

CANADA / JUDGMENT

R. v. B.T.

2020 BCSC 1185

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1185 R. v. B.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.T.,

2020 BCSC 1185

Date: 20200612

Docket: 48937-2

Registry: Prince George

Regina

v.

B.T.

Restriction on Publication: Pursuant to 486.4 C.C.C.

Before: The Honourable Madam Justice Donegan

(appearing by videoconference)

Oral Reasons for Judgment

Counsel for the Crown appearing by teleconference:

A.E. McLellan

Counsel for the Accused:

E.K. Jones

Place and Date of Trial/Hearing:

Prince G.D., B.C.

October 28-31, 2019 November 1, 4 & 5, 2019 January 13-17, 2020 and February 5, 2020

Place and Date of Judgment:

Prince George, B.C.

June 12, 2020

Introduction

- [1] A.D. is a nine-year-old child who lives with her parents, S.D. and C.D., in Prince George. B.T., the accused before the court, is C.D.'s cousin and he lived with their family from about August 2015 until his arrest in May 2018. B.T.'s arrest arose from allegations made by A.D. that he had taken pornographic pictures of her and sexually assaulted her. The police investigation revealed child pornography images on a cellular telephone and a computer. B.T. now stands charged with sexual touching, invitation to sexual touching, sexual assault of A.D. and with making, possessing, and accessing child pornography.
- [2] The Crown called several witnesses at trial, including A.D. and her parents, police officers and an expert in the area of forensic examination of electronic devices. It also tendered a large body of data and images extracted from a computer and a cellphone. Considered as a whole, the Crown submits that the case against B.T. is overwhelmingly strong and he should be convicted on all counts.
- [3] B.T. testified in his defence and denied all allegations. He submits that his evidence ought to be believed or at least ought to raise a reasonable doubt resulting in an acquittal on all counts. His counsel candidly conceded at the end of submissions that if the court does not believe B.T., or his evidence failed to raise a reasonable doubt, the Crown's evidence is indeed overwhelming against B.T.
- [4] I will begin now with a discussion of the legal principles that govern disposition of this case.

Governing Legal Principles

The Offences Charged

- [5] Of course, any discussion of the legal principles must begin with the principle that the Crown bears the onus of proving, beyond a reasonable doubt, each element of each offence with which B.T. is charged.
- [6] Count 1 reads that:
- [B.T.], from the 1st day of October, 2015 to the 28th day of May, 2018, inclusive, at or near Prince George, in the Province of British Columbia, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of [A.D.], a person under the age of sixteen years, contrary to Section 151 of the Criminal Code.

[7] Section 151 of the Criminal Code, R.S.C., 1985, c. C-46 [Code] reads:

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

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

[8] In addition to proving that B.T. is the person who committed the offence outlined in Count 1 on the date and in the place prescribed, the Crown must also prove that:

- A.D. was less than 16 years old at the time;
- B.T. intentionally touched her, either directly or indirectly; and
- that touching was for a sexual purpose.

[9] There is no issue the Crown has proven that A.D. was less than 16 years old at the time of the offence that underpins these charges. She was nine years old when she testified at trial. In the relevant timeframe, she was between five and seven years of age. As with all of the counts, there is also no issue the Crown has proven that the events at issue occurred in Prince George, British Columbia.

[10] Count 2 reads:

[B.T.], from the 1st day of October, 2015 to the 28th day of May, 2018, inclusive, at or near Prince George, in the Province of British Columbia, did, for a sexual purpose, invite, counsel or incite [A.D.], a person under the age of sixteen years, to touch, directly or indirectly, with a part of her body, or with an object, the body of A. G. D. or the body of [B.T.], contrary to Section 152 of the Criminal Code.

[11] Section 152 of the Code reads:

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

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

[12] In addition to proving that B.T. is the person who committed the offence outlined in Count 2 on the date and in the place prescribed, the Crown must also prove that:

- A.D. was less than 16 years old at the time;
- B.T. invited (counselled or incited) A.D. to touch, either directly or indirectly, with a part of her body or with an object, her body or B.T.'s body; and
- that the invitation, counselling, or inciting to touch was for a sexual purpose.

[13] Again, there is no issue that the Crown has proven A.D. was less than 16 years old at the time of the events in this count.

[14] "Invite" means to request, ask, or suggest by words or gestures or both, that something be done. "Counsel" means to suggest that someone do something or to advise or recommend that he or she do it. "Incite" means to encourage or urge someone by words or gestures or both to do something.

