PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacIntosh*, 2024 NSPC 18

Date: 20240104
Docket: 8483052
8483053
8483054
Registry: Halifax

Between:

His Majesty the King

v.

Cody MacIntosh

Restriction on Publication:
s. 486.4 Criminal Code : Ban under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way

TRIAL DECISION

Judge: The Honourable Judge Elizabeth Buckle

Heard: April 7, 8, May 9, 16, 17, 24, July 11, September 28, October 7, 2022, March 31, May 19, August 15, 16, 17, September 1, 26, October 3, 6, 2023

Decision: January 4, 2024

Charges: Sections 151, 271, and 163.1(2), *Criminal Code*

Counsel: Alicia Kennedy for the Crown
Peter Planetta for the Defence
Michelle James for the Defence

By the Court:

Introduction

[1] Cody MacIntosh is charged with ‘sexual assault’, ‘sexual interference’ (touching a person who is under 16 years old for a sexual purpose) and ‘making child pornography’, contrary to ss. 271, 151 and 163.1(2) of the *Criminal Code.* To reduce the risk of identifying the complainant, I have referred to her as ‘the complainant’ in these reasons and used first initials to refer to people who were associated with her.

[2] Mr. MacIntosh testified. He admitted that he engaged in sexual activity with the complainant and recorded that activity on his phone. At the time, he was 24 years old, and the complainant was 15 years old. He testified that he believed the complainant was at least 18 years old and that she consented to the sexual activity. Mr. MacIntosh’s mistake about her age could entitle him to acquittals on the charges of ‘sexual interference’ and ‘making child pornography’ and allow him to rely on consent to defend the ‘sexual assault’ charge.

[3] In a mid-trial ruling, I excluded the complainant’s evidence as a remedy for breaches of ss. 7 and 11(d) of the *Charter* arising from the inability of the Defence to complete cross-examination.

[4] Therefore, the issues at trial included mistaken belief in age, communicated consent and Mr. MacIntosh’s credibility/reliability.

[5] This case was legally complex, my reasons (including this trial decision and a separately reported *Charter* decision) were lengthy, and Mr. MacIntosh is not cognitively sophisticated. As a result, rather than read my reasons into the record, I read a summary of my findings to Mr. MacIntosh and counsel and then provided these reasons in writing.

General Principles

[6] Mr. MacIntosh is presumed to be innocent of these charges. The Crown bears the burden of proving each element of each offence beyond a reasonable doubt.

[7] Proof beyond a reasonable doubt is a high standard. It is more than suspicion or probability. It is not proof to an absolute certainty but falls much closer to absolute certainty than to proof on a balance of probabilities. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice (*R. v. Starr,* 2000 SCC 40; and, *R. v. Lifchus,* [1997] 3 S.C.R. 320).

[8] The charges can be proven through direct or circumstantial evidence or a combination. Ultimately, what is important is to answer the question of whether "the evidence as a whole establishes the accused's guilt beyond a reasonable doubt" (*R. v. Dinardo,* 2008 SCC 24, para. 23).

[9] I am entitled to accept all, some or none of the testimony of any witness. I have to assess the testimony of each witness to determine whether it is credible and reliable. However, a criminal trial is not about simply choosing whether I prefer the evidence that supports guilt over that which does not. Where there is evidence that is inconsistent with guilt (whether from the accused, other defence evidence or the evidence of the Crown), if I believe it or find that it raises a reasonable doubt, I must acquit. Even if I reject that evidence, I must examine the remaining evidence that I do accept and acquit if it leaves me with a reasonable doubt. (*W.D.),* [1991] 1 S.C.R. 742; *Dinardo*; *R. v. B.D.*, 2011 ONCA 51, p. 114; and, *R. v. Horne*, 2023 NSCA 64, paras. 58-59).

[10] I am permitted to draw logical or common-sense inferences where those inferences are grounded in or flow from the evidence (*R. v. Pastro,* 2021 BCCA 149). However, the burden on the Crown when proof of an element is based on circumstantial evidence is to prove beyond a reasonable doubt that the guilty inference is the only reasonable inference to be drawn from the evidence (*R. v. Griffen,* [2009] S.C.J. No. 28, para. 34). There is no burden on the Defence to persuade me that there are other <u>more</u> reasonable or even <u>equally</u> reasonable inferences that can be drawn. Further, a reasonable doubt may be logically based on a lack of evidence (*R. v. Vilaroman*, 2016 SCC 33, para. 36). The Crown is not required to disprove all possibilities, just those that are reasonable and plausible (*R. v. Lights*, 2020 ONCA 128, paras. 127-129).

[11] The ultimate question is "whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty" (*Vilaroman,* at para. 38). If so, then the accused must be acquitted.

[12] Whether on direct or circumstantial evidence, the standard of proof beyond a reasonable doubt applies only to the determination of ultimate issues not to the weighing of individual pieces of evidence (See: *R. v. Morin* [1988] 2 S.C.R. 345, paras. 33-43; *R. v. Morin*, [1992] 3 S.C.R. 286, para. 19; *R. v. Ritch*, 2022 NSCA 52, para. 134 & footnote 56; *R. v. T.J.F.*, 2023 NSCA 28, para. 48; and, *R. v. Ahmadzai*, 2012 BCCA 215, para. 34).

Mr. MacIntosh's Credibility and Reliability

[13] Mr. MacIntosh's credibility and the reliability of his recollections were relevant to most of the issues. As with every witness, I was required to assess his credibility and evidence "… by reference to criteria appropriate to [his] mental development, understanding and ability to communicate (*R. v. W.R.* [1992] 2 S.C.R. 122, para. 26).

[14] Mr. MacIntosh was 24 years old when he met the complainant and 25 or 26 when he testified at various stages of the court proceeding. However, in my view, his mental development, understanding and ability to communicate are not that of a typical 26-year-old. He has a good vocabulary but seemed to process information slowly, had a simplistic understanding of some concepts, struggled with complex logic, became easily frustrated or upset, and sometimes struggled to communicate his evidence.

[15] I recognize that, in some respects, he is more mature than his actual age. His life experiences, such as incarceration, have made him shrewd and he admitted that he has developed the ability to lie and manipulate. However, in other respects, he presents as immature and intellectually unsophisticated. He successfully completed his GED while incarcerated but has very little formal education. He could not recall how far he got in school but testified that when he was doing his GED, they started him at grade 5. He suffers from bipolar disorder and ADHD for which he takes medication and described himself as having a "thought-process disorder".

[16] I believe that, whether because of medication or some underlying neuro-divergence, he has learning, cognitive or intellectual deficits. The Crown argued that in the absence of expert evidence, I cannot say that. I certainly recognize that I cannot diagnose him. However, I am permitted to make inferences based on what I have seen. Over the past two years, I have had many opportunities to interact with Mr. MacIntosh and to see him interact with others: I have spoken

with him and seen him speak with counsel and sheriffs during his many court appearances; I watched him on video during his lengthy police detention; and, I saw him answer questions when interviewed by police and while testifying and being cross-examined on a voluntariness *voir dire*, a s. 276 hearing and at trial.

[17] I have assessed Mr. MacIntosh's evidence and credibility with reference to my impression of his mental development and ability to understand, process and communicate information. Despite viewing his evidence through that lens, I had concerns about his credibility and the reliability of some of his recollections. His demeanour and manner of answering questions have not contributed to those concerns. I accept that his expressions of frustration and reluctance to answer some questions were the result of his cognitive abilities and embarrassment about the subject matter. My concerns are grounded in more objective measures of credibility and reliability. Specific examples will come up as I deal with the evidence. However, in summary, his testimony was frequently internally inconsistent or inconsistent with his statement to police or with objective evidence. It was also occasionally implausible. I do not view all those instances as being intentional lies. Rather, at times, it seemed that, rather than acknowledge that he couldn't recall certain details, he purported to have a clear recollection and then later became confused.

Issues and Outline of Legal Principles

[18] At this stage, I will outline the law and arguments. Some will be dealt with in more detail later in my reasons.

[19] Mr. MacIntosh is charged with touching a person under the age of 16 for a sexual purpose contrary to s. 151, sexual assault contrary to s. 271 and making child pornography contrary to s. 163.1(2). Each of these offences has its own discrete elements all of which, if not conceded, must be proven beyond a reasonable doubt.

[20] Many of the elements have been conceded: Mr. MacIntosh intentionally touched the complainant; the touching impacted her sexual integrity; the touching was for a sexual purpose; the complainant was under 16 so the touching was prohibited by s. 151 and the complainant was too young to give legal consent to sexual activity (s. 150.1(1) & (2.1)); and, the recording shows sexual activity with a person under the age of 18, so constitutes child pornography (s. 163.1).

[21] Mr. MacIntosh testified he believed the complainant was 18 years old and believed she was consenting to the sexual activity.

[22] For ‘sexual interference’ and ‘making child pornography’ (ss. 151 & 163.1), knowledge of age is an element of the offence. If Mr. MacIntosh did not know the complainant was under-age (under 16 or under18), he did not have the required criminal intent to sexually touch/record an under-age person and would be entitled to acquittals on those charges.

[23] For the ‘sexual assault’ charge, his knowledge of age is relevant to his ability to rely on consent.

[24] Where, as in this case, a complainant is under the age of 16 and the accused is more that five years older, “it is not a defence that the complainant consented to the activity that forms the subject-matter of the charges” (s. 150.1(1) & (2.1)).

