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Social Media Crime in Canada: Annotated Criminal Code, R.S.C., 1985, c. C-46, 2nd ed.

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Social Media Crime in Canada:
Annotated *Criminal Code*, R.S.C., 1985, c. C-46

2nd Edition

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Introduction

Over 80% of Canadians use the Internet and approximately 20 million Canadians are active on social media networks.[1] It is not surprising that criminal activity is taking place in these global digital communities and this is raising challenges for criminal law and the criminal justice system.[2] The Supreme Court of Canada recently recognized in *R. v. K.R.J.*[3] that "[t]he rate of technological change over the past decade has fundamentally altered the social context" in which certain crimes are occurring and social media networks have given "unprecedented access to potential victims and avenues" for offending.[4]

This annotated *Criminal Code* aims to be a resource for scholars, judges, Crown prosecutors and defence counsel, police, and others interested in social media and criminal law. After the relevant *Criminal Code* provisions in **bold**, a brief description of the general law related to them appear, followed by a more detailed set of case summaries that describe the application of each provision in the social media context. These summaries are concise enough to identify potentially relevant judicial decisions quickly so that readers can then consult the full decisions. The following offences are covered in this annotated *Criminal Code*:

- Participation in the activity in a terrorist group (s. 83.18)
- Counselling the commission of an indictable offence for the benefit of, at the direction of or in association with a terrorist organization (ss. 2, 83.24-27, 464)
- Public mischief (s. 140)
- Sexual interference (s. 151)
- Invitation to sexual touching (s. 152)
- Sexual Exploitation (s. 153)
- Voyeurism (s. 162)
- Child pornography (s. 163.1)
- Luring a child (s. 172.1)
- Indecent acts (s. 173)
- Criminal harassment (s. 264)
- Uttering threats (s. 264.1)
- Sexual assault (s. 265)
- Inciting hatred (s. 319)
- Unauthorized use of a computer (s. 342.1)
- Extortion (s. 346)

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1 Statistics Canada, "Police-reported cybercrime in Canada, 2012", by Benjamin Mazowita & Mireille Vézina, in *Juristat,* Catalogue No 85-002-X (Ottawa: Statistics Canada, 2014); Shea Bennett, "59% use Facebook in Canada (LinkedIn: 30%, Twitter: 25%, Instagram: 16%)", *Ad Week,* (February 4, 2015), online: <http://www.adweek.com/socialtimes/canada-social-media- study/614360>.

2 Maryke Silalahi Nuth, "Taking Advantage of New Technologies: For and Against Crime", (2008) 24:5 Computer L & Security Rev 437; Thaddeus Hoffmeister, "The Challenges of Preventing and Prosecuting Social Media Crimes", (2014) 35:1 Pace Law Review 115.

3 *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 SCR 906.

4 *Ibid*, para 102.

Participation in activity of terrorist group

83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Prosecution
(2) An offence may be committed under subsection (1) whether or not
- **(a) a terrorist group actually facilitates or carries out a terrorist activity;**
- **(b) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or**
- **(c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.**

Meaning of participating or contributing
(3) Participating in or contributing to an activity of a terrorist group includes
- **(a) providing, receiving or recruiting a person to receive training;**
- **(b) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;**
- **(c) recruiting a person in order to facilitate or commit**
  - **(i) a terrorism offence, or**
  - **(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence;**
- **(d) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and**
- **(e) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit**
  - **(i) a terrorism offence, or**
  - **(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence.**

Factors
(4) In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused
- **(a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;**
- **(b) frequently associates with any of the persons who constitute the terrorist group;**
- **(c) receives any benefit from the terrorist group; or**
- **(d) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.**

2001, c. 41, s. 4.

* * * * *

General case law

Essential elements — The *actus reus* of this offence is direct or indirect participation in, or contribution to, a terrorist group's activity. S. 83.18(3) provides a list of behaviours to assist in determining what amounts to participation or contribution; s. 83.18(4) provides additional indicia of participation and contribution. This list does not expand the normal meaning of participation or contribution, it "simply allows the courts to 'consider' the factors identified".[1] S. 83.01(1) of the *Criminal Code* defines "terrorist activity" and "terrorist group" for the purposes of 83.18, with s. 83.05 providing a non-exhaustive list of "listed entities" that qualify as terrorist groups.[2] The *mens rea* of this offence has two components: first, the impugned act must be done "knowingly"; second, the accused must have a subjective purpose of improving a terrorist group's ability to facilitate or carry out a terrorist activity.[3] A purposive analysis of s. 83.18 excludes convictions for "(i) innocent or socially useful conduct absent any intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity, and (ii) conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity."[4]

— [1]*United States of America v. Nadarajah*, 2010 ONCA 859, 09 OR (3d) 662, para. 18-19, aff'd *Sriskandarajah v United States of America,* 2012 SCC 70, [2012] 3 S.C.R. 609.

— [2]*United States of America v. Sriskandarajah,* 2010 ONCA 857, 109 OR (3d) 680, para. 17, aff'd *Sriskandarajah v United States of America,* 2012 SCC 70, [2012] 3 S.C.R. 609.

— [3]*United States of America v. Nadarajah*, 2010 ONCA 859, 09 OR (3d) 662, para. 22, aff'd *Sriskandarajah v United States of America,* 2012 SCC 70, [2012] 3 S.C.R. 609; *R. v. Khawaja,* 2012 SCC 69, [2012] 3 SCR 555, para. 46.

— [4]*R. v. Khawaja*, 2012 SCC 69, [2012] 3 SCR 555, para. 53.

***Charter* concerns — freedom of expression — fundamental justice** — The purpose of the terrorism legislation does not violate the *Charter* s. 2(b)'s protection of freedom of expression. There is also no evidence that the definition of "terrorist "activity" as per s. 83.01(1)(b)(i)(A) will have a chilling effect on freedom of expression. S. 83.18 is not overbroad, nor is its impact grossly disproportionate; as such, it does not violate s. 7 of the *Canadian Charter of Rights and Freedoms*.

— *R. v. Khawaja*, 2012 SCC 69, [2012] 3 SCR 555.

* * * * *

Social media case law

Evidence — The accused had, amongst other conduct, added a friend on Facebook from high school who had gone to Somalia to join Al-Shabaab, the terrorist group. This constituted evidence that the accused knew Al-Shabaab was a terrorist group.

— *R. v. Hersi,* 2014 ONSC 4414, 115 W.C.B. (2d) 289.

Counselling the commission of an indictable offence for the benefit of, at the direction of or in association with a terrorist organization

2 [...] "terrorism offence"

"terrorism offence" means

(a) an offence under any of sections 83.02 to 83.04 or 83.18 to 83.23,
(b) an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group,
(c) an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity, or
(d) a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a), (b) or (c);

*** * * * ***

83.24 Proceedings in respect of a terrorism offence or an offence under section 83.12 shall not be commenced without the consent of the Attorney General.

83.25 (1) Where a person is alleged to have committed a terrorism offence or an offence under section 83.12, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced at the instance of the Government of Canada and conducted by the Attorney General of Canada or counsel acting on his or her behalf in any territorial division in Canada, if the offence is alleged to have occurred outside the province in which the proceedings are commenced, whether or not proceedings have previously been commenced elsewhere in Canada.
(2) An accused may be tried and punished in respect of an offence referred to in subsection (1) in the same manner as if the offence had been committed in the territorial division where the proceeding is conducted.

83.26 A sentence, other than one of life imprisonment, imposed on a person for an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 shall be served consecutively to
(a) any other punishment imposed on the person, other than a sentence of life imprisonment, for an offence arising out of the same event or series of events; and
(b) any other sentence, other than one of life imprisonment, to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections.

83.27 (1) Notwithstanding anything in this Act, a person convicted of an indictable offence, other than an offence for which a sentence of imprisonment for life is

imposed as a minimum punishment, where the act or omission constituting the offence also constitutes a terrorist activity, is liable to imprisonment for life.

(2) Subsection (1) does not apply unless the prosecutor satisfies the court that the offender, before making a plea, was notified that the application of that subsection would be sought.

2001, c. 41, s. 4.

* * * * *

464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

(a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and

(b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 464; R.S., 1985, c. 27 (1st Supp.), s. 60.

* * * * *

General case law

Essential elements — S. 464(a) prohibits the counselling of an indictable offence, even where that offence is not committed by the person counselled. The *actus reus* for counselling is that the materials or statements made or transmitted actively induce or advocate, and do not merely describe, the commission of an offence. The *mens rea* is either of an intention that the offence counselled be committed, or knowingly counselled and was reckless as to whether the offence would be committed.[1] S. 2 describes a "terrorism offence", and states that the counselling of any of the proscribed terrorism offences is itself a terrorism offence. Ss. 83.24-83.27 provide for special procedures and sentencing provisions related to terrorism offences, most notably that they are subject to a maximum punishment of life imprisonment. This provision has been found not to offend the totality principle.[2]

— [1] *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432.

— [2] *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555.

* * * * *

Social media case law

Evidence — *Charter* s. 7 — Police techniques to preserve evidence of social media activity — The accused had created a number of pro-ISIS Facebook pages, and made frequent posts on those pages, all of which were alleged to constitute counselling the commission of

indictable offences for the benefit of, at the direction of, or in association with a terrorist organization. The defence challenged the admission of screenshots of those posts based on s. 7 of the *Charter*, and ss. 31.1-31.8 of the *Canada Evidence Act (CEA)*, which deals with the admission of electronic documents. The defence argued that the screenshots were an insufficient method of preserving the posts as evidence. They argued that, instead, the police ought to have used forensic-grade software, which had been demonstrated to be available to them, to preserve the code underlying the posts, including any associated metadata, so as to allow for a later reconstruction of the entire post, including any surrounding context from the page on which the post was located.

The court found that the Crown had failed to establish the integrity[1] of the documents. The police officers that took the screenshots did not believe that they would be used as evidence in court, but only to generate further leads. As a result, they did not fully expand some truncated posts, and some screenshots contained artefacts that blocked part of the relevant post. This meant that the screenshots could not be compared with metadata later received via a Mutual Legal Assistance Treaty request related to the Facebook posts. The posts were nonetheless found to be authentic, as the investigating police officers could testify that they matched what was visible to them on the computer screen. The court noted, however, that the issue of authorship, that is, whether the accused actually created the posts, was a factual issue to be resolved at trial.

Moving on to the best evidence rule, the court found that although the problems with the way that the screenshots were collected prevented the Crown from relying on the presumption of integrity under the *CEA*, nevertheless, they were the best available evidence, and ought to be admitted.

Turning to the *Charter* s. 7 argument, the defence had argued that the metadata and other information that might have been captured by a more skilful search, using more advanced software, would be relevant evidence that would meet the relevant test for disclosure. The defence submitted that the failure to do so, and the deletion of some original screenshots, amounts to the loss and destruction of evidence. The court rejected this suggestion, and found that, although some evidence may have been lost, the RCMP did not act with unacceptable negligence, and later took steps to preserve evidence. As a result, no breach of s. 7 was found.

— *R. v. Hamdan,* 2017 BCSC 676, [2017] B.C.J. No 986.
— [1]The court differentiated integrity from authenticity, noting that integrity requires that the documents be proven not to have been altered from their original form, whereas authenticity simply requires that the documents be confirmed to be what they purport or appear to be. Integrity is not to be addressed at the admissibility stage, but rather later upon weighing the evidence.

Evidence – *Charter* s. 8 – *Charter* s. 10 – The accused was charged with four terrorism counts arising from posts he made on Facebook. The defence brought a pre-trial application for a remedy under s. 24(2) of the *Charter* for s 8 and s. 10(b) violations. In a previous pre-trial application, *R v Hamdan,* 2017 BCSC 467, the BCSC addressed the s. 10(b) violation and found that the accused's s. 10(b) right was violated. The focus of this decision is the s. 8 violation, which occurred when the RCMP searched the accused's email accounts without judicial authorization. The Crown conceded that the s. 8 violation occurred.

The unlawful search was the result of a miscommunication between the officer who searched the accused's email accounts and that officer's superior. The court found that the search did not satisfy s. 24(2) because the impugned evidence was not obtained in a manner that denied or violated the accused's rights. Admitting the evidence would not bring the administration of justice into disrepute because the impact of the *Charter*-infringing conduct was relatively minor. In addition, the evidence was highly important to the case and likely unavailable from any other source. The defence application was dismissed.

— *R v Hamdan*, 2017 BCSC 867, 2017 CarswellBC 1397

Evidence — Collective assessment of Facebook posts — The accused was charged with four terrorism counts arising from posts he made on Facebook. Three of the counts were for counselling offences, which required the Crown to prove beyond a reasonable doubt that the accused "actively induced" others to commit the indictable offences. The Crown's position was that the Court could consider all 85 of the posts that were submitted as evidence collectively, as none of the posts could individually provide adequate proof of active inducement. The defence rejected that position, submitting that the posts were never meant to be read together as they were published in different contexts to different audiences over a ten-month period. The defence's position was that any inferences drawn from the posts collectively would be unreliable. The court rejected the Crown's argument, concluding that the collective content of the posts was inadequate to satisfy the Crown's onus to establish the actus reus of the offences. The court accepted that it is possible in some circumstances to infer or find active inducement from a series of posts or comments on social media. However, it found that it would be illogical and unreasonable to read the posts together in this case because the collection of posts was very large and covered many topics.

One particular post contained graphic details about how "lone wolves" may commit murder or assault, and invited "brothers of Islam in Egypt seeking jihad" to listen to that description. The court concluded that the post appeared to be an active inducement to others to commit murder and assault. However, based on missing context and the accused's evidence about that missing context, the court did not accept that post as proof beyond a reasonable doubt. The court also found that the Crown could not rely on the "lone wolf" post with respect to the count of inducing others to commit the offence of mischief in relation to property for the benefit of, at the direction of or in association with a terrorist group. As a result, the court found the accused not guilty on all counts.

— *R v Hamdan*, 2017 BCSC 1770, 2017 CarswellBC 2708

Public mischief

140 (1) Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by

- **(a) making a false statement that accuses some other person of having committed an offence;**
- **(b) doing anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself;**
- **(c) reporting that an offence has been committed when it has not been committed; or**
- **(d) reporting or in any other way making it known or causing it to be made known that he or some other person has died when he or that other person has not died.**

Punishment

(2) Every one who commits public mischief

- **(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or**
- **(b) is guilty of an offence punishable on summary conviction.**

R.S., 1985, c. C-46, s. 140; R.S., 1985, c. 27 (1st Supp.), s. 19.

* * * * *

General case law

Essential elements — The *actus reus* of this offence can be any of the actions outlined in s. 140(1)(a) to (d), provided that they cause a peace officer to begin or continue an investigation. The meaning of "offence" under s. 140 extends beyond crimes in the *Criminal Code*; it is equivalent to a "breach of law involving penal sanction".[1] It is unnecessary to establish on a *voir dire* the voluntariness of statements alleged to constitute the *actus reus* of a s. 140 offence.[2] "Reporting" can be to entities other than the police, such as the Children's Aid Society or a prison official. If these organizations refer the report to the police, and the accused "intends that the police act upon it", then all essential elements have been met.[3] The *mens rea* of this offence is a specific intent to mislead a peace officer. Situations where a police officer does not, in fact, embark on an investigation, but the accused does have the requisite intent in making the false report, can be dealt with as an attempt to commit this offence.[4]

— [1]*R. v. Howard* (1972), 3 O.R. 119, 7 C.C.C. (2d) 211 (ONCA).
— [2]*R. v. Stapleton* (1982), 134 D.L.R. (3d) 239; 26 CR (3d) 361 (ONCA).
— [3]*R. v. Delacruz* (2009), 249 C.C.C. (3d) 501, 87 W.C.B. (2d) 55 (ON SC) at para. 15., aff'd in *R v. Delacruz*, 2013 ONCA 61, 105 W.C.B. (2d) 437.
— [4]*R. v. Whalen* (1977), 34 C.C.C. (2d) 557, [1977] B.C.J. No. 1097 (PC) at para. 9-10, cited with approval in *R. v. Poirier* (1989), 101 N.B.R. (2d) 67, 52 C.C.C. (3d) 276 (NBCA).

* * * * *

Social media case law

Definition of "Swatting" — "Swatting involves tricking an emergency service agency into dispatching an emergency response based on a false report of an ongoing critical incident.

Swatting can lead to the deployment of a range of emergency response teams including police, fire and bomb squads and the evacuation of businesses, schools or other public institutions."
— ***R. v. B.L.A.*, 2015 BCPC 203, 123 W.C.B. (2d) 85, para. 4.**

Sexual interference

151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

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

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

R.S., 1985, c. C-46, s. 151; R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 3; 2008, c. 6, s. 54; 2012, c. 1, s. 11; 2015, c. 23, s. 2.

* * * * *

General case law

Essential elements — The *actus reus* of this offence is directly or indirectly touching any part of the body of a person under 16 years, either with the accused's body parts or an object. The *mens rea* requires specific intent to touch for a sexual purpose.[1] An "accused who intends sexual interaction of any kind with a child and with that intent makes contact with the body of a child 'touches' the child and is guilty" of sexual interference.[2] Where the accused is found guilty of sexual assault and sexual interference, the *Kienapple* principle may prevent multiple convictions.[3]

— [1] *R. v. Bone* (1993), 85 Man. R. (2d) 220, 81 C.C.C. (3d) 389 (MBCA).

— [2] *R. v. Sears* (1990), 66 Man. R. (2d) 47, 58 C.C.C. (3d) 62 (MBCA).

— [3] *R. v. C.G.F.*, 2003 NSCA 136, 219 N.S.R. (2d) 277, para. 38-39; *R. v. R.C.M.*, 2007 NLTD 29, 798 A.P.R. 322; *R. v. Lonegren*, 2008 BCSC 1817, 81 W.C.B. (2d) 613; *R. v. Alyea* (1997), 100 B.C.A.C. 241, [1997] B.C.J. No. 2702, para. 3-4.

Consent no defence — S. 150.1 provides that the consent of the complainant is no defence to, among others, an offence under s. 151. This limitation is not a violation of s. 7 of the *Charter*.[1]

— [1] *R. v. Hann* (1992), 75 C.C.C. (3d) 355, 100 Nfld. & P.E.I.R. 339 (NLCA).

* * * * *

Social media case law

Establishing identity of accused as person who sent Facebook messages — "It defies rational belief that for two hours and forty-nine minutes…someone pretending to be [the accused] was sending and receiving approximately 80 Facebook messages on his account, while deleting each message so that [that accused], who was also on his Facebook account during that night, never saw any of the messages."

— *R. v. I.W.S.,* 2013 ONSC 4162, 107 W.C.B. (2d) 518, para. 123.

Establishing identity of accused as person who sent Facebook messages – The accused was charged with the sexual interference and sexual assault of his 4-year-old daughter. The

accused alluded to committing the offences in a Facebook communication with a family friend's daughter. At trial, the accused denied molesting his daughter, and also denied ever communicating with the family friend's daughter on Facebook. The court concluded that to believe someone other than the accused sent the Facebook messages would "strain credulity." Further, "[t]he accused's denial of that damning piece of evidence entirely undermines his credibility on the central issues," namely, his denial of the charged offences.
— *R. v. B.R.*, [2017] O.J. No. 3782, 2017 ONSC 4429, para 40, 54

Use of inculpatory Facebook messages — After having touched the complainant's breasts in her home while her parents were briefly absent, the accused returned to his home, and later sent the complainant an apology via Facebook messenger, which the accused then deleted before the complainant could show her parents. This apology, and another which was later received via text message to the complainant's mother, were found to be equivocal, and so were given little weight by the court.
— *R. v. Douglas,* 2017 CanLII 6878 (NL PC), [2017] N.J. No. 59.

Taking reasonable steps to ascertain complainant's age – The 15-year-old complainant told the accused that she was 24 years old. The court found that the complainant's stated age was not inconsistent with her appearance or the information on her Facebook profile. The court concluded that the evidence did not establish beyond a reasonable doubt that the accused did not take all reasonable steps to ascertain the complainant's age.
— *R. v. Konneh*, 2019 ABQB 3, 2019 CarswellAlta 17

Taking reasonable steps to ascertain complainant's age – The accused was charged with sexual interference and sexual assault. The court found that the complainant had pursued the developmentally delayed accused, who has an estimated grade four education. Taking this context into account, the court concluded the accused took all reasonable steps to ascertain the complainant's age — the accused asked the complainant for her age, but "received a coy response"; he checked her Facebook page and found no birthdate; he knew she was attending high school; and his belief that she looked older than sixteen was corroborated by a photo filed as an exhibit. The court acquitted the accused on both charges.
— *R. v. C.G.V.*, [2017] O.J. No. 6485, 2017 ONCJ 850

Taking reasonable steps to ascertain the complainant's age — The court noted that the complainant lied about her age and her Facebook profile picture "shows a young person trying to seem significantly older than her 14 years" (para. 9). However, while the complainant may have been manipulative, this was "[a]ll the more reason" the 40-year-old accused should have made more inquiries into the complainant's age before having sex with her (para. 56). The court convicted the accused of sexual interference and sexual assault.
— *R. v. Beckford,* 2016 ONSC 1066, 28 W.C.B. (2d) 298.