[15] Count 3 reads:

[B.T.], from the 1st day of October, 2015 to the 28th day of May, 2018, inclusive, at or near Prince George, in the Province of British Columbia, did sexually assault [A.D.], contrary to Section 271 of the Criminal Code.

[16] Section 271 of the Code reads:

271 Everyone who commits a sexual assault is guilty of

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

[17] In addition to proving that B.T. is the person who committed the offence in Count 3 on the date and in the place prescribed, the Crown must also prove that:

- B.T. applied force to A.D. or attempted or threatened to apply force to A.D. with the present ability to effect his purpose;
- the application of force by B.T. on A.D. was intentional; and
- the application of force by B.T. on A.D. took place in circumstances of a sexual nature.

[18] In this case, the Crown is not required to prove the additional elements of an absence of consent by A.D. and that B.T. knew A.D. did not consent to the activity in question. This is because A.D. was under the age of 16 years at the time of these events and B.T. was in his early 30s at the time. In these circumstances, by virtue of s. 150.1 of the Code, it is no defence that the complainant consented to the activity that forms the subject matter of the charge.

[19] Count 4 reads:

[B.T.], from the 1st day of October, 2015 to the 28th day of May, 2018, inclusive, at or near Prince George, in the Province of British Columbia did make child pornography, contrary to Section 163.1(2) of the Criminal Code.

[20] Section 163.1(2) of the Code reads:

163.1(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

[21] In addition to proving that B.T. is the person who committed the offence in Count 4 on the date and in the place prescribed, the Crown must also prove that:

- the materials at issue are child pornography as defined in s. 163.1(1) of the Code; and
- B.T. knowingly made child pornography.

[22] As with Counts 5 and 6, in Count 4 there is no issue, indeed B.T. has admitted, that the materials at issue are child pornography as defined in s. 163.1(1) of the Code.

[23] Count 5 reads:

[B.T.], from the 1st day of October, 2015 to the 28th day of May, 2018, inclusive, at or near Prince George, in the Province of British Columbia, did have in his possession, child pornography, contrary to Section 163.1(4) of the Criminal Code.

[24] Section 163.1(4) of the Code reads:

- (4) Every person who possesses any child pornography is guilty of
- (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or
 - (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[25] In addition to proving B.T. is the person who committed the offence in this count, on the date and in the place prescribed, the Crown must also prove that:

- the materials are child pornography as defined in s. 163.1(1); and
- B.T. knowingly possessed the child pornography.

[26] To establish possession, the Crown must prove that B.T. had both knowledge of and some act or measure of control over the child pornography. Knowledge and control can be inferred from the surrounding circumstances.

[27] Possession can be personal, constructive, or joint. It does not require any proprietary or ownership interest. The definition of possession is found in s. 4(3) of the Code, which reads:

4 (3) For the purposes of this Act,

- (a) a person has anything in possession when he has it in his personal possession or knowingly
 - (i) has it in the actual possession or custody of another person, or
 - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
- (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[28] In this case, the Crown alleges personal possession. I will have more to say about possession in this context in a moment.

[29] Count 6 reads:

[B.T.], from the 1st day of October, 2015 to the 28th day of May, 2018, inclusive, at or near Prince George, Province of British Columbia, did access child pornography contrary to Section 163.1(4.1) of the Criminal Code.

[30] Section 163.1(4.1) of the Code provides:

Accessing child pornography

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

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

[31] In addition to proving B.T. is the person who committed the offence in this count on the date and in the place prescribed, the Crown must prove that:

- the materials were child pornography as defined in s. 163.1(1); and

- B.T. knowingly accessed that child pornography.
- [32] The elements of accessing child pornography are knowingly causing child pornography to be viewed by or transmitted to oneself: *R. v. R.D.*, 2010 BCCA 313 at para. 31.
- [33] It is important to know that there is a distinction between possession of child pornography and accessing child pornography. As the Crown points out in their written submissions, the meaning of and distinction between possession and accessing child pornography on a computer was considered by the Supreme Court of Canada in *R. v. Morelli*, 2010 SCC 8:
- [14] In my view, merely viewing in a Web browser an image stored in a remote location on the Internet does not establish the level of control necessary to find possession. Possession of illegal images requires possession of the underlying data files in some way. Simply viewing images online constitutes the separate crime of accessing child pornography, created by Parliament in s. 163.1(4.1) of the Criminal Code.
- [15] For the purposes of the Criminal Code, "possession" is defined in s. 4(3) to include personal possession, constructive possession, and joint possession. Of these three forms of culpable possession, only the first two are relevant here. It is undisputed that knowledge and control are essential elements common to both.
- [16] On an allegation of personal possession, the requirement of knowledge comprises two elements: the accused must be aware that he or she has physical custody of the thing in question, and must be aware as well of what that thing is. Both elements must co-exist with an act of control (outside of public duty): *Beaver v. The Queen*, [1957] S.C.R. 531, at pp. 541-42.
- [17] Constructive possession is established where the accused did not have physical custody of the object in question, but did have it "in the actual possession or custody of another person" or "in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person" (Criminal Code, s. 4(3)(a)). Constructive possession is thus complete where the accused: (1) has knowledge of the character of the object, (2) knowingly puts or keeps the object in a particular place, whether or not that place belongs to him, and (3) intends to have the object in the particular place for his "use or benefit" or that of another person.
- [18] Here, the appellant is alleged to have had possession of digital images in a computer, rather than tangible objects. The law of possession, however, developed in relation to physical, concrete objects. Its extension to virtual objects -- in this case, images stored as digital files and displayed on computer monitors -- presents conceptual problems. Unlike traditional photographs, the digital information encoding the image -- the image file -- can be possessed even if no representation of the image is visible. Likewise, even if displayed on a person's computer monitor, the underlying information might remain firmly outside that person's possession, located on a server thousands of kilometres away, over which that person has no control.

- [19] Essentially, there are thus two potential "objects" of possession of an image in a computer -- the image file and its decoded visual representation on-screen. The question is whether one can ever be said to be in culpable possession of the visual depiction alone, or whether one can only culpably possess the underlying file. Canadian cases appear implicitly to accept only the latter proposition: That possession of an image in a computer means possession of the underlying data file, not its mere visual depiction.
- [20] Three Canadian appellate decisions illustrate the point.
- [21] In *R. v. Panko* (2007), 52 C.R. (6th) 378, the Ontario Superior Court of Justice held that possession might be established on the basis of icons on the desktop that pointed to illegal images stored on the computer's own hard drive.
- [22] In *R. v. Weir*, 2001 ABCA 181, 95 Alta. L.R. (3d) 225, the Alberta Court of Appeal confirmed the validity of a search warrant obtained on information that prohibited images were attached to an e-mail message received by the accused but not yet opened. The court rejected the submission that the search warrant had been issued for an anticipated offence because it was a reasonable inference that the files would have already been downloaded onto the accused's computer at the time the warrant was authorized.
- [23] Finally, in *R. v. Daniels*, 2004 NLCA 73, 242 Nfld. & P.E.I.R. 290, the Newfoundland and Labrador Court of Appeal found that possession began at the moment the accused began downloading the illegal image files to his hard drive, even though the download was interrupted and the images were never viewed.
- [24] In all three cases, the courts proceeded on the understanding that the object illegally possessed by the accused was the image file, not a visual display or rendering of the image.
- [25] This is a sensible interpretation for a number of reasons. First, and most important, because Parliament, in s. 163.1(4.1) of the Criminal Code, has made accessing illegal child pornography a separate crime, different from possession. In virtue of s. 163.1(4.2), a person accesses child pornography by "knowingly caus[ing the] child pornography to be viewed by, or transmitted to, himself or herself".
- [26] Parliament's purpose in creating the offence of accessing child pornography, as explained by the then Minister of Justice, was to "capture those who intentionally view child pornography on the [Inter]net but where the legal notion of possession may be problematic" (Hon. Anne McLellan, House of Commons Debates, vol. 137, 1st Sess., 37th Parl., May 3, 2001, at p. 3581).
- [27] What made a charge of possession "problematic", of course, is that possessing a digital file and viewing it are discrete operations -- one could be criminalized without also criminalizing the other. In the case of child pornography, Parliament has now criminalized both. But viewing and possession should nevertheless be kept conceptually separate, lest the criminal law be left without the analytical tools necessary to distinguish between storing the underlying data file and merely viewing the representation that is produced when that data, residing elsewhere, is decoded. The ITO here is specifically limited to allegations of

possession pursuant to s. 163.1(4) of the Criminal Code (ITO, preamble and paras. 2, 4 and 16).

