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R v CF, 2024 SKKB 210

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REDACTED VERSION
KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 210**

Date: **2024 11 29**
File No.: CRM-RG-00161-2022
Judicial Centre: Regina

BETWEEN:

HIS MAJESTY THE KING

CROWN/RESPONDENT

- and -

C. F.

ACCUSED/APPLICANT

PUBLICATION RESTRICTION: The publication of these reasons is restricted pursuant to ss. 486.4(1) of the *Criminal Code* such that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way.

Counsel:

J. Patrick Malone	for the Crown
Christina G. Skibinsky	for the accused

ORAL JUDGMENT
November 22, 2024
WRITTEN REASONS
November 29, 2024

MITCHELL J.

I. INTRODUCTION

[1] Mr. C. F., [Mr. F.] or [accused], is charged with: three Counts of child luring contrary to s. 172.1 of the *Criminal Code*, RSC 1985, c C-46; one Count of child

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sexual exploitation contrary to ss. 153(1)(b) of the *Criminal Code*; and one Count of invitation to sexual touching contrary to s. 152 of the *Criminal Code*.

[2] More particularly, the five-Counts in the Indictment dated June 15, 2022, which Mr. F. faces read as follows:

> 1. **THAT HE**, the said **[C. F.]**, between the 21st day of June, A.D. 2019 and the 3rd day of October, A.D. 2019 at or near Regina, Saskatchewan, did by means of telecommunication communicate with [V. A.], a person under the age of 18 years old, for the purpose of committing an offence with respect to that person under section 163.1 of the *Criminal Code*, contrary to section 172.1(1)(a) of the *Criminal Code*.
>
> 2. **THAT HE**, the said **[C. F.]**, between the 21st day of June, A.D. 2019 and the 3rd day of October, A.D. 2019 at or near Regina, Saskatchewan, did by means of telecommunication communicate with [V. A.], a person under the age of 18 years old, for the purpose of committing an offence with respect to that person under section 151 of the *Criminal Code*, contrary to section 172.1(1)(b) of the *Criminal Code*.
>
> 3. **THAT HE**, the said **[C. F.]**, between the 21st day of June, A.D. 2019 and the 3rd day of October, A.D. 2019 at or near Regina, Saskatchewan, did by means of telecommunication communicate with [V. A.], a person under the age of 18 years old, for the purpose of committing an offence with respect to that person under section 271 of the *Criminal Code*, contrary to section 172.1(1)(b) of the *Criminal Code*.
>
> 4. **THAT HE,** the said **[C. F.]**, between the 21st day of June, A.D. 2019 and the 3rd day of October, A.D. 2019 at or near Regina, Saskatchewan, did, being in a position of trust or authority towards [V. A.], a young person, for a sexual purpose, invite, counsel, or incite the young person to touch directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person, contrary to section 153(1)(b) of the *Criminal Code*.
>
> 5. **THAT HE,** the said **[C. F.]**, between the 21st day of June, A.D. 2019 and the 3rd day of October, A.D. 2019 at or near Regina, Saskatchewan, did for a sexual purpose, invite, or counsel, or incite [V. A.], a person under the age of 16 years old, to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the

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age of 16 years old, contrary to section 152 of the *Criminal Code*.

[3] At the opening of trial, Mr. F. was arraigned on these charges, and pled not guilty to all Counts.

[4] Following the completion of the trial, and at the commencement of counsels' final arguments, Crown counsel stayed the charge laid under ss. 153(1)(b) – the offence of child sexual exploitation, found in Count #4 of the Indictment.

[5] At the conclusion of counsels' final arguments, I reserved my decision to today, November 22, 2024.

[6] These reasons explain why I have concluded that the Crown has met its stringent burden to prove the allegations against Mr. F. Accordingly, I must convict him on three of the four Counts in the Indictment. In light of this result, it will be necessary to consider whether in these circumstances the rule in *R v Kienapple*, [1975] 1 SCR 729 [*Kienapple*], applies.

II. LAW

A. Relevant *Criminal Code* Sections

1. The Offence of Child Luring

[7] Section 172.1 of the *Criminal Code* codifies the offence of child luring. Mr. F. stands charged under both ss. 172.1(1)(a) and (b), which read as follows:

> **Luring a child**
>
> **172.1(1)** Every person commits an offence who, by a means of telecommunication, communicates with
>
> > **(a)** a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under subsection 153(1), section 155, 163.1, 170, 171 or 279.011 or subsection 279.02(2), 279.03(2), 286.1(2), 286.2(2) or 286.3(2);

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> **(b)** a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 271, 272, 273 or 280 with respect to that person; …

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[8] Parliament created the offence of child luring "to combat the very real threat posed by adult predators who attempt to groom or lure children by electronic means": *R v Morrison*, 2019 SCC 15 at para 39, [2019] 2 SCR 3 [*Morrison*]. See also: *R v Levigne*, 2010 SCC 25 at para 24, [2010] 2 SCR 3 [*Levigne*].

[9] This offence has three essential elements which the Crown must establish beyond a reasonable doubt. These three elements are (1) an intentional communication by means of telecommunication; (2) with a person who is, or who the accused believes is, under the requisite age; (3) for the purpose of facilitating the commission of a designated offence with respect to that person. See: *Levigne* at para 23; and *Morrison* at para 43.