Taking reasonable steps to ascertain the complainant's age —Though there was no evidence as to whether the accused had access to the complainant's full Facebook profile, it was plausible that the accused saw the complainant's fake age on Facebook. This was one of eight factors that led the court to conclude there was reasonable doubt as to whether the

accused failed to take reasonable steps to ascertain the complainant's age. The court acquitted the accused of sexual assault and sexual interference.
— *R. v. Akinsuyi*, 2016 ONSC 2103, 129 W.C.B. (2d) 515.

Taking reasonable steps to ascertain the complainant's age —The 17-year-old accused had a sexual relationship with the 12-year-old complainant. Among other things, the court found the complainant lied about her age and posted pictures of herself on Facebook designed to make her look sexually mature. The accused immediately terminated the relationship after the complainant told him she was twelve. The court acquitted the accused of sexual assault and sexual interference.
— *R. v. R.R.*, 2014 ONCJ 96, 112 W.C.B. (2d) 302.

Taking reasonable steps to ascertain the complainant's age — The complainant listed her age as 16 on Facebook, when she was in fact 12. The court noted it was common for youth to lie about their age to gain access to Facebook, thus the complainant's behavior was not "particularly probative of dishonesty" (para. 47). On the facts, the court found the accused did not take all reasonable steps to ascertain the complainant's age, and thus convicted him of sexual assault (and directed a conditional stay of proceedings on the sexual interference charge).
— *R. v. Z.I.D.*, 2012 BCPC 570, [2012] B.C.J. No. 3079.

Taking reasonable steps to ascertain the complainant's age —The court accepted that the accused honestly believed the complainant was at least 16 or 17, in part due to the complainant's listed age on Facebook, and the "general tenor of her website pages…[as] trying to portray herself as someone much older than thirteen" (para. 22). Other factors included racial difference and the accused's recent arrival to Canada from St. Vincent. On the facts, the court found the accused to have taken reasonable steps to ascertain her age, and acquitted him of sexual assault and sexual interference.
— *R. v. Garraway*, 2010 ONCJ 642, 92 W.C.B. (2d) 210.

Subjective belief of the complainant's age – The BCSC accepted that the 53-year-old male accused held the subjective belief that the 14-year-old male complainant was 16. The court came to this conclusion in part based on evidence from the complainant's Facebook page, including the fact that his Facebook profile may have indicated that he was 16, and that it contained images in which he looked older. Ultimately however, the court determined that the accused failed to take all reasonable steps to ascertain the complainant's age before engaging in sexual activity with him, and the accused was convicted.
— *R. v. Angel*, 2018 BCSC 794

Honest but mistaken belief in the complainant's age – The accused was charged with sexual interference and sexual assault. "Notwithstanding that the Complainant's Facebook profile identified her as 16 years old and said she went to the high school in Community B, and she had used filters on her profile pictures to enhance her apparent age, I am satisfied that these factors did not cause the Accused to have an honest belief that she was 16 years old or older. The Accused testified that he only looked at a few of the pictures. He did not claim that the Complainant's Facebook profile or photographs led him to believe that she was 16."
— *R. v. J.M.,* [2017] N.J. No. 223, 2017 NLTD(G) 110, 139 W.C.B. (2d) 250, para 51

Constitutionality of retrospective application of s. 161(1) amendments — The 2012 s. 161(1) amendments empower sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age (s. 161(1)(c)), or from using the Internet or other digital networks (s. 161(1)(d)). The Supreme Court found that these amendments constitute punishment, and thus retrospectively applying them violates s. 11 of the *Charter*. Retrospective application of the s. 161(1)(c) contact provision fails the cost-benefit stage of the *Oakes* test, but retrospective application of the s. 161(1)(d) internet prohibition is saved by s. 1. Section 161(1)(d) is directed at "grave, emerging harms precipitated by a rapidly evolving social and technological context". Furthermore, an "Internet prohibition, while invasive, is not among the most onerous punishments, such as increased incarceration" (para. 114).
— *R. v. K.R.J.,* 2016 SCC 31, [2016] 1 S.C.R. 906.

Sentencing —The accused pled guilty to sexual interference and breach of probation. The court treated the accused's planned and deliberate contact of the victim through "Facebook (where teenagers live)" as an aggravating factor (para. 105).
— *R. v. Scott*, [2014] 1117 A.P.R. 179, 121 W.C.B. (2d) 609 (NLPC).

Sentencing — The accused pled guilty to sexual interference, invitation to sexual touching, and luring a child. Among other conditions, the court imposed a s. 161 prohibition order for life, which included a prohibition on using the Internet or other digital network, unless for employment, seeking employment, or education.
— *R. v. Stanley* (2014), 119 W.C.B. (2d) 419, [2014] O.J. No. 6378 (ONCJ).

Sentencing — The accused pled guilty to sexual interference and luring a child. The accused's Facebook messages to the victim were used as evidence to show the accused's manipulative behaviour and high risk for future sexual misconduct. The court thus emphasized the principles of denunciation and deterrence. Among other things, the court imposed a 3-year probation order that included a prohibition from owning, touching, or possessing any computer system or any other device capable of accessing the Internet.
— *R. v. Lamb*, 2013 BCPC 137, 107 W.C.B. (2d) 199.

Sentencing — The accused pled guilty to sexual interference and luring a child. Citing a report from the Sentencing Council for England and Wales, the court noted that the exchange of "sexual images" of the victim (in this case, over Facebook) was an aggravating factor (para. 11).
— *R. v. Nightingale,* [2013] N.J. No. 31, 104 W.C.B. (2d) 1235 (NLPC).

Sentencing — The accused pled guilty to sexual interference, invitation to sexual touching, sexual exploitation, harassment, and use of a forged document. All of the charges arose out of a six-year relationship that began when the complainant was 13 and the accused was 37. The accused was a firefighter who had acted as a first aid instructor to the complainant. After the complainant broke off contact with the accused, the accused's harassment included following the complainant, waiting outside her home, and creating a fake Facebook profile under another name in order to get the complainant to contact him. The accused argued for a sentence of 10 months, equivalent to the pre-trial time credited, but this was found to be insufficient given the serious and ongoing nature of the conduct, the serious impact on the complainant, and the accused's abuse of a position of trust and authority.
— *R. c. Turcotte,* 2017 QCCQ 318, EYB 2017-275806.

Invitation to sexual touching

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

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

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

R.S., 1985, c. C-46, s. 152; R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 3; 2008, c. 6, s. 54; 2012, c. 1, s. 12; 2015, c. 23, s. 3.

* * * * *

General case law

Essential elements — *actus reus* — The *actus reus* of this offence is fulfilled when the accused invites, counsels, or incites a child under 16 to touch a person, including the accused or the child themselves, for a sexual purpose.[1] "Touch" should be interpreted purposively, consistent with Parliament's objective to prevent sexual exploitation of children, and thus covers both actual and indirect touching.[2] Touching need not have actually occurred, given that the "core verbs [of this offence] involve communication"; such communication can be express or implied.[3] An accused's request to touch the victim in a sexual manner can constitute the *actus reus* of this offence.[4]

— [1]*R. v. Legare*, 2008 ABCA 138, 429 A.R. 271, para. 33, aff'd *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551 on other grounds.

— [2]*R. v. Fong*, 1994 ABCA 267, 157 A.R. 73, para. 10.

— [3] *R. v. Legare*, 2008 ABCA 138, 429 A.R. 271, para. 35, aff'd *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551 on other grounds.

— [4]*R. v. Gray* (2004), 190 O.A.C. 319, [2004] O.J. No. 4100 (ONCA).

Essential elements — *mens rea* — The *mens rea* of this offence requires knowingly communicating for a sexual purpose with a person under 16 years old, where the accused either intended, or knew that there was a substantial and unjustified risk, that the child would receive that communication as being an invitation, incitement, or counselling to do the physical conduct that s. 152 prohibits.[1] The *mens rea* must be present when the communication occurs, but such present intent does not need to be intent for imminent sexual touching. A trier of fact could infer from "dirty talk" that the accused had "present intent to manoeuvre the child psychologically towards sexual touching" by normalizing such touching through the "dirty talk".[2]

— [1]*R. v. Legare,* 2008 ABCA 138, 429 A.R. 271, para. 40, aff'd in *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551 on other grounds.

— [2]*R. v. Legare*, 2008 ABCA 138, 429 A.R. 271, para. 47, aff'd in *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551 on other grounds.

Consent no defence — S. 150.1 provides that the consent of the complainant is no defence to, among others, an offence under s. 152. This limitation is not a violation of s. 7 of the *Charter*.[1]
— [1]*R. v. Hann* (1992), 75 C.C.C. (3d) 355, 100 Nfld. & P.E.I.R. 339 (NLCA).

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Social media case law

Invitation to sexual touching via Facebook — The accused's sexual messages and "penis pictures" shared with the 15-year old complainant via Facebook were for the purpose of facilitating invitation to sexual touching. The accused was also found guilty of the offence of luring a child in s. 172.1(1)(b) of the *Criminal Code*.
— *R. v. A.H.*, 2016 ONSC 3709, 131 W.C.B. (2d) 302.

Invitation to sexual touching via Snapchat — The accused and complainant began "sexting" each other when the complainant was only 15 years of age, including explicit Snapchats and Skyping where nude images were shared. The court found that this conduct constituted the offence of Invitation to Sexual Touching, even though "the Crown could not explain…why this crystal clear offence had no been charged" (para. 355).
— *R. v. J.J.O*, 2016 ONCJ 264, 130 W.C.B. (2d) 665.

Invitation to sexual touching via Facebook — After the 34-year-old accused had sexual intercourse with the 15-year-old complainant, he sent sexually explicit messages to the complainant's Facebook account, inviting her to "finish what they had started the night before". The judge found the accused knew he was sending messages to the complainant (as opposed to her 22-year-old cousin), and convicted him of invitation to sexual touching.
— *R. v. Clarke*, 2016 SKCA 80, 480 Sask. R. 277.

Facebook listed age rejected as evidence —The court rejected fresh evidence of the complainant's listed age on Facebook, because the complainant had already told the accused over Facebook "in no uncertain terms" that she was 15. Thus, the age listed on her Facebook page "would be unlikely to overcome" the accused's "clear understanding that the complainant was 15" (para. 112).
— *R. v. Clarke*, 2016 SKCA 80, 480 Sask. R. 277.

Facebook evidence to support complainant's account of events — The complainant's recollection of events from childhood and early adolescence was inconsistent, but the court found her credible in part because "the Facebook conversations [between the complainant and accused] are strong evidence supporting the complainant's general account of events" (para. 78). The accused's denial of writing the Facebook messages was not believed.
— *R. v. J.S.M.*, 2015 NSSC 312, 127 W.C.B. (2d) 90.

Constitutionality of retrospective application of s. 161(1) amendments — The 2012 s. 161(1) amendments empower sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age (s. 161(1)(c)), or from using the Internet or other digital networks (s. 161(1)(d)). The Supreme Court found that these amendments constitute punishment, and thus retrospectively applying them violates s. 11 of the *Charter*. Retrospective application of the s. 161(1)(c) contact provision fails the cost-benefit stage of the *Oakes* test, but retrospective application of the s. 161(1)(d) internet prohibition is saved by s. 1. Section

161(1)(d) is directed at “grave, emerging harms precipitated by a rapidly evolving social and technological context”. Furthermore, an “Internet prohibition, while invasive, is not among the most onerous punishments, such as increased incarceration” (para. 114).
— *R. v. K.R.J.,* 2016 SCC 31, [2016] 1 S.C.R. 906.

Sentencing — The accused pled guilty to sexual interference, invitation to sexual touching, and luring a child. Among other things, the court imposed a s. 161 prohibition order for life, which included a prohibition on using the internet or other digital network, unless for employment, seeking employment, or education.
— *R. v. Stanley* (2015), 119 W.C.B. (2d) 419, [2015] O.J. No. 6378 (ONCJ).

Sentencing — In considering an appeal of a sentence for numerous sexual offences, the court noted the accused’s submitted sentencing decisions for comparison “were rendered some time ago”; we better understand now the severe impact online sexual exploitation can have on children (para. 17). Consequently, the court found that it “must resort to imprisonment, emphasizing the sentencing objectives of protection, punishment and deterrence”, and dismissed the accused’s argument that the parity principle had been violated (para. 18).
— *R. v. Mackie,* 2014 ABCA 221, 588 A.R. 1.

Sentencing — The accused pled guilty to luring a child, extortion, distributing and accessing child pornography, invitation to sexual touching, unauthorized use of computer, and other offences. In determining that the accused bore a high level of moral blameworthiness, the court noted the accused’s “use of the internet…has elements of disturbing online sexual harassment – an adult criminally cyberbullying and cyberstalking” (para. 62). As an “online faceless unknown entity,” he was also “all the more frightening for his victims” (para. 64).
— *R. v. Mackie*, 2013 ABPC 116, 106 W.C.B. (2d) 545.

Sentencing — The accused pled guilty to invitation to sexual touching. The court noted that “access to young persons by way of internet or cell phone text is so readily available that the court must attempt to deter others from engaging in this conduct” (para. 31). At the same time, the Facebook contact between the parties was an isolated chat, as opposed to messaging over a long period time. Consequently, the court went beyond the minimum of 90 days, but kept the sentence to the lower range of sentencing at 6 months incarceration.
— *R. v. Kanigan*, 2014 SKQB 147, 445 Sask. R. 247.

Sentencing — The accused pled guilty to invitation to sexual touching, possession and distribution of child pornography, and transmission of sexually explicit material to a child. The accused’s proposed sentencing case law had significantly lower dispositions than what the Crown proposed. The court distinguished the accused’s proposed sentencing case law on the facts, and also noted “the legal landscape is evolving as Courts become more aware of the dangers that this type or sexual harassment and cyber bullying invokes” (para. 33).
— *R. v. N.L.G.,* 2015 MBCA 81, 323 Man. R. (2d) 73.

Sexual exploitation

153 (1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who

- **(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or**
- **(b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.**

Punishment

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

- **(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or**
- **(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.**

Inference of sexual exploitation

(1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

- **(a) the age of the young person;**
- **(b) the age difference between the person and the young person;**
- **(c) the evolution of the relationship; and**
- **(d) the degree of control or influence by the person over the young person.**

Definition of *young person*
(2) In this section, *young person* means a person 16 years of age or more but under the age of eighteen years.

R.S., 1985, c. C-46, s. 153; R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 4; 2008, c. 6, s. 54; 2012, c. 1, s. 13; 2015, c. 23, s. 4.

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General case law

Essential elements — s. 153 — The language in ss. 153 (a) and (b) is similar to that in ss. 151 and 152, respectively, with the difference being that s. 153 applies to complainants between 16

and 18 years old. In addition to the different age range of the complainant, s. 153 also requires that the accused be in a position of trust or authority towards the complainant, a person with whom the complainant is in a relationship of dependency, or be in a relationship with the complainant that is exploitative of the complainant. Proof of *mens rea* is, of course, required for each element. The presence of any of the trust, authority, dependency, or exploitation relationships will suffice to make out this offence, and no proof is necessary that the accused actually abused their position or relationship by engaging in the prohibited conduct.[1]
— [1]*R. v. Audet* (1996), 2 S.C.R. 171, S.C.J. No. 61.

Consent no defence — S. 150.1 provides that the consent of the complainant is no defence to, among others, an offence under s. 153(1). This limitation is not a violation of s. 7 of the *Charter*.[1]
— [1]*R. v. Hann* (1992), 75 C.C.C. (3d) 355, 100 Nfld. & P.E.I.R. 339 (NLCA).

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Social media case law

Sentencing — Sexual Interference (s. 153(1)(a)) — The accused, a substitute teacher in the 16 year old complainant's class, was found guilty at trial of Sexual Interference contrary to s. 153(1)(a). Despite a probation report indicating that the accused was at a low risk of recidivism, the court found, after an exhaustive review of sentencing precedents and principles for this offence, that the accused's position of trust as a teacher, and the importance of similarly situated individuals maintaining appropriate boundaries, required that the sentence emphasize general deterrence over rehabilitation. The court found this prioritization was necessary in order to communicate to teachers that their position of power renders their students incapable of consenting to sexual activity, even in the face of their students', or their students' parents', apparent consent. Among the factors pointed to by the court as evidence of the accused's failure to maintain appropriate boundaries was the accused having added the complainant as a friend on Facebook, where they later exchanged messages to plan the encounters that formed the subject matter of the charge. The accused was sentenced to six months of incarceration, double the 90-day mandatory minimum.
— *R. c. Lapointe*, 2016 QCCQ 1951, J.E. 2016-796.

Voyeurism

162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

- **(a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;**
- **(b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or**
- **(c) the observation or recording is done for a sexual purpose.**

Definition of *visual recording*
(2) In this section, *visual recording* includes a photographic, film or video recording made by any means.

Exemption
(3) Paragraphs (1)(a) and (b) do not apply to a peace officer who, under the authority of a warrant issued under section 487.01, is carrying out any activity referred to in those paragraphs.

Printing, publication, etc., of voyeuristic recordings
(4) Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available.

Punishment
(5) Every one who commits an offence under subsection (1) or (4)

- **(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or**
- **(b) is guilty of an offence punishable on summary conviction.**

Defence
(6) No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good.

Question of law, motives
(7) For the purposes of subsection (6),

- **(a) it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good; and**
- **(b) the motives of an accused are irrelevant.**

R.S., 1985, c. C-46, s. 162; R.S., 1985, c. 19 (3rd Supp.), s. 4; 2005, c. 32, s. 6.

* * * * *

General case law

Essential elements — s. 162(1) — Voyeurism is committed where a person 1) surreptitiously; 2) observes or makes a visual recording (defined in s. 162(2)); 3) of a person who is in circumstances that give rise to a reasonable expectation of privacy; and 4) the actions outlined in 162(1)(a), (b), or (c) are fulfilled.[1] There is debate as to whether "surreptitiously" includes an element of *mens rea* (i.e. that the accused must intend that the victim not know that they were being observed or recorded).[2] Assessing a "sexual purpose" (as per s. 162(1)(c)) includes sexual gratification as a factor, but not a sole or essential factor.[3] Without direct evidence, a court could infer that the purpose of photographing women's buttocks is most likely sexual (as per s. 162(1)(c)), but that is not the only rational inference.[4] The interpretation of privacy expectations under s. 162 "must keep pace with technological development"[5] — for instance, it is reasonable for beach goers to expect that close-up imagery of one's private areas "will not be captured as permanent record for the photographer, and potentially millions of others on-line".[6]
— [1]*R. v. Keough*, 2011 ABQB 48, 501 A.R. 26.
— [2]*R. v. Lebenfish*, 2014 ONCJ 130, 112 W.C.B. (2d) 628.
— [3]*R. v. Jarvis*, 2015 ONSC 6813, 126 W.C.B. (2d) 598.
— [4]*R. v. Taylor*, 2015 ONCJ 449, 124 W.C.B. (2d) 56.
— [5]*R. v. Rudiger*, 2011 BCSC 1397, 98 W.C.B. (2d) 101, para. 117.
— [6]*R. v. Taylor*, 2015 ONCJ 449, 124 W.C.B. (2d) 56, para. 32.

Essential elements — s. 162(4) — This section creates an offence of trafficking or possessing, for the purpose of trafficking, a recording made as a result of an offence under s. 162(1). This section includes a *mens rea* of actual knowledge that the recording was obtained by the commission of such an offence. This offence is considered more serious than those in s. 162(1).
— *R. v. Desilva,* 2011 ONCJ 133, 93 W.C.B. (2d) 412, para. 20.

