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

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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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\(^4\) 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.

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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


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.


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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.

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);

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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.

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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.

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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
counselling was 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


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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\textsuperscript{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.


\textsuperscript{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.
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.

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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”. It is unnecessary to establish on a voir dire the voluntariness of statements alleged to constitute the actus reus of a s. 140 offence. “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. 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.


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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.”
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.

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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.\(^3\)


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.\(^1\)


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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.”


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.


**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.


**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.


**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.


**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).


**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.


**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).


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).


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.


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.


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).


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.

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.

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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


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


**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*.


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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*.


**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).


**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.


**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).


**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.


**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).

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.

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).

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).

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.

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).
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.

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.\(^1\) — \textit{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 \textit{Charter}.\(^1\) — \textit{R. v. Hann (1992), 75 C.C.C. (3d) 355, 100 Nfld. & P.E.I.R. 339 (NLCA).}

#### 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.

— \textit{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.
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


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).


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.


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).

**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.”
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.

* * * * *

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. “Advocates or counsels” in s. 163.1(b) may include implicit messages in written material.


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 [...]”

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 will 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). 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. 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.

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. Constructive possession may be found even where the accused aborted downloading and the images were never viewed. The accused must have knowledge of the content of the material in possession, but not that the material constituted child pornography. Evidence of the “accessing” offence in s. 163.1(4.1) is not sufficient to establish the “possession” offence in s. 163.1(4).

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.” Viewing child pornography online constitutes the crime of accessing child pornography.
— 1 R. v. R.D., 2010 BCCA 313, 489 W.A.C. 133.

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


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.


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


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.


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.


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).

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.

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.

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.

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.

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.

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.


**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.


**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).


**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).


**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 of sexual harassment and cyber bullying invokes” (para. 33).


**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.


**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.


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).


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).


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.


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.


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.


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.

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.
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.

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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. 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. 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. “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. 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.


* * * *

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.

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.

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).

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.
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.


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.


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.


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.


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.


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).


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).

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.

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.

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.

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.

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).

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.
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.

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.

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.

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).
— 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).
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).

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.

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.

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.

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).

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.

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.

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.

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.

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.

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.
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.

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).

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.

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.

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).

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).

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).
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.

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.

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).

Sentencing — The accused pled guilty to one count each of s. 151 sexual interference, and s. 172.1 luring. 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.

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 interference, 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.
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.

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. An indecent act does not require a sexual context; instead, it should be assessed on the community standard of tolerance test. 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. 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.

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

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

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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).

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).
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


Defining harassment — To prove harassment, it is not sufficient that the complainant was annoyed or disturbed; 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


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.


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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.”

**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.”

**Criminal harassment by means of Twitter** — The accused made a large volume of tweets (some of which were offensive or obscene) related to the complainant but did not engage in threats or harassment in relation to her. When the complainant blocked the accused on Twitter, it did not convey to him that she was harassed. While the accused lacked knowledge that the complainant was harassed, he was reckless as to whether she was harassed. However, the accused was acquitted of criminal harassment because the complainant’s fear for safety was not objectively reasonable. The accused conformed to Twitter’s rules and values of freedom of expression under the *Canadian Charter of Rights and Freedoms*.

**Criminal harassment by means of 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". While convicted of uttering threats for this conduct (see below), the accused was acquitted of criminal harassment as the Crown had not established that the then Premier of Quebec was harassed or that the conduct of the accused caused her to fear for her safety or the safety of anyone known to her.

**Criminal harassment by means of Facebook** — The accused posted various things on his Facebook, which the complainant (his estranged wife) felt were meant to threaten her. The court found “none of the material...can be considered threatening in themselves” (para. 86). Furthermore, since the accused had blocked the complainant from his Facebook page, there could be no harassment until the complainant decided to take the extra step of viewing the accused’s profile from another person’s Facebook account; “[w]hether or not the complainant was harassed was thus dependent solely on her actions and not the accused’s” (para. 91).

**Criminal harassment by means of Facebook** — The accused asked the complainant twice over Facebook to show him her breasts, allegedly sent her pornographic pictures over email, and stared at her chest during family gatherings. She blocked him on Facebook and deleted him
from MSN. The accused also approached the complainant when she was alone and asked her “in an angry voice if they had a problem” (para. 10). The court did not find the complainant credible. They also found the accused asking her if “they had a problem” was not a threat; in any case, such fear would have been deemed unreasonable.