[10] In *R v Legare*, 2009 SCC 56 at para 38, [2009] 3 SCR 551 [*Legare*], the Supreme Court of Canada advised trial judges that when determining if the Crown has satisfied its burden under s. 172.1, "it is neither necessary nor particularly helpful … to recast every element of the offence in terms of its *actus reus*, or "act" component, and its *mens rea*, or requisite mental element". Instead, "s. 172.1 criminalizes otherwise lawful conduct when its specific purpose is to facilitate the commission of a specified secondary offence with respect to an underage person".

[11] The crux of the offence of child luring under s. 172.1 is "whether the *evidence as a whole* establishes beyond a reasonable doubt that the accused communicated by" [a digital device] "with an underage victim for the purpose of facilitating the commission of a specified secondary offence with respect to that victim": *Legare* at para 42 [emphasis in original].

[12] Here, Mr. F. is charged pursuant to ss. 172.1(1)(a) and 172.1(1)(b).

The specified secondary offence for the purposes of Count #1 – the charge under ss. 172.1(1)(a) – is the offence of child pornography created in s. 163.1.

[13] The specified secondary offence for the purposes of Count #2 – the first charge under ss. 172.1(1)(b) – is the offence of child sexual interference created in s. 151.

[14] The specified secondary offence for the purposes of Count #3 – the second charge under ss. 172.1(1)(b) – is the offence of sexual assault created in s. 271.

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2. The Offence of Invitation to Sexual Touching

[15] Section 152 creates the offence of invitation to sexual touching. In its relevant parts, this section reads as follows:

> **Invitation to sexual touching**
>
> **152** Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,
>
> > **(a)** is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year …
>
> [Emphasis added]

[16] Subsection 22(3) is important as it clarifies the meaning of "counsel" found in s. 152. That subsection reads as follows:

> **Definition of counsel**
>
> **22(3)** For purposes of this Act, **counsel** includes procure, solicit or incite.

[17] Section 152 requires proof that the accused person counselled, invited, or incited the complainant to touch: *R v R.V.*, 2021 SCC 10 at para 51, [2021] 1 SCR 131.

The means by which this offence can be committed extends beyond mere invitation. By virtue of the definition of "counsel" found in ss. 22(3), this offence is committed when an accused ""procure[s]" a person under the age of 16 to touch them for a sexual purpose". See: *R v P.R.J.*, 2023 BCCA 13 at para 49, 423 CCC (3d) 113.

[18] The *actus reus* of s. 152 requires proof beyond a reasonable doubt that the accused communicated with a minor in a way which constitutes an invitation, incitement, or counselling. See: *R v Legare*, 2008 ABCA 138 at paras 33 and 37, 236 CCC (3d) 380 [*Legare ABCA*], aff'd *Legare*.

[19] To establish the requisite *mens rea* of s. 152 requires proof beyond a reasonable doubt that the invitation, counselling, or incitement by the accused person was made "either with the intention that the complainant would receive that communication as being an invitation, incitement or counselling to do the physical conduct s. 152 would avoid, or that he knew that there was a substantial and unjustified risk that she would receive that communication as being an invitation": *R v Clarke*, 2016 SKCA 80 at para 108, 338 CCC (3d) 83. See also: *Legare ABCA* at para 41.

B. Foundational Legal Principles

[20] At the outset of adjudicating any criminal prosecution, it is important to remind oneself of the following foundational legal principles.

1. The Presumption of Innocence

[21] Subsection 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, guarantees the right of any person charged with an offence to be presumed innocent until proven guilty beyond a reasonable doubt. The presumption of innocence, along with the Crown's obligation to prove guilt beyond a reasonable doubt, "form the golden thread of criminal law": *R v Oakes*, [1986] 1 SCR 103 at 120.

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[22] Recently in *Morrison*, Moldaver J. encapsulated the over-arching significance of this presumption at para. 51 as follows:

> [51] Section 11(*d*) of the *Charter* protects the accused's right to be presumed innocent until proven guilty. Before an accused can be convicted of an offence, the trier of fact must be satisfied beyond a reasonable doubt that all of the essential elements of the offence have been proved: see *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 654. This is one of the principal safeguards for ensuring, so far as possible, that innocent persons are not convicted: see *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 13. The right to be presumed innocent is violated by any provision whose effect is to allow for a conviction despite the existence of a reasonable doubt: see *Vaillancourt*, at pp. 654-56; *R. v. St-Onge Lamoureux*, 2010 SCC 57, [2012] 3 S.C.R. 187, at para. 24.

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2. Proof Beyond a Reasonable Doubt

[23] To ensure that every citizen charged with a criminal offence is presumed innocent, our law demands that the state establish his or her guilt beyond a reasonable doubt. In *R v Lifchus*, [1997] 3 SCR 320 at para 36, the Supreme Court of Canada elaborated on the meaning of the 'beyond a reasonable doubt' standard of proof:

- The standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- The burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- A reasonable doubt is not a doubt based upon sympathy or prejudice;
- Rather, it is based upon reason and common sense;
- It is logically connected to the evidence or absence of evidence;
- It does not involve proof to an absolute certainty; it is not proof beyond <u>any</u> doubt nor is it an imaginary or frivolous doubt; and

- More is required than proof that the accused is probably guilty — a jury which concludes only that the accused is probably guilty must acquit.