[25] However, Mr. MacIntosh asserts that the complainant subjectively consented to (was a willing participant in) the sexual activity. If Mr. MacIntosh did not know the complainant was under 16 years old, his belief in consent could provide a defence to the charge of ‘sexual assault’ (*R. v. Holloway*, 2013 ONCA 374).

[26] Importantly, for the ‘sexual assault’ charge, a mistaken belief that the complainant was old enough to consent would not automatically result in an acquittal. It simply “opens the door” for Mr. MacIntosh to rely on consent as a defence (*Holloway*, para. 12).

[27] Mr. MacIntosh’s testimony that he believed the complainant was 18 years old and believed that she was consenting to the sexual activity raises the defences of ‘mistaken belief in age’ and ‘mistaken belief in communicated consent’.

[28] Mr. MacIntosh could not rely on either of these defences unless it has an “air of reality”. A defence will have an ‘air of reality’ where there is “evidence on the record upon which a properly instructed jury acting reasonably, could acquit” (*R. v. Cinous*, 2002 SCC 29, at para. 39). To meet that evidentiary burden, there must be evidence capable of supporting both requirements of the defence - honest belief and ‘all reasonable steps’/‘reasonable steps’ (*R. v. Morrison*, 2019 SCC 15, para. 118 – 119; and, *R. v. Barton*, 2019 SCC 33, para. 121). In applying this test, I had to consider “the totality of the evidence” and assume “the evidence relied upon by the accused to be true” (*Cinous*, at para. 39).

[29] If there is an 'air of reality' to the defence, the Crown must disprove it beyond a reasonable doubt.

[30] Each of these defences requires that Mr. MacIntosh have an honest belief and has been further limited by Parliament. His belief that the complainant was 18 years old is not a defence unless he took "all reasonable steps" to ascertain her age (ss. 150.1(4) & 163.1(5)). His belief in communicated consent is not a defence if it arose from recklessness or willful blindness, if he did not take "reasonable steps" to ascertain that she was consenting, or if there is no evidence that her agreement to the activity was affirmatively expressed through words or actively expressed by conduct (s. 273.2).

[31] The Crown disproves these defences if it proves the absence of any of the requirements beyond a reasonable doubt (*R. v. George*, 2017 SCC 38, para. 8; *Morrison*, paras. 86-90; *R. v. Angel*, 2019 BCCA 449, para. 56; and, *Barton*, para. 123).

[32] The law is unsettled as to whether negating these defences is sufficient for conviction or if the Crown must also prove beyond a reasonable doubt that Mr. MacIntosh knew the complainant was underage and/or not consenting (See: *George*, para. 8; *Morrison*, paras. 80-94; *Angel*, paras. 22-52; *R. v. MacIntyre*, 2019 CMAC 3; *R. v. Carbone*, 2020 ONCA 394, paras. 67-122; *R. v. McLean*, 2021 NLCA 24; *R. v. Jerace*, 2021 BCCA 94; and, *R. v. H.W.*, 2022 ONCA 15).

[33] If, in addition to negating the defences, the Crown is required to prove that Mr. MacIntosh knew the complainant was underage and/or knew she was not consenting, the requisite knowledge is satisfied by proof that he was willfully blind or reckless that the complainant was underage or not consenting (See: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, para. 42; *Barton*, para. 87; *Morrison*, para. 101; *Carbone*, para. 124; and, *H.W.*, paras. 74-98).

[34] The Defence submitted that the Crown did not negate the 'mistake of age' defence – did not disprove the honesty of Mr. MacIntosh's belief in age or that he took all reasonable steps to ascertain her age. As such, he should be acquitted of the charges of 'sexual interference' and 'making child pornography'. Further, the complainant subjectively consented (willingly participated) in the activity and Mr. MacIntosh had an honest belief, having taken reasonable steps, that she communicated her agreement. This mistaken belief in age permits him to rely on

her agreement or his belief in her agreement, resulting in acquittal of 'sexual assault'.

[35] The Crown submitted that it has negated the 'mistake of age' defence by proving both that Mr. MacIntosh's belief in age was not honest and that he failed to take all reasonable steps. Further, if required, it also proved that Mr. MacIntosh knew, was willfully blind or reckless that he was touching and recording someone who was underage and cannot rely on consent as a defence to sexual assault. Alternatively, if it had not met its burden with respect to Mr. MacIntosh's knowledge of age, the Crown argued that he should still be convicted of sexual assault because it proved the complainant did not subjectively consent, negated his 'mistaken belief in communicated consent' defence, and, if necessary, also proved that Mr. MacIntosh was reckless or willfully blind about whether she was consenting.

[36] Further arguments were made with respect to the 'child pornography' charge, but I will address those later in my reasons.

Background Facts

[37] At this stage, I will provide a general summary of the facts. Further details will be provided as I deal with each of the issues.

[38] Mr. MacIntosh met the complainant on November 25th. They did not previously know each other or know anything about each other. At that time, the complainant was 15 years old, living with her grandmother and attending high school (evidence of her grandmother). Mr. MacIntosh was 24 years old, on parole and living in a halfway house in Dartmouth. The day after meeting, they engaged in the sexual activity that is the subject matter of the charges – that included oral, vaginal and anal intercourse in the washroom of a local mall.

[39] Between meeting her for the first time and engaging in the sexual activity that is the subject of the charges, Mr. MacIntosh spent about six hours with the complainant over 24 to 36 hours: two to three hours on the 25th; a few hours on the morning of the 26th; and a little under two hours on the evening of the 26th. They also communicated by telephone and/or text.

[40] They first met at a local mall. He had gone there to meet someone, and the complainant was there with other people. They smoked some marihuana with the

group and then spent two to three hours together, walking around and talking. They were alone for much of that time. They agreed to meet the next day and had each other's contact information.

[41] On November 26th, they met sometime in the morning and were together until early afternoon. They spent time in and around a mall and walking around. At 1:00 p.m. they were confronted by a security guard in a stairwell of a mall who recorded part of his interaction with them (Ex. 2).

[42] Sometime after 1:00 p.m., Mr. MacIntosh left to go back to check-in at his residence. He testified that, during the afternoon, he and the complainant communicated by telephone and/or text message, exchanging at least 80 to 100 text messages. Following a successful s. 276 application, Mr. MacIntosh testified that during this time they had a conversation where he and the complainant agreed to meet later to engage in sexual activity, including anal sex. They did meet in downtown Halifax at, according to his recollection, around 6:00 p.m.

[43] Before entering the family washroom in a mall where they engaged in the sexual activity that is the subject of the charges, they spent time in and around a mall and walking around. However, they were not together for the entire time. Mr. MacIntosh testified that they had some kind of minor disagreement and the complainant left for a while. He could not recall how long they were apart. He gave various estimates ranging from 30 to 75 minutes, but ultimately said he believed they were apart for about 40 minutes.

[44] I have concluded they probably entered the washroom around 8:30 p.m. Mr. MacIntosh did not have a clear recollection of the timing. However, he recorded much of the activity on his telephone in four segments (Ex. 11). The time stamp on the first video shows that at 8:35 p.m. they were in the washroom and the complainant was performing oral sex on him.

[45] They were in the washroom for about 15 to 20 minutes. The last recording of the sexual activity ends at about 8:50 p.m. (Ex. 12).

[46] Mr. MacIntosh testified that after they left the washroom, he went across the street to get a bus back to his residence. Video from metro transit shows Mr. MacIntosh boarding a bus on Spring Garden Road at 9:08 p.m., then at a terminal where he transferred to a second bus and then leaving the second bus at 9:59 p.m. (Ex. 6).

[47] While at the terminal, Mr. MacIntosh met a man and they sat together during the second bus ride. Mr. MacIntosh testified that he showed that man a photograph of the complainant on his phone and the person knew her. Mr. MacIntosh testified that he told the guy that he was in a sexual relationship with her and learned that she was around 16 years old. Mr. MacIntosh testified that he became upset at this and, as a result, the guy called someone whom Mr. MacIntosh believed was the complainant and confronted her about the lie.

[48] At some point that evening, a couple of the video segments recorded by Mr. MacIntosh were sent from his phone, by text message, to 'J', a friend of the complainant's (Ex. 9). These show Mr. MacIntosh and the complainant engaging in sexual activity in the washroom. Mr. MacIntosh denies that he sent the video and testified that they must have been sent by the person he met at the bus terminal.

[49] 'J' testified that at around 9:00 p.m. on November 26th, the complainant called him from the Halifax library and told him what had happened. He said she sounded panicky. He met her at the library and took her to the youth shelter where he resided. 'C', a mutual friend, was there and the three of them talked. Then 'J' called Mr. MacIntosh and apparently confronted him about what the complainant had said. 'J' testified that Mr. MacIntosh told him that he had proof of his version and, at around 10:00 p.m., sent the two video-clips to him by text. 'J' saved the clips and provided them to police when they contacted him.

[50] Gregory Patterson, the commissionaire at the half-way house, testified that Mr. MacIntosh was due back at 9:45 p.m. About six minutes after that time, Mr. Patterson called Mr. MacIntosh to warn him he was late. Mr. MacIntosh then arrived back at 10:13 p.m. Mr. Patterson saw him enter and immediately came to speak with him because he had taken the earlier call from him. Mr. Patterson testified that Mr. MacIntosh sounded upset during the call and reported some confusion about the time he was due back. When Mr. MacIntosh arrived back, he was upset.

