child pornography but was acquitted of accessing child pornography.

The police received a tip from Mr. M's ex-wife that Mr. M was in possession of child pornography. This was during a heated custody battle over their child.

Following a search of his home computers, around 2,400 images and videos of child pornography were discovered in a deleted folder. He was convicted of possessing child pornography but was acquitted of accessing child pornography, because it was possible other users may have accessed the internet to view the pornography sites. Mr. M appealed his conviction of possessing child pornography, arguing the trial judge had made a mistake in finding Mr. M was aware of the deleted child pornography, arguing his ex-wife and her new husband must have planted the images on his computer. To be found guilty of possessing child pornography, the accused must have control and knowledge over the child pornography.

Mr. M was the main user of the computer containing the deleted child pornography, but others did have access to the computer. Many of the images were organized in folders and sub-folders

with names clearly indicating they were child pornography. The main file folder was deleted after Mr. M was informed the police were going to search his computer for child pornography. The court found that this evidence made it clear that Mr. M was aware of the images, he would have had to seek out the file to delete it.

The appeal was dismissed.

xxx. 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.

xxxi. [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.

Mr. B 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.

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.

xxxii. 2014 ONSC 3794

In **2014 ONSC 3794**, Mr. D, was convicted of for luring, child pornography, sexual interference and other offences.

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 that all dealt with some area of sexual exploitation. He pled guilty to 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 seven-year and seven-month global sentence. 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).

xxxiii. 2014 ONSC 1472

In **2014 ONSC 1472**, Mr. T, a police officer, was acquitted of sexual assault, sexual exploitation when in position of trust or authority, breach of trust and making/possessing child pornography.

He had met a 16-year-old girl when she was stopped at a store for shoplifting. Knowing of the family troubles she had, he offered her a room to rent in the basement of his house, which she accepted. The events that formed the subject matter of the charges and the trial were alleged to have occurred in the months after she moved into his home. Mr. T allegedly sexually assaulted the girl while she slept, forced her to engage in sexual activity with he and his wife, and eventually took explicit photos of her alone and engaging in sexual activity with his wife. The girl indicated that she had moved out after the initial sexual assault but came back to the house several times for a variety of reasons.

The Court questioned the credibility of the complainant, and ultimately acquitted Mr. T on all counts. It consistently raised her troubled family history and run-ins with the law as contributing to her potential for misleading the court:

> To be sexually assaulted in June and remain in the residence for several more months when she appears to be a strong-willed person who would and could leave, raises a doubt. To return later when there is a hot tub, and use the hot tub with her girlfriend and the wife of the Defendant and the Defendant seems implausible if there had been a prior sexual assault to the extent of forced sexual intercourse. To provide a variety of statements about the type of camera used adds to the confusion […the victim] had many contacts with Durham Regional Police when calling about domestic legal circumstances and yet made no complaint about the allegations. If the allegations against [the defendant] occurred, one cannot imagine that she would not have made some complaint. The only explanation given is that she was afraid that [the complainant] would have the shoplifting charge reinstated. That is unbelievable.[87]

xxxiv. 2014 ONSC 674

[87] 2014 ONSC 1472 [emphasis added].

In **2014 ONSC 674**, 72-year-old Mr. S pleaded guilty to possession of child pornography, making available child pornography and voyeurism.

Mr. S' IP address was flagged by international authorities for distributing child pornography on a file sharing network. The victims were young females ranging from four years old to 11 years old. Authorities seized Mr. S' computers and discovered, among other things, videos of his 13-year-old step-granddaughter changing her clothing. In total, a collection of 22,696 unique images of child pornography and 586 videos depicting child sexual abuse were seized.

The court cited mitigating factors, including his age and that "…[a]part from his problems with child pornography, [Mr. S] appears to be a person of good character."[88]

Mr. S was sentenced to four-years' imprisonment (less pre-trial time spent in pre-trial custody) to be served concurrently for all counts, along with several ancillary orders including mandatory sex-registry compliance, and a prohibition from using the internet.

xxxv. 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

[88] 2014 ONSC 674 at 11.

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."[89]

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 ten-year weapons prohibition, a 20-year 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.

xxxvi. 2013 ONCA 424

In **2013 ONCA 424**, Mr. B, a 47-year-old man, was convicted of possessing child pornography.

The police located several dozen videos and images of young girls in sex acts with other children or adult men. The sentencing judge commented on the seriousness of possessing child pornography, stating: "Children must be protected from being trafficked, exploited and abused and then continually re-victimized by those who seek out this type of pornography."[90]

He was sentenced to 6 months' imprisonment and 18 months' probation. Additional orders included the forfeiture of the computer used, a 20-year registration as a sex offender, a DNA order, and limitations on being near and communicating with children, including using his computer to

[89] *2013 ONCJ 801 at para 5.*
[90] 2012 ONSC 6997 at para 21.

access children. No order was made preventing his use of his computer because he was a technology specialist for his work.

He appealed the decision, arguing the search of his home had violated his rights to be free from unreasonable search and seizure. Mr. B argued that the Information to Obtain form did not contain enough information to allow a search and the search had been unreasonably carried out because the police had entered his home with guns drawn. The appeal court found that the search warrant was obtained properly and because child pornography can easily be disposed of, encrypted, or hidden, the "no-knock" entry was reasonable.

The appeal was dismissed.

Also see: 2012 ONSC 6997 (Sentencing); 2011 ONSC 7566 (Charter – Search and Seizure).

xxxvii. [2012] OJ no 3606 (ONCA)

In **[2012] OJ No 3606 (ONCA),** Mr. D appealed his conviction and sentence for multiple sexual offences and child pornography offences.

He argued that his chat logs and other digital evidence did not support a conviction for many of the offences, that Ms. G was not a reliable witness, that his lawyer properly addressed all the evidence, and that the conditions of his probation should not prohibit him from using the internet or possessing devices capable of accessing the internet.

Mr. D asked his ex-girlfriend, Ms. G, to take sexual photos of herself and her 12-year-old daughter. Ms. G complied and sent photos and a video of her and her daughter, which she led to a criminal conviction against her. He also sent Ms. G sexual photos of adults and children during their relationship.

A second ex-girlfriend, Ms. B, also said that Mr. D sent her sexual photos of adults and children and that Mr. D used her computer and afterwards she found images of naked children on it. The police searched several of his other devices that were in Ms. B's apartment and found images of child pornography on them.

At trial, Mr. D was found guilty of making child pornography, sexual interference, invitation to sexual touching, sexual assault and the possession of child pornography. He was sentenced to a year in jail, and three years' probation.

His appeal was dismissed. The trial judge had properly assessed the evidence, witness testimony, and his lawyer's treatment of the evidence would not have impacted the outcome of the trial. The internet prohibition was considered a reasonable condition in light of the convictions. Mr. D was allowed to use the internet for work purposes.

xxxviii. 2012 ONCA 660

In **2012 ONCA 660**, Mr. W was charged with accessing and possessing child pornography.