[24] As well, proof beyond a reasonable doubt lies "much closer to absolute certainty than to proof on a balance of probabilities": *R v Starr*, 2000 SCC 40 at para 242, [2000] 2 SCR 144.

[25] With these important legal principles identified, I turn now to consider the testimony provided at trial by the various witnesses.

III. EVIDENCE AT TRIAL

A. Witnesses

[26] In this case, the Crown called four witnesses. These witnesses were: (1) Corporal Rhonda Reimer; (2) Constable Peter John Froh; (3) Ms. V. A., the complainant [complainant], and (4) Ms. J. F.

[27] The defence did not call any witnesses.

B. Evidence of Crown Witnesses

(1) Corporal Rhonda Reimer

[28] As noted, this proceeding began as a blended *voir dire* with the intention that the evidence led by the Crown on the *voir dire* proper would, subsequently, be transferred and applied to the trial. The central issue related to the admissibility of certain electronic messages exchanged among the accused, Mr. F.; the complainant, and her mother, Ms. J. F. Counsel for the accused did not consent to the admissibility of these messages.

[29] Corporal Rhonda Reimer [Cpl. Reimer] was the first Crown witness. She

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has been a member of the Regina Police Service [RPS] for a number of years and was promoted to the rank of corporal in 2019.

[30] In October 2019, Cpl. Reimer was a child abuse investigator working out of the Regina Children Justice Centre [RCJC]. She explained she first became involved in this case on October 23, 2019, following a referral from the Ministry of Social Services.

[31] Cpl. Reimer testified that on October 23, 2019, she attended at [REDACTED] High School where the complainant was enrolled. At that time Cpl. Reimer interviewed the complainant, however, no disclosures were forthcoming. When asked by Cpl. Reimer if the complainant had received concerning messages from anyone, the complainant answered simply, “no”.

[32] Cpl. Reimer testified that the following day, she received telephone calls from Ms. F., the complainant’s mother, as well as personnel from [REDACTED] High School.

[33] Following her conversation with Cpl. Reimer, Ms. F. attended at the RCJC with the complainant on October 24, 2019. Ms. F. showed her the text messages received by the complainant on her cell phone, allegedly sent by the accused. Cpl. Reimer testified that both Ms. F. and the complainant voluntarily turned over their cell phones to the RPS.

[34] Subsequently, Cpl. Reimer obtained a search warrant in order to lawfully review and retrieve the information contained in these cell phones.

[35] On cross-examination Cpl. Reimer testified that she left for the Internet Child Exploitation Unit [ICE], an office affiliated with the RPS with both cell phones, at approximately 15:53 p.m. on October 24, 2019. There, she delivered those cell phones over to Constable Peter John Froh of that unit and asked him to extract the data

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contained on those phones.

[36] Cpl. Reimer testified that once the data extraction process was completed, Cst. Froh returned the cell phones to her and gave her a USB containing all the information extracted from the cell phones. She then returned the cell phones to the complainant and her mother and, at all times, stored the USB locked inside her desk drawer or in the property locker of the RPS.

[37] On cross-examination, Cpl. Reimer testified that the extraction report was prepared using the Cellebrite Reader Program. This program facilitates reading the data contained on the USB.

[38] Cpl. Reimer testified that when preparing the information extracted from the cell phones for the purposes of Crown disclosure, she entered two phone numbers into the program, one of which was Mr. F.'s cell phone number, the other number belonged to the complainant. She also repeated this procedure inputting Mr. F.'s cell phone number and that of the complainant's mother. The program downloaded all messages involving these various numbers. Additionally, Cpl. Reimer placed temporal parameters on this search. The dates she selected were those expressly identified in the indictment against Mr. F., namely between June 21, 2019, and October 3, 2019, inclusive.

[39] This information was disclosed to Mr. F.'s counsel and entered into evidence at trial as follows: Exhibit P-1 (the complainant's cell phone extraction); Exhibit P-2 (the complainant's mother's cell phone extraction); Exhibit P-3 (text messages from the complainant's cell phone); and Exhibit P-4 (text messages from the complainant's mother's cell phone).

[40] Cpl. Reimer also explained that she did not obtain a search warrant to seize Mr. F.'s cell phone as part of this investigation.

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(2) Constable Peter John Froh

[41] Cst. Froh has been a member of the RPS since 2010.

[42] Cst. Froh testified that on October 24, 2019, Cpl. Reimer attended at the ICE office and requested that he extract information contained on two cell phones. He explained he had been trained on how to extract data from cell phones and other electronic devices.

[43] Cst. Froh testified that first he photographed each phone and their SIN cards. Then he connected each phone to a computer and downloaded the data contained in the cell phones onto the computer. Cst. Froh explained that this process can last from between ten minutes to a half an hour. At no time did he review the data stored on each cell phone.