[51] The complainant's grandmother testified that she was supposed to be home by 10:00 p.m. but called and sounded upset. She called again a short time later and still sounded upset. Her grandmother told her to take a cab home. She did and arrived home at about 10:30 p.m. When she arrived home, she was upset, seemed "off" and had balance issues. They spoke and the complainant was taken to the

children's hospital. Later the police were contacted, they interviewed the complainant and arrested Mr. MacIntosh.

[52] When Mr. MacIntosh was arrested, he repeatedly asked police to look at his phone. Immediately upon being arrested for sexual assault, he said, "my phone. You can look at my phone". After being cautioned and advised of his right to consult counsel, he told Cst. Andrew Beaton, "Take my phone. Everything's on my phone". He later asked Cst. Jeff MacLean if they had looked at the video yet.

Analysis

Issue 1 - Knowledge of Age

[53] Because Mr. MacIntosh's knowledge of the complainant's age impacts all charges, I will start with that issue.

Mistaken Belief in Age (ss. 150.1(4) & 163.1(5))

[54] The first question was whether Mr. MacIntosh could rely on a mistaken belief that the complainant was at least 16/18 years old (ss. 150.1(4) & 163.1(5)).

[55] It requires that Mr. MacIntosh have honestly believed that the complainant was of legal age (at least 16 years old for the sexual touching and sexual assault offences and at least 18 years old for the 'child pornography' offence) and that he took "all reasonable steps to ascertain" her age (ss. 150.1(4) & 163.1(5)).

Step 1 – Air of Reality to the Defence

[56] I was satisfied that there was evidence capable of supporting the required findings. Mr. MacIntosh testified that: he believed the complainant was at least 18 years old; he was told that she was 20 years; information she provided him about her life was consistent with her being that age; and, when he became suspicious that she wasn't really 20 years old he took some steps to have her tell him her real age. Further, 'J', the complainant's friend, testified that he was aware that she lied about her age including telling people that she was 18 or 20 years old.

Step 2 – Honest Belief and All Reasonable Steps

[57] Because there was an air of reality to the defence, the Crown was required to disprove it beyond a reasonable doubt. The Crown could do that by proving either

that Mr. MacIntosh did not honestly believe the complainant was at least 16 or 18 or did not take "all reasonable steps" to ascertain her age (*George*, para. 8; *Morrison*, paras. 86 – 90; and, *Angel*, para. 56).

[58] The first requirement, Mr. MacIntosh's belief that the complainant was at least 16 or 18 years old, is subjective. I had to decide whether, on all the evidence, the Crown had proven beyond a reasonable doubt that Mr. MacIntosh's stated belief was not honestly held. For this inquiry, Mr. MacIntosh's individual characteristics were relevant (e.g. *R. v. Budden* [2014] N.J. No. 78, para. 76). At this stage of the inquiry, his belief does not have to be reasonable. However, to decide whether it was honestly held, I had to assess the credibility of his stated belief in the context of the other evidence, including the various 'indicia' of age.

[59] The second requirement, the 'all reasonable steps' requirement, "has objective and subjective dimensions: the steps must be objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time." (*Morrison,* para. 105). This inquiry has been described as a "highly contextual, fact-specific exercise" (*George*, para. 9). Some general principles can be distilled from the cases:

- I must apply a practical, common-sense approach, bearing in mind its overarching purpose which is to bar an accused from raising a defence based on an asserted belief that is "entirely devoid of an objective evidentiary basis" (*R. v. Levigne*, 2010 SCC 25, para. 31; and, *Morrison,* para. 111);

- An accused is not required to take all possible steps (*R. v. Osborne*, [1992] 102 Nfld. & P.E.I.R. 194 (NLCA)). However, they are required to take all steps that a reasonable person would take in the circumstances known to them at the time (*George*, para. 9);

- Any steps must be "meaningful" in that they must provide information reasonably capable of supporting the belief that the complainant was of legal age (*Morrison*, para. 106);

- Both the steps taken and the information received are relevant (*Morrison,* para. 107);

- Reasonable steps need not be ‘active’ in that the receipt and consideration of unsolicited information could provide information reasonably capable of supporting the belief (para. 109);

- An accused has an ongoing requirement to re-assess, particularly if there were “red flags” raised that impacted the accused’s belief (*Morrison*, para. 108); and,

- The sufficiency of the steps will depend, in part, on what information was available without further inquiry (e.g. *R. v. Dragos*, 2012 ONCA 538, para. 35). Such that, “the more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them” (*George*, para. 9).

Mr. MacIntosh’s Individual Characteristics

[60] In assessing the honesty of Mr. MacIntosh’s subjective belief, I have considered his individual circumstances as outlined above including his age, relative maturity, intelligence, life experience etc.

Available Indicia of Age

[61] There was information available to Mr. MacIntosh that was relevant to both the honesty of his stated belief and the reasonableness of any steps he took. Obviously, no factor, taken alone, will be determinative and it is important that I consider all the circumstances known to Mr. MacIntosh in their totality and cumulatively.

[62] The information that was available without specific inquiry included the following:

a. The Complainant’s Stated Age

[63] Mr. MacIntosh had information that the complainant was 20 years old and that she was 18 years old.

[64] He testified that he was initially told that she was 20 years old. He said that when he first met her, everyone decided to smoke marihuana but wanted to make sure they were of age. In that context, he was told that she was 20. His evidence

about whether she was present when that information was provided or whether she also told him she was 20 years old is inconsistent and unclear.

[65] In direct examination, he said that "everyone" told him she was 20 years old. He said that the complainant was nearby during the discussion about smoking marihuana and when he asked everyone how old they were, 'C' said the complainant was 20 years old, the complainant said she was 20 years old, everyone said she was 20 years old.

[66] In cross-examination, he acknowledged that he hadn't told police that the complainant had told him she was 20. In his police interview, in response to being told that the charges included an allegation that she was 15, he said "I didn't know… I know that she was 20. All her friends told me she was 20". Later, he told police that he asked everybody how old she was, and all her friends told him she was 20.

[67] Then, contrary to his direct evidence, he testified that this conversation about her age was not in her hearing and that he didn't want to make her uncomfortable by questioning her about her age. He further explained that the complainant told him she was 20 when the two of them left the group to go for a walk. He explained that he didn't tell police that the complainant had also confirmed her age because he was suffering the effects of lack of sleep before the interview and that he suffers from a thought-process disorder.

[68] Despite these discrepancies about who told him, some of which I attribute to the circumstances of the police interview which I addressed in my voluntariness ruling, I accept that someone told Mr. MacIntosh that the complainant was 20 years old in response to inquiries about smoking marihuana. That evidence is plausible given that he was on parole and would want to avoid getting into trouble by giving marihuana to young people. There is also support for the idea that the complainant and/or her friends might lie about her age. 'J' testified that she would tell him she was 17 years old, but he heard different things from other people, including that she was 16, 18 or 20 years old.

[69] I also accept his evidence given in cross-examination that the complainant was not present when he received that information but, later when he was alone with her, she told him she was 20 years old. Mr. MacIntosh's testimony that he later became upset with the complainant after he received information that she was

18 years old, lends credence to his testimony that she previously told him that she was 20 years old.

[70] Mr. MacIntosh testified that sometime later, before they engaged in the sexual activity that is the subject of the charges, he learned that she was 18 years old, not 20 years old. His evidence about who told him is also inconsistent and unclear.

[71] In his direct-evidence and his interview with police, he said that it was the complainant who told him she was 18. In his evidence, he explained that they had a conversation where her age changed and she said she was 18, the information caught him off guard, so he questioned her about it and she provided an explanation for the discrepancy. He also acknowledged telling police that she said she was 18 and continued to say she was 18 after he confronted her. However, in cross-examination, he testified that it was the complainant's friend who had told him she was 18, not the complainant.

[72] His evidence in direct and his police statement cannot be reconciled with his evidence in cross-examination. However, despite that, I accept that he did receive information that the complainant was 18 years old, not 20. I accept this part of his evidence because by saying this, he is introducing confusion or inaccuracy about her age which, in some respect, is contrary to his interest. I also found that his reaction to learning she was not 20 years old was plausible and his description of the conversation where he confronted her was detailed and included odd or unusual facts that are unlikely to be a fabrication. I think it is more likely that the complainant told Mr. MacIntosh that she was 18. I say that because his description of his reaction and subsequent questioning of the complainant makes more sense if the information came from her and because this is what he told police not long after the incident when the events would have been fresher in his mind.

b. The Complainant's Physical Appearance

[73] Mr. MacIntosh did not specifically comment on the complainant's appearance. However, he did say that he did not observe anything about her that suggested that what he'd been told about her age was wrong.

[74] In my view, her physical appearance alone would not be sufficient to remove the need for further inquiry but would also not cause an obvious 'red flag' if his stated belief was that she was 16 years old. However, his stated belief is that she

was at least 18 years old. In my view, her appearance alone, would cause a reasonable person to question that. I had the opportunity to observe her in video taken by a security guard about seven hours before the sexual activity (Ex. 2), in video of the activity in the washroom (Ex. 9 & 11), in a still photo taken from the washroom video (Ex. 4), and in her student ID for 2020-2021 that was seized by D/Cst. McGrath during his interview with her (Ex. 3). In the washroom video, she is wearing relatively heavy eye makeup but has a round, full face that suggests she is much younger than 18 years old. Her clothing and physical size are consistent with virtually any age. The videos do not allow me to assess whether her physical development would have provided relevant information about age. In her school ID, she is not wearing the same makeup as in the washroom video. In that photo and the video from the security guard, she looks younger than 16 years old.

c. Ages and Appearances of her Companions

[75] When Mr. MacIntosh met the complainant, she was with people of mixed ages but including two people who looked younger than 18 years old. Mr. MacIntosh said that she was with "C", two other males and a female. He testified that one of the males looked to be in his 30s, but the other males were younger looking. He described 'C' to police as a "young kid". That description was corroborated by Cst. Derek McCulley who spoke with 'C' during the investigation. He said 'C' was 15 or 16 years old at the time but looked to be about 12 or 13 years old.