- [28] Interpreting possession to apply only to the underlying data file is also more faithful to a traditional understanding of what it means to "possess" something. The traditional objects of criminal possession -- for example, contraband, drugs, and illegal weapons -- are all things that could, potentially at least, be transferred to another person.
- [29] Without storing the underlying data, however, an image on a screen cannot be transferred. The mere possibility of sharing a link to a Web site or enlarging the visual depiction of a Web site, as one could "zoom in" on a TV screen image, is insufficient to constitute control over the content of that site. It is indeed the underlying data file that is the stable "object" that can be transferred, stored, and, indeed, possessed. More broadly, the object possessed must itself have some sort of permanence.
- [30] Thus, while it does not matter for the purposes of criminal possession how briefly one is in possession of the object, the thing said to be culpably possessed cannot -- like a broadcast image flickering across a TV screen or a digital image displayed transiently on-screen -- be essentially evanescent.
- [31] Plainly, the mere fact that an image has been accessed by or displayed in a Web browser does not, without more, constitute possession of that image. An ITO seeking a warrant to search for evidence of possession (rather than accessing) must therefore provide reasonable and probable grounds to believe that the alleged offender possesses (or has possessed) digital files of an illegal image, and that evidence of that possession will be found in the place to be searched. It is not enough to provide reasonable and probable grounds to believe that the alleged offender viewed or accessed illegal images using a computer, without knowingly taking possession -- which includes control -- of the underlying files in some way.
- [32] In applying these principles to the facts of this case, I take care not to be understood to have circumscribed or defined constructive possession of virtual objects. I leave open the possibility, for example, that one could constructively possess a digital file without downloading it to his or her hard drive, using for example a Web-based e-mail account to store illegal material.
- [33] In short, my purpose here is not to say what constructive possession of virtual objects necessarily is, but rather what it manifestly is not. Plainly, in my view, previous access and the possibility of again accessing a Web site that contains digital images, located on a distant server over which the viewer has no control, do not constitute -- either alone or together -- constructive possession. However elastic the notion of constructive possession may be, to stretch it that far is to defy the limits of its elasticity.
- [34] For the sake of greater clarity, I turn now to consider how this understanding of possession applies to files in an Internet cache (that is, copies of files automatically stored on the hard drive by a Web browser).

- [35] When accessing Web pages, most Internet browsers will store on the computer's own hard drive a temporary copy of all or most of the files that comprise the Web page. This is typically known as a "caching function" and the location of the temporary, automatic copies is known as the "cache". While the configuration of the caching function varies and can be modified by the user, cached files typically include images and are generally discarded automatically after a certain number of days, or after the cache grows to a certain size.
- [36] On my view of possession, the automatic caching of a file to the hard drive does not, without more, constitute possession. While the cached file might be in a "place" over which the computer user has control, in order to establish possession, it is necessary to satisfy mens rea or fault requirements as well. Thus, it must be shown that the file was knowingly stored and retained through the cache.
- [37] In the present case, the charge is not based on the appellant using his cache to possess child pornography. It is hardly surprising as most computer users are unaware of the contents of their cache, how it operates, or even its existence. Absent that awareness, they lack the mental or fault element essential to a finding that they culpably possess the images in their cache. Having said that, there may be rare cases where the cache is knowingly used as a location to store copies of image files with the intent to retain possession of them through the cache.

[Emphasis in original]

- [34] Overall, it is important to keep in mind that it is only the elements of the offences that are subject to criminal standard of proof, not individual pieces of evidence. Individual pieces of evidence can be proven on a balance of probabilities.
- [35] As was discussed by the Supreme Court of Canada in *R. v. Morin*, [1988] 2 S.C.R. 345, a trier of fact should not conduct a piecemeal analysis of the evidence. It is not each piece of evidence that requires proof beyond a reasonable doubt. It is the cumulative effect of the evidence that must be considered. Individual facts are "a link in the chain of ultimate proof", but it is the evidence as a whole that must be considered with respect to each element of the offence the Crown must prove.

R. v. W.(D.)

- [36] B.T. testified in this case. For cases involving the credibility of the accused, the Supreme Court of Canada has given us guidance in applying the reasonable doubt concept in *R. v. W. (D.)*, 1 S.C.R. 742. That framework is as follows:

- First, if I believe the evidence of the accused, I must acquit;
- Second, if I do not believe the evidence of the accused, but am left in a reasonable doubt by it, I must acquit; and

· Third, even if I am not left in a reasonable doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence I do accept, I am convinced, beyond a reasonable doubt, by the evidence of the guilt of the accused.