German police were investigating online pornography downloads and found several associated with Canadian IP addresses. Learning this, Canadian police requested the name and address associated with the IP address from his internet service provider. They did so without a warrant. The company gave the police Mr. W's name and address, and that information was then used to get a warrant to search Mr. W's home for child pornography, which resulted in about 30,000 images and 373 videos of child pornography.

At trial, he unsuccessfully argued that his rights to be free from unreasonable search and seizure were violated by the search, and that the evidence should be excluded. He was convicted and sentenced to 11 months in jail and three years' probation.

Mr. W appealed his convictions, arguing the he had a reasonable expectation of privacy in his name and address held by the internet company, and his right to be free of unreasonable search and seizure was violated when the company gave the police that information. He also argued that even with that information there wasn't enough information to issue a warrant. If the evidence was not admissible, Mr. W should be acquitted.

The Court of Appeal found that Mr. W believed he had a reasonable expectation of privacy in the information, but that a reasonable person would know they did not have a reasonable expectation of privacy. The court found that the terms of service agreement with the internet company stated it was appropriate for the company to cooperate with police by providing information, and certain provisions of the *Personal Information Protection and Electronic Documents Act* permitted the company to release the information to the police. Additionally, the information provided to get a warrant to search Mr. W's home had provided a proper basis to infer that there was a reasonable chance that Mr. W had accessed child pornography on his computer.

Therefore, the evidence was admissible and the appeal was dismissed.

Also see: 2008 ONCJ 355 (Charter).

xxxix. 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 pleaded 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 years old, 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, immaturity, 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.

The appeal was dismissed.

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

xl. 2012 ONCA 367

In **2012 ONCA 367**, Mr. B was convicted of multiple counts of possessing and distributing child pornography.

The police had connected his IP address with child pornography that was shared online. A search of his home that he shared with two roommates resulted in child pornography being found on

his computer and on two USB sticks he had broken. Mr. B made statements to the police at the time of the search and arrest. Of the three statements only one was found to violate his *Charter* rights, the police had only asked preliminary questions when he made his first statement and he had declined to talk to a lawyer for the third statement, but the second statement he made he should have been offered a chance to talk to a lawyer. The second statement where Mr. B admitted to possessing the child pornography was still found to be admissible evidence. The judge found that although his rights were violated, the evidence was still admissible.

His appeal was dismissed.

xli. 2012 ONCA 162

In **2012 ONCA 162**, Mr. M, a 37-year-old man, pleaded guilty to incest, sexual assault, and making and possessing child pornography in relation to his teenage daughter.

When his daughter was between 13 and 14 years old her father repeatedly vaginally and anally assaulted her, masturbated and ejaculated on her, and filmed some of the incidents. His daughter told someone about the sexual abuse and a search of his home resulted in videos and photos of the assaults, as well as around 1,800 other images of child pornography, including images of forced sexual interactions.

Mr. M was a high-ranking military officer who stated he had begun sexually fantasizing about his daughter to disassociate from the stress of serving in Afghanistan. He was diagnosed with post-traumatic stress disorder. However, his PTSD and use of malaria drugs to self-medicate were not thought to have caused Mr. M to abuse his daughter.

Mr. M was sentenced to six years in jail. The Crown appealed the sentence, arguing the judge should have viewed the videos of the abuse to understand the seriousness of the offences and that a six-year sentence was not long enough.

On appeal the court stated:

> In this case, the trial judge was presented with a difficult and troubling issue. The images copied on to the disc contained video of the victim actually being assaulted by the offender. The victim was present in court and the trial judge was of the view that she had the right to be present during the proceedings. The judge was also of the view that the offender's right to be present during the proceedings required that if the judge was to view the disc he would have to do so in the offender's presence and, it followed, in the victim's presence. It would have been open to the judge to take steps to limit the exposure of the child pornography, including the images of the assaults on the complainant, to the public. Even so, the viewing of the disc showing the sexual assaults of the victim could cause additional trauma to the victim. The judge was sensitive to this fact and this was a proper consideration.
>
> […]
>
> The [Crown] makes much of the fact that the trial judge sought the views of the victim as to whether he should look at the contents of the disc. Counsel argues that the trial judge should not have let the views of the victim determine the decision. But this is not what occurred. While the trial judge sought the views of the victim, he made it abundantly clear that it was his decision not hers. It was not wrong for him to take those views into account. He did not defer to her wishes. The courts are becoming increasingly more sensitive not just to the impact of crimes upon the victim, but of the criminal process itself. It is not wrong for the trial judge to involve the victim in the process, provided that involvement does not interfere with the orderly presentation of the case, or unfairly interfere with the rights of the parties to a fair hearing.[91]

The Court of Appeal found that the judge did not make a mistake in not watching the video, which the trial judge did not do in part to protect the daughter from the experience of the film being shown in open court, the images had been described in detail and the trial judge had extensive experience with child pornography in his career, and found the sentence to be fit for the offence.

Also see: [2012] SCCA No 242 (Leave to appeal).

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[91] 2012 ONCA 162 at para 34 & 36.

xlii. [2011] OJ No 4151 (ONCJ)

In **[2011] OJ No 4151 (ONCJ)**, Mr. M pleaded guilty to possession of child pornography and breaching probation. He was on probation for another case of possessing child pornography and counselling sexual assault.

Mr. M was a gymnastics coach who had been communicating with an undercover police officer who was posing as a pedophilic father of a young child. Mr. M was telling the officer how to abuse his child. A search of Mr. M's home found child pornography on his computer and a collection of girls' underwear that had been worn. He was sentenced to jail time and probation, including restrictions from communicating with children and using the internet.

While on probation, Mr. M's sister-in-law approached his probation officer about a fake Facebook account Mr. M had created and text messages he had sent her that described his pleasure in pedophilia, and discussed a desire to drive by schools to look at and touch young girls. A second search of his home found that he was using the internet to look up sexual stories about young children and images of child pornography.

The court interpreted child pornography to be:

> In my view, any image created for the clear purpose of appealing to the prurient interest of a pedophile or involving the sexual degradation of a child is sufficient to bring such image within the definition of child pornography.
>
> The court should not craft too narrow a definition of child pornography so as to limit the ability of police authorities to prosecute the evil that is child pornography.[92]

[92] [2011] OJ No 4151 at paras 24-25.

He was sentenced to 6 months' imprisonment on top of the 225 days already served and three years' probation. Additional orders included a ban on possessing or using devices capable of accessing the internet, using email, or subscribing to an internet service unless for the purposes of employment. He was also ordered not to possess or access images of children who are naked or portrayed in a sexual manner, not to be in the company of children unless supervised by an adult who is aware of his conviction, a DNA order and a registration as a sex offender for life.

xliii. 2011 ONCA 26

In **2011 ONCA 26**, Mr. N was convicted of possessing child pornography.