[76] I had the opportunity to observe 'J' when he testified. He was not asked whether he was one of the people with her at the mall when she first met Mr. MacIntosh so I don't know whether he was the other 'young looking' person described by Mr. MacIntosh. However, he testified that he had been with Mr. MacIntosh and the complainant at the library. At that time, 'J' was just short of his 22nd birthday. However, when he testified two years later, he still looked significantly younger than that.

d. Context of Their Interactions

[77] The context and circumstances of their interactions were consistent with her being under 16 or 18-years-old. When they met, she was hanging around a mall and they spent most of their time together walking around and hanging around malls. Mr. MacIntosh testified that she smoked marihuana which, at 15 years old, she could not legally do. However, that would not be a reliable indicator that she

was older. They did nothing together that would have exclusively suggested she was 18 years old: she was not out late at night; they didn't go to bars together; and, he entered a liquor store to get a bag, but she did not go in. However, they also did nothing that would have exclusively suggested she was younger.

e. Information About Her Lifestyle

[78] Mr. MacIntosh agreed that the complainant did not have things that he might expect an adult to have – there was no indication that she had an apartment or was otherwise independent, he did not know whether she had a job but there was no indication that she did and she did not have her own money. However, he testified that she told him she had gone to school to be a security guard and that she had lost a child two years previously, both of which would suggest she was older than 15.

[79] There are two other pieces of information that, if available to Mr. MacIntosh, would have suggested she was probably younger than 18. First, her school ID which clearly shows her as a grade 10 student in 2020/21 (Ex. 3). Mr. MacIntosh denied he saw the ID. 'J' testified that she usually had it with her and described her wearing it around her neck on what is commonly referred to as a lanyard. When the complainant was interviewed by police, she had her ID with her but D/Cst. McGrath did not say whether it was around her neck or attached to a lanyard. It is clear from the exhibit that the card is damaged such that it could not be held by a lanyard (Ex. 3). That was the morning after Mr. MacIntosh last saw her. As such, I do not accept that it was around her neck during the time she was with Mr. MacIntosh and accept his evidence that he did not see her ID.

[80] Second, when the complainant and Mr. MacIntosh were confronted by the security guard in the stairwell of the mall, she told the guard she was a student. The guard testified that he asked them if they were students and she said she was a student at a specific high school. However, on the video, she can be heard saying that she is a 'student' but not that she is attends high school. When this was put to the guard in cross-examination, his responses suggested that it was said after the video was turned off. Given the way the conversation unfolded on the video, I don't accept that. The video shows the guard asking the complainant and Mr. MacIntosh if they were students and the complainant immediately responding "yes, I'm a student" with nothing else said. That is when I would expect to hear the reference to the named high school. The recording ends immediately after that. The guard did not testify that he asked again later. As such, I believe the guard is mistaken about hearing the reference to a specific named high school. Mr.

MacIntosh denies that he heard her say she was a student at all. I don't accept his evidence that he didn't hear this part of the conversation. He was part of the conversation that was taking place, his voice can be heard when he can't be seen on the video, and he was only about six to eight feet away in an open stairwell. As such, I am satisfied that knew she was a 'student' but not that she was a high school student. That information is consistent with her being either 15 or 18 years old.

f. Possible 'Red Flags'

[81] There were 'red flags' that should have, and did, cause Mr. MacIntosh to be suspicious about her age. Most importantly, he learned that the original information he was provided, that she was 20 years old, was not correct. That conflicting information alerted him to the fact there was, at least, confusion about her age and, more likely, dishonesty. In his testimony, he did not acknowledge there had been dishonesty about her age. However, the evidence suggests that, at the time, he felt there had been. That is why he took steps to see if she was lying about her age. He was also aware that the complainant had lied to him about other things. In cross-examination, he agreed she had lied to him about losing a baby and being abandoned by her mother. However, it is not clear that he knew those were lies at the time, so I have not treated them as 'red flags'. However, she also told him she had murdered two people which he knew at the time to be a lie and he was present when she lied to the security guard in the stairwell by telling him she had a car in the car-park.

g. Age Disparity

[82] Cases suggest that the greater the disparity in ages between the accused and the complainant, the greater the level of inquiry required (*R.A.K.*, para. 10). Here, the age difference was approximately nine years. That is not as significant a gap as is present in many cases.

Steps to Ascertain the Complainant's Age

[83] I turn now to what steps Mr. MacIntosh took to ascertain the complainant's age:

a. Initial Questions About Her Age

[84] As I said, Mr. MacIntosh asked whether the group was old enough to smoke marijuana and learned that the complainant was 20 years old. I found that she was not present when this was said but she subsequently confirmed that she was 20. It is not clear whether that was in response to a question or just part of a conversation.

b. Further Questions and 'Virtue Testing'

[85] After the complainant told him she was 18 years old, he confronted her. She provided the explanation about losing her child. He then took another step to see if she was lying about age. He tried to play a game or manipulate her to make her feel comfortable about telling him the truth about her age. He told her it would be ok if she was younger, that it wouldn't be a problem and he wouldn't be mad because the truth mattered more. However, he testified that she was adamant that she was telling the truth about her age. His evidence was not clear or consistent as to whether she maintained that she was 20 years old or 18 years old. As I said, in cross-examination, he denied that she had ever told him she was 18 years old. However, he acknowledged telling police that when he accused her of lying about her age, she said no, and promised she was 18 years old.

c. Conversation with Complainant's Friend ('J')

[86] Mr. MacIntosh also testified that prior to the sexual activity in the bathroom, he spoke with the complainant's best friend about her age. In his direct evidence, he said that this happened after the conversation with her during which he discovered there was a discrepancy concerning her age. He did not name the person, but I am satisfied he was referring to 'J'. Mr. MacIntosh said the person had testified and provided descriptors that matched details 'J' provided about himself when he testified.

[87] Mr. MacIntosh testified that the friend confirmed that the complainant was grieving the loss of a child which could explain the issue with her age and confirmed that she was 18 years old. 'J' was not specifically asked about this conversation and did not mention it when he testified. He did testify about a conversation with Mr. MacIntosh later that evening. His evidence was not entirely consistent about that communication. However, for purpose of this issue, what is important is that he testified about a telephone call he made to Mr. MacIntosh, not

one that Mr. MacIntosh made to him. Further, when asked whether he recalled any discussion of the complainant's age during that call, he said "no".

[88] He was also separately asked questions about the complainant's age and his knowledge that she and her friends lied about her age. During that testimony, he did not say that he had ever had a conversation with Mr. MacIntosh about the complainant's age.

[89] So, despite testifying about these two subjects – a telephone conversation with Mr. MacIntosh and the complainant's age – he did not say he'd ever received a call from Mr. MacIntosh and did not say he'd spoken to Mr. MacIntosh about her age. Given that, and concerns I had about Mr. MacIntosh's credibility and reliability, I do not accept that 'J' told Mr. MacIntosh that the complainant was 18 or confirmed the information about her having lost a child.

Conclusion on Mistake of Age

[90] I have concerns about Mr. MacIntosh's credibility and the reliability of his recollections and do not accept all his evidence. However, I have a reasonable doubt that he subjectively believed the complainant was at least 18 years old. In reaching that conclusion, I have considered all the circumstances known to him and his individual characteristics.

[91] However, the Crown has proven beyond a reasonable doubt that he did not take all reasonable steps to ascertain her true age. In reaching that conclusion, I have considered all the circumstances known to him, cumulatively.

[92] There were pieces of information available to Mr. MacIntosh without further inquiry that supported Mr. MacIntosh's belief in the complainant's age: her friends told him she was 20 years old; and she later told him she was 18 years old, had lost a child two years earlier and had gone to school to be a security guard.

[93] The remaining information was either neutral or suggested that she was younger: she looked younger than 18 years old; she was a student; she apparently did not work, did not have an apartment and did not have spending money; she was hanging around with people of mixed ages including two who looked very young; and, she was hanging around a shopping mall.

[94] There was also a clear ‘red flag’ that related specifically to her age - the confusion, inconsistency, or dishonesty about her age. Mr. MacIntosh learned that the original information he received about her age was not correct. As I said, I believe that she and others told him she was 20 years old, and she later told him she was 18 years old. He clearly felt he’d been lied to. That is what caused him to be “caught of guard”, why he confronted her and why he engaged in ‘virtue testing’ to try to get her to tell him the truth.

[95] The question to be answered was whether, based on the available indicia of age known to Mr. MacIntosh, a reasonable person would accept the complainant’s age without further inquiry? If not, what further inquiry would be reasonable? (*R. v. P. (L.T.)* (1997), 113 C.C.C. (3d) 42, paras. 20 & 27).