Meaning of "reasonable expectation of privacy" — Though s. 162(1) requires assessing a "reasonable expectation of privacy", using s. 8 *Charter* jurisprudence in this assessment should be pursued with caution. S. 8 interpretation is based on different principles than that of interpreting *Code* provisions: the expectation of privacy under s. 162 relates to a complainant, versus an accused under s. 8, and s. 8 typically addresses privacy interests that have limited relevance under s. 162 of the *Code*. Nevertheless, s. 8 jurisprudence is relevant to the extent that privacy is a "protean concept", relevant considerations include that privacy must be assessed on the totality of the circumstances, that an expectation of privacy is a normative, rather than descriptive standard, and that a privacy inquiry protects people, not places.
— *R. v. Rudiger,* 2011 BCSC 1397, 98 W.C.B. (2d) 101.

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Social media case law

Sentencing – The accused was convicted of criminal harassment and voyeurism. He had posted a sexually explicit video of the complainant on his Facebook page. He sent the link to 13 friends and family, "inviting them to view the video". The video was also sent as an attachment

to the emails. The court concluded there was no actual wide circulation of the video. However, “[g]iven the common use of social networking sites and their potential for enormous harm, general deterrence plays a significant principle in this sentencing” (para. 34).
— *R. v. Desilva,* 2011 ONCJ 133, 93 W.C.B. (2d) 412.

Sentencing — The accused pled guilty to voyeurism. In determining the sentence, the court noted: “It seems to me that the principle focus of the sentence here should be denunciatory. It should also strive to deter this person and others from this type of offence. In this age of computers, "iPhones", Facebook, and YouTube, there is a very real risk that images like this could be disseminated around the world.”
— *R. v. F.G.* (2011), 93 W.C.B. (2d) 416, 308 Nfld. & P.E.I.R. 59 (NLPC).

Publication of an Intimate Image Without Consent

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) of an offence punishable on summary conviction.

Definition of intimate image

(2) In this section, intimate image means a visual recording of a person made by any means including a photographic, film or video recording,

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Defence

(3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.

Question of fact and law, motives

(4) For the purposes of subsection (3),

(a) it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and

(b) the motives of an accused are irrelevant.

2014, c. 31, s. 3

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General case law

Essential elements – Actus reus – The accused had dated the complainant on and off for about three years; during the off periods, the complainant dated B.L. The accused took a video of himself and the complainant having sex without her consent. After some confrontation between the accused and B.L., the accused sent a screenshot of the aforementioned video to B.L. The complainant testified the screenshot was taken from the accused's Facebook profile, meaning the screenshot had been "made public on Facebook for some period of time" (para 23). The accused was found guilty of making an intimate image of the complainant available without the complainant's consent, contrary to s. 162.1 of the *Criminal Code*.
— *R. v. Verner*, [2017] OJ No 3206, 2017 ONCJ 415

Essential elements – s. 162.1(2)(a) – "intimate image" – The court considered whether the word "nude" was disjunctive or conjunctive with the other words of s. 162.1(2)(a), which constitutes one element of "intimate image". The court found that the word "nude" was disjunctive, and as such, s. 161.1(2)(a) could be established in three ways: "where the person is nude; where the person's genital organ, anal region or breasts are exposed; or where they have engaged in explicit sexual activity" (para 43). Given the complainant was nude in the screenshot, s. 161(2)(a) was established.
— *R. v. Verner*, [2017] OJ No 3206, 2017 ONCJ 415

Essential elements – s. 162.1(2)(a) – "explicit sexual activity" – The court found that the word "nude" was disjunctive, and as such, s. 161.1(2)(a) could be established in three ways: "where the person is nude; where the person's genital organ, anal region or breasts are exposed; or where they have engaged in explicit sexual activity" (para 43). Given the complainant was nude in the screenshot, s. 161(2)(a) was established. The court found that the impugned screenshot could be considered "explicit sexual activity" under s. 161(2)(a). The screenshot depicts two nude parties, positioned near a bed; it was also "taken the context of an act of sexual intercourse" (para 64).
— *R. v. Verner*, [2017] OJ No 3206, 2017 ONCJ 415

Social media case law

Fabrication of Facebook messages – The Crown's position was that the accused attempted to extort the complainant using intimate images of her, and that he posted two such images on Facebook and Skype without her consent. The court found that, despite the complainant's testimony to the contrary, she had sufficient knowledge of computers such that she could have accessed the accused's Facebook account and feigned the offending messages which were presented at trial. The accused was acquitted on both counts.
— *R. v. Sobh*, 2018 ONSC 2299

Complainant's consent to distribution of images – The Crown's position was that the accused attempted to extort the complainant using intimate images of her, and that he posted two such images on Facebook and Skype without her consent. The court concluded that the complainant may have given blanket consent for the accused to post intimate images during their relationship. If her consent was later withdrawn, the Crown failed to demonstrate beyond a reasonable doubt that the relevant images were still on the Internet at that time. The accused was acquitted on both counts.
— *R. v. Sobh*, 2018 ONSC 2299

Sentencing – The accused recorded sexual acts between himself and the complainant, who was not aware of the recording and did not consent to it at the time it was made. The complainant did consent to the taking of nude photos as long as the accused did not distribute them. Nevertheless, the accused published the intimate videos and images on Facebook and Instagram. In concluding that a prison sentence was necessary to achieve the sentencing objectives of deterrence and denunciation, the court considered several aggravating factors. The court noted that the accused planned his offending behaviour, his actions were not momentary or impulsive, and that he could have stopped at any time but chose to proceed. The accused was sentenced to five months imprisonment followed by a 12-month probation term.

— ***R. v. Haines-Matthews,*** **2018 ABPC 264, 2018 CarswellAlta 2753**

Sentencing – In sentencing the offender, who pled guilty, the court was "mindful of certain realities" which suggested "a less severe sentence than those imposed in other situations". The court distinguished these "realities" from "mitigating considerations". One such reality was that the intimate images were not posted widely on the internet, but only to a limited and identified set of individuals who were the complainant's family and friends. The court acknowledged that these circumstances likely heightened the complainant's feeling of embarrassment, but indicated that these individuals were less likely to republish the images, thus lessening the lasting impact of the offence.

— ***R. v. J.B.*****, 2018 ONSC 4726**

Sentencing – The accused pled guilty to distributing intimate images without the complainant's consent. The accused had dated the complainant for three years. The distribution occurred via direct messaging on Instagram. The accused admitted he wanted revenge when he sent the pictures. Aggravating factors included the accused's attempt to use the photos to extort the complainant to talk to him; abuse of the complainant's trust; and the traumatic impact on the complainant. Mitigating factors included the accused's expression of remorse; apparent appreciation of impact on the victim; and high chance of rehabilitation. The court imposed a conditional discharge with a three-year probation order, and a "significant community service order." Further, the court noted the centrality of the Internet to a person's everyday life, and that courts "should avoid imposing orders that create overbroad or unreasonable restrictions on an individual's liberty". Consequently, the accused was restricted from Internet use and social media access for the first six months of his probation, "rather than [under] the broader provisions of section 162.2".

— ***R. v. Calpito*****, [2017] O.J. No. 1171, para 111-112, 2017 ONCJ 129**

Child pornography

Definition of 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.**

Making child pornography
(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.

Distribution, etc. of child pornography
(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.

Possession of child pornography
(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**
- **(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.**

Accessing child pornography
(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**

(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.

Interpretation
(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.

Aggravating factor
(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.

Defence
(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.

Defence
(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.

Question of law
(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.

1993, c. 46, s. 2; 2002, c. 13, s. 5; 2005, c. 32, s. 7; 2012, c. 1, s. 17; 2015, c. 23, s. 7.

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General case law

Defining child pornography — "Person" in s. 163.1(1)(a) includes both actual and imaginary persons. An objective approach should be applied to the terms "depicted" in s. 163.1(1)(a)(i), as well as "dominant characteristic" and "sexual purpose in s. 163.1(1)(a)(ii). "Explicit sexual activity" in s. 163(1)(a)(i) refers to acts which viewed objectively fall at the extreme end of the spectrum of sexual activity (e.g. acts involving nudity or intimate sexual activity).[1] S. 163.1(1)(a)(ii), however, provides that materials that depict intimate areas of children are

extreme, without more.[2] "Advocates or counsels" in s. 163.1(b) may include implicit messages in written material.[3]

— [1]*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45.
— [2]*R. v. J.E.I.*, 2005 BCCA 584, 204 C.C.C. (3d) 137, para. 16.
— [3]*R. v. Beattie*, [2005] 75 O.R. (3d) 117, 196 O.A.C. 95 (ONCA).

Proof of offence — 163.1 — "The normal inference that one intends the natural consequences of one's actions is applicable to computer usage just as it is to any other human activity [...]"
— *R. v. Missions*, 2005 NSCA 82, 196 C.C.C. (3d) 253.

Essential elements — 163.1(2) — "Making" —There is conflicting jurisprudence as to whether "making" child pornography includes or excludes copying existing child pornography onto a CD, DVD, hard drive, or other form of storage.
— *R. v. Keough*, 2011 ABQB 48, 501 A.R. 26 (finding that mere copying <u>will</u> qualify as "making").

Essential elements — 163.1(3) — "Distribution" —Sharing files through an Internet file-sharing program will fulfil the *actus reus* of this offence. The *mens rea* is intent, actual knowledge or wilful blindness that the pornographic material was being made available (not that the accused must knowingly, by some positive act, facilitate the availability of the material).[1] In the context of file-sharing programs, where the accused is aware the program is based on open information sharing, it is logical to infer that the accused was aware he would be sharing information with third parties.[2] However, where the accused deletes the child pornography files from the shared file, there may be reasonable doubt as to their intent to make child pornography available.[3]
— [1]*R. v. Spencer*, 2014 SCC 43, 2 S.C.R. 212.
— [2]*R. v. Johannson*, 2008 SKQB 451, 335 Sask. R. 22.
— [3]*R. v. Pressacco*, 2010 SKQB 114, 352 Sask. R. 276.

Essential elements — 163.1(4) — "Possession" —"Possession" is generally defined in s. 4(3). Under s. 163.1(4), mere automatic caching of a file to a hard drive is insufficient to constitute possession; one must knowingly store and retain the file.[1] Constructive possession may be found even where the accused aborted downloading and the images were never viewed.[2] The accused must have knowledge of the content of the material in possession, but not that the material constituted child pornography.[3] Evidence of the "accessing" offence in s. 163.1(4.1) is not sufficient to establish the "possession" offence in s. 163.1(4).[4]
— [1]*R. v. Morelli*, 2010 SCC 8, 1 S.C.R. 253.
— [2]*R. v. Daniels*, 2004 NLCA 73, 191 C.C.C. (3d) 393.
— [3]*R v Chalk*, 2007 ONCA 815, 88 OR (3d) 448.
— [4]*R v Farmer*, 2014 ONCA 823, 318 C.C.C (3d) 322.

Essential elements — 163.1(4.1) — "Accessing" — This offence is made out where the accused "knowingly caus[es] child pornography to be viewed by, or transmitted to, oneself."[1] Viewing child pornography online constitutes the crime of accessing child pornography.[2]
— [1]*R. v. R.D.*, 2010 BCCA 313, 489 W.A.C. 133.
— [2]*R. v. Morelli*, 2010 SCC 8, 1 S.C.R. 253.

Essential elements — Defence of legitimate purpose — 163.1(6) — The defence in s. 163.1(6) has two elements: 1) that the accused have a legitimate purpose for possessing the

material (five exhaustive categories of which are listed in s. 163.1(6)(a)), and 2) that the conduct complained of does not pose an undue risk of harm to persons under 18.[1] On the first element, the purpose must be subjectively related to one of the five categories listed, and there must also be an "objectively verifiable" connection between the conduct and the stated legitimate purpose. Specifically, this requires an objective connection between the accused's actions and purpose, and between that purpose and one or more of the protected categories.[2]
— [1]*R. v. Katigbak*, 2011 SCC 48, 3 SCR 326.
— [2]*R. v. Katigbak*, 2011 SCC 48, 3 SCR 326, para. 60.

***Charter* concerns — Private use exception —** S. 163.1(4) unjustifiably restricts freedom of expression in two scenarios: 1) where written materials or visual representations are created and held by the accused alone, exclusively for personal use; or 2) visual recordings, created by or depicting the accused, that depict lawful sexual activity and are held by the accused exclusively for private use. There is thus an exemption of such material from charges of making and possessing child pornography.
— [1]*R. v. Sharpe*, 2001 SCC 2, 1 S.C.R. 45.

***Charter* concerns — Private use exception — Availability of exception —** The private use exception from *Sharpe* is only available where: 1) The sexual activity is lawful, including by reference to the offence of Sexual Exploitation contained in s. 153, 2) all participants consent to the recording, and 3) the recording is created and retained strictly for the private use of those involved.[1] Threats to show a private recording to third parties should be considered in determining whether the private use exception applies.[2]
— [1]*R. v. Barabash*, 2015 SCC 29, 2 S.C.R. 522.
— [2]*R. v. Dabrowski*, 2007 ONCA 619, 86 O.R. (3d) 721.

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Social media case law

Definition child pornography — The complainant's "selfies" depicted a young girl's breasts. The court found that this constituted child pornography based on "common sense and judicial opinion" (para. 14). The Facebook messaging about the photographs was also sexualized, and it was immaterial that the accused was 16 years old at the time, even though he was not the accused that typically comes to mind when we think of harms associated with child pornography.
— *R. v. Y.*, 2015 NSPC 14, 357 N.S.R. (2d) 340.

Definition of child pornography — The accused downloaded several photos of a 15-year-old girl from her Facebook profile, then "doctored" them to make them sexual. This constituted child pornography.
— *R. v. Bowers,* 2013 BCPC 383, 113 W.C.B. (2d) 63.

Private use defence — Using a fake Facebook account to extort the complainant, the accused and his friend agreed to reveal the identity of the fake account in exchange for a sexual picture of the complainant. The complainant sent two selfies exposing her breasts, and the accused did not reveal his true identity. The private use defence fails, because the complainant's consent to producing sexual images "was exploited, manipulated consent" (para. 47).
— *R. v. Y.,* 2015 NSPC 14, 357 N.S.R. (2d) 340.

Making child pornography — Age of the complainant — The accused, the coach of a sports team, sent messages via text and Facebook to several players asking for photographs of their genitals. Some of the players provided such photos, for which the accused was convicted of making child pornography, as well as luring and exploitation offences. The accused was acquitted of the child pornography charges in relation to one complainant, as there was a reasonable doubt about whether the exchange of photographs had begun before or after the complainant's 18th birthday, with the Crown only able to provide evidence of photos being sent after that day.
— *R. v. Cristoferi-Paolucci,* 2017 ONSC 207, [2017] O.J. No. 1217.

Possession for the purpose of distribution — The accused watched his friend use remote computer access to share sexual photos of the complainant to other people on Facebook. The accused's decision not to shut the remote access "door" makes him party to his friend's possession of child pornography for the purpose of distribution.
— *R. v. Y.,* 2015 NSPC 14, 357 N.S.R. (2d) 340.

Possessing and making child pornography available via Facebook and Twitter — seizure of cell phone — The warrantless seizure of the accused's cell phone did not infringe s. 8 of the *Canadian Charter of Rights and Freedoms.* The police had received reports via American authorities from Facebook and Twitter that a user had uploaded pornographic images of young males. After identification of the accused, in all of the circumstances, their decision to seize his cell phone without a warrant was reasonable to prevent an imminent danger of the loss or destruction of evidence.
— *R. v. Neill*, 2016 ONSC 4963, 134 W.C.B. (2d) 457.

Constitutionality of child pornography provisions' scope — On appeal, the accused argued that new legal issues (gross disproportionality as a principle of fundamental justice, and *Canada (Attorney General) v. Bedford,* 2013 SCC 72*,* clarifying separate s. 7 and s. 1 analysis) justified reconsidering *R. v. Sharpe,* 2001 SCC 2. The court agreed and ordered a new trial. Regarding the accused's argument that the aforementioned child pornography provisions also violate s. 15, the Court of Appeal upheld the trial judge's decision that s. 163.1(3) and (4) do not create a distinction on the basis of age of the offender.
— *R. v. M.B.*, 2016 BCCA 476, 135 W.C.B. (2d) 221.

Constitutionality of mandatory minimum — The accused used hypotheticals to argue the mandatory sentencing provisions in s. 163.1 of the *Criminal Code* violated s. 12 of the *Canadian Charter of Rights and Freedoms*. One hypothetical imagined a 17-year-old female consensually taking and sharing sexual pictures with her 18-year-old boyfriend, who then shares the pictures with another, potentially on social media. Bound by *R. v. Schultz* (2008 ABQB 679)*,* the court said the one-year mandatory minimum in this scenario would not violate s. 12.
— *R. v. Watts,* 2016 ABPC 57, 31 Alta. L.R. (6th) 105.

Identity of Facebook users on device – Child pornography was found on an iPhone belonging to the accused, but identity was at issue because the accused was not the sole user of the device. The iPhone was used to access two Facebook accounts which did not appear to belong to the accused; however, the evidence did not establish that those accounts were actually held by other individuals. The court noted that a person can adopt any name he or she wishes in

creating a Facebook account. Furthermore, there was no indication that other possible Facebook users used the phone for any purpose other than to access Facebook.
– *R. v. Paquette*, 2018 BCSC 1462

Sentencing – The accused lured six victims, all girls between 12 and 14 years old, using Snapchat. He coerced his victims into sending him nude photographs, which he saved and stored on his iPhone. In the sentencing decision, the court considered the fact that he never had a face-to-face meeting with any of his victims, finding that he did not demonstrate any intention to commit sexual acts with them. The court stated that this was not a mitigating factor, but instead removed from consideration factors that would otherwise justify a longer term of imprisonment.
— *R. v. Kron*, 2018 ONCJ 622

Sentencing – The accused pled guilty to possession of child pornography and internet luring. The accused had created a fake Facebook identity to persuade an 11-year-old girl to engage in sexually explicit conversation, and send him sexually explicit pictures of herself. He also sent her pictures of an adult penis. Though the accused characterized his actions as a "stupid decision", the court rejected this narrative and emphasized a high moral culpability. Specifically, the court noted the accused "was involved in the internet luring of a child through a medium in which children are particularly susceptible to influence because of the importance it plays in their daily lives: Facebook. To use Facebook in this manner illustrates a commitment to the commission of a sexual offence against a child which is alarming."
— *R. v. Clarke*, [2017] N.J. No. 230, 2017 NLPC 1317A00102, para 88

Sentencing – The accused pled guilty to making child pornography available. The judge found the accused's actions — i.e. uploading pictures of young boys engaging in "sexual activities which are sexual assaults" — allowed an inference of "sufficient psychological harm to be bodily harm". Additionally, the "bodily harm does not end when the photo or video is made, it continues each time, the image is viewed and distributed." As such, the accused's acts constituted a "violent offence" under s. 39(1)(a) of the *Youth Criminal Justice Act*, and allowed for imposition of custody for a young offender.
— *R. v. G.D.,* [2017] O.J. No. 2308

Sentencing — The accused was convicted of 11 counts of sexual interference and exploitation of four young children. About a decade later, he was subsequently convicted of sexual abuse of a two-year-old child, possessing and distributing (through Facebook) child pornography, and having breached a s. 161 order. Among other things, the accused was prohibited for life from using the Internet or other digital network, unless for counselling or employment and in the presence of the counsellor or employer.
— *R. v. Campbell* (2017), 136 W.C.B. (2d) 468, [2017] N.J. No. 1 (PC).

Sentencing — The accused pled guilty to luring a child, possession of child pornography, and 11 counts of extortion. The terms of his 18-month probation included, among other things: not possessing or using any computer or other device that has Internet access, except with advance written permission; monitored use of Internet access, if granted; and the accused's identification by his full real name when communicating with anyone by means of a computer or other device, including via including Facebook, Twitter, Instagram, or any other social network.
— *R. v. R.W.*, 2016 ONCJ 325, 131 W.C.B. (2d) 68.

Sentencing — The accused pled guilty to possessing and making child pornography available. Among other things, his probation term included a condition to surrender any computer or electronic device, as well as his user ID or passwords, to the RCMP or to his probation officer if they ask, for inspection purposes. The sentencing judge specifically refrained from forbidding computer use, "because computers have a big place in our world" and "things like email and Facebook…can actually help [the accused] not feel as isolated" (para. 58).
— *R. v. King,* 2016 NWTSC 29, 130 W.C.B. (2d) 85.