He appealed his 6-month sentence. The court dismissed the appeal stating: "Sadly, possession of child pornography facilitated through the internet is on the rise. It is an abhorrent crime that victimizes the most vulnerable members of our society and hence the need for sentences to reflect denunciation and deterrence."

xliv. 2010 ONCJ 600

In **2010 ONCJ 600,** Mr. S, a 43-year-old man, pleaded guilty to 13 counts of assault, sexual assault, invitation to sexual touching, possession of child pornography and producing child pornography.

Among other things, Mr. S filmed himself conducting multiple assaults and sexual assaults against women and girls over many years while they slept. Complainants included his common-law wife, who he physically assaulted; a 10 or 11-year-old girl who he showed pornography to, sexually touched, and attempted sexual intercourse with; a girl from the ages of 9-12 who Mr. S had sexual conversations with, showed pornography to, and tried to convince her to kiss another female child; a second girl from the ages of 9-12 whom Mr. S gave drugs and alcohol to, sexually touched, and attempted sexual intercourse with; a nine-year-old girl who he sexually touched; a girl whose age is not noted who he touched sexually; a girl from the ages 11-15 who Mr. S sexually touched

and had sexual intercourse with; a girl from the ages of 10-14 who he sexually touched; and a 17-20-year-old young woman who exchanged drugs for sexual contact with Mr. S where she role played being a child or acted out rape scenarios. Mr. S sexually assaulted her on several occasions. The sexual abuse against these children and young woman was videotaped by Mr. S, the underage girls were often sleeping or did not consent to the sexual contact. Thousands of child pornography photos and videos were found on Mr. S's computer, including images of very young children and infants.

After reviewing the evidence, including 60 two-hour videotapes, the Court sentenced Mr. S to 12 years' imprisonment for one particularly violent count and three years' imprisonment for the other counts to be served concurrently. Mr. S was also designated a long-term offender (LTO) and received a 10-year LTO order with recommendations for parole conditions. Additional orders included a 20-year registration as a sex offender, a DNA order, a 10-year weapons prohibition, and 10-year restriction on contact with children.

Also see: [2010] OJ No 6323 (ONCJ) (Ruling re cross-examination); 2009 ONCJ 459 (Trial of an issue); 2009 ONCJ 410 (Admissible evidence); 2009 ONCJ 181 (Publication Ban).

xlv. 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 conditional 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.

xlvi. 2010 ONSC 330

In **2010 ONSC 330**, Mr. K was charged with possessing and making child pornography.

Mr. K hid a video camera in his 16-year-old stepdaughter's bedroom on several occasions and filmed her without her knowledge. He did this over several years. His wife discovered the videos years later along with other pornographic material. The question before the court was whether the images were child pornography or not. The videos are of the girl undressing, showing her breasts in some of the films. The court held that her breast was a sexual organ and Mr. K admitted he took them for a sexual purpose.

Mr. K was found guilty of possessing and making child pornography.

xlvii. 2010 ONCA 27

In **2010 ONCA 27**, Mr. F, a 35-year-old man, pleaded guilty to sexual assault and possessing, making and distributing child pornography.

In 2005, investigations into this chatroom found that the room was used to create and exchange child pornography. 82 members were arrested and over 30 children who had been abused were rescued. Mr. F had been a member at that time but was not one of the people arrested. Law

enforcement later closed the chatroom. When the chatroom was reopened by its members in 2006, Mr. F joined using a new username and engaged in conversation with the undercover officer.

Mr. F sexually assaulted his four-year-old daughter and streamed the assaults via webcam to a user on an online chatroom for pedophiles. An undercover police officer had chatted with Mr. F, who had sent the officer 147 child pornography images, told him that he had two daughters, sent nude images of his youngest daughter, sent his daughter's name, and bragged about sexually assaulting her. He told the officer he began abusing his daughter after being encouraged to from his online peers. Mr. F was arrested following the livestream to the officer. A search of his home led to thousands of child pornography images, nude images of children, and obscenity. Some of the children were bound or had sexual or violent commentary written on them. Some images included weapons.

At trial he was sentenced to four years in jail and three years' probation. He expressed remorse for his actions.

The Crown appealed the sentence.

The appeal judge found the sentence "manifestly unfit" and did not meet the objectives of deterrence of Mr. F and other future offenders. The judge stated:

> Unfortunately, the incidence of this behaviour appears to be increasing and expanding as technology becomes more sophisticated, encouraging the production of child pornography and greatly facilitating its distribution. The victims are innocent children who become props in a perverted show, played out for an ever-wider audience not only of voyeurs but of perpetrators.[93]

[93] 2010 ONCA 27 at para 22.

The following factors were taken into account:

1. The respondent was participating in a child pornography chat room with like-minded adults.

2. People participating in the chat room traded child pornographic pictures.

3. These pictures included depictions of sexual assaults as well as other violence and other demeaning aggression against victimized children.

4. Victim impact information from one of those children showed that the pictures were made currently, that is, they were not historical material just being re-circulated in cyber-space.

5. The participants discussed committing sexual assaults on children and encouraged other participants to do the same. The respondent acknowledged that it was this encouragement that caused him to act out his fantasies on his own child.

6. The respondent sexually assaulted his own daughter on an ongoing basis. He was grooming her to participate in this activity by touching herself and posing for pictures.

7. The respondent's daughter was a captive victim under his care and control. The abuse was ongoing and escalating and further assaults and abuse were only prevented because he was caught.

8. The fact that the victim was the respondent's own child is the most egregious breach of trust there can be.

9. The respondent disclosed his daughter's name to the other participants in the chat room, another extension of his breach of trust.

10. Not only did the respondent transmit pictures of his daughter being sexually assaulted by him to a stranger over the internet, he escalated the nature and extent of the criminal activity level by assaulting her as a live show to another participant. Had the other person in the chat room not been an undercover officer, it is likely that such a situation could escalate into more aggressive and prolonged sexual activity with the other person encouraging the activity.

11. By his live assault of his daughter in front of his new "friend", a person he believed to be a pedophile, the respondent was sharing his child as an object of pleasure for both men for a criminal purpose. This constitutes an entire new aspect of the nature of the abuse that underlies the crime of making and distributing child pornography.

> The trial judge found that the respondent enjoyed being able to show off his daughter.
>
> 12. The victim impact statements show the long-term effect of all the aspects of this activity. Obviously sexual abuse of a child by a parent is likely to have a significant psychological effect on the child. However, the additional trauma is caused by the child knowing that her photos are out in the public domain where unknown numbers of people around the world may be able to access them, and, in this case, know the child's name. It was unclear on the evidence whether anything transmitted in the conversation with the officer to a chat room that was immediately disabled could be available to be seen in the future. However, the victims have ongoing fear and uncertainty regarding what remains accessible on the internet and to whom. It amounts to ongoing psychological victimization of all the children involved.[94]

Mr. F's sentence was increased to seven years in jail. Additional orders included a DNA order, a 10-year limitation on being near or working with children, a 10-year limitation on using a computer to communicate with people under 14 years old, a 20-year registration as a sex offender, a 10-year weapons ban, and forfeiture of the images and equipment used in the offence.