[96] In *Osborne,* the Newfoundland Court of Appeal said, “[t]here must be an earnest enquiry or some other compelling factor that obviates the need for an enquiry (p. 9).

[97] Mr. MacIntosh barely knew the complainant when he engaged in sexual activity with her. Most of the information known to him was, at best, neutral on the issue of her age. I asked myself whether the indicia that suggested she was older was ‘compelling’ information that removed the need for further enquiry. I concluded it was not and a reasonable person would not have accepted that the complainant was at least 18 years old without further enquiry.

[98] In reaching that conclusion, I acknowledge that on the first day, Mr. MacIntosh asked others how old the complainant was and that she told him her age. It is not necessary that people always ask the age of their sexual partners, but it is also not always sufficient (*George,* para. 9; *R. v. W.G.*, 2018 ONSC 5404; and, *R. v. Eichner,* 2020 ONSC 4602). The Supreme Court in *George* said that sometimes a reasonable person will have to do more than ask a person their age because of the “commonly recognized motivation for young people to misrepresent their age” (para. 9, citations omitted).

[99] Here, before engaging in the sexual activity that is the subject of the charges, Mr. MacIntosh knew the complainant’s friends had lied to him about her age, knew she had lied to him about her age and other things, and knew she had lied to the security guard. Given that, a reasonable person would have to do more.

[100] I then asked what further enquiry would be reasonable.

[101] Courts have refrained from providing ‘checklists’ of what steps will be required to meet the legal test for reasonableness. However, the more reasonable the accused’s perception of the complainant’s age, the fewer steps reasonably required of them (*George,* para. 9).

[102] Mr. MacIntosh’s perception of the complainant as being 18 or more was not very reasonable. She looked younger than 18 years old and the other objective criteria did not suggest she was 18 or older. Mr. MacIntosh had very little information suggesting that she was 18 or older. He relied primarily on what he’d been told. He acknowledged telling police, “so if all her friends are telling me she’s 20, why wouldn’t I believe it?”. A belief that she was 16 years old would be more reasonable, requiring fewer steps.

[103] The steps taken by Mr. MacIntosh to ascertain her age included his initial inquiry where he learned she was 20 years old, his confrontation of her when he learned that was not correct and then what I have described as a ‘virtue test’ – when he became suspicious, he tried to trick or encourage the complainant into being honest about her age. When she continued to be adamant that she was telling the truth about her age, he accepted her word.

[104] Most of that information came from the complainant, either passively or because Mr. MacIntosh confronted her and tried to trick her. As such, it relied on her honesty.

[105] In my view, what Mr. MacIntosh did does not meet the requirement for “all reasonable steps”. In the words of the Court in *Osborne*, it was not an “earnest enquiry”.

[106] I reminded myself that he did not have to take all possible steps, just do what a reasonable person would do. Given the confusion or deceit around her actual age and what he knew about her willingness to lie, something more was required. He could easily have asked her for Identification. He did not, even after his suspicions were raised about her age. Taking concrete, objective, steps, such as asking for Identification, is not required in every case. However, there are many circumstances where courts have concluded that simply accepting a complainant’s word about their age will not be enough and some concrete step will be necessary (see: *W.G.*, para. 71; and, *Eichner,* paras. 165-171).

[107] This is one of those circumstances. Asking for Identification or taking some other objectively verifiable step to obtain her age is the minimum a reasonable person would do, given the confusion or deceit about her age and the absence of other compelling information. Mr. MacIntosh did not, so the Crown has proven beyond a reasonable doubt that Mr. MacIntosh did not take all reasonable steps to ascertain the complainant's age and has negated the mistake of age defence.

Proof of Knowledge of Age

[108] As I previously mentioned, since the decision of the Supreme Court of Canada in *Morrison*, there has been disagreement amongst appellate courts as to whether negating the 'mistaken belief in age' defence is sufficient for conviction. In *Morrison*, Moldaver, J., said, "put simply, as a matter of law, an accused cannot be convicted merely for failing to establish a defence; rather, a conviction will be sustained only where the Crown is able to negate a properly raised defence *and* show, on the evidence as a whole, that all of the essential elements of the offence in question have been proved beyond a reasonable doubt." (para. 90).

[109] In *Morrison*, the Court was specifically dealing with 'mistake of age' in the context of an online offence involving a police sting operation where there was no underage victim. The British Columbia Court of Appeal has restricted Justice Moldaver's comments to that context and found that where there is an actual underage complainant, once the 'mistake of age' defence is negated, conviction will follow (see: *Angel*; and, *Jerace*). Applying that approach would result in Mr. MacIntosh being convicted of all offences because the Crown has negated the defence.

[110] The Ontario Court of Appeal has applied Justice Moldaver's comments more broadly, concluding that negating the mistake of age defence is not sufficient for conviction (e.g. *Carbone*). That Court has found that the Crown must still prove beyond a reasonable doubt that the accused had the requisite knowledge of age. Applying this approach, I would have to go on to consider whether the Crown has proven Mr. MacIntosh knew the complainant was underage (under 16 for ss. 151 and 271 and under 18 for s. 163.1(2)).

[111] The Nova Scotia Court of Appeal has not yet weighed into that debate.

[112] It is only if the two approaches would have different results that I need to choose between the two.

[113] Under the Ontario approach, the Crown is required to prove the accused knew the complainant was under the proscribed age. As I said, I have a reasonable doubt that Mr. MacIntosh honestly believed the complainant was at least 18 years old. However, knowledge is satisfied by proving that Mr. MacIntosh was reckless or willfully blind that the complainant was underage (e.g. *Morrison*, para. 90; *R. v. J.A.*, 2011 SCC 28, para. 24; *R. v. W.G.*, 2021 ONCA 578, para. 47; *R. v. Westman*, 1995 BCCA 285, para. 18; *Angel*, para. 45; and, *R. v. Fox*, 2023 ONCA 674. paras. 47 & 48).

[114] Further, where the 'mistaken belief in age' defence is unavailable or negated, the accused's belief about the complainant's age must be "removed from the evidentiary mix" (*Morrison*, paras. 83, 121 & 124). Here, Mr. MacIntosh's belief did not meet the statutory requirements of s. 150.1(4), so it is not available to him. At this stage of the analysis, I was required to focus on what the Crown could prove and ensure I did not allow the defence to "re-enter through the back door" by considering evidence of Mr. MacIntosh's belief or allowing it to form part of the analysis on whether the Crown had proven knowledge (*H.W.*, paras. 91-93; *MacIntyre*, para. 67)

[115] Recklessness exists where a person who is "aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk" (*Sansregret v. The Queen*, [1985] 1 S.C.R., 570, p. 582; *Morrison*, para. 100; and, *Fox*, para. 25). In the context of a sexual offence involving a child, the Ontario Court of Appeal has said that the risk-taking is blameworthy and can attract criminal liability even where the risk is seen as low (*Carbone*, para. 125). Recklessness concerning age is established where the Crown proves that the accused appreciated there was some risk that the complainant was under the legal age and decided to proceed with the activity anyway (*Carbone*, paras. 124 – 126).

[116] Wilful blindness is close to actual knowledge. It has been described as "deliberate ignorance". It exists where an accused "has his suspicions aroused but then deliberately omits to make further enquiries because he wishes to remain in ignorance …" (*Sansregret*, pp. 584-586; also see *Morrison*, para. 98).

[117] Here there are two different ages at issue. For the child pornography offence, the Crown had to prove Mr. MacIntosh knew (including wilful blindness and recklessness) that the complainant was under 18 years old and for 'sexual

interference' and 'sexual assault', the Crown had to prove he knew (including wilful blindness and recklessness) that she was under 16 years old.

[118] I have concluded that the Crown met that burden for both ages by proving Mr. MacIntosh was reckless about age in general and willfully blind to some aspects. I am satisfied that he was aware there was some risk that the complainant was under 16 years old. Given the lack of conclusive information about her age and the contradiction/deceit about her age, there was an objective risk that she was underage. The fact that he became upset when he learned that he had been given incorrect information about age, confronted her about her age and engaged in 'virtue testing' to try to get her to tell him the truth demonstrates he was also subjectively aware that there was some risk. He then relied on the honesty of her continuing assertion that she was 18. To the extent that he denied being aware of a continuing risk, I reject his evidence, and find that he knew there was at least some continuing risk that she was underage. In all the circumstances, but especially given his knowledge of her deceit, it is not plausible that he did not know there was some continuing risk that she might be underage. I say that despite my view that he has some cognitive deficits. Despite that awareness of risk, he acted. His failure to take any further step was, at best, reckless because he persisted despite knowing that a risk remained. At worst, it was willful blindness because he deliberately chose not to make further inquiries despite knowing there was a reason for inquiry.

[119] Given the concessions, that finding is sufficient to prove guilt on all offences beyond a reasonable doubt.

[120] However, there are two further areas that I will address. The first relates to the sexual assault charge in Count 1 and the second relates to the charge of 'making child pornography' in Count 3.

Issue 2: Subjective Consent and Belief in Communicated Consent

[121] If I was wrong in my analysis of 'mistake of age'/knowledge of age, I would still have found Mr. MacIntosh guilty of sexual assault because all elements of that offence were proven beyond a reasonable doubt. I will only address the *actus reus* and *mens rea* for absence of consent as all other elements were conceded.

[122] The *actus reus* of consent has two aspects: subjective consent (whether a complainant was in her own mind agreeing); and, legal consent (whether a

complainant's subjective consent will be given legal effect) (*R. v. G.F.*, 2021 SCC 20, paras. 31-34).