Sentencing — The accused was convicted of extortion, possession of child pornography, and possession of child pornography for the purpose of distribution. Among other things, his conditional discharge order prohibited accessing any "internet based social media sites". The court was concerned social media restrictions may impair the accused's ability to overcome his social anxiety and reintegrate, but the nature of the accused's offending made "it inappropriate to permit social media access" unless and until rehabilitative progress is made (para. 56).
— *R. v. Y.*, 2015 NSPC 66, 366 N.S.R. (2d) 57.

Sentencing — The accused pled guilty to sexual touching, possession and distribution of child pornography, and transmission of sexually explicit material to a child. The accused offered sentencing case law that had significantly lower dispositions than what the Crown proposed. The court distinguished the accused's proposed cases on the facts, and also noted "the legal landscape is evolving as Courts become more aware of the dangers that this type or sexual harassment and cyber bullying invokes" (para. 33).
— *R. v. N.L.G.*, 2015 MBCA 81, 323 Man. R. (2d) 73.

Sentencing — The accused was convicted of possession and distribution of child pornography. She made a fake Facebook account and posted a pornographic photo of the victim on the victim's Facebook wall. The court deemed this a "planned offence that was vengeful" and "a form of bullying that society condemns" — thus, it would be "contrary to the public interest to allow [a discharge]" (para. 7). The distribution of the material through the anonymity of the Internet was also deemed an aggravating feature.
— *R. v. K.F.*, 2015 BCPC 417, 128 W.C.B. (2d) 653.

Sentencing — The accused pled guilty to sexual touching, possessing and distributing child pornography, and transmitting sexually explicit material to a child. The court noted that "bullying and sexual exploitation of children, via social media, represents a new and disturbing phenomena in our society" (para. 1). It thus imposed, among other things, twelve months of supervised probation, which included a prohibition on accessing social media or possessing any device that provides access to the Internet.
— *R. v. N.G.,* 2014 MBPC 63, 311 Man. R. (2d) 286, varied on other grounds *R. v. N.L.G.,* 2015 MBCA 81, 124 W.C.B. (2d) 418.

Sentencing — In considering an appeal of a sentence for numerous sexual offences, the court noted the accused's submitted sentencing decisions for comparison "were rendered some time ago"; and that the court better understands now the severe impact online sexual exploitation can have on children (para. 17). Consequently, the court "must resort to imprisonment, emphasizing the sentencing objectives of protection, punishment and deterrence", and dismissed the accused's argument that the parity principle had been violated (para. 18).

— *R. v. Mackie*, 2014 ABCA 221, 588 A.R. 1.

Sentencing — The accused pled guilty to luring a child, extortion, distributing and accessing child pornography, invitation to sexual touching, unauthorized use of computer, and other offences. In determining his high moral blameworthiness, the court noted the accused's "use of the internet…have [sic] elements of disturbing online sexual harassment – an adult criminally cyberbullying and cyberstalking" (para. 62). As an "online faceless unknown entity," he was also "all the more frightening for his victims" (para. 64).
— *R. v. Mackie,* 2013 ABPC 116, 106 W.C.B. (2d) 545.

Sentencing — The accused pled guilty to possessing child pornography. Among other things, the court imposed a two-year probation order prohibiting Internet or other digital network access.
— *R. v. Bowers,* 2013 BCPC 383, 113 W.C.B. (2d) 63.

Sentencing — The accused was convicted of 53 counts related to child pornography, including posting, accessing, and producing child pornography on Facebook. His use of Facebook to meet other like-minded individuals was considered an aggravating factor. Among other things, the court imposed a 20-year s. 161 order prohibiting the accused from using a computer system for the purpose of communicating with a person less than 16 years old.
— *R. v. Pattison,* 2012 SKQB 330, 403 Sask. R. 145.

Sentencing — The accused was convicted of possessing child pornography and luring. The offences related to the sending of a single photo by the complainant to the accused. The accused had gone too far in what was a misguided attempt to relate to a young person who faced similar difficulties to those faced by the accused during his youth in the same community, and this case was distinguished from the majority of child pornography cases involving large "collections". The accused was Aboriginal, posed no risk of recidivism, and had been on highly restrictive bail conditions without breaches for 5 years. The sentencing proceeded on the provisions as they stood in 2011, with no minimum for the luring, and 14 days minimum for the child pornography. The accused was sentenced to 60 days intermittent on the child pornography charge, and a 9-month conditional sentence on the luring charge.
— *R. v. Crant,* 2017 ONCJ 192, [2017] O.J. No. 1493.

Sentencing — The accused pled guilty to sexual interference and distribution of child pornography. The accused had produced videos of sexual interference with the daughter of his partner, and had tweeted a pornographic video of an unrelated minor, accompanied by a caption suggesting sexual predation. This tweet was what initially alerted the police to the accused's activities. The court rejected an argument by the accused that the posting of a single image should attract only the mandatory minimum sentence. The court found that, given the "abhorrent" nature of the tweet and the image it contained, more than the minimum was required. The accused was sentenced to 15 months on the child pornography charge, and 24 months consecutive on the sexual interference. As well, the three-year probation order to follow the time in custody included a term requiring the accused to provide details of their cellphone and Internet service accounts, and allow a probation officer to inspect any devices used for accessing the Internet.
— *R. v. C.A.H.*, 2017 BCPC 79, [2017] B.C.J. No. 528.

Sentencing — Sentencing of a young person for making child pornography available. The accused had posted 10 images of child pornography to Twitter. Many of the images depicted children being subjected to violent sexual abuse, which qualified as bodily harm. The offence was found to be a violent offence pursuant to s. 39(1)(a) of the *Youth Criminal Justice Act* (*YCJA*), and so a custodial sentence was available. However, pursuant to s. 38(2)(i) of the *YCJA*, custody was not the least restrictive sentence capable of achieving the purposes of sentencing in this situation, and so a 2-year term of probation was ordered.
— R. v. G.D.,* [2017] O.J. No. 2308*, 2017 CarswellOnt 6619 (ONCJ).

Luring a child

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

- **(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subsection 153(1), section 155, 163.1, 170, 171 or 279.011 or subsection 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2);**
- **(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; or**
- **(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under section 281 with respect to that person.**

Punishment

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

- **(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or**
- **(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.**

Presumption re age

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

No defence

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

2002, c. 13, s. 8; 2007, c. 20, s. 1; 2008, c. 6, s. 14; 2012, c. 1, s. 22; 2014, c. 25, s. 9; 2015, c. 23, s. 11.

* * * * *

General case law

Essential elements — The *actus reus* of s. 172.1(1)(a), (b), and (c) has two elements: 1) communicating by means of a computer system (as defined by s. 342.1 (1)), and 2) with a person under the designated age, or with a person the accused believes to be under the designated age. Where it has been represented to the accused that the person they are

communicating with is underage, the accused is presumed to have believed that person was in fact underage. This presumption can be rebutted by evidence the accused took reasonable steps to ascertain the real age of the person.[1] The *mens rea* of 172.1(a), (b), and (c) is a specific intent to facilitate the commission of one of the designated offences with the person with whom the communication is made.[2] It is worth noting, however, that this quasi-inchoate offence may involve some overlap between the *actus reus* and the *mens rea,* and distinguishing the two may not be helpful.[3] "Facilitating" includes "helping to bring about" and "making easier or more probable". Sexually explicit language may be sufficient to establish this criminal purpose, but is not necessary.[4] The accused need not meet or intend to meet the victim to actually commit the designated secondary offences, nor must the designated offence have to be factually possible.[5]

— [1]*R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3.

— [2]*R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173, leave to appeal refused [2009] S.C.C.A. No. 395.

— [3]*R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, para. 38-39.

— [4]*R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551.

— [5]*R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173, para. 32, leave to appeal refused [2009] S.C.C.A. No. 395.

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Social media case law

Luring a child via Facebook — The accused's sexual messages and "penis pictures" shared with the 15-year old complainant via Facebook were for the purpose of facilitating invitation to sexual touching under s. 152 of the *Criminal Code,* so he was found guilty of the offence of luring a child in s. 172.1(1)(b) of the *Criminal Code*.

— *R. v. A.H.*, 2016 ONSC 3709, 131 W.C.B. (2d) 302.

Luring a child via Facebook — The 34-year-old accused was a teacher and house leader at a private boarding school attended by the 17-year-old complainant. The court ruled their Facebook communications were for the purpose of facilitating their sexual encounters, which were previously decided to constitute the offence of sexual exploitation. The accused was consequently convicted of luring a child.

— *R. v. Olson*, 2016 BCPC 150, 130 W.C.B. (2d) 664.

Luring a child via Facebook — In determining the accused's intention in sending Facebook messages to the complainant, the court noted there were no explicitly sexual messages. However, considering the uncle-niece context and evidence as a whole, the court found the "only reasonable conclusion is that the accused was repeatedly communicating with the [complainant]…to make it easier for him" to have sexual contact with her (para. 108).

— *R. v. Skin*, 2016 BCSC 2468, 136 W.C.B. (2d) 228.

Luring a child via Facebook — The 19-year-old accused sent sexual messages — including a picture of his penis — to the 14 and 13-year-old complainants via Facebook and text messages. This was for the purpose of facilitating invitation to sexual touching under s. 152 of the *Criminal Code,* so he was found guilty of two counts of luring a child.

— *R. v. M.J.A.H.*, 2014 ONCJ 31, 111 W.C.B. (2d) 770.

Luring a child via Facebook — The court found that the accused "sought out a potential victim when she made a Facebook friend request" of the complainant. The accused's subsequent befriending online "fostered a relationship of trust…with a view to advancing the [accused's] ultimate goal to procure [the complainant] into prostitution" (para. 114). Consequently, the accused was found guilty of luring a child.
— *R. v. K.O.*, 2014 ONCJ 277, [2014] O.J. No. 2792.

Luring a child via Facebook — The 40-year-old accused sent sexual messages to "a young girl" (a police officer posing as a 14-year-old girl). The messages were sent for the purpose of facilitating invitation to sexual touching under s. 152 of the *Criminal Code,* so the accused was found guilty of the offence of luring a child.
— *R. v. McCall*, 2011 BCPC 7, 92 W.C.B. (2d) 573.

Luring a child via Facebook — The accused, who was the brother-in-law of the complainant, was convicted of two counts of s. 151 sexual interference, s. 152 invitation to touching, and s. 172.1 luring. The luring charge arose from Facebook messages sent in order to arrange occasions to meet, which gave rise to some of the s. 151 and s. 152 charges. Although only one count of luring had been charged, the judge found that every separate invitation sent by Facebook could have supported a distinct charge of luring.
— *R. c. F.D.,* 2013 QCCQ 17822*,* [2013] J.Q. no 20351, aff'd on other grounds *F.D. c. R.,* 2016 QCCA 317, 128 W.C.B. (2d) 420.

Sentence reduction for alleged breach of s. 8 rights — Interception of communication — The accused claimed that the failure of the police to obtain an authorization under s. 184.2 of the *Criminal Code* to intercept his communications was a breach of the *Charter*, an argument that was accepted on sentencing and led to a 2-month reduction in sentence. On appeal, that section was found not to apply, as interception requires that the police be acting as a third party to the communication. Here, the accused was communicating directly with a police officer, albeit under the pretence that the officer was a 14-year-old girl. When the police made electronic copies of the communications using a computer program that was not an interception.
— *R. v. Mills*, 2017 NLCA 12, [2017] N.J. No. 55.

Establishing identity of the accused – Similar fact evidence – The accused was charged with multiple luring offences, in relation to 15 boys. The Crown argued the accused used two different fake online identities (on Facebook and MSN) to communicate with the complainants and entice them into participating in sexual acts for payments. The accused denied all of the charges, and denied that he had any link to the impugned online profiles. The Crown made a similar fact application, contending there was striking similarity that established "that the same person committed all the luring acts in the indictment, and that there was some evidence linking [the accused] to the acts" (para 198). Accepting this similar fact application, the court found that the facts proved beyond a reasonable doubt that the accused authored the messages from the Facebook profile (para 419-431). Consequently, he was convicted of the luring charges.
— *R. v. McColeman*, [2017] O.J. No. 4294, 2017 ONSC 4019

Establishing identity of accused as person who sent Facebook messages — The accused denied any knowledge of Facebook messages (from an account under his name) sent to an undercover police officer. The court deemed "there was nothing beyond the messages themselves and the fragments recovered from the computer to connect the email and chat messages" to the accused (para. 46). As a result, the charge failed on identity.

— *R. v. Mills* (2014), 118 W.C.B. (2d) 207, 359 Nfld & P.E.I.R. 336 (NLPC).

Establishing identity of accused as person who sent Facebook messages — The accused admitted to the RCMP that he communicated with the complainant on Facebook. The court also noted the accused's theory that he did not send the messages "defies logic", as it "makes no sense for an unknown third party to impersonate on Facebook [the accused], a person whom the complainant has known for most of her life" (para. 29).
— *R. v. Harris*, 2010 PESC 32, 89 W.C.B. (2d) 247.

Reasonable steps to ascertain age of the complainant – After meeting the 13-year-old complainant in person, the appellant lured him over Facebook. The appellant submitted that he took reasonable steps to ascertain the age of the complainant, and argued a defence of mistaken belief that the complainant was over 16 years of age. Several factors suggested that the complainant was of a young age, including: the complainant had a youthful appearance when the accused first met him, and the complainant's Facebook profile picture was a photo of the complainant as a child. The appellant had asked the complainant his age in a Facebook message, but the complainant did not respond. The appellant took no further steps to ascertain the complainant's age. The court found that a reasonable person would have asked more questions in the circumstances. The court upheld the conviction and dismissed the appeal.
— *R. v. Crant*, 2018 ONSC 1479

Accused's belief he was communicating with someone older —Using fake Skype and Facebook accounts, an undercover officer posed as a 15-year-old boy interested in the accused's Craigslist solicitation for sex from young boys. The court rejected the accused's testimony that he believed an adult was using the accounts, in part, because it "would seem an unlikely prospect for someone just 'playing a game' on the internet" to manufacture false Facebook and Skype accounts (para. 61).
— *R. v. Froese*, 2015 ONSC 1075, 119 W.C.B. (2d) 577.

Accused's belief he was communicated with someone older —The accused passed along personal information to an undercover police officer posing as a 14-year-old girl on Facebook. This was found to be inconsistent with his belief that he was actually communicating with an older man who might threaten or extort him. The court also rejected that the accused would spend hours chatting to an older man out of boredom, since this was inconsistent with the accused's purported fear the older man could threaten or extort him.
— *R. v. McCall*, 2011 BCPC 7, 92 W.C.B. (2d) 573.

Accused's belief he was communicating with someone older — The accused's testimony as to his belief that the 12-year-old complainant was 18 was not credible. The accused had lied about his own age on his Facebook profile, and so ought to have known that people lie about their age on Facebook. The complainant told him she was 16 years or older ("16 ans et plus"), which was an ambiguous response that should have caused the accused to make further enquiries. The accused was found to have been wilfully blind as to the age of the complainant.
— *Directeur des poursuites criminelles et pénales c. Rayo*, 2017 QCCQ 128, [2017] J.Q. no 216.

Accused's belief he was communicating with someone older — In denying he intended to communicate with a 13-year-old, the accused claimed children use texting and Facebook more

frequently than Internet Relay Chat (IRC), which he was using. Taking the evidence as a whole, the court rejected the accused's argument.
— *R. v. R.J.S.*, 2010 NSSC 253, 88 W.C.B. (2d) 694.

Accused's belief he was communicating with someone older — The accused communicated with an undercover officer who was posing as a 15-year-old girl via Craigslist and Facebook. The accused also recorded his thoughts about the exchanges in a private word processing document. During their conversations, the accused had expressed some equivocation about his belief that the complainant was underage, and about the activities they might engage in, but the private document was convincing evidence that he believed the complainant was 15, and that he intended to facilitate sexual contact with her.
— *R. v. Drury,* 2017 ONSC 2330*, [2017] O.J. No. 2002.*

Use and deactivation of Facebook account by accused — "This deactivation [of the accused's Facebook account] and the numerous cell phone message deletions are more than coincidental and infer a current or very recent effort to destroy evidence. The accused's argument that someone else may have used his email account is a statement made without any air of reality" (paras. 215-6).
— *R. v. A.H.*, 2016 ONSC 3709, 131 W.C.B. (2d) 302.

Admissibility of Facebook conversations as evidence — The complainant's mother printed out Facebook messages between the complainant and the accused's alleged Facebook account, then provided them to the police. The court ruled the Facebook conversations were provided without any state action and thus immune from *Charter* scrutiny.
— *R. v. Lowrey,* 2016 ABPC 131, 40 Alta. L.R. (6th) 163.

Admissibility of Facebook conversations as evidence —The complainant consented to the police taking over her Facebook account for investigative purposes. The accused argued the extraction of information from this Facebook investigation breached his s. 8 rights. For a variety of reasons, the court deemed his expectation of privacy unreasonable, and thus s. 8 was not engaged. Even if this expectation of privacy analysis was incorrect, the complainant had consented to a search of her Facebook account, and thus the search and seizure was undertaken with lawful authorization. Therefore, there was no s. 8 violation.
— *R. v. Lowrey,* 2016 ABPC 131, 40 Alta. L.R. (6th) 163.

Admissibility of Facebook conversations as evidence — The court applied section 31.1 of the *Canada Evidence Act* to copies of Facebook messages the accused sent to a victim, which were used as evidence at trial. The victim's review of the copies and testimony that the copies were accurate was found to be capable of supporting the authenticity of evidence, as section 31.1 requires.
— *R. v. J.S.M.,* 2015 NSSC 312, 127 W.C.B. (2d) 90.

Admissibility of Facebook conversations as evidence — The police took screen captures of the accused's Facebook profile, and of their communications with the accused while they were undercover. The court ruled the screen captures were admissible and "more akin to a photo or real evidence" than to officer's investigative notes. Thus, s. 30(10) of the *Canada Evidence Act* did not apply to them.
— *R. v. Mills*, 118 W.C.B. (2d) 207, 359 Nfld & P.E.I.R. 336 (NLPC).

Facebook messages as evidence of sexual intention – The accused sent many Facebook messages of a sexual nature to the 13-year-old complainant. The court accepted these Facebook messages as evidence of the accused's sexual interest in the complainant and the accused's hope of establishing a sexual relationship.
— *R. v. Dawe*, 2018 CarswellNfld 205

Seizure of evidence – The appellant was arrested at the door to his apartment. The arresting officers accompanied him into his home, and one officer observed an open computer which displayed an open Facebook page listing the appellant's email address. The page read "Your account has been deactivated". The officer seized the computer. The appellant argued that this was a breach of his s 8 rights under the Charter, as the officers did not have a search warrant. The court concluded that, under s. 489(1)(b) of the *Criminal Code*, officers are entitled to seize items they believe constitute evidence of the offence. As the computer was open and in plain view, the officers were entitled to seize it.
— *R. v. A.H.*, 2018 ONCA 677

Collection of evidence from Facebook – The appeal court addressed the process used to obtain information from Facebook, and how it relates to trial delay. Here, the Crown was required to engage Canada's Mutual Legal Assistance Treaty with the United States, and requested an administrative subpoena of Facebook for IP addresses, email addresses, aliases, and chat messages. The court held that, while the resulting delay constituted *institutional* delay, it was not *extraordinary* delay requiring special treatment. Still, the court emphasized that when the Crown engages the assistance of the US using the Mutual Legal Assistance Treaty, the Crown is expected to oversee the process and make efforts to minimize undue delay.
— *R. v. Kaulback*, 2018 NLCA 8

***Charter* rights during undercover police investigations on Facebook** — The police posed as underage girls and communicated with the accused via Facebook and email. They used a computer program to record these conversations, and extracted information to run checks on the accused in the CPIC and ICAN databases. The police did not have authorization for these activities under s. 184.2 of the *Criminal Code* or through a general warrant. This, added to the accused's expectation of privacy to his email and Facebook, meant the police's actions breached the accused's s. 8 rights. The court also expressed unease that the police's undercover account had "friended" other people (some minors), whose identities "were in effect conscripted into surveillance" without consent (para. 39).
— *R. v. Mills* (2013), 110 W.C.B. (2d) 408, 343 Nfld. & P.E.I.R. 128 (NLPC).
— See *contra*, *R. v. N.J.S*, 2014 BCSC 2658, [2014] B.C.J. No. 3504, para. 70, where the court distinguished *Mills* and held: "In my opinion, e-mails that have been sent and received between individuals who are unknown to each other do not fall within the definition of electronic communications found in s. 183 of the *Code*".