[44] Once the extraction process was completed, Cst. Froh testified that he immediately returned the two cell phones to Cpl. Reimer. He copied the data to a computer file and transferred this data onto a USB, which he also gave to Cpl. Reimer. Cst. Froh testified that a U-Fed Reader was utilized to read the data extracted from the electronic devices. He explained that the data obtained during the extraction is what the user of the cell phone would see.

(3) Ms. V. A.

[45] The complainant was 19 years of age at the time she gave her testimony. However, she was only 14 years of age when the text messages forming the basis of certain Counts in the Indictment were allegedly sent to her by the accused.

[46] The accused is the complainant's stepfather. He married her mother – Ms. F. – when the complainant was quite young, approximately 10 years of age.

[47] The complainant testified she began receiving a series of messages from

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the accused on October 3, 2019, commencing at approximately 9:27 p.m. She testified that she knows the messages were sent by the accused, as they communicated by text message every day, and she added the identifier "Dad ([REDACTED])" to text messages sent by the accused.

[48] These messages are contained in Exhibit P3. Commencing at page 3 of this Exhibit and continuing through to page 8, these messages read as follows:

CF	Listen! I love you and I'm here for anything you need to talk about. I'm actually not upset that you chose a [sex] toy. As much as your mom is probably pissed about it
CF	If you need any advice or information or opinions about anything sweetie please let me know!!
VA	Ok
CF	Listen, you and I have a pretty good relationship and I don't want to fuck it up
VA	I know
CF	I love you like you could never understand
VA	I know
CF	No I don't think you do
VA	Oh?
CF	If you were 18 I'd throw your mom out on the street and be with you! Like I totally love you
CF	Never tell your mom this shit ever!!!
CF	I'm not joking, I totally am serious.
VA	OMG
VA	Lmao
CF	I'm not joking at all. I seriously love you! Why do you think I do everything for you the way I do
CF	Send me a pic of your sex toy

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VA You're wild

CF Ya, and your mom is a fucking bore

VA Lmao

CF Send me a pic of your toy

VA Why?

CF Or did mom confiscate it

CF Why not?

VA No she didn't but why?

VA That's weird (laugh emoji)

CF I wanna see it

CF No its not

VA Quit being weird

…

CF Ok, send me pic whenever

If you only knew how I feel about you!

…

CF Its unreal! I love you more than I love your mom! This stays between you and me, nobody else ever sees this !!!

VA Ok

VA I'm not joking, I'm dead serious

VA I know

CF I would love to make love to you bit [*sic*] your way to young yet and it kills me!

VA Oh

CF You are the most beautiful lady I've ever seen in my life

CF Please dont ever say anything about this to anyone!

VA K

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CF I'm serious, I would leave your mom for you in a heartbeat! I wish I could be with you but unfortunately its illegal right now

VA Yup it is

CF That sux [*sic*]

VA K

CF Like, I cant even explain how much I want to be you

VA Do you understand I'm 14?

CF It kills me, I'm not a freak or a pervert or anything like that, I just love you

VA Oh

CF Ya I do understand that!

VA Ok

CF That's my biggest conundrum, if you were 18 there wouldn't be an issue. But keep in mind, I will love you like nobody else until you are 18 and if you are willing we will kick your mom out and be together. Only if you want of course.

CF I'm not joking around, I've never felt this for anyone else in my life!

VA Wow

CF It blows my mind, and your only 14 yet

VA Wild

…

CF I love you! I totally and completely love you! I would give up everything to be able to be with you!

VA Are you drinking?

CF No

VA Are you sure?

CF I'm just being brutally honest right now.

[49] A few text messages later in this exchange read as follows commencing

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at page 9 of Exhibit P-3:

CF The whole sex toy thing got me thinking

VA About?

CF If it wasn't illegal, I would totally love to make love to you or at least help you experiment

VA Oh

CF I'm not joking kid, I love you! I'd go to jail, leave your mom, whatever it took to show how much I love you!

VA Oh

CF Please make sure this entire conversation is deleted as soon as were done so your mom doesn't see it, please!

[50] Continuing on at page 10 of Exhibit P-3, we see the following exchange:

VA Why would you risk going to jail for me

CF Just because I love you as much as I do, I would give everything I have to be with you! I would pay to see you naked or playing with yourself!

CF Every time I play with myself I think of you, you are my world right now!

CF Remember this is for you and me only!!!

VA How long have you had these feelings

CF It's been a while, but haven't been able to act on them

VA Ok

CF Its weird because I've never felt like this before, it kinda freaks me out

VA Me too

[51] Again, commencing at page 12 of Exhibit P-3, we see the following exchange:

CF I understand your still young and you may not understand everything I'm saying to you but I would love to be the first man you be with

VA Oh ok

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CF I really dont know how to say it any better, I have a love for you like nothing I've ever felt before

VA Ok

CF I know its fucked up, I know it's weird but you are all i think of all day every day!

VA Ok

CF You are my world right now, I am totally enthralled with you, I would give anything to be the first person to make love to you, if you havent already.

VA Oh

CF No joking

VA Ok

CF I'd love to see videos of you playing with your toy, it would be everything for me

VA No thanks

[52] The complainant testified that when she received these text messages she was "shocked and confused". She thought that the accused was attracted to her and "wanted to do things to her". However, on cross-examination, she stated that until this time she had no prior indication the accused wanted to have sex with her.