[123] With respect to the *actus reus,* the Crown and Defence both made submissions about whether absence of subjective consent had been proven. However, in my view the combined effect of ss. 150.1(1), 273.1(2)(b), 273.1(3) and the Supreme Court's analysis in *G.F.*, means that the Crown was not required to prove the absence of subjective consent because any subjective consent was not legally effective due to the complainant's age. As Justice Doherty said in *Carbone,* "[a]ge can be seen as a proxy for the absence of consent when the allegation involves sexual activity with underage persons." (para. 124).

[124] If the Crown was required to prove absence of subjective consent (that the complainant was not a willing participant), I was persuaded beyond a reasonable doubt that they did.

[125] With respect to the *mens rea,* I have also concluded that Mr. MacIntosh could not rely on the defence of honest belief in communicated consent because he did not meet the requirements of s. 273.2. Specifically, his belief arose from his recklessness or wilful blindness, and he did not take reasonable steps to ascertain that she was consenting. Finally, if, despite negating that defence, the Crown was required to prove he knew the complainant was not subjectively consenting, the Crown did that by showing he was reckless about the complainant's consent.

[126] My reasons are as follows.

Consent – Actus Reus

[127] Section 150.1(1) says that the consent of a person who is under 16 is not a defence to a charge of sexual assault (except in circumstances that do not apply here). The legal effect of that provision is to place the underage complainant either in the category of complainants who are "incapable of consenting … for any reason other than [unconsciousness]" under s. 273.1(2)(b) or in the category of other "circumstances in which no consent is obtained" under s. 273.1(3).

[128] In *G.F.,* the Court explained how various factors (common law, s. 265(3) and s. 273.1(2)) could, for policy reasons, cause subjective consent to be legally ineffective. The Court noted that some factors, such as incapacity due to intoxication, prevent subjective consent because they are linked to its conditions

(paras. 36-47). Others, such as where the complainant's agreement is induced by abuse of power, trust or authority, recognize that subjective consent existed but vitiate it rendering it "of no force or effect" (paras. 36 & 44). Where proven to the requisite standard, both categories have the same legal effect – no consent.

[129] It is not clear whether being 'underage' prevents subjective consent or vitiates it, but it clearly means that any subjective consent cannot be given legal effect. As a result, in my view, where the complainant is proven to be underage, the *actus reus* of absence of consent is established and the inquiry turns to whether the *mens rea* for that element is proven. Any evidence that the underage complainant subjectively consented (was a willing participant) would be relevant to mistaken belief in communicated consent and the accused's knowledge of absence of consent.

[130] First, I will address the absence of subjective consent. This is determined solely by reference to the complainant's "subjective internal state of mind towards the touching, at the time it occurred" (*Ewanchuck*, para. 26). It is proven if the complainant was not, in her own mind, agreeing to engage in the sexual activity (*G.F.*, para. 29; *Ewanchuk*, para. 48; *Barton*, para. 89; and, *R. v. Goldfinch,* 2019 SCC 38, para. 44).

[131] Consent is defined in s. 273.1 as the "voluntary agreement to engage in the sexual activity in question.".

[132] The Supreme Court of Canada has described voluntary agreement as "the conscious agreement of the complainant to engage in every sexual act in a particular encounter" (*R. v. J.A.*, 2011 SCC 28, at para. 31).

[133] Consent must be "present at the time the sexual activity in question takes place" (s. 273.1(1.1)). The law recognizes that no consent exists where the complainant "expresses, by words or conduct, a lack of agreement to engage in the activity" or, having initially consented, "expresses, by words or conduct, a lack of agreement to continue to engage in the activity (s. 273.1(2)(d) & (e); and, *G.F.*, paras. 29 – 33 and 42 – 47).

[134] Here, because I have excluded the complainant's testimony, I do not have her direct evidence as to what was in her mind. However, like any other fact or element, absence of consent can be proven through other evidence. The other

evidence available to me includes the recordings of the activity and Mr. MacIntosh's evidence.

[135] Mr. MacIntosh testified that he and the complainant had a telephone conversation earlier in the day (about six hours before the sexual activity) where they agreed they would meet later to have sex. He said he raised the subject of anal sex, they discussed that neither of them had ever done that before, they agreed they would try it and he agreed he would bring lubricant for that purpose. I accept that they had some conversation about sex, including about anal sex and the need for lubricant. His evidence was not entirely consistent about when this conversation occurred or the details. However, some of the details he provided are unlikely to be fabricated. For example, he acknowledged that they both said they had never tried anal sex before and related an odd detail of their discussion about lubricant. He recalled that detail because he thought it was humorous.

[136] Four recordings, video and audio, were seized from Mr. MacIntosh's phone (Ex. 12):

- 0460 (1:30 duration) – showing the complainant on her knees performing oral sex on Mr. MacIntosh;

- 0461 (2:44 duration) – showing intercourse from behind followed by her on her knees performing oral sex on him;

- 0462 (5:09 duration) – showing her on her knees performing oral sex on him;

- 0463 (1:58 duration) – begins with him masturbating himself, ejaculating onto her face and then putting his penis in her mouth.

[137] The video is not complete. Mr. MacIntosh does not assert that there were lengthy periods that were not recorded. However, he testified that during a portion of the activity that was not recorded, the complainant orgasmed and because she was standing and her legs became weak, he had to support her to prevent her from falling. He also said that some other actions that were suggestive of consent, were not captured in the recording.

[138] In the first video, she is performing oral sex on Mr. MacIntosh, looking directly at the camera. She does not appear to be unhappy, is actively engaged in

that activity, and there is no indication of any force by Mr. MacIntosh. Throughout the recording, Mr. MacIntosh is directing her – telling her what he wants her to do and say. She says little except to reply to direct questions or when he tells her to say something. The tone of the interaction changes as the recordings progress. He becomes more assertive with her and near the end is giving her authoritative commands. Over time, when her face can be seen, she no longer looks happy, and she makes sounds that suggest she is, at least, uncomfortable.

[139] There are some specific things in the videos that are particularly relevant to what was in the complainant's mind with respect to consent and what was being communicated to Mr. MacIntosh. At one point when she was performing oral sex on him, the complainant said she was tired, and he responded "you're tired? Yeah, are you? Keep going though". Then, later Mr. MacIntosh raised the subject of anal sex. At this point, the complainant was again on her knees performing oral sex on him. He began by asking, "can I put it in your ass?". She did not respond and did not change her position. Then, he twice stated, "I'm going to put it in your ass". Again, she did not respond and did not change her position. Then, in a very firm tone he said, "bend the fuck over". She did not immediately change her position and at this point he appeared to drop the phone he was using to record. On the recording, she can be heard saying something and he responded, in a firm tone, "I'll be careful, now get up …". I could not hear what she said on the recording. However, in cross-examination, Mr. MacIntosh agreed that she said she had never done it and in response he said, "I'll be careful, get up, its going to hurt a little".

[140] Mr. MacIntosh testified that he did not continue to record the activity because he needed both hands. He said that after the recording ended, the complainant got up and bent over the sink. She put her hands on the counter, lifted her buttocks in the air and used her hand to spread her buttocks as he spread lubrication. He penetrated her anus with his fingers and then his penis. That continued for a while during which the complainant was making a lot of noise which he interpreted as her enjoying herself. He denied it was possible that she was in pain.

[141] In the final recording, Mr. MacIntosh was masturbating himself while the complainant knelt in front of him. He told her to look at him, began to ejaculate onto her face, then put his penis in her mouth, directing her to go faster, not to stop and finally to "swallow it".

[142] Mr. MacIntosh acknowledged that he did not ask the complainant's permission to do most of the sexual acts they engaged in, including slapping her buttocks, putting his fingers in her anus, and ejaculating on her face. He also acknowledged that she did not verbally respond to his request, statement, or order concerning anal sex. However, he testified that she responded physically and by making sounds signifying she enjoyed the activity.

[143] I accept his evidence that before the anal sex, the complainant changed positions, allowed him to apply lubrication, did not resist when he put his fingers or penis in her anus and made sounds that he perceived as enjoyment. Given that he did not know her well, either in general or as a sexual partner, in determining whether she was subjectively consenting, I put very little weight on his perception of the meaning of the sounds she was making.

[144] To infer absence of consent, I would have to be satisfied beyond a reasonable doubt that it is the only rational inference from all the evidence.

[145] That evidence includes the complainant's earlier agreement to meet Mr. MacIntosh for the purpose of engaging in sexual activity, her earlier statement of interest/agreement to try anal sex, her actions and words on the recordings, and Mr. MacIntosh's evidence about what she said and did that is not captured on the recording.

[146] All the evidence, including the recordings, suggests that the complainant was willingly participating at the beginning of the recording. However, I am satisfied beyond a reasonable doubt that she changed her mind and was not, in her own mind, agreeing to what came after, including the continuation/resumption of oral sex, the anal sex and having him ejaculate on her face.

[147] I have reached that conclusion despite the absence of her testimony because I am satisfied that absence of subjective consent is the only rational or reasonable inference to be drawn from the evidence and proper application of legal principles. First, the only reasonable interpretation of the complainant's words, "I'm tired", after she had been performing oral sex for some time, is that she was tired of doing that. That interpretation is consistent with her physical actions and facial expression and, given Mr. MacIntosh's response, is also how he interpreted it. That is evidence of what was in her mind and suggests that she wanted to stop. It also expresses, "by words or conduct, a lack of agreement to continue" which statutorily amounts to absence of consent (s. 273.1(2)(e)).