Constitutionality of mandatory minimum penalty — The court created and considered a reasonable hypothetical of a 19-year-old using a smartphone to solicit a 16-year-old for nude photos. Without any argument from counsel, the court concluded a 90-day jail sentence would not be grossly disproportionate for this situation. It expressed "significant hesitation and reluctance" making this judgement, and noted "on a more complete record, it may well be determined that the 90-day minimum jail sentence is grossly disproportionate to the offence described" (paras. 71-73).

— *R. v. S.S.,* 2014 ONCJ 184, 113 W.C.B. (2d) 160.

Constitutionality of retrospective application of s. 161(1) amendments — The 2012 s. 161(1) amendments empower sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age (s. 161.1(1)(c)), or from using the Internet or other digital networks (s. 161(1)(d)). The Supreme Court found that these amendments constitute punishment, and thus retrospectively applying them violates s. 11 of the *Charter*. Retrospective application of the s. 161(1)(c) contact provision fails the cost-benefit stage of the *Oakes* test, but retrospective application of the s. 161(1)(d) internet prohibition is saved by s. 1. Section 161(1)(d) is directed at "grave, emerging harms precipitated by a rapidly evolving social and technological context". Furthermore, an "Internet prohibition, while invasive, is not among the most onerous punishments, such as increased incarceration" (para. 114).
— *R. v. K.R.J.,* 2016 SCC 31, [2016] 1 S.C.R. 906.

Appropriate remedy for destruction of evidence — To create space on the forensic server, the police deleted imaged hard drives of the complainant and accused's computer. As a result of this negligent failure to preserve and disclose evidence, the accused was unable to mount a full answer and defence. The court granted a stay of proceedings.
— *R. v. Kelly,* 1109 A.P.R. 123, 118 W.C.B. (2d) 25 (NLSC).

***Charter* s. 11(b) *Jordan* application for judicial stay of proceedings based on delay in disclosure —** 18 months were required in order for the Crown to make full disclosure of materials obtained via analysis of the accused's computer and a Mutual Legal Assistance Treaty (MLAT) request to the United States in order to obtain information from Facebook. It was found to be unreasonable to expect the accused to make an election or hold a preliminary inquiry before this essential disclosure was received, and it was noted that only one of the accused's elections was done with the benefit of full disclosure, and so no delay could be attributed to the accused's three (re-)elections. Part of the delay was attributed to a single civilian police employee having responsibility for all computer forensic work required on this matter, as well as an incomplete initial response received from Facebook that delayed the MLAT process by a total of 18 months. A stay was granted as a remedy for a breach of the accused's *Charter* s. 11(b) to trial without delay, pursuant to *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.
— *R. v. Kaulback*, [2017] C.C.S. No. 1444, 2017 CanLII 7095 (NLPC).

Sentencing –The accused lured six victims, all girls between 12 and 14 years old, using Snapchat. He coerced his victims into sending him nude photographs, which he saved and stored on his iPhone. In the sentencing decision, the court considered the fact that he never had a face-to-face meeting with any of his victims, finding that he did not demonstrate any intention to commit a sexual act with them. The court stated that this was not a mitigating factor, but instead removed from consideration factors that would otherwise justify a longer term of imprisonment.
— *R. v. Kron*, 2018 ONCJ 622

Sentencing – The Canadian offender communicated with four young girls in the United Kingdom for the purpose of committing sexual offences against them. He used Instagram and another social media platform called "ooVoo". In a victim impact statement, one victim discussed the social isolation she faced following the offences. She explained that her friends would exclude her from certain conversations because they knew her parents monitored her

accounts. The court took victim impact into account in sentencing, noting that "One can hardly comprehend the impact that Mr. Carter's actions will have upon [one of the victims] and her family as she grows older."
— *R. v. Carter*, 2018 CarswellNfld 28, para 53

Sentencing – The accused pled guilty to internet luring. "The Court of Appeal has emphasized that the sentences imposed for online child luring must serve to safeguard children who are indefatigable users of the Internet from those predators who would abuse this technology to lure them into situations where they can be sexually exploited and abused." As such, this crime ordinarily demands a custodial sentence. The judge imposed a s. 161(1) order, including a prohibition on "using the Internet, or any similar communication service, to access any content that violates the law or to directly or indirectly access any social media sites, social network, Internet discussion forum or chat room, or maintain a personal profile on any such service (for example Facebook, Twitter, Tinder, Instagram or any equivalent or similar service)."
— *R. v. Gucciardi*, [2017] O.J. No. 5974, 2017 ONCJ 770, para 45, 74

Sentencing – The accused pled guilty to possession of child pornography and internet luring. The accused had created a fake Facebook identity to persuade an 11-year-old girl to engage in sexually explicit conversation, and send him sexually explicit pictures of herself. He also sent her pictures of an adult penis. Though the accused characterized his actions as a "stupid decision", the court rejected this narrative and emphasized a high moral culpability. Specifically, the court noted the accused "was involved in the internet luring of a child through a medium in which children are particularly susceptible to influence because of the importance it plays in their daily lives: Facebook. To use Facebook in this manner illustrates a commitment to the commission of a sexual offence against a child which is alarming."
— *R. v. Clarke*, [2017] N.J. No. 230, 2017 NLPC 1317A00102, para 88

Sentencing — The accused was convicted of luring a child. Since his s. 8 *Charter* rights were violated during an undercover Facebook investigation, his sentence was reduced. A request for a stay of proceedings was rejected.
— *R. v. Mills*, 1136 A.P.R. 237, 120 W.C.B. (2d) 235 (NLPC).

Sentencing — The accused pled guilty to sexual assault, prostitution of a person less than 18 years old, failure to comply with a recognizance, and luring a child. Among other things, the sentencing judge prohibited the accused from Internet use for 20 years, and from owning or using any mobile device with Internet capabilities. The Court of Appeal deemed this order as unnecessary for advancing the objective of protecting children, given the Internet may be required for a "myriad or innocent and perhaps unavoidable activities" (para. 26). Furthermore, "Section 161(1)(d) permits the courts to prohibit Internet use but does not provide the court with the power to restrict ownership of such Internet capable devices" (para. 27). The replacement order included a 20-year prohibition of using a computer to communicate with a person under 16 years old, except for immediate family members, and prohibited Internet use "or any similar communication service to…directly or indirectly access any social media sites, social network, Internet discussion forum, or chat room, or maintain a personal profile on any such service," including Facebook (para. 29).
— *R. v. Brar,* 2016 ONCA 724, 134 O.R. (3d) 103.

Sentencing — The accused pled guilty to luring a child, possession of child pornography, and 11 counts of extortion. The terms of his 18-month probation included, among other things: not

possessing or using any computer or other device that has Internet access, except with advance written permission; monitored use of Internet access, if granted; and the accused's identification by his full real name when communicating with anyone by means including Facebook, Twitter, Instagram, or any other social network.
— *R. v. R.W.,* 2016 ONCJ 325, 131 W.C.B. (2d) 68.

Sentencing — The accused was convicted of luring a child. The accused's creation of three false Facebook identities for luring was deemed "alarming and frightening" (para. 75), especially since Facebook is a "medium in which children are particularly susceptible to influence because of the importance it plays in their daily lives" (para. 79). The court concluded both Crown and defense sentencing submissions did not adequately reflect the seriousness of the offence. Among other things, the court imposed a 10-year prohibition of using the Internet or other digital network to contact any person under 18 years of age, except the two children he lived with.
— *R. v. M.C.,* 2016 CanLII 83, 127 W.C.B. (2d) 435 (NLPC).

Sentencing — Crown appeal of sentence. The accused's use of the Internet to lure was a serious aggravating factor that justified at least a three-year sentence of imprisonment. However, the appropriate global sentence of three-and-one-half years' imprisonment was not imposed, because of the lengthy delay of more than one-and-a-half years beyond what was usual for a substantive appeal.
— *R. v. Hajar,* 2014 ABCA 222, 577 A.R. 57.

Sentencing — The accused pled guilty to luring a child and breaching probation. Among other things, the court imposed a 10-year supervision order, which included prohibiting possession or use of any device with Internet access, or accessing any other digital network, without advance written permission of the supervisor.
— *R. v. Slade,* 2015 ONCJ 8, 119 W.C.B. (2d) 533.

Sentencing — The accused pled guilty to luring a child. Among other things, the court imposed a 12-month probation order, which included prohibiting the accused from owning, possessing, accessing, or using a device that can access the Internet, except for employment, education, or other purposes after obtaining written permission from a probation officer.
— *R. v. M.G.P.,* 2015 SKPC 80, 477 Sask. R. 263.

Sentencing —The accused pled guilty to luring a child and distributing sexually explicit material to a child. The court noted his sexual Facebook messaging to three girls lacked "the sophistication and predatory anonymity of many offenders"; this was one reason the court was less willing to find the accused should be separated from society for a long time (paras. 73, 78). Among other things, the court imposed a probation order, which included conditions not to possess or use any device that access the internet, except with prior written permission; if permission is given, the accused must provide passwords and allow monitoring.
— *R. v. Callahan-Smith,* 2015 YKTC 3, 119 W.C.B. (2d) 417.

Sentencing — The accused pled guilty to luring a child and making sexually explicit material available to a child. Among other things, the court imposed a three-year probation period, including conditions of not possessing any device capable of accessing the Internet, and not using any electronic device to access chat rooms or social networking sites.
— *R. v. Smith,* 2014 ONCJ 543, 116 W.C.B. (2d) 655.

Sentencing — The accused pled guilty to sexual interference and luring a child. An aggravating factor was his Internet use, which amounted to a "virtual home invasion" and was "specifically designed to evade any parental oversight" (para. 17). Among other things, the court imposed a 3-year probation period, including prohibition of contact in person or by means of telecommunication, with anyone under the age of 16 (unless supervised by an appropriate person).
— *R. v. Hajar*, 2014 ABQB 550, 116 W.C.B. (2d) 655.

Sentencing — The accused pled guilty to sexual interference, invitation to sexual touching, and luring a child. Among other things, the court imposed a s. 161 prohibition order for life, which included a prohibition on using the Internet or other digital network, unless for employment, seeking employment, or education.
— *R. v. Stanley,* [2014] O.J. No. 6378, 119 W.C.B. (2d) 419 (ONCJ).

Sentencing — The developmentally-delayed accused pled guilty to offences of luring a child and breach of recognizance. Among other things, the court imposed a 15-month probation period that required him not to use the Internet or other digital network, unless under the supervision and in the immediate presence of an adult.
— *R. v. S.S.,* 2014 ONCJ 184, 113 W.C.B. (2d) 160.

Sentencing — In considering an appeal of a sentence for numerous sexual offences, the court noted the accused's submitted sentencing decisions for comparison "were rendered some time ago"; we better understand now the severe impact online sexual exploitation can have on children (para. 17). Consequently, the court "must resort to imprisonment, emphasizing the sentencing objectives of protection, punishment and deterrence", and dismissed the accused's argument that the parity principle had been violated (para. 18).
— *R. v. Mackie*, 2014 ABCA 221, 588 A.R. 1.

Sentencing — The accused pled guilty to luring a child, extortion, distributing and accessing child pornography, invitation to sexual touching, unauthorized use of computer, and other offences. In determining his high moral blameworthiness, the court noted the accused's "use of the internet…have [sic] elements of disturbing online sexual harassment – an adult criminally cyberbullying and cyberstalking" (para. 62). As an "online faceless unknown entity," he was also "all the more frightening for his victims" (para. 64).
— *R. v. Mackie,* 2013 ABPC 116, 106 W.C.B. (2d) 545.

Sentencing — The accused pled guilty to sexual interference and luring a child. Citing a report from the Sentencing Council for England and Wales, the court notes that exchange of "sexual images" of a victim (in this case, over Facebook) is an aggravating factor (para. 11).
— *R. v. Nightingale,* 1030 A.P.R. 60, 104 W.C.B. (2d) 1235 (NLPC).

Sentencing — The accused pled guilty to sexual interference and luring a child. The accused's Facebook messages to the victim were used as evidence to show the accused's manipulative behaviour and high risk for future sexual misconduct. The court thus emphasized the principles of denunciation and deterrence. Among other things, the court imposed a 3-year probation order that included a prohibition of owning, touching, or possessing any computer system or any other device capable of accessing the Internet.
— *R. v. Lamb*, 2013 BCPC 137, 107 W.C.B. (2d) 199.

Sentencing — The accused was found guilty after a jury trial of luring a child. The majority of the communication occurred on an online dating site, as well as by text message and Facebook chat. Sentencing was conducted on the basis of the provisions of s. 172.1 before the introduction of a mandatory minimum. The fact that the complainant was a real young person, as opposed to fictitious, as where undercover police engage the accused, was considered aggravating.
— *R. c. Allard,* 2014 NBBR 261, 118 W.C.B. (2d) 430 (NBQB).

Sentencing — The accused pled guilty to counts of s. 151 sexual interference, and s. 172.1 luring. The Crown appealed against a 90-day intermittent sentence given by the trial judge, arguing for a 15-18 month range. On appeal, the defence maintained the original sentence was appropriate. The court confirmed the trial judge's identification, as an aggravating factor, of a pattern of manipulation, moving from the virtual to the real. The court described inappropriate chat messages and sharing of intimate photos, which occurred mostly on an adult dating website, but also via Facebook, as a prelude to the sexual touching. The court also found that the trial judge gave insufficient weight to the importance of premeditation, in the form of grooming the victim via the luring offence, as a predicate to the sexual interference (paras. 50-52). The court found that the absence of violence, other than the inherent violence of the offence, was not a mitigating factor (para. 56).
— *R. c. Bergeron,* 2013 QCCA 7*,* 110 W.C.B. (2d) 784*.*

Sentencing — The accused plead guilty to one count each of s. 172.1 luring, s. 151 sexual interference, and s. 152 invitation to sexual touching. The serious touching offences were planned in detail via Facebook messages, giving rise to the charge of luring. The court found that the fact that the victim was between 15 and 16 at the time of commission of the offence was not a mitigating factor. Relying on *R. c. Arbut*, 2009 QCCA 46, [2009] J.Q. no 150, the court found that the sentence for the luring offence should be consecutive to any sentence for the ultimate sexual interference or invitation to touching offences, but with consideration for the totality principle. A global sentence of 27 months, with 12 months for the luring offence, and 15 consecutive months for the interference and invitation offences, was ordered.
— *R. c. Fortin*, 2015 QCCQ 1369, [2015] J.Q. no 1513.

Sentencing — The accused pled guilty to one count each of luring and sexual interference. Thousands of messages had been exchanged by text message, Facebook, and Skype. A 14 month sentence was imposed, with 11 months for luring, and three months consecutive for the sexual inference, which were the sentences sought by the crown. The fact that the luring had proceeded to physical contact was an aggravating factor for sentencing on the luring offence. There was extensive discussion of the totality principle as well as a finding that, even if they might be part of the same "criminal adventure", these two offences are sufficiently distinct so as not to offend the rule in *R. v. Kienapple*, [1975] 1 SCR 729.
— *R. v. Dominaux* (2017), 136 W.C.B. (2d) 218, [2017] N.J. No. 16 (NLPC).

Sentencing — The accused was convicted of possessing child pornography, and luring. The offences related to the sending of a single photo by the complainant to the accused. The accused had gone too far in what was a misguided attempt to relate to a young person who faced similar difficulties to those faced by the accused during his youth in the same community. The accused was Aboriginal, posed no risk of recidivism, and had been on highly restrictive bail conditions without breaches for 5 years. The sentencing proceeded on the provisions as they

stood in 2011, with no minimum for the luring, and 14 days for the child pornography. The accused was sentenced to 60 days intermittent on the child pornography charge, and a 9 month conditional sentence on the luring charge.

— *R. v. Crant,* 2017 ONCJ 192, [2017] O.J. No. 1493.

Indecent acts

173 (1) Everyone who wilfully does an indecent act in a public place in the presence of one or more persons, or in any place with intent to insult or offend any person,

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

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

Exposure

(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of 16 years

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

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

R.S., 1985, c. C-46, s. 173; R.S., 1985, c. 19 (3rd Supp.), s. 7; 2008, c. 6, s. 54; 2010, c. 17, s. 2; 2012, c. 1, s. 23.

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General case law

Essential elements — s. 173(1) — "Indecent act" and "public place" is defined in s. 150 of the *Criminal Code*. "Public place" should be understood as any place to which the public have physical, as opposed to simply visual, access.[1] An indecent act does not require a sexual context; instead, it should be assessed on the community standard of tolerance test.[2] This offence is made out when either: (i) the accused wilfully does an indecent act in a public place in the presence of one or more persons other than the accused; or (ii) the accused does an indecent act in any place with a specific intent to insult or offend any person. Regarding (i), there is conflicting jurisprudence as to whether "wilfully" applies merely to the indecent act, or also to the requirement that the act be done in a public place in the presence of one or more people.[3] That an unmonitored video camera observes the acts, or another person was involved in the act, does not satisfy the requirement that the act was performed in the presence of one or more persons.[4]

— [1]*R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6.

— [2]*R. v. Jacob,* [1996] 31 O.R. (3d) 350, 142 DLR (4th) 411 (ONCA).

— [3]*R. v. Sloan*, [1994] 18 O.R. (3d) 143, 70 O.A.C. 357 (ONCA), (Galligan J.A. finding willfulness applies to both elements, Osborne J.A. finding that it applies only to the commission or performance of the act, and Goodman J.A. taking no position on this issue); *R. c. Mailhot* (1996), 108 C.C.C. (3d) 376, 31 W.C.B. (2d) 466 (QCCA), (preferring the position of Galligan J.A. in *Sloan* that both the act, and its being done in the presence of another, must be willful).

— [4]*R. v. Follett* (1994), 91 C.C.C. (3d) 435, 24 W.C.B. (2d) 456 (NLSC), affd in *R. v. Follett* (1995), 98 C.C.C. (3d) 493, 27 W.C.B. (2d) 413 (NLCA).

Essential elements — s. 173(2) — "Indecent act" is defined in s. 150 of the *Criminal Code*. Mere nudity, without a degree of "moral turpitude", will not suffice.[1] "In any place" refers to the location where the accused exposes himself; there is no requirement the accused and victim be in the same place when the offence is committed. As such, this section applies to images sent over the Internet.[2]

— [1]*R. v. Beaupre* (1971), 7 C.C.C. (2d) 320, [1971] B.C.J. No. 607, para. 6 (BCSC).
— [2]*R. v. Alicandro*, 2009 ONCA 133, 95 O.R. (3d) 173, leave to appeal refused [2009] S.C.C.A. No. 395.

Consent no defence — S. 150.1 provides that the consent of the complainant is no defence to, among others, an offence under s. 173(2). This limitation is not a violation of s. 7 of the *Charter*.[1]

— [1]*R. v. Hann* (1992), 75 C.C.C. (3d) 355, 100 Nfld. & P.E.I.R. 339 (NLCA).

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Social media case law

Exposure of genitals for sexual purpose to a person under 16 years of age via Facebook — On the facts, the accused was acquitted of this offence because the Crown failed to prove beyond a reasonable doubt that the "penis picture" allegedly sent by the accused via Facebook was of *his* genital organs. "If the accused sent pictures of someone else's penis he would not have violated the section" (para. 199).

— *R. v. A.H.*, 2016 ONSC 3709, 131 W.C.B. (2d) 302.

Constitutionality of retrospective application of s. 161(1) amendments — The 2012 s. 161(1) amendments empower sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age (s. 161.1(1)(c)), or from using the Internet or other digital networks (s. 161(1)(d)). The Supreme Court found that these amendments constitute punishment, and thus retrospectively applying them violates s. 11 of the *Charter*. Retrospective application of the s. 161(1)(c) contact provision fails the cost-benefit stage of the *Oakes* test, but retrospective application of the s. 161(1)(d) internet prohibition is saved by s. 1. Section 161(1)(d) is directed at "grave, emerging harms precipitated by a rapidly evolving social and technological context". Furthermore, an "Internet prohibition, while invasive, is not among the most onerous punishments, such as increased incarceration" (para. 114).

— *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906.