[53] The complainant testified that on another occasion, the accused forwarded a link to a video located on the 'RedTube' platform to her in another text message. It was attached to a text sent by the accused in the following exchange of messages on June 22, 2019, at approximately 2:12 a.m.:

CF If you need tips, check out redtube.com

VA UGLYYYYYYY!!!

CF Just saying

[54] The complainant stated that she was not sure what this video was about, so she typed 'RedTube' into her search engine and it came up as a webpage showing

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women having sex. She described it as “lesbian porn” and testified that she did not watch any of those videos. The term “UGLYYYYYYY!!!”, she explained, was a word she and the accused utilized for topics which were uncomfortable.

[55] On cross-examination, the complainant acknowledged that at her first interview with Cpl. Reimer, she denied that anything had happened between herself and the accused which made her feel uncomfortable or unsafe. She testified that she did this because she did not want the situation to escalate, even though she knew that the accused had sent the text messages.

[56] The complainant also admitted that it was her friend, A. M., who brought some of the text messages she had exchanged with the accused to the attention of school personnel at [REDACTED] High School. She testified that both the accused and her mother had warned her about her friendship with Mr. M., and actively discouraged her from seeing him or spending the night with him at her friend’s residence.

(4) Ms. J. F.

[57] Ms. F., who is employed as a letter carrier with Canada Post, is the mother of the complainant and was married to the accused. She testified that her relationship with him began sometime in 2001, and ended on October 23, 2019, the day she learned of the text messages the accused had exchanged with the complainant.

[58] On that day, she received a telephone call from a police officer who was Cpl. Reimer. Cpl. Reimer told her about the text messages and arranged to meet with her the following day – October 24, 2019.

[59] That evening, she spoke to her daughter. The complainant showed her the series of text messages she had received on October 3, 2019. The content of those messages shocked her.

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[60] Shortly after her conversation with her daughter, Ms. F. texted the accused. She advised him that she had seen the text messages between him and the complainant. As well, she told him that the police had called and made arrangements to meet with her and the complainant the following day. Then the following exchange occurred between them, as outlined in Exhibit P-4 at pages 2-3 and Exhibit P-1 at pages 24-25:

JF	Don't even think of driving back here either the police advised to call them if you show up
CF	I'm sorry, I was drunk and stupid
JF	There is no excuse you can give to anything that's the most fucked up thing
CF	I know
JF	To even say that fucking drunk means you have had thought or been looking at her I am so disgusted right now
CF	Never had a thought, ever
JF	That's fuckingn [*sic*] bullshit you don't get drunk and out of the blue are in love with your fucking 14 year old step daughter and want to see her play with her fucking vibrator
CF	I don't remember saying any of the stuff in that pic
JF	Not a good excuse at all and I don't fucking believe it for a second. There is no way I could trust you near us ever again

[61] On cross-examination, defence counsel questioned Ms. F. extensively on who else might have had access to the accused's cell phone. Ms. F. testified that their young son J., who was born in 2013 and six years old at the time the alleged offences occurred, could play with the accused's cell phone, but only if the accused allowed it.

[62] Ms. F. testified that around October 2019, the accused - who was a journey man scaffolder – was employed in Rocanville, Saskatchewan. While he was there, some other persons working at the site might have had access to the accused's

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cell phone. She did not know.

C. Evidence for the Defence

[63] As noted, the defence called no evidence.

IV. ARE THE TEXT MESSAGES ADMISSIBLE?

[64] This trial began as a *voir dire* respecting the admissibility of certain electronic messages exchanged among the accused, the complainant, and her mother. Defence counsel did not consent to the admissibility of those text messages. Accordingly, a blended *voir dire* was held with the intention that the evidence led by the Crown on the *voir dire* proper would, subsequently, be transferred and applied to the trial. Yet before this can happen, it is necessary for me to determine if the Crown has satisfied the criteria for their admissibility as set out in ss. 31.1 - 31.5 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*].

A. Law

[65] These text messages qualify as electronic documents for the purposes of the *CEA*. Consequently, pursuant to s. 31.1 of the *CEA*, the Crown bears the burden of proving their authenticity. This means the Crown is required to "adduce evidence *capable* of supporting a finding that the electronic document is what it purports to be [emphasis in original]": *R v C.B.*, 2019 ONCA 380 at para 67, 376 CCC (3d) 393 [*C.B.*]. The case law is clear that the authenticity requirement in the *CEA* does not modify the common law but merely codifies it. See especially: *R v Hirsch*, 2017 SKCA 14 at para 18, 353 CCC (3d) 230 [*Hirsch*], and David M. Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013), 11 CJLT 181 [*Paciocco*]

[66] The common law imposes a relatively low standard for authentication; all that is needed is "some evidence" to support the conclusion that the electronic document

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is what the party presenting it claims it to be. As *Paciocco* at 196-197 states, for the purposes of admissibility, authentication is "nothing more than a threshold test requiring that there be some basis for leaving the evidence to the fact-finder for ultimate evaluation". See: *Hirsch* at para 18; and *C.B.* at para 68.