[148] Mr. MacIntosh told her to keep going and she did. That acquiescence is not evidence of real agreement or subjective consent.

[149] Even more compelling is the evidence about anal sex. At the time Mr. MacIntosh made the request, the statement and then the demand for anal sex, the complainant was kneeling in front of him. She said nothing and did nothing that could be interpreted as consent to anal sex. I accept that after he told her to "bend the fuck over" and "get up", she complied and bent over the sink.

[150] The anal sex was a new activity. Mr. MacIntosh recognized the need to ask permission for that activity. However, when he requested permission, the complainant did not say "yes" and did not change her position to accommodate that activity. She also did not respond verbally or change her position when he twice stated that he was going to have anal sex with her. Finally, he ordered her to comply, and she did.

[151] I acknowledge that she did not say 'no', did not try to get away and ultimately complied by doing what he told her to do and by facilitating his application of lubrication. However, the absence of a positive response to a clear question was, in these specific circumstances, synonymous with 'no' and a clear manifestation of what was in her mind. The only thing she said in response to his demand for anal sex was that she had never done that before. That in no way indicates that she was agreeing to do it. If anything, it is a further sign of reluctance or hesitation. Her continued lack of verbal or physical response to his repeated statements that he was going to have anal sex with her was clear evidence of her lack of agreement to the activity. There is no other reasonable or rational inference that can be drawn from her conduct. She got up and moved only when he ordered her to. Given, the tone and language he used in ordering her to comply, the fact that she complied cannot be interpreted as agreement. Similarly, in the circumstances, anything she did to facilitate his application of lubrication is not indicative or true consent or agreement, but merely an acceptance of the inevitable.

[152] As I said, I accept that about six hours before she was in the washroom, the complainant expressed some interest in or agreement to engage in anal sex with Mr. MacIntosh. I also accept that she subjectively consented to some sexual activity with him, did not say 'no' to anal sex and physically accommodated that activity when he ordered her to 'bend over'. I have considered whether that evidence allows for a reasonable or rational inference that she was, in her own mind, agreeing to the activity in the moment. Given what can be seen and heard

on the recordings, I have concluded that is not a rational or reasonable inference on all the evidence.

[153] In the result, if the Crown was required to prove the absence of subjective consent, it was proven.

Consent – Mens Rea

Mistaken Belief in Communicated Consent

[154] The Defence sought to rely on 'mistaken belief in communicated consent'. This relates to what Mr. MacIntosh perceived, rather than what was in the complainant's mind. The defence is limited by common law and statute.

[155] It cannot be based on a mistake of law, including a mistake about what lawful consent is (*Barton*, paras. 95-100). So, believing that silence or lack of resistance is communicated consent would not engage the defence (*Barton,* para. 98).

[156] There are also statutory restrictions on the defence. It is not available: where the accused's belief arose from his recklessness or wilful blindness; where he did not take reasonable steps to ascertain that the complainant was consenting; or, where there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct (s. 273.2).

[157] As I discussed previously, the defence is not available simply because an accused asserts it. There must be an air of reality, meaning some evidence that he both honestly believed she had communicated consent and took reasonable steps to ascertain consent (*Barton*, para. 121).

[158] There is some evidence that Mr. MacIntosh honestly believed the complainant communicated her consent verbally in advance of the activity and nonverbally during the activity.

[159] There is also some evidence that he took reasonable steps during the initial sexual activity. The video supports his assertion that the complainant was communicating her 'consent' nonverbally during that time.

[160] However, I reach a different conclusion for the activity that occurred after the complainant said she was tired during oral sex: the continuation and resumption of oral sex; the anal sex; and, ejaculating on her face.

[161] To support the reasonable steps requirement, Mr. MacIntosh relied on the following evidence: the conversation with the complainant earlier in the day where she expressed interest and agreement in engaging in sex (including anal sex), they planned to meet for that purpose and discussed the preparatory step of bring lubrication; she willingly engaged in some of the activity; she did not resist or object to the activity; she made sounds and movements that he perceived as her enjoying the activity; she moved her body physically toward him; and, physically moved to accommodate anal sex.

[162] For the latter activity referred to above, I have concluded there is no air of reality to Mr. MacIntosh's belief in communicated consent. There is no evidence capable of supporting findings that he took reasonable steps to ensure she was consenting to that activity. The evidence shows that any belief he had that she was consenting to that activity was the result of recklessness or a mistake of what lawful consent was. She did not communicate consent to that activity either verbally or nonverbally and Mr. MacIntosh took no steps to ensure she was communicating consent.

[163] I accept that in the earlier conversation, she agreed to engage in sexual activity with him and was interested in trying anal sex. I also accept that she subjectivity consented to some sexual activity at the beginning of their encounter and communicated that consent, nonverbally. Both are relevant and could contribute to Mr. MacIntosh's belief in consent. However, consent must be specific to an activity and at the time the activity occurs (*Barton,* para. 99).

[164] The complainant's statement that she was tired during oral sex signalled a change of mind. Mr. MacIntosh took no steps in response to that statement. He did not ask if she wanted to keep going, he just said "keep going though". As I previously said, Mr. MacIntosh and the complainant were unfamiliar with each other. As discussed by Martin, J. in *Barton,* this raises the "risk of miscommunications, misunderstandings, and mistakes", making this a circumstance where the "threshold for satisfying the reasonable steps requirement will be elevated" (para. 108).

[165] Prior to engaging in anal sex, Mr. MacIntosh asked the complainant if he could have anal sex with her. He knew that was required, but then proceeded without a response. When she did not say 'yes' in response to his question, he told her he was going to do it and then he ordered her to comply using strong terms and an authoritative voice. This is not reasonable steps to ascertain consent to anal sex. Anal sex was a new activity and one that is recognized as more invasive than other forms of sexual activity. As such, it is also a circumstance where the threshold for satisfying the reasonable steps requirement is elevated (*Barton*, para. 108).

[166] In these circumstances, the fact that the complainant complied with his direction by bending over and spreading her buttocks while he applied lubricant is not capable of lending an air of reality to the defence. Her physical compliance in the face of his forceful and direct order is not communicated consent to anal sex. Finally, he took no steps to determine whether she would consent to having him ejaculate on her face and there was no verbal or nonverbal communication of consent from her prior to him doing that or putting his penis in her mouth the final time.

[167] If I am wrong about the air of reality, based on the same evidence, I would have found that the Crown had disproven the 'mistaken belief in communicated consent' defence beyond a reasonable doubt. There is evidence that Mr. MacIntosh believed he did nothing wrong when he engaged in this activity with the complainant. As I will discuss later, he sent the video clips to 'J' because he thought they exonerated him. He also was eager to show them to police when he was arrested. However, that belief was not supported by reasonable steps to ascertain the complainant's consent. Further, the complainant did not communicate consent to each activity by words or actions. Finally, any belief in consent arose from recklessness or a mistaken belief that acquiescence and compliance demonstrated consent (a mistake of law).

Proof of Knowledge of Absence of Consent

[168] Finally, like with the defence of 'mistaken belief in age', some appellant courts have found that even where the defence of 'mistaken belief in communicated consent' is unavailable or negated, the Crown must still prove the accused knew the complainant was not consenting (*H.W.*, para. 11; *MacIntyre*, paras. 32-83 and the cases cited therein).

[169] That requires the Crown to prove that Mr. MacIntosh engaged in the sexual activity, "knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of" the complainant (*Barton*, para. 87; and *G.F.*, para. 25).

[170] Like with 'mistaken belief in age', because the 'mistaken belief in communicated consent' defence is unavailable, it must be "removed from the evidentiary mix" in considering whether the Crown has met its burden to prove Mr. MacIntosh's knowledge of absence of subjective consent (*Carbone*, paras. 129-131; *H.W.*, para. 91; and, *MacIntyre*, para. 67). Here, the common law and statutory requirements of the defence were not met, so it "is not a defence - it is not exculpatory" and Mr. MacIntosh's belief in consent is not available to him at this stage of the analysis (*H.W.*, para. 90-92).

[171] The Crown has proven beyond a reasonable doubt that Mr. MacIntosh was at least reckless about the complainant's lack of consent to the sexual activity referred to above.

[172] The complainant's statement that she was tired during oral sex demonstrates an objective risk that she was no longer consenting. Mr. MacIntosh acknowledged that statement and told her to continue anyway. I find that he knew there was at least some risk that she was no longer consenting. It is not plausible that he could hear her say she was tired and tell her to keep going without being aware there was a risk that she wanted to stop. He later asked her if he could engage in anal sex with her. That demonstrates some knowledge of the need for permission for that activity. The complainant did not give that permission. Her repeated absence of an affirmative response demonstrates a clear objective risk that she was not consenting to anal sex. Mr. MacIntosh's repeated assertions of what he was going to do and ultimate order for her to comply demonstrates, at the very least, awareness of that risk. Despite that, he engaged in the activity.

Issue 3: Child Pornography Count (s. 163.1(2))

[173] Given the arguments made by counsel and an issue with the wording of the charge, the 'child pornography' count requires further comment.

[174] Count 3 alleges, in the alternative, several different modes of committing the offence under s. 163.1(2). One of those modes is 'making child pornography'.