Criminal harassment

264 (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

Prohibited conduct
(2) The conduct mentioned in subsection (1) consists of

- **(a) repeatedly following from place to place the other person or anyone known to them;**
- **(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;**
- **(c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or**
- **(d) engaging in threatening conduct directed at the other person or any member of their family.**

Punishment
(3) Every person who contravenes this section is guilty of

- **(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or**
- **(b) an offence punishable on summary conviction.**

Factors to be considered
(4) Where a person is convicted of an offence under this section, the court imposing the sentence on the person shall consider as an aggravating factor that, at the time the offence was committed, the person contravened

- **(a) the terms or conditions of an order made pursuant to section 161 or a recognizance entered into pursuant to section 810, 810.1 or 810.2; or**
- **(b) the terms or conditions of any other order or recognizance made or entered into under the common law or a provision of this or any other Act of Parliament or of a province that is similar in effect to an order or recognizance referred to in paragraph (a).**

Reasons
(5) Where the court is satisfied of the existence of an aggravating factor referred to in subsection (4), but decides not to give effect to it for sentencing purposes, the court shall give reasons for its decision.

R.S., 1985, c. C-46, s. 264; R.S., 1985, c. 27 (1st Supp.), s. 37; 1993, c. 45, s. 2; 1997, c. 16, s. 4, c. 17, s. 9; 2002, c. 13, s. 10.

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General case law

Essential elements — The elements of the *actus reus* are: 1) the accused engaged in conduct prohibited by s. 264(2)(a), (b), (c) or (d) of the *Code*; 2) the complainant was harassed; 3) the prohibited conduct caused the complainant to fear for their or another's safety; and 4) the complainant's fear was reasonable. The *mens rea* is knowledge of, wilful blindness, or recklessness as to whether the complainant was harassed.[1] "Repeatedly" under s. 264(2)(a) and (b) means more than once,[2] but not necessarily more than twice.[3] A charge under s. 264(1)(d) can be supported based on a single incident, unlike ss. 264(1)(a) and (b).[4] An accused's conduct may be contrary to s. 264(2)(d) without spoken words.[5] The *Kienapple* principle may preclude multiple convictions for criminal harassment and uttering threats.[6]
— [1]*R. v. Sillipp*, 1997 ABCA 346, 209 A.R. 253; *R. v. Kosikar*, 178 D.L.R. (4th) 238, 138 C.C.C. (3d) (ONCA); *R. c. Lamontagne*, 129 C.C.C. (3d) 181, 39 W.C.B. (2d) 546 (QCCA); *R. v. Sanchez*, 2012 BCCA 469, 99 C.R. (6th) 180.
— [2]*R. v. Ryback*, 71 B.C.A.C. 175, 105 C.C.C. (3d) 240 (BCCA).
— [3]*R. v. Ohenhen*, 77 O.R. (3d) 570, 200 C.C.C. (3d) 309 (ONCA).
— [4]*R. v. Kosikar* (1999), 178 D.L.R. (4th) 238, 138 C.C.C. (3d) (ONCA), para. 15-17; *R. v. Hawkins*, 2006 BCCA 498, 233 B.C.A.C. 7, at para. 19-20.
— [5]*R. v. Kohl* (2009), 94 O.R. (3d) 241, 241 CCC (3d) 284 (ONCA).
— [6]*R. v. Hawkins*, 2006 BCCA 498, 233 B.C.A.C. 7.

Defining harassment — To prove harassment, it is not sufficient that the complainant was annoyed or disquieted; instead, the complainant must have felt "tormented, troubled, worried continually or chronically, plagued, bedeviled and badgered".[1] These words do not replace the word "harassed" in the *Code*, nor is it necessary that a complainant experience all of these feelings cumulatively to be harassed.[2] Harassment is not restricted to its "classical" sense of repeated minor attacks, and can include bothering the complainant with repeated demands, solicitations, or incitements. Harassment can be bothersome by reason principally of its continuity or repetitive nature.[3]
— [1]*R. v. Kosikar*, 178 D.L.R. (4th) 238, 138 C.C.C. (3d) 217 (ONCA), paras. 24-5.
— [2]*R. v. Kordrostami*, 47 O.R. (3d) 788, 143 C.C.C. (3d) 488 (ONCA).
— [3]*R. c. Lamontagne*, 129 C.C.C. (3d) 181, 39 W.C.B. (2d) 546 (ONCA), para. 28.

***Charter* concerns —** Assuming the provisions of s. 264 infringe the right to freedom of expression guaranteed by s. 2(b) of the *Charter*, the infringement is justified by s. 1 of the *Charter*. S. 264 also does not violate s. 7 of the *Charter* for being impermissibly vague, or allowing the morally innocent to be punished.
— [1]*R. v. Sillipp*, 1997 ABCA 346, 209 A.R. 253; *R. v. Krushel* (2000), 130 O.A.C. 160, 142 C.C.C. (3d) 1 (ONCA).

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Social media case law

Definition of "Doxing" —"Doxing" involves publishing on the Internet identifiable personal information about an individual that has usually been obtained from social media sites and from hacking into private systems. Depending on the nature of the information, its disclosure can cause the victim distress, fear, embarrassment and shame. The personal information can be

used by others to facilitate identity theft and fraud. The threat to publish private information can also be used by the person who holds the information for extortion and blackmail purposes."
— *R. v. B.L.A.*, 2015 BCPC 203, 123 W.C.B. (2d) 85, para. 3.

Definition of "Swatting" —"Swatting involves tricking an emergency service agency into dispatching an emergency response based on a false report of an ongoing critical incident. Swatting can lead to the deployment of a range of emergency response teams including police, fire and bomb squads and the evacuation of businesses, schools or other public institutions."
— *R. v. B.L.A.*, 2015 BCPC 203, 123 W.C.B. (2d) 85, para. 4.

Not objectively reasonable — Blocking on social media, in this case twitter, may not be enough to convey that an individual has been harassed.
— *R v. Elliott*, 2016 ONCJ 35.

Not objectively reasonable — The accused continuously sent threatening messages via Facebook and text message. The accused's claim that the complainant's subjective feeling of harassment resulted from a misinterpretation of the Facebook message was not credible.
— *R. v. Richner,* 2017 QCCQ 3095.

Not objectively reasonable — Accused posted various threatening materials against the complaint (his ex-wife) on Facebook. Court found that none of the material can be considered threatening in themselves. Given that the accused also blocked the complainant, the court held that there could be no harassment until the complainant decided to use another person's account to view the accused's profile.
— *R. v. Corby,* 2012 BCPC 561.

Not objectively reasonable — Accused commented "Good get the bitch out of there before I bomb her" when she tweeted a CTV article "Pauline Marois ready to call an election" (para 2). Accused acquitted of criminal harassment as the Crown failed to establish that then Premier of Quebec feared for her safety or anyone known to her.
— *R. v. Le Seelleur*, 2014 QCCQ 12216.

Not objectively reasonable — Accused asked complainant twice over Facebook to show him her breasts, allegedly sent her pornographic pictures over email, and stared at her chest during family gatherings. Complainant blocked him on Facebook and deleted him from MSN. Court neither found complainant credible nor found that such fear would have been reasonable.
— *R. v. Doyle,* 2009 NSPC 56.

Objectively reasonable — The accused was convicted of criminal harassment due to emails, text messages, and Facebook messages sent to the complainant. Just a smiley face, the court found, can trigger objectively reasonable paranoia regarding "how far the accused was willing to go" (para 18).
— *R. v. Alotaibi* (2013), OJ No 2473, 109 WCB (2d) 111.

Objectively reasonable — Accused sent numerous Facebook messages from his personal account and two other fake accounts. The court accepted that it was the Accused sending

messages from the fake accounts, given the consistency of tenor and content. Complainant's threat found to be reasonable, in part, because one message was read as a threat.
— *R. v. Amiri*, [2015] O.J. No. 5256.

Objectively reasonable — In granting the Crown's application for witness accommodation, the court accepted that the Crown's argument "that the circumstances surrounding the alleged offence, being through a communication by way of Facebook, are supportive of the view that direct confrontation of the witness by the accused in the courtroom will cause the witness unacceptable stress and anxiety" (para. 16)
— *R. v. O'Hare,* 2017 BCPC 118.

Objectively reasonable — Accused sent SnapChat messages threatening to shoot up two schools. The few students who received personal messages of "RIP" also felt especially threatened (para 7). Two schools had to take additional security measures and parents feared for their children's lives. The principal of Eastdale Collegiate also claimed in his Victim Impact Statement that "students are afraid to come to school, have lost instructional time, and have required counselling" (para 23).
— *R. v. Richardson*, [2018] O.J. No 1452.

Objectively reasonable — RM and SH (motorcyclists) were harassed through social media/ email/ in-person by Mr. James, who is a member of the Bacchus Motorcycle Club. James, for instance, sent the following Facebook message to RM when he was out-of-town: "will see you as soon as you get back. Don't waste your dollars on any souvenirs" (para 37). Judge claimed that: "I am satisfied beyond a reasonable doubt that, looking at all the circumstances, Mr. James was effectively saying to RM: "you, and your family, are at risk of suffering serious bodily harm" (para 177).
— *R. v. Howe,* [2018] N.S.J. No. 281.

Objectively reasonable — Hirsch posted a nude photo of his ex-girlfriend and uttered a threat along with the photo, namely that he would choke his ex-girlfriend and end it with a shotgun shell. Accused sentenced to 6-months incarceration and 12 months probation; sentence upheld on appeal.
— *R. v. Hirsch*, [2017] S.J. No. 59, 2017 SKCA 14.

Objectively reasonable — Ernest Stewart began messaging his ex-girlfriend and her current partner. After Stewart was blocked, he hacked his ex-girlfriend's Facebook account and sent the following messages to the victim's current partner: "don't be coming around because Ernest will be anal with his actions like Texas Chainsaw" (para 3). He also messaged, I hope somebody don't fall over the wharf and crack their skull, I've seen it before, Accidents Happen" (para 3). Judge sentenced Stewart to an adjusted global sentence of 30 months which included 6 months for criminal harassment.
— *R. v. Stewart*, [2018] N.J. No. 76.

Objectively reasonable — Accused repeatedly harassed victim on social media (namely Facebook), thereby causing victim to reasonably fear for her safety. One of the messages, for instance, claimed: "Tell your mom that if she doesn't fucking straighten out, she will be fucking drug (sic) behind a truck" (para 54).

— *R. v. Lauck*, [2018] A.J. No. 1312.

Objectively reasonable — Mr. R separated from his wife, Ms. R. Mr. R concluded that his wife had an affair with Mr. A. In response, Mr. R messaged Mr. A's wife (Ms. A), informing her of the affair and threatening to harm her husband. Many acts of harassment were ensued against Ms. R and Mr. A, including on Twitter, e-mail, Google Review, and voicemail.
— *R. v. J.R.*, [2018] O.J. No. 6409.

Evidence — Section 8 of the *Charter* was not breached by the police (1) receiving emails from [the accused's email address] directed to the email address created by the police; (2) obtaining screen captures of emails allegedly composed by the accused; or (3) obtaining subscriber information from Shaw Communications relating to the I.P. address of the emails received by the police. Consequently, the screen captures, all the email transactions in question, and the PIPEDA requests and responses were admitted into evidence.
— *R v Labrentz,* 2010 ABPC 11.

Evidence — Proof of the Tweets sent by the accused and their content comprise the entire case on the act of repeated communications. The detective used the Sysomos software to obtain electronic records of the tweets, part of which is not available on the public platform. Court found there is sufficient corroborating evidence proving the accused sent the tweets and no reason to question the reliability of the Sysomos software used.
— *R. v. Elliott*, 2016 ONCJ 35.

Evidence — The accused was convicted of criminal harassment, in part due to a large number of Facebook messages sent from his personal account and two other fake Facebook accounts. The court accepted that the accused sent the Facebook messages from the fake Facebook accounts, given the consistency of tenor and content of these messages with the accused's text messages and in-person interactions with the complainant.
— *R. v. Amiri*, [2015] O.J. No. 5256.

Sentencing — Aggravating factors were the serious impacts that the social media posts had on the communities: Two schools had to go on shut down as a result of the accused's posts threatening to shoot down the school. Another aggravating factor is that the student was warned when he was 16 for similar posts and was offered counselling, but he declined.
— *R. v. Richardson*, [2018] O.J. No 1452.

Sentencing — Abusing/ assaulting a (common law) partner was an aggravating factor as per section 718.2(a)(ii). The fact that accused did not post the video of the victim having sexual intercourse with another man, but only sent it to the victim's friend, decreased the seriousness of the crime.
— *R. v. Greene*, [2018] N.J. No. 95.

Sentencing — The court held that general deterrence and denunciation are primary considerations when individuals use social media to criminally harass others. "It is imperative that the community at large get the message that using social media to criminally harass another person will not be tolerated and that serious repercussions will ensue for those who engage in it" (para 27).

— *R. v. Gardner*, [2018] N.J. No. 243.

Sentencing — The accused, a talented young pianist, posted his ex-girlfriend's nude photos on a pornographic website without her consent. He was charged with criminal harassment and pled guilty. Court noted his excellent antecedent record and high rehabilitation potential, but refused to exercise its discharge discretion under s. 730(1), stating the best interest of the accused is outweighed by the sentencing objectives of denunciation and general deterrence "given the affront to the high value society places on human dignity and privacy within the context of close intimate relationships." (para. 28). A 12-month non-reporting probation was imposed.
— *R. v. B.Z. (Zhou)*, 2016 ONCJ 547.

Sentencing (Prohibition on Social Media Use) — Court found the accused's conduct had a life-changing and serious effect on the victim and her family, and that the accused had little appreciation for the impact of his conduct. In sentencing him to 18 months incarceration additional to the 5-months spent in pre-trial detention, the Court imposed a 3-year probation order, which included a prohibition from accessing the internet and not being in possession of any electronic device with capacity to access to the internet.
— *R. v. Cholin,* 2010 BCPC 417.

Sentencing (Prohibition on Social Media Use) — The accused (a youth) sent a number of threatening Facebook messages to his ex-girlfriend, in the context of other abusive and criminal conduct. Court found his behaviour exhibited a "complete breakdown in respect for others", particularly the three victims (para. 57). The sentence was a 6-month deferred custody and supervision order and a 15-month probation, under the conditions that the accused immediately delete his social media accounts.
— *R. v. C.L.*, 2014 NSPC 79.

Sentencing (Review Board) — Layne and & Deneeka were involved in an intimate relationship, Daneeka no longer wanted contact. Layne nonetheless contacted Deneeka by phone, text message, and Facebook. Layne's current diagnosis is schizophrenia and cannbis abuse disorder. Review board concluded that Layne continued to pose a significant threat to the safety of the community, and he received a conditional discharge disposition, subject to conditions, including he not cohabit with Daneeka.
— *Layne (Re)* (2018), O.R.B.D. No. 1211.

Sentencing (Review Board) — The board, in agreement with the hospital, agreed "that a detention order is both necessary and appropriate at this early stage of Ms. Fournier's treatment and rehabilitation (para 21). Review board found Ms. Fournier's threats against a Crown attorney, which she posted on Facebook, was due to her delusions, which have been ongoing for 18 years.
— *Fournier (Re)* (2018), O.R.B.D. No. 53.

Not Criminally Responsible (Review Board) — The accused, diagnosed with Asperger's Disorder, was found NCR on account of mental disorder on two counts of criminal harassment in 2013. He has since been detained at the hospital.
— *Baynham-McColl (Re)* (2017), O.R.B.D. No. 120.

Not Criminally Responsible (Review Board) — Accused found Not Criminally Responsible after repeated interactions on Facebook and other mediums with victim. Accused diagnosed with a delusional disorder. The court did not make a Disposition but deferred the matter to the Ontario Review Board. “Board satisfied that that Mr. McCormick poses a risk of serious physical or psychological harm to members of the public and should be subject to a detention Disposition.” (para 40).

— *McCormick (Re)* (2018), O.R.B.D. No. 2970.

Not criminally Responsible (Review Board) — Teresa Lidguerre was found NCR on charges of uttering death threats against PM Justin Trudeau and uttering death threats against unspecified persons and PM Justin Trudeau. Under s. 672.47, the court did not make a disposition but remanded the accused to the Ontario Review Board. Given Ms. Lidguerre’s severe mental illness of schizophrenia, her reintegration into society and other needs, as well as the paramount consideration of public safety, the Board issued a detention order under s. 672.54.

— *Lidguerre (Re)* (2017), O.R.B.D. No. 630, 2017 CarswellOnt 4315.

Not Criminally Responsible (Review Board) — Carpio was found NCR on charges of criminal harassment, uttering threats, and breach of recognizance, and was made subject to the dispositions of the Ontario Review Board. He was diagnosed as psychotic disorder NOS with at least three years of history and potential to relapse into substance abuse. Accordingly, the Board found he has met the test for significant risk and should continue to be detained.

— *Carpio (Re)* (2017), O.R.B.D. No. 27, 2017 CarswellOnt 105.

Not Criminally Responsible (Review Board) — Mr. Jain was found NCR on four charges of uttering death threat and was detained at a health care facility. Since primary school, he has been struggling with mental illness (diagnosed Bipolar I Disorder) and later substance abuse. A conditional discharge was granted.

— *Jain (Re)* (2017), O.R.B.D. No. 356, 2017 CarswellOnt 2830.

Not Criminally Responsible (Review Board) — Mr. Im was found NCR on charges of criminal harassment, uttering a threat to cause death or bodily harm, and failure to comply with probation order. The Court did not make a disposition. The Board found his Schizophrenia and residual psychotic symptoms continue to pose a threat and ordered detention at a treatment facility.

— *Im (Re)* (2017), O.R.B.D. No. 287, 2017 CarswellOnt 2607.

Charter considerations — The accused was sentenced to 1yr imprisonment followed by 2yr probation for posting photos of his 16-year-old ex-girlfriend on the internet. He challenged the constitutionality of the mandatory minimum sentence of 1yr prescribed by s. 163.1(3) for violating s. 12 of the Charter. Court found the section does not constitute cruel and unusual punishment – deterrence & denunciation were primary objectives when case involves abuse of a minor (para 85).

— *R. v. Shultz*, 2008 ABQB 679.

Uttering threats

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a) to cause death or bodily harm to any person;

(b) to burn, destroy or damage real or personal property; or

(c) to kill, poison or injure an animal or bird that is the property of any person.

Punishment

(2) Every one who commits an offence under paragraph (1)(a) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Idem

(3) Every one who commits an offence under paragraph (1)(b) or (c)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. 27 (1st Supp.), s. 38; 1994, c. 44, s. 16.

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General case law

Essential elements — *actus reus* — The *actus reus* of this offence is uttering, conveying, or otherwise causing any person to receive a threat of death or serious bodily harm. Whether a statement constitutes a threat is a question of law, assessed on an objective standard, with regards to the particular context in which the statement is communicated.[1] The Crown does not need to prove the intended recipient was intimidated by the threat, or even aware of the threat. It is also unnecessary for the threat to be directed towards a specific person; a threat towards a particular group is sufficient.[2]

— [1]*R. v. McRae*, 2013 SCC 68, [2013] 3 S.C.R. 931.

— [2]*R. c. Rémy*, [1993] R.J.Q. 1383, 82 C.C.C. (3d) 176 (QCCA).

Essential elements — *mens rea* — The *mens rea* of this offence is intent to have the threat intimidate, or to be taken seriously. This fault element is disjunctive. While this is a subjective standard, the court will often have to draw inferences from the words and circumstances to determine whether the requisite *mens rea* was present.[1] The accused need not have intended to convey the threat to the intended victim of the threat, or to carry out the threat.[2] It is sufficient the accused intended that those to whom the words were spoken take the threat seriously.[3]

— [1]*R. v. McRae*, 2013 SCC 68, [2013] 3 S.C.R. 931.

— [2]*R. v. Tibando* (1994), 69 O.A.C. 225, 88 C.C.C. (3d) 229 (ONCA), para. 2.

— [3]*R. v. McRae*, 2013 SCC 68, [2013] 3 S.C.R. 931, para. 17, citing *R. v. Clemente*, [1994] 2 S.C.R. 758, [1994] S.C.J. No. 50.

***Charter* concerns —** S. 264.1 infringes the right to freedom of expression as guaranteed by s. 2(b) of the *Charter*, but is saved by s. 1 of the *Charter*.
— *R. v. Clemente* (1993), 92 Man.R. (2d) 51, 86 C.C.C. (3d) 398 (MBCA), aff'd in *R. v. Clemente*, [1994] 2 S.C.R. 758, 95 Man.R. (2d) 161.

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Social media case law

Uttering threats on Twitter — A 19-year old accused posted a link on Twitter to a CTV article entitled "Pauline Marois ready to call an election", with her own comment: "Good get the bitch out of there before I bomb her". Despite the accused's regret, remorse and cooperation with the police after being confronted by them about the tweet, she was angry and frustrated at the moment she made this tweet and had the requisite intention to be taken seriously. She was convicted of uttering threats. However, she was acquitted of criminal harassment (see above).
— *R. v. Le Seelleur*, 2014 QCCQ 12216, 2015EXP-309.