Also see: 2007 CarswellOnt 10006 (ONCJ).

xlviii. 2008 CarswellOnt 9798

In **2008 CarswellOnt 9798**, Mr. R was charged with making, possessing and distributing child pornography of his 17-year-old girlfriend, Ms. Y.

Mr. R had taken pictures of them having sex without her knowledge. When Ms. Y found the photos on his phone she asked him to delete them, which he said he would. After they broke up, she saw the images in a poster form stating "Hoe..Do you know [Ms. Y's name]? You could be him. Call [Ms. Y's phone number]". The poster had been emailed to several people and her mother

[94] 2010 ONCA 27 at para 25.

had obtained a copy. The poster had been sent from an email address associated with Mr. R. Mr. R also chatted with a friend, Mr. M, on MSN about sending the poster.

The defence argued that the pictures were not clearly graphic as they only show Ms. Y's nude body on the lap of Mr. R. Ms. Y testified that the images are of her having sex with Mr. R. The court found that the images and the content would objectively be depicting sexual activity and determined it was child pornography.

The charge of possessing child pornography was stayed under the *Kienapple* principle, and Mr. R was found guilty of the other child pornography offences.

xlix. 2007 ONCA 815

In **2007 ONCA 815**, Mr. C was convicted of possessing child pornography.

Mr. C was aware the child pornography was on his computer and asked his girlfriend to delete it after he had been arrested on another matter. She discovered the videos and reported them to the police. His girlfriend and her two children were aware of Mr. C downloading nude and sexual videos from the internet. Mr. C argued that he knew the child pornography was on his computer for several months before his arrest but he had not intentionally downloaded it.

On appeal he argued that the trial judge had made a mistake in finding that he had sufficient control over the child pornography. The appeal court found there was no mistake and dismissed his appeal.

l. [2007] OJ No 5811 (ONSC)

In **[2007] OJ No 5811 (ONCJ)**, Mr. C pleaded guilty to possessing child pornography, breaching recognizance of bail, making child pornography and voyeurism.

He had been surreptitiously making recordings of his niece and other children in the community and editing the images and storing them in different formats. Mr. C was arrested and his computer, storage devices, hard drives, CDs, DVDs and thumb drives were seized containing 14,869 unique images of child pornography, 44,487 images of nude children, 650,063 "other" unique images of children, and 600 videos of child pornography, 112 videos of child nudity, and 7,743 other videos of children. Most children were prepubescent females, including photos of adults sexually assaulting children.

The court cited R v Strohmeier, in which Justice DeFilippis stated:

> Possession of child pornography is a serious offence. The following general observations explain why: First, the prevalence of the offence is of great concern to the community. Whether it is because of the greater use of the Internet or an increase in law enforcement, there are more cases of possession of child pornography. In any event, the minimum jail term is a recent amendment to the *Criminal Code* and reflects Parliament's decision to remove the possibility of a conditional sentence for the offence. Second, the victimization of children captured in picture and video never ends. Time passes but the images remain. With the push of a button, those images can be shared with countless individuals throughout the world. Third, notwithstanding the permanent record that exists, greater exposure of child pornography leads to increased production, and the abuse of more children. Finally, there is a link between images of child pornography and inhibitions about the sexual assault of children.

He was sentenced to 18 months' incarceration for the possession of child pornography, 12 months for distributing child pornography, six months for the voyeurism, and two months for the breach of recognizance, as well as three years of probation, and orders to not use or possess devices capable of storing digital data unless for work, not to use email unless allowed by the probation officer, to provide the probation officer with information on his ISP, not to communicate with people under the age of 18, not to use social networking sites or chatrooms, not to possess images of children naked or in a sexual manner, not to possess a firearm, to provide a

DNA sample, to be registered as a sex offender for 10 years, to not be in public places with children, not to use a computer to communicate with a person under the age of 14 and to forfeit his devices.

li. 2007 ONCJ 513

In **2007 ONCJ 513**, Mr. K was charged with voyeurism, making and possessing child pornography.

Mr. K suggested that his 15-year-old step-daughter take a shower. She found two cameras hidden in towels in the bathroom. A police search of the property revealed a video of the step-daughter on his laptop and multiple images of her with her breasts and genitals exposed. He pleaded guilty to voyeurism and not guilty to the child pornography charges. The accused brought an application to exclude the images and argued his right to be free of unreasonable search and seizure was breached.

The application to exclude evidence was dismissed.

lii. 2007 ONCA 619

In **2007 ONCA 619**, Mr. D, a 29-year-old man, was acquitted of uttering a threat by telephone, criminal harassment, and making, possessing, and distributing child pornography in relation to a 14-year-old school girl.

He told the girl he was 19 years old. The two became sexual and recorded some of their sexual activity. On occasion some of Mr. D's friends were present during the filming of the sexual activity. The girl said that Mr. D threatened to cut her breasts and face, make a website for the video, and show the video to the girl's family and friends unless she complied with his rules. The trial judge did not have enough evidence to convict on the threats charge. The relationship ended and

Mr. D gave the videos to his friend for safekeeping. The girl's family found out about the videos and the girl reported it to the police.

At trial it was found that the child pornography was protected by the "private use" defence, that allows for young people to take nude or sexual photos of themselves as long as it is for their own private use and the sexual activity was lawful. The trial judge found the girl was capable of consenting, the sexual activity was lawful, and giving the videos to another friend did not cause the tapes to fall outside the exception.

The Crown appealed the acquittals on possessing and distributing child pornography.

The appeal court held that the trial judge did not properly assess the threat to distribute the video, which would remove the video from the private use exception, as the video would also be used as a tool in a threat. There were also questions about whether Mr. C giving the video tapes to his friend would impact the private use analysis.

A new trial was ordered.

liii. 2007 ONCA 461

In **2007 ONCA 461**, Mr. E was charged with several sexual offences against his sisters and later his stepdaughter beginning when they were between the ages of four to six years old. The offences included forced sexual contact as well as forced oral, vaginal, and anal intercourse and threats of violence and actual violence.

He took photos and videos of some of the assaults of his step-daughter. The trial judge rejected a joint submission for 10 years' imprisonment and sentenced Mr. E to 14 years' imprisonment.

At the Court of Appeal, the sentence was reduced to 10 years' imprisonment, taking into account his guilty plea and finding the joint submission for sentencing was not manifestly unjust.

liv. 2006 CanLII 7393 (ONCA)

In **2006 CanLII 7393 (ONCA),** Mr. W, a 22-year-old man, pleaded guilty to making and distributing child pornography of his 15-year-old girlfriend, Ms. J.