**Criminal harassment by means of Facebook** — The accused and the complainant were parents whose children attended the same daycare. After a miscommunication about pick-up after a play-date, the accused sent the complainant threatening messages via Facebook and text message. The accused later contacted the complainant at her home and place of work in violation of his bail conditions. The accused’s claim that the complainant’s subjective feeling of harassment resulted from a misinterpretation of the Facebook messages was not credible.


**Criminal harassment by means of Facebook** — NCRMD finding — The accused was found not criminally responsible by reason of mental disorder on two charges of criminal harassment. The offences involved sending repeated messages from multiple Facebook accounts to the complainant, as well as the complainant’s friends and family when the complainant failed to respond and blocked the accused. The complainant and the accused had once lived in the same apartment building, but otherwise had had little contact. These attempts at communication persisted after a warning from the police that the complainant no longer wished to be contacted by the accused. The accused had been diagnosed with Bipolar disorder, and was manic at the time of the offences. While he had a reasonable amount of insight into his mental illness, he was not fully compliant with his medication. The board found that, given the medical factors and the consideration of harassment as a violent offence, the accused would not be granted an absolute discharge.


— 1Several other NCRMD review board decisions have included criminal harassment and/or threat offences committed via social media, see *Lidguerre (Re)*, [2017] O.R.B.D. No. 630, 2017 CarswellOnt 4315 (Uttering Threats against the Prime Minister); *Carpio (Re)*, [2017] O.R.B.D. No. 27, 2017 CarswellOnt 105 (Harassment of and threats to ex-partner); *Jain (Re)*, [2017] O.R.B.D. No. 35, 2017 CarswellOnt 2830 (Threats to classmates); *Im (Re)*, [2017] O.R.B.D. No. 287, 2017 CarswellOnt 2607 (Harassment and threats related to former classmates).

**Witness accommodation** — 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).


**Establishing identity of accused as person who sent Facebook messages** — 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. The complainant’s fear was deemed reasonable, in part, because one Facebook message was read as a threat.


**Sentencing** — A custodial sentence was necessary given that, without proper treatment, the accused remained a high-risk to re-offend and did not appreciate that his persistent, disturbing and ongoing unwanted communications with a young CBC television actress, via social media and in-person, were criminal.


**Sentencing** — The accused posted nude photos of his girlfriend on a pornography site. He was convicted of criminal harassment, because the stigma of child pornography charges was deemed too severe in his circumstances. Due to the accused’s guilty plea, high rehabilitation prospects, and “exemplary” academic achievements, the court exercised discretion to suspend the accused’s sentence and placed him on a non-reporting probationary period for 12 months. The court refrained from imposing Internet prohibitions, in part because restricting electronic communication was thought to impair the accused’s reintegration into the community.


**Sentencing** — The accused pled guilty to criminal harassment. The court accepted the Crown’s analogy that “if you commit an offence with a motor vehicle, you lose driving privileges…so it should be with ‘social media’” (para. 69). The conditions of the accused’s six-month deferred custody and supervision order, as well as a 15-month probation order, thus included: immediate deletion of social media accounts, no access to Internet-based social media sites, and a ban on opening social media accounts under aliases.


**Sentencing** — The accused was convicted of criminal harassment and voyeurism. He had posted on his Facebook page a sexually explicit video of the complainant. 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).

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

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
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.

Social media case law

Uttering threats by 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).

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.

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.

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.
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.

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.)

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.

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.

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.
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.

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.
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.

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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 willfully 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.


**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. 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.”


**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


**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.

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.\(^1\)


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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.


**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.


**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.


**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.


**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.

**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.

**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.

**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).

**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.

**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.
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.

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 electromagnetically 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.

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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).

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
— ¹R. v. Buzzanga and Durocher (1979), 101 DLR (3d) 488, 49 CCC (2d) 369 (ONCA).

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

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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.

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


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


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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.*


**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).


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).

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. “Anything” has a “wide, unrestricted dictionary definition, and includes sexual favours.” 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

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**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

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**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

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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.”

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**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.”

**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.

**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.

**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).

**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).

**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).