Uttering threats on Facebook — Through Facebook, the accused described to the complainant his sexual fantasies, which included physically harming her in violent ways. Upon arrest, the accused was found in possession of a hand-written note stating the accused could only get sexual pleasure "if the female was undergoing extreme pain, being raped, abused, tortured, or was [...] crying". When establishing the intent behind the Facebook messages, the court noted the accused's incriminating words. Furthermore, given the brevity of relationship between the parties, it was reasonable to conclude the accused's Facebook messages were serious when they conveyed he did not care if she consented to being harmed.
— *R. v. D.D.*, 2013 ONCJ 134, 105 W.C.B. (2d) 345.

Uttering threats on Facebook — The accused had previously posted images of swastikas, a single reference to the Virginia Tech massacre, and anti-Semitic comments on his Facebook profile. The police cautioned him about these posts, but no charges were laid. About a month later, the accused posted a status update on his profile reading: "I'm wearing black and I'm riding black this time around…I'm bringing death with me this time around." The court noted that the format of a Facebook status update "diminishes the seriousness" of these words (para. 9). After considering the accused's habit of posting hourly Facebook updates on what he was doing, political opinions, and biblical references, the court concluded there was a reasonable doubt as to whether the accused intended his status update as a death threat.
— *R. v. Lee,* 2010 ONCJ 291, 89 W.C.B. (2d) 209.

Uttering threats on Facebook — The accused posted a number of Facebook statuses that, "[v]iewed objectively…would convey a threat of serious bodily harm" (para. 7). However, the court concluded the accused did not mean to intimidate, because people use Facebook to construct an alternate persona, the postings were mere expressions of emotions directed towards those who might be sympathetic to the accused's anger at losing his son, the accused had numerous contacts with the apparent targets of his threats, yet did not do anything, and the accused testified he posted these items to blow off steam, as he was taught in a prior anger management course.
— *R. v. Sather*, 2008 ONCJ 98, 78 W.C.B. (2d) 285.

Uttering threats on Facebook — The accused posted a number of statuses on Facebook advocating for the death of political figures, including Prime Minister Justin Trudeau and Alberta Premier Rachel Notley. The accused had previously been warned by police that threats to kill or cause bodily harm "cross the line" of s. 264.1 of the *Criminal Code*. This case was distinguished from *R. v. Sather* (above) on the basis that the accused in this case did not adduce any evidence that his comments were part of an attempt to create an alternate persona, or intended simply as an attempt to blow off steam.
— *R. v. Hayes*, 2017 SKPC 8, [2017] S.J. No. 40.

Uttering threats on Facebook — The accused was acquitted on an Uttering Threats charge based on a reasonable doubt about whether the accused intended to intimidate or be feared, given that the accused's statements were phrased in an apparently facetious or absurd manner, despite their hateful content. (See, however, entry for *R. c. Rioux* under s. 319, inciting hatred.)
— *R. c. Rioux*, 2016 QCCQ 6762, 2016EXP-2527, unofficial English translation available at 2016 CarswellQue 13004.

Uttering threats on Facebook — Consideration of accused's explanation of comments — The accused successfully appealed convictions for uttering threats and s. 464 counselling the commission of an indictable offence (murder) on the basis that the trial judge failed to consider the explanations that the accused offered for comments he had posted on Facebook, as well as the fact that the accused deleted the comments once he realized they were attracting controversy. The court rejected the Crown's claim that the accused's clarification, that he meant to call for the death of particular individuals only after lawful trials in a jurisdiction that retains the death penalty, went to motive and not to intention. The explanations offered were found to go beyond motive, and to provide context for the interpretation of the accused's comments.
— *Joad c. R.*, 2016 QCCA 1940, 136 W.C.B. (2d) 231.

Uttering threats – Admissibility of Facebook evidence – The accused was charged with one count of assault causing bodily harm and one count of uttering a threat to cause death or bodily harm to the complainant, his wife. On the alleged date of the offence, the accused and the complainant were in their home. The complainant sent Facebook messages to her landlady indicating that an assault had occurred and that she needed help. The court assessed the admissibility of the Facebook hearsay evidence using the framework from *R v Bradshaw*, [2017] SCJ No 35 (SCC). Under this framework, the court was satisfied that the corroborative evidence ruled out the alternative explanations such that the only remaining explanation for the statement was the accuracy of its material aspects, and substantive reliability of the hearsay evidence was established.
— *R. v. ASG*, 2019 BCPC 5, 2019 CarswellBC 78

Authentication of Facebook evidence —The accused appealed a conviction for uttering threats based on, among other grounds, the failure of the trial judge to consider s. 31.1 of the *Canada Evidence Act (CEA)*, or to adequately authenticate evidence consisting of a screenshot alleged to depict a Facebook post by the accused. The appeal was rejected. S. 31.1 *CEA* was explained as simply a codification of the common-law rules of authentication, and the Crown was found to have sufficiently authenticated the documents by putting them to the complainant on direct examination. As to the integrity of the documents, although the screenshot had been provided by a friend of the complainant, the trial judge adequately addressed the issue of integrity by identifying pieces of evidence that led to the conclusion that it would be speculative

to conclude that anyone but the accused had authored the messages.
— *R. v. Hirsch*, 2017 SKCA 14, [2017] S.J. No. 59.

Limits on the *Charter* right to freedom of expression — After posting on Facebook a general threat to women, the accused was charged with uttering a threat to cause death or bodily harm to all women. The self-represented accused petitioned, amongst other things, that what was posted on Facebook was protected by s. 2(b) of the *Charter*, and was thus inadmissible as evidence. The court disagreed, because s. 1 of the *Charter* allows reasonable limits — such as s. 264 of the *Criminal Code* — on s. 2(b) rights.
— *R. v. Hunt,* 2012 QCCQ 4688, 2012EXP-2784.

Sentencing for terrorist threat on Twitter — The accused communicated via Twitter with Islamic extremists and supporters of ISIS, culminating in his writing "Give me Canadian addresses. I will ensure something happens." He pled guilty to uttering threats for this statement. Given the circumstances of the accused, that he had few followers on Twitter, that he did not actually intend to engage in terrorist activity, and that the offence was essentially a nuisance to law enforcement, on appeal his sentence of one-year imprisonment was found to have unduly emphasized deterrence and denunciation such that it was reduced to six months imprisonment.
— *R. v. Boissoneau*, 2016 ONSC 820, 128 W.C.B. (2d) 399.

Sentencing for uttering threats — The accused pled guilty to, among other things, uttering a threat on Facebook to burn property. The accused was sentenced to three months' incarceration, and a twelve-month probation period to follow. Probation conditions included prohibitions on communicating, including by Facebook, with victims of his threats.
— *R. v. Saunders,* 2013 CanLII 75485, 343 Nfld. & P.E.I.R. 271 (NLPC).

Sentencing for uttering threats — The accused was convicted of knowingly uttering a threat to cause death by electronic messaging; specifically, the accused used Snapchat to threaten to commit school shootings. The accused was 18 years old at the time of sentencing and was a first offender. The court considered it an aggravating factor that the accused had engaged in similar online threats in the past, at which time the police had not charged him but had cautioned and advised him of the illegality of his actions. Accordingly, the court did not accept that the accused did not understand the seriousness of Snapchat threats. Balancing the sentencing principles of deterrence and denunciation with those of restraint, rehabilitation and reintegration back into the community, the court determined that a suspended sentence with three years' probation would be appropriate and just.
— *R v Richardson*, 2018 ONCJ 171, 2018 CarswellOnt 4301

Sexual assault

265 (1) A person commits an assault when

- **(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;**
- **(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or**
- **(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.**

Application
(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Consent
(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- **(a) the application of force to the complainant or to a person other than the complainant;**
- **(b) threats or fear of the application of force to the complainant or to a person other than the complainant;**
- **(c) fraud; or**
- **(d) the exercise of authority.**

Accused's belief as to consent
(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

R.S., c. C-34, s. 244; 1974-75-76, c. 93, s. 21; 1980-81-82-83, c. 125, s. 19.

* * * * *

271 Everyone who commits a sexual assault is guilty of

- **(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or**
- **(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, 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.**

R.S.C. 1985, c. 19 (3rd Supp.), s. 10; 1994, c. 44, s. 19; 2012, c. 1, s. 25; 2015, c. 23, s. 14

* * * * *

General case law

Essential elements — The *actus reus* of this offence contains three elements: 1) touching; 2) the sexual nature of the contact; and 3) the absence of consent. The first two elements are objective, and it is sufficient that the accused's actions were voluntary even absent *mens rea* with respect to the sexual nature of his behaviour. The third element is subjective, determined by reference to the complainant's subjective internal state of mind towards the touching at the time it occurred. The *mens rea* of this offence contains two elements: 1) intention to touch, and 2) knowing of, or being reckless or wilfully blind to, a lack of consent on the part of the person touched. The accused may deny the requisite *mens rea* by asserting an honest but mistaken belief in consent; the common law and *Criminal Code* provisions in ss. 273.1(2) and 273.2 limit this defence.

— *R. v. Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193.

Assessing the sexual nature of contact — Determining whether the impugned conduct has the requisite sexual nature is an objective inquiry. Factors to consider are "the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force". Desire for sexual gratification or other motives may also be a factor, but it is simply one of many factors to be considered.[1] In fact, it has been held that since sexual assault is an act of power, aggression and control, "sexual gratification, if present, is at best a footnote."[2]

— [1]*R. v. Chase,* [1987] 2 SCR 293, 45 DLR (4th) 98, para. 11.

— [2]*R. v. K.B.V.* (1992), 8 O.R. (3d) 20, 71 C.C.C. (3d) 65 (ONCA), para. 10.

Evidentiary issues — S. 276 restricts the purposes to which evidence of the complainant's past sexual activity can be put. These restrictions, along with the accompanying procedures in ss. 276.1-276.5 do not violate ss. 7 or 11(d) of the *Charter*.[1] Sections 278.1-278.91 set out a procedure by which the defence can apply for the disclosure of records in which the complainant has a privacy interest. These sections are a response to the common-law system devised in *R. v. O'Connor*.[2] This procedure is *Charter*-compliant.[3]

— [1]*R. v. Darrach*, [2000] 2 S.C.R. 443, S.C.J. No. 46, para. 22.

— [2]*R. v. O'Connor*, [1995] 4 S.C.R. 411, S.C.J. No. 98.

— [3]*R. v. Mills*, [1999] 3 S.C.R. 668, S.C.J. No. 68.

Consent — "The sexual activity in question" — S. 273.1 defines "consent", and prescribes situations where consent is not obtained. It can either be proven that the complainant did not agree to the touching, its sexual nature, or the identity of the accused, or, if those factors are not established, that there were factors that would operate to vitiate the complainant's apparent consent. The "sexual activity in question" is defined by the touching, its sexual nature, and the identity of the accused only, and does not incorporate factors such as condom use or STI status. These factors should instead be considered as part of fraud vitiating consent.[1] Prior consent does not remain operative at future times, particularly where a complainant becomes unconscious.[2]

— [1] *R. v. Hutchinson*, 2014 SCC 19, 1 SCR 346.

— [2] *R. v. J.A.,* 2011 SCC 28, 2 SCR 440; *R. v. Ashlee,* 2006 ABCA 244, 61 Alta. L.R. (4th) 226, leave to appeal refused, [2006] S.C.C.A. No. 415.

Consent no defence — S. 150.1 provides that the consent of a complainant under the age of 16 is no defence to, among others, an offence under s. 271. This limitation is not a violation of s. 7 of the *Charter*.[1]
— [1]*R. v. Hann* (1992), 75 C.C.C. (3d) 355, 100 Nfld. & P.E.I.R. 339 (NLCA).

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Social media case law

Admissibility of Facebook conversations as evidence — The court ruled screenshots of a Facebook conversation between the accused and victim constituted an "electronic document" under s. 31.8 of the *Canada Evidence Act*. The victim's testimony of how Facebook works — in addition to the lack of evidence presented to doubt the integrity of the screenshots — was sufficient for the court to determine the screenshots were admissible as electronic documents. The court also found the accused was the person chatting with the victim on Facebook. While the screenshots constituted hearsay evidence, they were admitted under an exception to the hearsay rule.
— *R. v. Soh*, 2014 NBQB 20, 416 N.B.R. (2d) 328.

Snapchat evidence used to bolster credibility — While in a car with the accused shortly before the assault took place, the complainant sent a Snapchat, depicting the accused and subtitled "I'm scared", along with text messages, to her sister and another friend. At trial, the consistent description of this Snapchat message by witnesses was used to bolster the credibility of those witnesses, as well as that of the complainant. Although the Snapchat could only be described by witnesses at the time of trial, given the self-destructing nature of the medium, the text messages sent alongside were used to confirm a witness' description of the timeline of events.
— *R. v. Qhasimy*, 2017 ABPC 83, [2017] A.J. No. 398.

Facebook evidence used to bolster credibility — Facebook messages between the accused and the complainant, along with text messages and messages sent via the Xbox Live gaming service, were used to bolster the complainant's credibility, and to demonstrate the need for the accused to have made further inquiries into the complainant's consent, given that the complainant had previously been very clear that she did not consent to penetrative sexual intercourse.
— *R. v. J.P.*, 2017 BCPC 71, [2017] B.C.J. No. 497.

Facebook evidence used to impeach credibility — Facebook messages sent between the complainant and accused, and the complainant and a relative, were used to impeach the complainant's credibility, resulting in an acquittal.
— *R. v. Norton,* 2017 ONSC 1395, [2017] O.J. No. 1343.

Facebook messages as evidence – accused denies identity in Facebook evidence – The accused was charged with sexual assault and sexual interference of his 4-year-old daughter. The complainant's mother, upon learning of the molestations, sought support from a family friend. This family friend's daughter and the accused apparently engaged in Facebook

communication, in which the accused essentially admitted to molesting his daughter. The accused denied molesting his daughter, and also denied ever communicating with the family friend's daughter on Facebook. On the facts, the court rejected the accused's evidence, and concluded the accused was the author of the impugned Facebook messages. To believe someone other than the accused sent the Facebook messages would "strain credulity." Further, "[t]he accused's denial of that damning piece of evidence entirely undermines his credibility on the central issues," namely, his denial of the charged offences. The court found the accused guilty of all charges.

— *R. v. B.R.*, [2017] O.J. No. 3782, 2017 ONSC 4429, para 40, 54

Admissibility of Facebook messages for the truth of their contents – The accused was charged with the sexual assault of "J", a mutual friend of himself and his wife, "R". At trial, R testified that she witnessed the accused and J engaging in consensual sex. However, in Facebook posts, R stated that J was unconscious and did not consent. The court determined that the Facebook posts had sufficient threshold reliability to be admitted as out-of-court statements, in part because R was available for cross-examination.

— *R. v. C.F.N.*, 2018 YKSC 19

Instagram post as evidence of consent – The accused, who suffered from cerebral palsy and multiple mental illnesses, was charged with two counts of sexual assault of the complainant. The accused took the position that the sexual activity was consensual or, in the alternative, that he had a mistaken belief that the complainant consented. The accused and the complainant were both over the age of consent and had a relationship with sexual overtones at the time of the alleged offences. They often spoke about violent sex, rape fantasies, suicidal ideation, and the infliction of pain. Near the end of their relationship, the complainant posted a photo of herself on Instagram with the caption "it was consensual but consequential". The accused submitted this Instagram post as evidence of the complainant's consent. In the context of the relationship between the accused and the complainant, the court did not accept the complainant's testimony that the post had nothing to do with the accused and was only wordplay. The court concluded that the Crown failed to establish lack of consent beyond a reasonable doubt. The court further stated that if it had not determined the case on this basis, the court would have found that the accused had an honest but mistaken belief that the complainant consented. The accused was found not guilty.

— *R. v. Shepperd*, 2018 ONCJ 692

Temporary nature of Snapchat communications – The alleged offence occurred when the accused and the complainant met up on a Sunday night, but their text message conversation only referenced plans on Monday night. By "rational inference", the court determined that the accused and the complainant must have discussed their Sunday night plans over Snapchat. The court also discussed the temporary nature of messages sent over Snapchat, and specifically that they are not retrievable by the court as they are not stored on a server.

— *R. v. Hamidi*, [2018] OJ No 2788, para 19, 86

Accused denies identity in Snapchat evidence – The accused was charged with sexual assault. The complainant provided a screenshot of a Snapchat conversation with someone who implicitly admitted to sexual intercourse with the complainant. The complainant testified that the interlocutor in the Snapchat conversation was the accused, while the accused denied it was him. On that facts, the judge was convinced that the interlocutor was indeed the accused; the accused's denial eroded his credibility, while the Snapchat conversation as a whole bolstered

the complainant's version of events. As such, the court found the accused guilty of sexual assault.
— *R. v. J.M.*, [2018] O.J. No. 188, 2018 ONSC 344

Taking reasonable steps to ascertain the complainant's age — The court noted the complainant lied about her age and her Facebook profile picture "shows a young person trying to seem significantly older than her 14 years" (para. 9). However, while the complainant may well have been manipulative, this was "[a]ll the more reason" the 40-year-old accused should have made more inquiries into the complainant's age before having sex with her (para. 56). The court convicted the accused of sexual interference and sexual assault.
— *R. v. Beckford,* 2016 ONSC 1066, 28 W.C.B. (2d) 298.

Taking reasonable steps to ascertain the complainant's age —Though there was no evidence as to whether the accused had access to the complainant's full Facebook profile, it was plausible that the accused saw the complainant's fake age on Facebook. This was one of eight factors that led the court to conclude there was reasonable doubt as to whether the accused failed to take reasonable steps to ascertain the complainant's age. The court acquitted the accused of sexual assault and sexual interference.
— *R. v. Akinsuyi*, 2016 ONSC 2103, 129 W.C.B. (2d) 515.

Taking reasonable steps to ascertain the complainant's age —The 17-year-old accused had a sexual relationship with the 12-year-old complainant. Among other things, the court found the complainant lied about her age and posted pictures of herself on Facebook designed to make her look sexually mature. The accused also immediately terminated their relationship after the complainant told him she was twelve. The court acquitted the accused of sexual assault and sexual interference.
— *R. v. R.R.,* 2014 ONCJ 96, 112 W.C.B. (2d) 302.

Taking reasonable steps to ascertain the complainant's age — The complainant listed her age as 16 on Facebook, when she was in fact 12. The court noted it was common for youth to lie about their age to gain access to Facebook, thus the complainant's behavior was not "particularly probative of dishonesty" (para. 47). On the facts, the court found the accused did not take all reasonable steps to ascertain the complainant's age, and thus convicted him of sexual assault (and directed a conditional stay of proceedings on the sexual interference charge).
— *R. v. Z.I.D.*, 2012 BCPC 570, [2012] B.C.J. No. 3079.

Taking reasonable steps to ascertain the complainant's age —The court accepted the accused honestly believed the complainant was at least 16 or 17, in part due to the complainant's listed age on Facebook, and the "general tenor of her website pages…[as] trying to portray herself as someone much older than thirteen" (para. 22). Other factors included racial difference and the accused's recent arrival to Canada from St. Vincent. On the facts, the court deemed the accused to have taken reasonable steps to ascertain her age, and acquitted him of sexual assault and sexual interference.
— *R. v. Garraway,* 2010 ONCJ 642, 92 W.C.B. (2d) 210.

Taking reasonable steps to ascertain the complainant's age — The court accepted that the accused, who was 18, honestly believed that the complainant was 15, and not 12. The complainant's Facebook profile indicated that she was 15, and the accused confirmed that the

complainant's birthday was the one listed on Facebook, without confirming the year. There was a reasonable doubt about the complainant's evidence that she had told the accused her age. The Crown argued that it would be obvious to a reasonable person that information on Facebook is not necessarily true. This argument was partially rejected, with the court finding that it would have been sensible to be sceptical of information found on Facebook, but that the information available on Facebook is not so unreliable that no reasonable person would have relied on it.
— *R. v. D.O.*, 2017 ONSC 2027, [2017] O.J. No. 1787.

Taking reasonable steps to ascertain the complainant's age — The accused, who was 20 at the time, had sex with the 14-year-old complainant. The accused had significant learning disabilities, and was immature for his age. He and the complainant were part of a group of friends most of whom were 17. On one occasion, the complainant told the accused's mother, in front of the accused, that she was 17. The complainant's Facebook profile indicated that she was 19. The Crown argued that this discrepancy should have prompted further inquiries from the accused, but the court rejected that argument on the basis that there was a reasonable doubt about what age was indicated on the profile at the relevant time.
— *R. v. Minzen*, 2017 ONCJ 127, [2017] O.J. No. 1182.