The sexual activities were consensual and both agreed to take photos of their sexual interactions. However, shortly after the photos were taken, Ms. J broke up with Mr. W. Mr. W then made a collage of images of Ms. J, including of their sexual encounters. His face was not in any of the images. He included her name and address on the images. The collage also stated:

> Weekend away.
>
> Hockey tickets: Free
>
> "Extra Shit": About $250.00
>
> Hotel room: $269.00
>
> a RING (fuckin' stupid): $500.00
>
> telling me you love me one weekend and that it's over the next weekend, and trusting me with these pics....
>
> . . . . .
>
> "PRICELESS"

The message also contained additional profanities about Ms. J.

Mr. W then emailed the collage to his friend, and saved the image into a folder on his file sharing program. The email was shared among other people and eventually Ms. J found out about it. Ms. J confronted Mr. W about the images, which he initially denied but later admitted. Another friend emailed the collage to Ms. J's father with the subject line "Daddy look what I've become", another person put the collage on her locker at school. Ms. J then took the image to the principal of her school, who called the police.

Mr. W admitted he took the photos and shared them with his friend. He pleaded guilty to making and distributing child pornography. The Crown withdrew the accessing charges. A sentencing report stated Mr. W had little remorse. Mr. W's lawyer said Mr. W had written a letter of apology but had never sent it because of a no-contact order, he also claimed he never intended to share the images online and did not realize they were child pornography.

Ms. J submitted a sixteen page victim impact statement.

Mr. W sought a sentence in the community, but he was sentenced to two years in jail and three years' probation. Additional orders included a ban on possessing any internet connected devices during his probation.

He appealed his conviction, sought to set aside his guilty plea, and his sentence.

The Court of Appeal affirmed his conviction, finding that although the trial judge did not make a plea inquiry and Mr. W claimed his lawyer had not properly informed him he may go to jail, there was no evidence that Mr. W complained to his lawyer about the plea or he was forced to plead guilty. The lawyer's communication with Mr. W was brief, but there was no evidence that his lawyer told Mr. W he would go to jail. Mr. W also tried to argue he would have raised the defence of artistic merit or medical merit, but there was nothing on the record to show that the appellant had denied the facts that supported his guilt or showed medical or artistic merit at the lower court.

The Court of Appeal did allow Mr. W to appeal his sentence. It noted this was not the typical child pornography case and reduced the sentence to eight months and removed the internet prohibition.

lv. 2004 CanLII 14199 (ONCA)

In **2004 CanLII 14199**, Mr. H was convicted of 43 charges of sexual assault, sexual interference, invitation to sexual touching, and possessing, distributing and importing child pornography.

He was between the ages of 13 and 23 when the offences occurred. An undercover police officer posing as someone looking for child pornography online connected with Mr. H who discussed his sexual contact with children and child pornography. They set up a meeting and Mr. H was arrested. Mr. H had been sexually abusing younger boys he befriended in his youth, and his friend's male and female children, and children he met at a park as an adult. He showed child pornography to the children he met at the park and made child pornography of them. He also had a large collection of child pornography on his computer.

The trial judge sentenced him to time served (30 months in pre-trial custody) and three years' probation, but dismissed his dangerous offender application, with lifetime limitations on being in contact with children, and a DNA order.

On appeal the Court held that the trial judge erred when dismissing the dangerous offender application because the sexual assaults did not pass a high seriousness threshold and that the circumstances surrounding the offence did not place the offender in the worst category. Sexual assault is a serious personal injury offence, regardless of the circumstances, and Mr. H had a long history of sexual offences against children and had a high risk of reoffending. Mr. H was declared a long-term offender. His sentence was varied to four years and 10 months' time served and an eight-year community supervision order.

Also see: [2002] OJ No 2290 (ONCJ); [2002] OJ No 1783 (ONCJ).

lvi. 2003 CanLII 8797 (ONCA)

In **2003 CanLii 8797 (ONCA),** Mr. B, a 32-year-old man, had pleaded guilty to distribution of child pornography and invitation to sexual touching in relation to a minor. He had been communicating

with a 13-year-old girl on the internet, who was actually an undercover police officer. He had sent her some child pornography and arranged to meet her. He was arrested at that location and had brought condoms and oil. Mr. B was sentenced to a 12 months' conditional sentence and two years' probation, additional orders included a 10 year ban on being in contact with children and a DNA order.

Mr. B claimed had looked at pornographic material on the internet and was collecting images to make a website, he also blamed his actions on alcohol use.

On appeal, the Court dismissed the appeal and did not change his sentence.

See also: [2003] OJ No 904 (application for leave to appeal), [2002] OJ No 5831 (sentencing).

lvii. 1998 CanLII 4737 (ONCA)

In **1998 CanLII 4737 (ONCA),** Mr. L was convicted of possessing child pornography.

He appealed his sentence.

The appeal court concluded that a jail sentence was appropriate and a conditional sentence "was inappropriate in the circumstances of this case which involved the distribution of child pornography in order to obtain more child pornography."

The appeal was dismissed.

lviii. 1995 CanLII 2283

In **1995 CanLII 2283 (ONCA)**, Mr. S, a 67-year-old man, pleaded guilty to possessing child pornography.

Mr. S had responded to an ad police put in a magazine in the United States offering to exchange child pornography. A search of his home resulted in a "substantial collection" of magazines, drawings, video cassettes, and other items containing child pornography, including scenes of bestiality and portraying incest.

He was sentenced to 18 months in jail.

He appealed his sentence.

The court stated:

> The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense possessors such as the appellant instigate the production and distribution of child pornography -- and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

The appeal judge found that Mr. S's collection of child pornography was "substantial and varied", but was a "67 year old man who has hitherto led an unblemished life." The sentence was reduced to 10 months in jail.

lix. 1995 CanLII 1897 (ONCA)

In **1995 CanLII 1897 (ONCA)**, Mr. J and Mr. G were convicted of multiple child pornography and sexual offences related to young girls and boys. The charges included making obscene material, making child pornography, possessing pornography, invitation to sexual touching, sexual touching, and anal intercourse (which was set aside due to its unconstitutionality).

A bag of 40 home video tapes featuring sexual abuse against young males were found in a river by a fisherman. In 1993, Mr. G and Mr. J learned of the new crime of possessing child pornography and decided to give the videos to someone to get rid of the videos for them. However, Mr. G continued to make child pornography videos after disposing of the bag.

33 videos seized from Mr. G's apartment and from the river were child pornography filmed by Mr. G consisting of 77 separate filming sessions. There were 10 children and 35 incidents of making child pornography over at least 22 separate days. The children were three boys between 11 and 13 years old and nine boys and young men between 14 and 18 years old.

Adults were filmed engaging sexually with some of the boys and some of the boys were instructed on how to act sexually. Mr. G paid the boys, who were economically marginalized and from dysfunctional homes, for their participation. The videos were not sold or distributed commercially. The court did not watch any of the videos but the graphic material was confirmed by Mr. G and Mr. J's lawyers.