[67] Turning to the "best evidence" criterion, that, too, is not "rocket science": *R v C.L.*, 2017 ONSC 3583 at para 23 [*C.L.*]. The primary role the "best evidence" provisions of the *CEA* – ss. 31.2(1) and 31.3 – fulfils is merely as an "adjunct to authenticity". These provisions assure the Court that the document submitted is the same as the one that was input into the electronic device, in this case, a cell phone. See: *Paciocco* at 200, and *R v M.C.*, 2024 ONSC 4057 at para 15.

[68] The *CEA* sets out various ways to satisfy the "best evidence" requirement. For example, ss. 31.2(1)(a) permits the Crown to prove "the integrity of the electronic document system" in which the electronic document is recorded or stored. Direct or circumstantial evidence that demonstrates, on a balance of probabilities, the electronic record in question is an accurate reproduction of the document stored on the computer is sufficient. See: *Hirsch* at paras 22-23; and *C.L.* at para 24.

[69] As well, the Crown can also rely upon the "functioning system presumption" to establish the integrity of the electronic documents system pursuant to ss. 31.3(a). This presumption is triggered by admissible information "capable of proving" that the electronic documents system was operating properly at all material times. It "should not take considerable evidence" to prove this; if, as here, a witness testifies that she received a text message or an e-mail on an electronic device that is circumstantial evidence that the computer system was operating properly: *Paciocco* at 204-207. See also: *C.B.* at para 69.

[70] There are other cases where this presumption was relied upon. In *R v K.M.*, 2016 NWTSC 36 at paras 36-60, for example, the Court found that because the

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person using the computer testified that it was working properly at the relevant time and there was no evidence to contradict him, the Crown could rely on the presumption of integrity. The weight to be attached to it is a separate matter, of course. See also: *Hirsch* at para 18.

[71] Defence counsel has alleged that these text messages were either sent from another cell phone referred to as a "ghost phone" or were otherwise tampered with by an unknown third party. Justice Watt in *C.B.* addresses this topic at paras 71-72:

> [71] But what of the prospect of tampering? Does it have to be negated before digital evidence can be properly authenticated?
>
> [72] As a matter of principle, it seems reasonable to infer that the sender has authored a message sent from his or her phone number. This inference is available and should be drawn in the absence of evidence that gives an air of reality to a claim that this may not be so. Rank speculation is not sufficient: *R. v. Ambrose*, 2015 ONCJ 813, at para. 52. And even if there were an air of reality to such a claim, the low threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, would seem to assign such a prospect to an assessment of weight.
>
> [Emphasis added]

B. Analysis

[72] The text messages in question are highly probative evidence respecting the various charges which the accused faces. Applying the relevant legal principles, I am persuaded that the Crown has met its burden to establish the authenticity of those messages, and those messages are admissible in these proceedings.

[73] Here, the complainant's evidence is uncontroverted. She testified that the screen captures of the text messages she received where from the accused, she recognized all messages from him by the identifier "Dad ([REDACTED])". As the Court of Appeal ruled in *Hirsch* at para 24, screen captures are the best evidence available to the Crown to adduce the accused's text messages into evidence. Indeed, the Court went so far as to conclude that given the "fluidity and impermanence" of text

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messaging screen capture may be one of the few ways of establishing what was actually sent at any point in time.

[74] The complainant insisted that at no time did she manipulate or tamper with those text messages. She recognized and identified the hard copy of those screen captures found in Exhibit P-3 as a genuine copy of those text messages. These screen captures are what they purport to be, namely a record of the sexually suggestive conversation between the complainant and the accused. I am satisfied that these text messages have been authenticated.

[75] I arrive at the same conclusion respecting the text messages found in Exhibit P-4.

[76] I am persuaded as well as to the integrity of the electronic data systems involved. Both the complainant and Ms. F. identified the hard copies of the text messages in question as an accurate copy of the messages they received. On this basis, I am satisfied the presumption of integrity under ss. 31.3(b) of the *CEA* applied in these circumstances and has not been rebutted as the accused adduced no evidence.

[77] I acknowledge that defence counsel advanced certain assertions of tampering or illicit altering of the text messages during her cross-examinations of various Crown witnesses. Those assertions were denied by each witness. In my view, these assertions qualify as the "rank speculation" spoken of in *C.B.* at para 72. There is no air of reality to them.

[78] In any event, even if such an air of reality existed in this case, it would not defeat the admissibility of the text messages, this would be a matter of assessing the weight of this evidence, and not its admissibility. See: *C.B.* at para 72.

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C. Conclusion

[79] Accordingly, for these reasons I am satisfied that the text messages and the exported text messages found in hard copies of the various screen captures in the exhibits may be entered into evidence by the Crown, are relevant and authentic. They are admissible at this trial under s. 31.1 of the *CEA*.

V. CREDIBILITY AND RELIABILITY

A. General Legal Principles

[80] Credibility and reliability are distinct concepts. However, as Chief Justice McLachlin acknowledged in *R v R.E.M.*, 2008 SCC 51 at para 49, [2008] 3 SCR 3, "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization". See also: *R v Gagnon*, 2006 SCC 17 at para 20, [2006] 1 SCR 621; and *R v Perrone*, 2014 MBCA 74 at paras 25-27, 313 CCC (3d) 399, aff'd 2015 SCC 8, [2015] 1 SCR 473.