Taking reasonable steps to ascertain the complainant's age – The accused was charged with sexual interference and sexual assault. The court found that the complainant had pursued the developmentally delayed accused, who has an estimated grade four education. Taking this context into account, the court concluded the accused took all reasonable steps to ascertain the complainant's age — the accused asked the complainant for her age, but "received a coy response"; he checked her Facebook page and found no birthdate; he knew she was attending high school; and his belief that she looked older than sixteen was corroborated by a photo filed as an exhibit. The court acquitted the accused on both charges.
— *R. v. C.G.V.*, [2017] O.J. No. 6485, 2017 ONCJ 850

Honest but mistaken belief in the complainant's age – The accused was charged with sexual interference and sexual assault. "Notwithstanding that the Complainant's Facebook profile identified her as 16 years old and said she went to the high school in Community B, and she had used filters on her profile pictures to enhance her apparent age, I am satisfied that these factors did not cause the Accused to have an honest belief that she was 16 years old or older. The Accused testified that he only looked at a few of the pictures. He did not claim that the Complainant's Facebook profile or photographs led him to believe that she was 16."
— *R. v. J.M.,* [2017] N.J. No. 223, 2017 NLTD(G) 110, 139 W.C.B. (2d) 250, para 51

Sentencing – In March 2014, the offender sexually assaulted the unconscious complainant, and in August 2014, the offender sexually assaulted her by force. The offender recorded the sexual assaults and, in August 2014, posted still images from the recordings on the complainant's Instagram account. The court considered whether the recording of sexual assaults was an aggravating factor in sentencing. The court did not consider the recording of the March 2014 assaults to be an aggravating factor in sentencing, as the offender was separately charged and convicted for that aspect of the assault under s 162. The offender was not charged under s 162 in relation to the August 2014 assault; therefore, the court considered the making and publishing of images relating to that assault to be an aggravating factor regarding that offence. The court also concluded that the two offences required a consecutive sentence, as each protected a different societal interest: privacy and bodily integrity.

— ***R. v. Johnson*, 2018 ONSC 5133**

Obtaining Sexual Services for Consideration

286.1 (1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,

(i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,

(A) for a first offence, a fine of $2,000, and

(B) for each subsequent offence, a fine of $4,000, or

(ii) in any other case,

(A) for a first offence, a fine of $1,000, and

(B) for each subsequent offence, a fine of $2,000; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months and a minimum punishment of,

(i) in the case referred to in subparagraph (a)(i),

(A) for a first offence, a fine of $1,000, and

(B) for each subsequent offence, a fine of $2,000, or

(ii) in any other case,

(A) for a first offence, a fine of $500, and

(B) for each subsequent offence, a fine of $1,000.

Obtaining sexual services for consideration from person under 18 years
(2) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person under the age of 18 years is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of

(a) for a first offence, six months; and

(b) for each subsequent offence, one year.

Subsequent offences
(3) In determining, for the purpose of subsection (2), whether a convicted person has committed a subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under that subsection; or

(b) an offence under subsection 212(4) of this Act, as it read from time to time before the day on which this subsection comes into force.

Sequence of convictions only
(4) In determining, for the purposes of this section, whether a convicted person has committed a subsequent offence, the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences, whether any offence occurred before or after any conviction or whether offences were prosecuted by indictment or by way of summary conviction proceedings.

Definitions of *place* and *public place*
(5) For the purposes of this section, *place* and *public place* have the same meaning as in subsection 197(1).
2014, c. 25, s. 20.

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Social media case law

Reasonable steps to ascertain age of the complainant – Charged under s 286.1(2), the accused submitted that he thought the 16-year-old complainant was 21 because her Facebook page said that she was born in 1994, and because she had photos of herself with alcohol on Facebook. When the accused had asked the complainant her age, she failed to answer. The court found that the Facebook evidence was not sufficient, and that a reasonable person would have asked more questions. In an interview with police, the accused acknowledged several times that the complainant was 16. Accordingly, the accused was found guilty.
— *R. v. Alcorn*, 2018 MBQB 17

Facebook messages as evidence of sexual intention – The accused was charged under s 286.1(2). The accused had sent many Facebook messages of a sexual nature to the 13-year-old complainant. The court accepted these Facebook messages as evidence of the accused's sexual interest in the complainant and the accused's hope of establishing a sexual relationship.
— *R. v. Dawe*, 2018 CarswellNfld 205

Public incitement of hatred

319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- **(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or**
- **(b) an offence punishable on summary conviction.**

Wilful promotion of hatred
(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- **(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or**
- **(b) an offence punishable on summary conviction.**

Defences
(3) No person shall be convicted of an offence under subsection (2)

- **(a) if he establishes that the statements communicated were true;**
- **(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;**
- **(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or**
- **(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.**

Forfeiture
(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

Exemption from seizure of communication facilities
(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

Consent
(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

Definitions
(7) In this section,

communicating **includes communicating by telephone, broadcasting or other audible or visible means; (*communiquer*)**

identifiable group **has the same meaning as in section 318; (*groupe identifiable*)**

public place **includes any place to which the public have access as of right or by invitation, express or implied; (*endroit public*)**

statements **includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations. (*déclarations*)**

R.S., 1985, c. C-46, s. 319; R.S., 1985, c. 27 (1st Supp.), s. 203; 2004, c. 14, s. 2.

* * * * *

General case law

Essential elements — Ss. 319(1) and (2) each create an offence relating to hate speech. The offence in s. 319(1) requires that the accused 1) incite hatred by 2) communicating 3) in a public place 4) words likely to lead to a breach of the peace. The narrower offence in s. 319(2), however, requires that the accused 1) wilfully promote hatred against an identifiable group by 2) communicating statements, other than in private conversation. The offence in s. 319(2) requires the consent of the Attorney General for prosecution (s. 319(6)). S. 319(3) provides for a number of defences to the offence in s. 319(2).
— *R. v. Buzzanga and Durocher* (1979), 101 DLR (3d) 488, 49 CCC (2d) 369 (ONCA).

Essential elements — *Mens rea* —The use of "wilfully" in s. 319(2) requires that the accused intend the promotion of hatred. Recklessness will not suffice.[1] "Promotes" requires active support or instigation, and hatred involves an emotion "of an intense and extreme nature that is clearly associated with vilification and detestation".[2]
— [1]*R. v. Buzzanga and Durocher* (1979), 101 DLR (3d) 488, 49 CCC (2d) 369 (ONCA).
— [2]*R. v. Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1.

Charter **concerns — Freedom of expression — Presumption of innocence —** This section violates s. 2(b) of the *Charter*, but that violation is saved by s. 1. This section violates s. 11(d) of the *Charter*, but is saved by s. 1.[1]
— [1]*R. v. Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1.

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Social media case law

Inciting hatred and uttering threats on Facebook — Over the course of a single afternoon and evening, the accused posted comments in response to a news article that had been posted on the official Facebook page of a leading television news broadcast. The accused expressed, in the comments section below the story, a desire to commit violent acts against members of

Québec's Muslim minority. The accused was acquitted of uttering threats (see above), but convicted of inciting hatred contrary to s. 319. The judge relied in part on the responses of other commenters on the article to find that the accused's comments provoked "apprehension, fear, and condemnation". The judge also found that the accused's comments were distinct from those of other commenters in failing to demonstrate a desire to engage in discussion, but rather to simply express the resentment that the accused had towards the group in question. As a freely accessible website for public exchange, the Facebook page in question qualified as a "public place" ("endroit public") under s. 319. The defence argued that the comments did not specifically identify a targeted group, but the court found that the context, including where the comments were posted, and the posts of other commenters to which the accused responded, allowed for a determination that the targeted group was Muslims. The court found that the accused's use of violent language, suggested use of force in order to share his intolerance, and insults towards those inclined towards acceptance of the Muslim community, were liable to lead to a breach of the peace.

— *R. c. Rioux*, 2016 QCCQ 6762, 2016EXP-2527, unofficial English translation available at 2016 CarswellQue 13004.

Unauthorized use of computer

342.1 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years, or is guilty of an offence punishable on summary conviction who, fraudulently and without colour of right,

- **(a) obtains, directly or indirectly, any computer service;**
- **(b) by means of an electro-magnetic, acoustic, mechanical or other device, intercepts or causes to be intercepted, directly or indirectly, any function of a computer system;**
- **(c) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (a) or (b) or under section 430 in relation to computer data or a computer system; or**
- **(d) uses, possesses, traffics in or permits another person to have access to a computer password that would enable a person to commit an offence under paragraph (a), (b) or (c).**

Definitions
(2) In this section,

computer data **means representations, including signs, signals or symbols, that are in a form suitable for processing in a computer system; (*données informatiques*)**

computer password **means any computer data by which a computer service or computer system is capable of being obtained or used; (*mot de passe*)**

computer program **means computer data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function; (*programme d'ordinateur*)**

computer service **includes data processing and the storage or retrieval of computer data; (*service d'ordinateur*)**

computer system **means a device that, or a group of interconnected or related devices one or more of which,**

- **(a) contains computer programs or other computer data, and**
- **(b) by means of computer programs,**
  - **(i) performs logic and control, and**
  - **(ii) may perform any other function; (*ordinateur*)**

data **[Repealed, 2014, c. 31, s. 16]**

electro-magnetic, acoustic, mechanical or other device **means any device or apparatus that is used or is capable of being used to intercept any function of a computer system, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing; (*dispositif électromagnétique, acoustique, mécanique ou autre*)**

function **includes logic, control, arithmetic, deletion, storage and retrieval and**

communication or telecommunication to, from or within a computer system; (*fonction*)

***intercept* includes listen to or record a function of a computer system, or acquire the substance, meaning or purport thereof; (*intercepter*)**

***traffic* means, in respect of a computer password, to sell, export from or import into Canada, distribute or deal with in any other way. (*trafic*)**

R.S., 1985, c. 27 (1st Supp.), s. 45; 1997, c. 18, s. 18; 2014, c. 31, s. 16.

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General case law

Essential elements — This section creates four offences: 1) "obtaining" a computer service or system under s. 342.1(1)(a), 2) "interception" of, or causing to be intercepted, any function of a computer system, which must be made by the specified means, under s. 342.1(1)(b), 3) "using" or causing to be used, directly or indirectly a computer system, with the accompanying *mens rea* that the use be with intent to commit the specified offences, under s. 342.1(1)(c), and 4) "enabling", by using, possessing, trafficking, or allowing another person access to a computer password that would enable that person to commit an offence under subs. (a), (b), or (c).

Essential elements — s. 342.1(1)(a) — The *actus reus* of the offence in s. 342.1(1)(a) requires that the accused obtained computer services, that that utilization was prohibited, that a reasonable person in the same situation would have concluded that the activity was dishonest, and that the act was done without colour of right. The *mens rea* required by the s. 342.1(1)(a) offence is that the accused consciously and voluntarily obtained computer services. This requires proof of intention to do the prohibited act, knowing that that act was prohibited by reference to the intended ends of the usage of the computer system.[1]
— [1]*R. c. Parent,* 2012 QCCA 1653, [2012] R.J.Q. 1817.

Meaning of "computer system" – "Computer system" appears to include text messaging via cellular phones,[1] though it has also been found that a Blackberry is not a "computer system", absent any expert evidence on this point.[2]
— [1]*R. v. Woodward*, 2011 ONCA 610, 107 O.R. (3d) 81.
— [2]*R. v. Cockell*, 2013 ABCA 112, 553 A.R. 91.

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Social media case law

Definition of "computer system" — A computer and Facebook account used to send messages constitute a "computer system" within the meaning of s. 342.1 of the *Criminal Code*.
— *R. v. A.H.*, 2016 ONSC 3709, 131 W.C.B. (2d) 302.

Sentencing — In considering an appeal of a sentence for numerous sexual offences, the court noted the accused's submitted sentencing decisions for comparison "were rendered some time ago"; we better understand now the severe impact online sexual exploitation can have on

children (para. 17). Consequently, the court "must resort to imprisonment, emphasizing the sentencing objectives of protection, punishment and deterrence", and dismissed the accused's argument that the parity principle had been violated (para. 18).
— *R. v. Mackie*, 2014 ABCA 221, 588 A.R. 1.

Sentencing — The accused pled guilty to luring a child, extortion, distributing and accessing child pornography, invitation to sexual touching, unauthorized use of computer, and other offences. In determining his high moral blameworthiness, the court noted the accused's "use of the internet…have [sic] elements of disturbing online sexual harassment – an adult criminally cyberbullying and cyberstalking" (para. 62). As an "online faceless unknown entity," he was also "all the more frightening for his victims" (para. 64).
— *R. v. Mackie,* 2013 ABPC 116, 106 W.C.B. (2d) 545.

Extortion

346 (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

Extortion
(1.1) Every person who commits extortion is guilty of an indictable offence and liable

- **(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of**
  - **(i) in the case of a first offence, five years, and**
  - **(ii) in the case of a second or subsequent offence, seven years;**
- **(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and**
- **(b) in any other case, to imprisonment for life.**

Subsequent offences
(1.2) In determining, for the purpose of paragraph (1.1)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

- **(a) an offence under this section;**
- **(b) an offence under subsection 85(1) or (2) or section 244 or 244.2; or**
- **(c) an offence under section 220, 236, 239, 272 or 273, subsection 279(1) or section 279.1 or 344 if a firearm was used in the commission of the offence.**

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only
(1.3) For the purposes of subsection (1.2), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

Saving
(2) A threat to institute civil proceedings is not a threat for the purposes of this section.

R.S., 1985, c. C-46, s. 346; R.S., 1985, c. 27 (1st Supp.), s. 46; 1995, c. 39, s. 150; 2008, c. 6, s. 33; 2009, c. 22, s. 15.

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General case law

Essential elements — The *actus reus* is made out when the accused 1) induced or attempted to induce someone to do something or cause something to be done; 2) by using threats, accusations, menaces, or violence; 3) without reasonable justification or excuse. The *mens rea* of this offence is intending to obtain "anything" by the *actus reus*. The accused's conduct must be viewed in its entirety and in context.[1] "Anything" has a "wide, unrestricted dictionary definition, and includes sexual favours."[2] "Attempting to induce" will constitute the full offence of extortion (not merely attempted extortion), even if the victim does not surrender to the accused's wishes.[3]

— [1]*R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368.
— [2]*R. v. Davis*, [1999] 3 S.C.R. 759, S.C.J. No. 67, para. 43.
— [3]*R. v. Noël*, 2001 NBCA 80, 239 N.B.R. (2d) 269.

Defining threats — The accused need not threaten to injure the victim personally; an accused's false statement that a third party with violent propensities or associations will deal with the victim is sufficient to constitute a threat.[1] A veiled reference may constitute a threat if, in light of the particular context, it sufficiently conveys to the victim the consequences that the victim fears or would prefer to avoid.[2]

— [1]*R. v. Swartz* (1977), 37 C.C.C. (2d) 409, 1 W.C.B. 336 (ONCA).
— [2]*R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368.

Defining reasonable justification or excuse — A reasonable justification or excuse is both fact and offence specific. It "refers to some matter that is extraneous to the existence of the essential elements of the offence that justifies or excuses actions that would otherwise constitute the crime." The burden is on the Crown to prove beyond a reasonable doubt the absence of any reasonable justification or excuse. The question is not whether the particular accused believed his threats were reasonably justified or excusable, but whether a reasonable person in the accused's position would have formed that view.[1] The reasonable justification or excuse must be not only for the demand, but also for the making of threats or menaces by which the accused sought to compel compliance with the demand.[2]

— [1]*R. v. H.A.* (2005), 202 O.A.C. 54, 206 C.C.C. (3d) 233 (ONCA), para. 72-74.
— [2]*R. v. Natarelli*, [1967] S.C.R. 539, 1 C.C.C. 154.

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Social media case law

Definition of "Doxing" —"Doxing involves publishing on the internet identifiable personal information about an individual that has usually been obtained from social media sites and from hacking into private systems. Depending on the nature of the information, its disclosure can cause the victim distress, fear, embarrassment and shame. The personal information can be used by others to facilitate identity theft and fraud. The threat to publish private information can also be used by the person who holds the information for extortion and blackmail purposes."

— *R. v. B.L.A.*, 2015 BCPC 203, 123 W.C.B. (2d) 85, para. 3.

Definition of "Swatting" —"Swatting involves tricking an emergency service agency into dispatching an emergency response based on a false report of an ongoing critical incident.

Swatting can lead to the deployment of a range of emergency response teams including police, fire and bomb squads and the evacuation of businesses, schools or other public institutions."
— *R. v. B.L.A.*, 2015 BCPC 203, 123 W.C.B. (2d) 85, para. 4.

Party liability through fake Facebook accounts — The accused created a fake Facebook account to converse with the complainant. The accused's friend used the account by remotely accessing the accused's computer, and proceeded to threaten the complainant with distributing semi-nude and nude photos of her, unless she produced another picture. By permitting his friend remote access to the computer and enabling him to assume the fake Facebook identity, the court found the accused facilitated extortion.
— *R. v. Y.,* 2015 NSPC 14, 357 N.S.R. (2d) 340.

Fabrication of Facebook messages – Complainant's consent to distribution of images – The Crown's position was that the accused attempted to extort the complainant using intimate images of her, and that he posted two such images on Facebook and Skype without her consent. The court found that, despite the complainant's testimony to the contrary, she had sufficient knowledge of computers such that she could have accessed the accused's Facebook account and feigned the offending messages which were presented at trial. The court also found that the complainant may have given blanket consent for the accused to post intimate images during their relationship. If her consent was later withdrawn, the Crown failed to demonstrate beyond a reasonable doubt that the relevant images were still on the Internet at that time. The accused was acquitted on both counts.
— *R. v. Sobh*, 2018 ONSC 2299

Establishing the identity of the accused – The complainant met someone named "Beau" on Tinder, and after initial communication, sent him a picture of her breasts through Snapchat. Beau saved the picture in a screenshot and used it to attempt to extort sexual favours from the complainant. The complainant began to suspect the Beau was the accused, Cody Penney — she had reviewed the accused's Twitter page, finding similarities in the messages she had received from Beau. The defence argued that all the evidence linking the accused to "Beau" was circumstantial, and equally consistent with "someone posing as [the accused] on the internet". The court rejected this argument, find that, on the facts, the only reasonable inference was that the accused was indeed "Beau". The accused was convicted of extortion, uttering threats, and harassment.
— *R. v. Penney*, [2017] N.J. No. 241, para 38

Sentencing – "[A] present day threat to release intimate photographs through social media cites allows for the sharing and dissemination of such photographs on a worldwide basis. This technology also makes it impossible for the victim to limit circulation or to retrieve the photographs. This modern day form of extortion is much different and more serious than older forms of extortion. The sentencing for such offences must reflect the changes in the sharing of information and the impact upon victims. General deterrence and denunciation must be the primary principles of sentencing applied."
— *R. v. Hunt*, [2017] N.J. No. 430, para 8

Sentencing — The accused pled guilty to luring a child, possession of child pornography, and 11 counts of extortion. The terms of his 18-month probation included, among other things: not possessing or using any computer or other device that has Internet access, except with

advance written permission; monitored use of Internet access, if granted; and the accused's identification by his full real name when communicating with anyone by means including Facebook, Twitter, Instagram, or any other social network.
— *R. v. R.W.,* 2016 ONCJ 325, 131 W.C.B. (2d) 68.

Sentencing — The accused was convicted of extortion, possession of child pornography, and possession of child pornography for the purpose of distribution. Among other things, his conditional discharge order prohibited accessing any Internet-based social media. The court was concerned social media restrictions may impair the accused's ability to overcome his social anxiety and reintegrate", but the nature of the accused's offending made "it inappropriate to permit social media access" unless and until rehabilitative progress is made (para. 56).
— *R. v. Y.,* 2015 NSPC 66, 366 N.S.R. (2d) 57.

Sentencing — In considering an appeal of a sentence for numerous sexual offences, the court noted the accused's submitted sentencing decisions for comparison "were rendered some time ago"; we better understand now the severe impact online sexual exploitation can have on children (para. 17). Consequently, the court "must resort to imprisonment, emphasizing the sentencing objectives of protection, punishment and deterrence", and dismissed the accused's argument that the parity principle had been violated (para. 18).
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