Mr. J had a history of secretly filming his sexual activity with children and young adults and showing them to select friends. Some of these videos were located from the bag found in the river. The videos showed "extensive sexual contact" with boys as young as 10 years old. He had also paid some of the boys to film the sexual activity. There were 24 video tapes with 12 children. Like the children in Mr. G's videos, the children were marginalized and Mr. J provided them with somewhere to spend time as well as gifts and trips.

Other commercial child pornography and videos were found in the possession of Mr. G and Mr. J, some of which involved child abuse. Mr. G showed the boys pornography to groom them.

On the influence of technology on pornography, the court stated:

> The conduct underlying these convictions discloses a subculture that is unsettling and repugnant. These appeals confront the court with the pressing issue of how to deal

> with offenders such as the appellants who prey on young persons, boys in this case, for no other purpose than their own sexual gratification. The court must be responsive to emerging concerns that pornography, particularly child pornography, has become an area of criminality that increasingly menaces our young people and threatens our values as a society. Because pornography now can be so easily prepared and disseminated through relatively inexpensive means, such as the hand-held video camera used in the case under appeal, it has emerged as a very real problem in our society.

The court stated that Mr. G's worst offence was making child pornography, Mr. J's worst was having sexual contact with young boys. At trial, Mr. G, a 61-year-old man, was sentenced to 10 years' imprisonment. Mr. J, a 42-year-old man, was sentenced to 15 years' imprisonment.

Both Mr. J and Mr. G appealed their sentences and the Appeal Court found that the sentences were disproportionate to the crimes committed and reduced Mr. G's sentence to five years and Mr. J's to seven years. The Court also set aside the order that they must serve at least half of their sentence before applying for parole and altered the orders related to being in contact with children.

Also see: [1994] OJ No 697 (Sentencing); [1994] OJ No 698 (Sentencing).

X. QUEBEC

i. 2018 QCCA 824

In **2017 QCCQ 8152,** Mr. R, a 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.

Mr. R contacted the child, Ms. A, over Facebook, who was 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 sentenced to two years' incarceration.

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

ii. 2018 QCCA 1516

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, he commented over MSN 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 two 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. The two 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 refused to visit her in the hospital. After this, at 16 years old, she reported 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 QCCA 1205

In **2017 QCCQ 11203**, Mr. I, now 52 years old, pled guilty to making child pornography accessible and possession of child pornography.

He used an online sharing software, Gigatribe, to exchange photos privately with other members. A police investigation traced 6 images qualifying as child pornography back to Mr. I's IP address. His hard drive was found to contain an additional 807 videos and 11039 photos of child pornography, of both boys and girls aged 0 to 12.

Mr. I was sentenced to 18 months' incarceration, and his appeal of the sentence was rejected.

Also see: 2018 QCCA 1205 (appeal).

iv. 2018 QCCA 597

In **2018 QCCA 597**, the accused, who was a minor, discovered he could see into the basement bedroom of his 13-year-old female neighbour when her blinds were open. On three occasions he attached a cellphone to the end of a hockey stick and managed to take photographs of his neighbor when she was nude or semi-nude in her bedroom. The accused then shared 11 photos of the

victim with Mr. Y, who added them to the collection of nude photographs of the females in his region. The collection of photos was shared with other individuals, one of whom recognized the victim and informed her of the photographs.

The accused was convicted on voyeurism and child pornography charges and was given a conditional sentence. On appeal, he was found guilty of the child pornography offences, for which he was given a conditional sentence, and the voyeurism charge was stayed according to the *Kienapple* principle.

Also see: 2017 QCCA 1143 (Appeal).

v. 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 sending 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 in jail.

vi. 2018 QCCA 306

In **2017 QCCQ 5585**, Mr. R pled guilty to multiple pornography charges spanning from 1998 to 2015, including distributing, possessing, and accessing child pornography. A police investigation traced three child pornography posts back to Mr. R's home IP address. A subsequent 71,548 photos and 2,407 videos were found in his possession, stored on CDs and floppy discs. The content was of young girls, 0 to 12 years old, posing nude or involved in sexual acts. The court described the images as degrading, disgusting, and beyond the imagination.

Mr. R was 55 years old at trial and was a victim of sexual abuse at 14 years old.

He was sentenced to 18 months incarceration, which was augmented to 36 months on appeal by the Crown.

See 2018 QCCA 306 (appeal of sentence).

vii. 2017 QCCQ 8005

In **2017 QCCQ 8005**, Mr. J and Ms. M, both currently 42 years old, pled guilty to sexual offences committed against Ms. M's son, who was three to four years old during the offences. They both pled guilty to sexual assault of a minor with the help of another person and the making of child pornography. Ms. M also pled guilty to possession and distribution of child pornography.

Mr. J and Ms. M met online in 2012 on a website for those looking to find new sexual partners. Their relationship lasts almost two years, during which they have an active sex life, including different partners. They included Ms. M's son into their sexual relations on seven occasions. This included the son being masturbated, sexually touching his mother, receiving oral sex from his mother, and having the sexual relations captured on her cellphone.

A police investigation of online child pornography led to their arrest, as images were traced back to Mr. J's work IP address. They found 615 images of child pornography on his computer, with children ranging from 0 to 10 years old. These photos included nude children, sexual relations

between children, sexual relations between children and adults, including anal sex. Ms. M was identified from one of the videos and her son was identified from her Facebook profile. Six videos were found on Ms. M's cellphone involving her son, including one where she is giving him oral sex but stops to change his diaper because he smells of urine. Over 60 images of him involved in sexual acts were also found. Some of the child pornography was exchanged between Mr. J and Ms. M, and also with other strangers.

Ms. M was sentenced to eight years' incarceration and Mr. J to nine years' incarceration.

viii. 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 bes-

tiality. 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.

ix. 2015 QCCQ 4509

In **2015 QCCQ 4509**, Mr. S 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.

He committed these offences against girls aged 12 to 16 across multiple Quebec cities. 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-year-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 with alcohol. These encounters sometimes also involved 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 found guilty of 47 of the 52 offences for which he was charged.

He was sentenced to 9 years' incarceration.

Also see: 2016 QCCQ 7602 (sentencing).

x. 2012 QCCA 1138

In **2009 QCCQ 20918**, Mr. B was convicted of nineteen counts of possession and distribution of child pornography.

Mr. B has a long history of sexual deviance, sexual aggression, and prior child pornography charges. He was designated as high risk of reoffending by several psychologists. At the time of these offences, Mr. B was on probation and was prohibited from being near minors. Over a two-week period, he entered two different elementary schools where he hid in the bathroom stalls

and took pictures of young girls, typically 6-years-old or younger, while they were in the bathroom. On three occasions the children informed a parent or teacher about the incident.

Mr. B was designated as a dangerous offender and was sentenced to an indeterminate time of imprisonment.