[175] There is no doubt that Mr. MacIntosh made the recording. Recording the sexual activity involved the creation of new material so constitutes 'making' as that word is interpreted in this context. Its content, explicit sexual activity with a person who is under the age of 18, clearly meets the definition of child pornography in s. 163.1(1)(a)(i). Given my conclusion that he knew the complainant was under 18 years old, all elements of 'making child pornography', contrary to s. 163.1(2) have been proven.

[176] The Defence submitted that Mr. MacIntosh made the recording for his own personal use. In my view his purpose in making it is not relevant to guilt for 'making' child pornography. I say that because, in my view, the Crown is not required to prove that he made it for any specific purpose.

[177] Section 163.1(2) reads:

> s. 163.1(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty …

[178] It includes the words "for the purpose of publication", however, that phrase has been interpreted as modifying only the 'possession' aspect of the charge (*R. v. Burrows*, [1995] O.J. No. 1820 (ONPC); and, *R. v. Horvat*, [2006] O.J. No. 1673 (OSCJ), paras. 6-10). I agree with that interpretation. In other words, this provision criminalizes aggravated forms of dealing with child pornography – making it, printing it, publishing it or possessing it for the purpose of publication. This interpretation is consistent with the ordinary grammatical construction of the subsection and with its place in the overall context of the provision. The offence and penalty for simple possession of child pornography is dealt with in subsection (4). In contrast, subsections (2) and (3) include the more serious offences of making, printing, publishing, transmitting, distributing and possession for those purposes, with consequently higher penalties.

[179] The Defence argued that if I concluded Mr. MacIntosh had sent the videos, he could rely on the 'legitimate purpose' exemption in s. 163.1(6). However, they did not argue that he could rely on that exemption for making the recording.

[180] So, Mr. MacIntosh is guilty of Count 3 - 'making child pornography' contrary to s. 163.1(2) – regardless of his purpose in making the recording or whether he sent it to 'J'.

[181] However, there is another issue relating to this count. Evidence was called and counsel made submissions about whether Mr. MacIntosh is the person who sent the video clips to 'J'.

[182] Mr. MacIntosh is not charged with distributing or transmitting child pornography. He is charged that he did:

> … make or print or publish or **have in his possession for the purpose of distribution or sale child pornography** to wit, video, contrary to **section 163.1(2)** of the Criminal Code.

[183] As such, he is charged with having child pornography "in his possession for the purpose of distribution or sale", not with distributing or transmitting it.

[184] Further, the charge is flawed such that even if the Crown proved that Mr. MacIntosh had the recordings in his possession for the purpose of sending them, he could not be convicted of that.

[185] The problem is that "possession for the purpose of distribution or sale" is not prohibited by s. 163.1(2). That provision, which is the one he is charged under, prohibits possession "for the purpose of publication". It is s. 163.1(3) that prohibits possession for the purpose of "distribution" or "sale".

[186] There was no application to amend or quash the count or to obtain particulars. I am satisfied that the Count is not fatally defective on its face and the Defence has not been prejudiced by the flaw.

[187] I am satisfied that part of the count survives: "make or print or publish child pornography to wit, video, contrary to section 163.1(2) of the Criminal Code". The problematic words, "or have in his possession for the purpose of distribution or sale", are surplusage, meaning that they need not be proven by the Crown, and Mr. MacIntosh has not been prejudiced by treating them that way.

[188] The count clearly alleges alternative modes of committing the offence. As such, the Defence was on notice that the Crown could obtain a conviction by proving any of those discrete modes. Three of those modes, "make or print or publish", match the numerical subsection charged, so the Defence was also on notice that Mr. MacIntosh would have to mount a defence to those modes. It is clear from the evidence and submissions that the Defence was alive to the jeopardy

Mr. MacIntosh faced for making the recording and knew he could be convicted if the Crown proved his knowledge of age.

[189] Distributing child pornography or possession for the purpose of distributing child pornography is not a mode of committing an offence under s. 163.1(2) and Mr. MacIntosh has not been charged under s. 163.1(3), so he cannot be convicted of an offence relating to distribution.

[190] 'Publishing' child pornography is captured by s. 163.1(2) and Count 3 does allege that he 'published' child pornography. I did consider whether sending the recording to 'J', if the Crown proved Mr. MacIntosh did that, would constitute 'publishing' under s. 163.1(2). I concluded that sending the recording to one other person is not 'publishing'.

[191] The word 'publish' is not defined in Part V of the *Criminal Code* and I have not found a case where it has been defined in the context of the child pornography provisions. Sending child pornography to one other person would constitute 'distributing' or 'transmitting' under s. 487.1(3). As a matter of statutory interpretation, it would not make sense for Parliament to have created two offences, using different language, if the intent was that they would capture the same conduct. So, in my view, 'publish' in subsection (2) must mean something different than "transmit, make available, distribute, sell, advertise" etc. in subsection (3). This interpretation is consistent with how these offences are charged in practice. Most cases involving allegations of 'publishing' involve material that is placed on websites or published in written material that is available to the public (eg. *R. v. D.D.B.,* 2015 ABPC 200). In contrast, sending child pornography to one other person is generally charged as 'distributing' or 'transmitting' under s. 163.1(3) (eg. see *R. v. McSween,* 2020 ONCA 343).

[192] Whether he sent the recordings may be relevant to sentencing and my consideration of Mr. MacIntosh's evidence on this subject did impact my credibility analysis, so I will briefly address this issue.

[193] There is no dispute that two of the recordings were sent by text from Mr. MacIntosh's phone to another person. However, Mr. MacIntosh denied that he was the person who sent the recordings.

[194] I am satisfied beyond a reasonable doubt that Mr. MacIntosh sent the recordings to 'J'. I accept 'J''s evidence that he received the videos from Mr.

MacIntosh at around 10:00 p.m. on November 26th. There were no indicators of deceit in 'J''s testimony. He had been a friend of the complainant, but that did not seem to influence the credibility of his evidence.

[195] As I said previously, his evidence about communication with Mr. MacIntosh on the evening of the 26th was not entirely consistent. However, I accept that after the complainant told him what had happened, he called a phone number provided to him by the complainant which he understood was Mr. MacIntosh's to find out what was going on. During the call, the person told him what had happened, 'J' asked if he had proof and, at around 10:00 p.m., the person sent the two video-clips by text. 'J' saved the clips and provided them to police when they contacted him. Those clips were presented in evidence (Ex. 9). This is what he said during direct-examination and re-direct-examination. In cross-examination, he testified that he had not had any telephone conversation with the person before receiving the videos by text and had no discussion with anyone other than the complainant about what had happened. When I questioned him to clarify whether he was referring to voice or text communication, he said it was both. He explained that he was confused in cross-examination and confirmed that he had a telephone conversation with the person and during or immediately after the call, the person texted him with the clips.

[196] Mr. MacIntosh denied he sent the clips to 'J' and testified that the videos must have been sent by the person he met at the bus station. I reject that evidence. It is inconsistent with all the objective evidence. The timestamps from Mr. MacIntosh's phone indicate that the recordings were sent at 10:03 p.m. Video from metro transit shows that the other man was only with Mr. MacIntosh until 9:49 p.m. when the man got off the bus. Mr. MacIntosh testified that the messages were not actually sent when the other guy tried to send them because he did not have wifi access while on the bus. Essentially, his evidence is that the message with the videos was 'pending' until he had wifi access and that was not until he got back to his residence. However, Mr. MacIntosh did not get off the bus until 9:58 p.m. and was not yet at his residence at 10:03, the timestamp on his phone showing when the video was sent. I accept Mr. Patterson's evidence that Mr. MacIntosh did not arrive back at the residence until 10:13 p.m.. His job was to monitor and record the activity of parolees, he saw Mr. MacIntosh enter and spoke with him because he had called earlier to say he'd be late. Mr. MacIntosh had a curfew condition, so keeping track of when he arrived was an important part of Mr. Patterson's job.

[197] Mr. MacIntosh also testified that his phone died and that somehow relates to the timing of the sending of the message. If his phone died it was after 9:59 p.m., since between 9:46 and 9:59 p.m., Mr. MacIntosh can clearly be seen on the transit video, looking at his phone, possibly texting and then either taking or making multiple phone calls. So, his phone was not dead at that time.

[198] Finally, Mr. MacIntosh's denial that he sent the videos is also inconsistent with his statement to police. He told police that he sent the recordings and provided an explanation for why he did that. In court, he testified that he was trying to cover for someone, presumably the person he met at the bus station, but I reject that.

[199] 'J''s evidence was credible, plausible and consistent with objective evidence. He could not be certain that he was communicating with Mr. MacIntosh but that is the only rational inference from his evidence. He confronted the person about the activity in the bathroom. That could only be Mr. MacIntosh. The clips were immediately sent from the same device. The fact that Mr. MacIntosh wanted to share the clips and believed they were exculpatory is consistent with Mr. MacIntosh's utterances upon arrest when he told Cst. Andrew Beaton he could look at his phone and said "take my phone. Everything's on my phone". Essentially, Mr. MacIntosh believed the video clips exonerated him by showing consensual activity, so he provided them to 'J' and wanted the police to see them to show he'd done nothing wrong.

Conclusion

[200] In the result, I find Cody MacIntosh guilty of all three charges – sexual assault contrary to s. 271, sexual interference contrary to s. 151 and, making child pornography contrary to s. 163.1(2). I will hear submissions on the application of the principles in *Kienapple* at the time of sentencing.

Elizabeth Buckle, JPC.