[81] Credibility is concerned with a witness' honesty or truthfulness. Reliability, however, focusses on a witness' powers of observation, recollection, and communication. A witness who is not credible cannot give reliable evidence. Yet, credibility is not a proxy for reliability. A credible witness may give unreliable evidence. See: *R v Wolff*, 2019 SKCA 103 at para 38, 380 CCC (3d) 223 [*Wolff*]; *R v H.C.*, 2009 ONCA 56 at para 41, 241 CCC (3d) 45.

[82] Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part, or none of a witness' evidence, and may attach different weight to different parts of a witness' evidence. See: *R v R.(D.)*, [1996] 2 SCR 291 at para 93.

[83] Moreover, testimonial demeanour is not the most reliable tool for

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evaluating credibility. See: *Wolff* at para 45.

[84] A more dependable measure is the specific testimony offered, rather than the source or manner of presentation. Testimony can be assessed through a non-exhaustive list of factors, including: (a) the plausibility of the evidence, (b) independent supporting evidence, (c) the external consistency of the evidence, (d) the internal consistency of the evidence, and (e) the "balance" of the evidence. See, for example: David M. Paciocco, "Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment" (2017), 22 Can Crim L Rev 31 (WL) at 37; and *Cavanaugh v Grenville Christian College*, 2020 ONSC 1133 at para 40.

[85] At bottom, the issue becomes: is the witness' evidence accurate? See: *R v Groshok,* 2019 SKCA 39 [*Groshok*]; *R v Charboneau*, 2019 ABQB 313 at para 67; and *R v Norman* (1993), 87 CCC (3d) 153 (WL) (Ont CA) at para 47.

B. The *W.(D.)* Framework

[86] It is well recognized that all statements of an accused person entered into evidence must be scrutinized in accordance with the principles laid down by the Supreme Court in *R v W.(D.),* [1991] 1 SCR 742 [*W.(D.)*]. The application of the *W.(D.)* analysis is not restricted to the in-court testimony of an accused person. For example, it must be conducted whenever a video-taped statement made by the accused is admitted into evidence. See especially: *R v Allale,* 2019 ABCA 154 at para 32 (and the authorities cited in that para.); *R v Woodland*, 2009 SKQB 262, 338 Sask R 244; *R v R.C.*, 2020 SKQB 333 at para 23; and *R v Friesen*, 2012 SKQB 181 at paras 12-13.

[87] The *W.(D.)* test applies not just to an accused person's testimony, but to any defence evidence and to any potentially exculpatory evidence, whether led by the defence or the Crown. See: *R v Smith*, 2020 ONCA 782 at para 12, 69 CR (7th) 126 [*Smith*]; *R v Kirlew*, 2017 ONCA 171 at para 17; *R v F.E.E.*, 2011 ONCA 783 at para

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104, 282 CCC (3d) 552 [*F.E.E.*]; and *R v B.D.*, 2011 ONCA 51 at para 114, 266 CCC (3d) 197.

[88] As announced by Cory J. in *W.(D.)* at 758, this analysis has three parts:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[89] The purpose of the *W.(D.)* analysis is intended to assist the trier of fact in "evaluating conflicting testimonial accounts" to determine whether the Crown has proven its case beyond a reasonable doubt: *R v J.H.S.*, 2008 SCC 30 at para 9, [2008] 2 SCR 152 [*J.H.S.*]. It is not a "magic incantation": *R v S.(W.D.)*, [1994] 3 SCR 521 at 553. It is the substance of the test that must be respected: *R v Dinardo*, 2008 SCC 24 at para 23, [2008] 1 SCR 788. The test is a reminder that "… the burden never shifts from the Crown to prove every element of the offence …": *J.H.S.* at para 9.

[90] Recently in *Groshok* at para 22, the Court of Appeal counselled that "[a] precise articulation of the *W.(D.)* test is not required by a trial judge". See also: *R v Thompson*, 2017 SKCA 33 at para 23. Similarly, compartmentalization of the analysis into three distinct steps is not necessary provided the reasons reflect that the correct analysis was undertaken. See: *Groshok* at para 22, referencing *R v Griffin*, 2018 ABCA 277 at paras 3 and 19, 366 CCC (3d) 309.

[91] At the end of the day, a trial judge must direct his or her mind "to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt": *R v Dinardo*, 2008 SCC 24 at para 23, [2008] 1 SCR 788. See also: *R v Fogah*, 2018 ONCA 564 at para 46, 362

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CCC (3d) 4 [*Fogah*] (leave to appeal denied: 2020 CanLII 37599). The focus of the instruction must always be the principle of reasonable doubt: *R v C.L.Y.*, 2008 SCC 2 at para 6, [2008] 1 SCR 5. See also: *Fogah* at para 46.

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C. Application

1. Witnesses for the Crown

[92] I am satisfied that the police witnesses called by the Crown – Cpl. Reimer and Cst. Froh – testified truthfully under oath. They were forthcoming in the evidence which they gave and did not deviate from their testimony under cross-examination. I found these witnesses to be both credible and reliable.