The accused appealed the trial decision, claiming that the court did not prove his actions constituted serious personal injury.

The appeal was dismissed.

Also see: 2012 QCCA 1138 (Appeal).

xi. 2012 QCCS 206

In **2012 QCCS 206**, Mr. B was charged with making child pornography, distributing child pornography, possessing child pornography, voyeurism, and inciting a person under 16 to touch him.

The police seized thousands of child pornography photos and hundreds of videos involving children between the ages of one and twelve-years-old. Mr. B posted images of his daughter on the internet to get men to talk with him about their fantasies about children. Mr. B did not deny any of the allegations made against him, save the charge of invitation to touching, but sought to review his pre-trial detention. The court found that there were not sufficient conditions for him to be supervised and his motion was dismissed.

xii. 2011 QCCA 2387

In **2011 QCCA 6888**, Mr. G was found guilty of voyeurism for filming a very young girl using the bathroom.

A police search of Mr. G's home resulted in the discovery of 175 different videos and 10 photographs containing child pornography. One video showed Mr. G installing a camera in a public washroom which captured the image of an eight-year-old girl urinating. Mr. G was found guilty of making and possessing child pornography. He was also found guilty of breaching his recognizance which included a court order to keep good behaviour when he yelled at two young girls, aged 12 and 14, demanding that they show him their breasts and vagina.

On appeal, the court reduced his sentence to 18-months' incarceration and three-years' probation. Additional orders included limitations on being in the presence of minors, and a prohibition from owning devices that could access the internet, take photographs or film.

Also see: 2011 QCCA 2387 (Appeal), 2011 QCCA 1398 (Appeal), 2011 QCCQ 991 (Evidence).

XI. SASKATCHEWAN

xiii. 2019 SKCA 17

In **2019 SKCA 17**, Mr. R was convicted of possessing, accessing and making child pornography. He was acquitted of sexual assault and sexually touching a child.

Mr. R admitted to his Bible group he was attracted to children. He hugged a female child at the group and groped her buttocks. The girl's father reported Mr. R to the police. Upon searching his home, the police found images of child pornography on Mr. R's computer, including images of him masturbating to images of videos of child abuse, a photoshopped image that made it appear that he was sexually touching a young girl, and a picture of him masturbating while looking at an image of a young girl in a dress. Mr. R admitted to always being attracted to very young girls. He had been convicted of possessing and accessing child pornography in the past.

The court found that Mr. R made child pornography when he edited or filmed himself into the images. He created new images of child pornography by doing so, the images were made for a sexual purpose. Mr. R was designated as a long-term offender and sentenced him to six years in jail. Additional orders included a lifetime registration as a sex offender, a DNA and limitations on being near young people. The private use defence was not available to him, due to the young age of the girls in the images.

He appealed the conviction and sentence. He argued his rights to be free of unreasonable search and seizure were breached, challenged the character evidence brought against him, challenged the trial judge's interpretation of making child pornography and argued that his trial took too long.

At the appeal court, first, the appeal judge found that the search was done with a warrant and did not breach his search and seizure rights. Secondly, the material entered on his character was not relied on by the judge to make a decision. Third, Mr. R had inserted or photoshopped himself into some videos and images, which was considered making child pornography. The appeal court found that the images were either a visual representation of sexual activity with children, or one that advocated or counseled it. Fourth, the court found that the delays were mainly by Mr. R's own making and the timing did not "markedly exceed" the reasonable time for the case.

His appeal of his conviction was dismissed.

He also argued his sentence was unfit.

The appeal court found his designation as a long-term threat was appropriate. He had previous offences and was deemed at risk to cause future harm to children. His sentence was altered so that two of the concurrent sentences were lowered to 4.5 years each, to better reflect "so-called 'Photoshop' cases". However, even with these adjustments the total sentence was still a six-year global sentence.

Also see: 2016 SKQB 330, 2015 SKQB 353, [2019] SCCA No 112.

xiv. 2018 SKCA 94

In **2018 SKCA 94**, Mr. C was sentenced to 11 years and 3 months incarceration after pleading guilty to sexual assault, sexual interference, making and possessing child pornography, and incest.

He has four children, two of whom were the complainants. He sexual abused his daughter Ms. Z from when she was 11 to 13 years and Ms. I from when she was 10 to 11 years old. He would digitally penetrate, have vaginal intercourse with, use dildos on, and request oral sex from Ms. Z. He would have her watch child and bestiality themed pornography. The sexual abuse included her once being tied up with a dog collar and having her legs and wrists bound prior to sexual intercourse. He also used sex toys on Ms. I and she was made to perform oral sex on Mr. C every week. He took naked photos of both of them, at his home and work, either simply nude or with sex toys in their vaginas. He was reported to the police when his wife found these photos and other child pornography on his computer under recently viewed files.

He has an extensive history of sexual offences against minors dating back three decades. Appeal of sentence by the Crown was dismissed.

Also see: 2017 SKQB 24 (Sentencing).

xv. 2017 SKCA 88

In **2017 SKCA 88**, Mr. U pleaded guilty to possessing child pornography and making child pornography available.

At trial the court found that his right to be free from an unreasonable search and seizure had been violated. The search warrant was not clear on whether it allowed for a search of the whole

residence or the basement suite where the evidence was found. However, the court held that the evidence would still be included. When this was decided, Mr. U pleaded guilty.

He was sentenced to 16 months in jail and three years' probation.

Mr. U appealed his decision, and tried to argue that the trial judge made a mistake in including the evidence but the appeal judge found that there was no basis for this argument to be made.

The appeal was dismissed.

xvi. 2016 SKCA 93

In **2016 SKCA 93**, Mr. M pleaded guilty to 11 counts of luring, extortion, child pornography offences, and sexual interference.

He was 18-years-old at the time of the offences and targeted four girls between the ages of 12 and 14 years old. Mr. M established individual relationships with these girls and then convinced them to send sexually explicit photos to him via text and internet messaging. He put extensive pressure on the girls to send images and directed them to engage in specific sexual activities in the photos.

In the appeal, the Court emphasized the special vulnerability of children to internet-based sexual offences. His original sentence of two years less a day and three years of probation was increased to three years of incarceration. Ancillary orders included a no-contact order, required counselling, prohibition from possessing devices capable of accessing the internet, providing a DNA sample and being registered as a sex offender.

xvii. 2016 SKQB 123

In **2016 SKQB 123,** Mr. G, a 27-year-old man, pleaded guilty to making child pornography available and possessing child pornography.

He was discovered while interacting with an undercover police officer online, who Mr. G provided access to 25 child pornography files via file sharing network. The undercover officer also captured screenshots of 2,126 other files. Under a warrant, the police seized Mr. G's computer, laptop and two "DataLocker" external hard drives that had military grade encryption on them and could not be opened. Mr. G was charged at the first trial on the evidence that was accessible. He was warned that when the police cracked the hard drive there could be additional charges. He was sentenced to two years less a day incarceration, and three years' probation.

When the police were able to crack the encryption on the hard drives some time later, they uncovered 12,775 unique images and videos surreptitiously taken of boys in a changing room and one of a boy urinating, that were focused on the boys' genitals. The videos were of boys under his care as a volunteer with the Big Brothers Big Sisters organization. Mr. G was further charged with voyeurism, possessing child pornography and making child pornography. The accused pled autrefois acquit and autrefois convict but failed to establish a basis for these pleas. Mr. G later pled guilty to the offences. His failure to assist in the investigation was not an aggravating circumstance and the surreptitious filming of the child pornography was considered at the "lower end" of the scale, but the fact that he was in a position of trust to the boys he filmed and the sheer number of child pornography images he had was an aggravating factor. He was sentenced to 29 month's incarceration, three years' probation and ancillary orders including a DNA order, a lifetime registration as a sex offender, a five-year prohibition from being near places where people under the age of 16 are, a five-year prohibition from using a computer to communicate with people under 16, and a forfeiture order.

Also see: **2015 SKQB 372** (Application for autrefois acquit and autrefois convict).

xviii. 2015 SKQB 408

In **2015 SKQB 408,** Mr. T was charged with various counts of sexual assault, invitation to sexual touching, voyeurism (observing, not recording), making child pornography available, sexually touching a person under the age of 16, and exposing his genitals to a person under the age of 16.

The victims were his two underage daughters. He pleaded not guilty. This case was in regards to whether recorded statements of the victim could be edited or redacted, which was permitted, and whether the victim could provide her testimony using a mode of shielding. The court held that a screen was permissible.

xix. 2014 SKCA 126

In **2014 SKCA 126,** the Crown appealed the sentence of Mr. N who had been convicted of sexually touching, sexual exploitation, making child pornography, and possessing child pornography of his granddaughter while she was between the age of three and five years old.

While babysitting, he would massage her vagina through her diaper under the guise of a game, sexually touch her, put his penis in her mouth or hand, show her pornography, and take photos of her genitalia. He also possessed other child pornography.

The appeal court found the age of the victim carried great weight and increased the sentence from four years of incarceration to five years.

Also see: [2014] 117 WCB (2d) 656 (Sentencing).

xx. 2013 SKCA 99

In **2013 SKCA 99**, Mr. J, a 40-year-old man, was convicted of possessing child pornography.

The police located child pornography Mr. J was sharing on a file sharing site on his computer. There was evidence Mr. J had searched for this type of pornography on a file sharing site.

He was acquitted of accessing child pornography because it was unclear when he had accessed it online on the dates listed in the indictment. He was acquitted of distributing child pornography because it was not clear whether he knew he was sharing the files while using the file sharing program.

He appealed his conviction on the possession charge and the Crown appealed his acquittal on accessing child pornography. Mr J's appeal of his conviction was dismissed, the trial judge did not make a mistake when considering the evidence that Mr. J was the "dominant user" of the computer the child pornography was on and there was no air of reality that anyone else downloaded the content. The Crown's appeal was allowed as the date Mr. J accessed the child pornography was not an essential element of the offence. He was found guilty of accessing child pornography but the conviction was stayed on the *Kienapple* principles.

Also see: 2018 SKQB 68; 2012 SKQB 277 (Trial).

xxi. 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.

Mr. S communicated with an undercover officer presenting as a 14-year-old girl on the internet, and sent 10 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 begun 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 step-daughter.

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 defence, 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 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 the person in the photo.

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.

xxii. 2012 SKCA 4

In **2012 SKCA 4**, Mr. B, an 18-year-old man, had been convicted of possessing and distributing child pornography.

A police officer had located child pornography on the internet that was affiliated with an IP address in Saskatchewan. Mr. B and his parents lived in the home associated with the IP address. A search warrant of the house resulted in child pornography on two computers, several CDs and several DVDs, as well as evidence that two file sharing programs had been used on the computers. Several thousand images of child pornography were discovered, including some images that had been deleted from the computers.

He was sentenced to 15 months' imprisonment and three years' probation. Additional orders included a 20-year registration as a sex offender, a DNA order, and a three-year limitation on being near children. He appealed his conviction and sentence.

On appeal, Mr. B first argued the trial judge could only consider "computer images" and that the bulk of the images were on the discs not the computer and were therefore not computer images as listed in the description of his crime. However, the court disagreed and found all the images were computer images. Second, he argued that because the images on his computer had been deleted, he had not intended to possess the images. However, the court found that he had sufficient knowledge of file sharing systems and had intentionally downloaded the child pornography, intending to possess it, even if only briefly. Third, he argued that he had not intended to share the images with the officer, that he normally had the sharing option off and that the default settings of the program were responsible for the sharing that occurred. However, the court found that the officer had viewed the images from Mr. B's files even if they hadn't been transmitted or downloaded due to bandwidth issues, and the sharing function of the program was turned on. The court found Mr. B to be knowledgeable enough about computers to know about these functions and options for sharing. His conviction was upheld on appeal.

He also appealed his sentence, but the appeal court found no error in the sentencing.

His appeals were dismissed.

Also see: 2010 SKQB 459 (Trial).

xxiii. 2011 SKCA 143

In **2011 SKCA 143**, Mr. T was convicted of making available, accessing and possessing child pornography.

The police were conducting an investigation into people who were using file sharing programs to share pornography. Mr. T was using one, he had files with child pornography on them that he had downloaded and were accessible to others to download. The police asked his internet service provider to give them information related to the IP address associated with the child pornography images at a particular time. The company provided the police the name, address, email, and telephone numbers of the person associated with the IP address and confirmed he was on the internet at that time. The police then searched his computer and found child pornography in his file-sharing folder.

He was sentenced to 13 months in jail, three years' probation. Additional orders included a three-year prohibition on being near young people, a DNA Order and a 20-year registration as a sex offender.

The majority of the judges at the Court of Appeal found that Mr. S had a reasonable expectation of privacy in his IP address as it was private and confidential and could potentially reveal a lot of information about a person and their online activity. In this case, information about who may have accessed child pornography. The company was not allowed to release that information without consent or under lawful authority.

However, they found that the police request for the information was a reasonable search. According to the judgement, the company was able to disclose the information under the terms of service of the company, and had the lawful authority – the judge interpreted federal privacy law *PIPEDA* section 29(2) as allowing for the discretionary and lawful disclosure to a law enforcement agency carrying out a lawful investigation– to do so. It further found that because the information was held by a third party, the internet company, it was a less intrusive search.

The court also held that the police had lawful authority to conduct the search: Section 487.014 of the Criminal Code allowed for a person to voluntarily provide information to another, which the internet company did.

A concurring judge agreed with the dismissal of the appeal but for different reasons: He did not find that there was a reasonable expectation of privacy in Mr. T's name, address and phone number associated with his IP address.

The appeal was dismissed.