[93] Turning to the complainant, I found her to be articulate and honest when giving her evidence. On cross-examination, she did not deviate from her evidence-in-chief. She testified that she did not tell anyone about the text messages received from the accused because in her words, she "didn't want the situation to escalate". It was a friend, and not the complainant, who brought these messages to the attention of school personnel. This testimony persuades me that she was not motivated to falsely accuse Mr. F. in these proceedings.

[94] I acknowledge that testifying in this trial in front of her former stepfather must have been difficult for the complainant. Yet, she gave her evidence in a forthright manner. I conclude that the complainant was a credible and reliable witness in these proceedings.

[95] The final Crown witness was Ms. F., the accused's former spouse. I acknowledge that the circumstances which brought an abrupt end to their marriage might suggest that she harboured bitterness and ill-will towards the accused. However, I did not perceive her testimony to be ill-motivated.

[96] Like her daughter, I found Ms. F. to be as truthful as she could be. When she was confronted with information she had not seen before, for example, she acknowledged that and did not attempt to avoid admitting her lack of knowledge. Overall, I found that she also testified in a forthright manner. I am persuaded that Ms. F. was also a credible and reliable witness in these proceedings.

2. Defence Evidence

[97] As noted, the accused did not testify nor did the defence lead any evidence of its own. However, despite this, it is still necessary to assess any exculpatory evidence whether led by the Crown or the defence in accordance with the *W.(D.)* analysis. See, for example: *Smith* at para 12; and *F.E.E.* at para 104.

[98] The first step of the *W.(D.)* analysis directs that if any evidence which might exonerate the accused is believed, an acquittal must follow.

[99] I do not perceive any such evidence. As noted, defence counsel attempted to elicit from Crown witnesses evidence which might support a finding that the text messages were sent from a "ghost phone" or were sent by an unidentified third person utilizing the accused's cell phone. I have already concluded that there is no air of reality to this theory, and, plainly, there is no evidentiary basis which could possibly support it. Accordingly, I am not left with a reasonable doubt which means the first step of the *W.(D.)* analysis is not met.

[100] This conclusion, in my view, is sufficient to dispose of the *W.(D.)* analysis in this case. However, for completeness, I will proceed to the remaining two steps.

[101] The second step of the *W.(D.)* analysis directs that if I do not believe any possible exculpatory evidence, but it leaves with a reasonable doubt, I must acquit. As I have already stated, there is no exculpatory evidence whatsoever. Consequently, I am

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not left with a reasonable doubt, and it follows that the second step of the *W.(D.)* analysis is not met.

[102] So, I move to the third step of the *W.(D.)* analysis and determine whether in the context of the evidence which I do accept, I am convinced beyond a reasonable doubt that the accused is guilty of the charges.

[103] On the third step, I find that while there is no exculpatory evidence, the Crown has failed to prove beyond a reasonable doubt that the 'RedTube' pornographic video meets the definition of "child pornography" found in ss. 163.1(1)(a) of the *Criminal Code*. That provision reads as follows:

> **Definition of child pornography**
>
> **163.1(1)** In this section, **child pornography** means
>
> **(a)** a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
>
> **(i)** that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
>
> **(ii)** the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years …
>
> [Emphasis in original]

[104] The complainant's uncontradicted evidence is that, indeed, the accused texted a link to the 'RedTube' website to her. She stated that she looked at and believed it to be a website displaying "lesbian porn". However, she said she did not look at any of those videos. Consequently, there is no evidence – independent or otherwise – that the website in question depicted pornographic videos by a person or persons "under the age of eighteen years".

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[105] Accordingly, I must find the accused not guilty on Count #1 of the Indictment.

[106] However, respecting the remaining Counts in the Indictment, I find that in the context of the evidence, I do accept the Crown has satisfied me beyond a reasonable doubt that the accused is guilty of the charges in those Counts.

VI. CONCLUSION AND VERDICTS

[107] Turning to the Counts in the Indictment, I come to the following conclusions.

[108] Mr. F., please stand.

[109] Respecting Count #1: I find Mr. F. not guilty of the offence of communicating by means of telecommunication with V. A., a person under the age of 18 years old, for the purpose of committing an offence with respect to that person under section 163.1 of the *Criminal Code*, contrary to section 172.1(1)(a) of the *Criminal Code*.

[110] Respecting Count #2: I find Mr. F. guilty of the offence of communicating by means of telecommunication with V. A., a person under the age of 18 years old, for the purpose of committing an offence with respect to that person under section 151 of the *Criminal Code*, contrary to section 172.1(1)(b) of the *Criminal Code*.

[111] Respecting Count #3: I find Mr. F. guilty of the offence of communicating by means of telecommunication with V. A., a person under the age of 18 years old, for the purpose of committing an offence with respect to that person under section 271 of the *Criminal Code*, contrary to section 172.1(1)(b) of the *Criminal Code*.

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[112] Count #4 of the Indictment has been stayed by the Crown.

[113] Respecting Count #5: I find Mr. F. guilty of the offence that he did for a sexual purpose, invite, or counsel, or incite V. A., a person under the age of 16 years old, to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years old, contrary to section 152 of the *Criminal Code*.

[114] In view of these verdicts, I invite counsel to address whether in these circumstances the rule in *Kienapple* has any application.

J.
G.G. MITCHELL

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