[37] To this list I would add, if, after careful consideration of all of the evidence, I am unable to decide whom or what to believe, I must acquit: *R. v. C.W.H.*, [1991] B.C.J. No. 2753 (B.C.C.A.).

[38] It is important to remember that the W.(D.) framework was never intended to be a statute and should not be read like one. Many courts have commented that the framework is not a magical incantation or something to be slavishly followed, but what is important is that the principles underlying the W.(D.) framework are applied.

[39] Justice Paciocco of the Ontario Court of Appeal discussed the underlying principles extensively in a recent article. He identified the principles that drive the W.(D.) framework as these:

1. Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred;
2. A criminal fact-finder that believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;
3. Even if a criminal fact-finder does not entirely believe evidence inconsistent with guilt, if the fact-finder cannot decide whether that evidence is true, there is a reasonable doubt and an acquittal must follow;
4. Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
5. Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

David M. Paciocco: Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment, 22, 1 *Can. Crim. L. Rev.*

Credibility and Reliability Assessment

[40] Closing submissions by counsel focussed on several aspects of the case, including credibility and reliability determinations.

[41] The court's fact-finding role requires an assessment of the credibility, which is the truthfulness or honesty of a witness, and the reliability or accuracy of the witness' evidence. This requires consideration of many factors which were conveniently summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).
- [42] To those factors, I would add that a court may believe some, all, or none of the evidence of a witness, that credibility determinations "may not be purely intellectual and may involve factors that are difficult to verbalize": *R. v. M.(R.E.)*, 2008 SCC 51 at para. 49. It is important not to base determinations of credibility on emotional evaluation, stereotypes, guesswork, or other kinds of impermissible reasoning. Credibility and reliability decisions have to be grounded in reason and made as objectively as possible.
- [43] I am also mindful to exercise caution in placing too much reliance on demeanour of a witness. I have no baseline upon which to assess the demeanour of a witness and I know that a courtroom can be an unfamiliar and at times intimidating place. Everyone reacts differently to it. I am particularly cautious in this case about using any evidence regarding B.T.'s demeanour in my assessment. B.T. suffers from certain disabilities that impact his social and communication skills.
- [44] It is within the W.(D.) framework, informed by all of these underlying principles, that I approach my assessment of the evidence in this case.

Overview of the Evidence

- [45] I will begin with an overview of the Crown's case. As many of the witnesses share common surnames, I will refer to most of them by their first names throughout the course of these reasons. I do so only for ease of reference and do not intend any disrespect.

The Crown's Case

- [46] The Crown's case contains a number of admissions of fact pursuant to s. 655 of the Code (exhibits 1, 2, and 9), along with reports referred to in the admissions.
- [47] I will begin by outlining these admissions and other facts that are not in dispute.

- [48] B.T., the accused before the court, was born on August 22, 1983. He is currently 35 years old.
- [49] C.D. and S.D. married in 2003 and have one child, A.D. A.D. was born on June 25, 2010, and is currently nine years old. C.D.'s father is G.D. B.T. is G.D.'s nephew and C.D.'s cousin. G.D. and C.D. have known B.T. his entire life.
- [50] B.T. moved into C.D. and S.D.'s home located at [address omitted], Prince George, British Columbia, in August 2015. The home has a basement, a main floor, and an upstairs floor. B.T. lived in the basement in an area fashioned into a bedroom. In this bedroom space, B.T. kept his computer and other electronics. C.D. and S.D.'s bedroom was located on the upper floor, as was A.D.'s bedroom. G.D. lived next door at [house number omitted].
- [51] On Monday, May 28, 2018, C.D. and S.D. attended the Prince George RCMP detachment to report what they believed to be suspicious activity between B.T. and their daughter, who was seven years old at the time.
- [52] On Tuesday, May 29, 2018, C.D. and S.D. brought A.D. to the SCAN clinic in Prince George to be interviewed by police. Constable Rose interviewed her from 8:45 a.m. to 9:35 a.m. The interview was video and audio recorded. As a result of that interview, Constables Foster, Dela Torre and Kim attended to the Prince George airport that afternoon to locate and arrest B.T. B.T. had been in the Lower Mainland visiting his mother. His plane arrived shortly before 2:00 p.m. and, at 2:03 p.m., Constable Dela Torre arrested B.T. as he entered the arrivals area of the airport.
- [53] At the time of his arrest, Constable Foster seized an LG G5 cellular telephone from B.T.'s left vest pocket (the "LG Cellphone"). At the time of its seizure, the LG Cellphone was connected to earphones and music was playing. The LG Cellphone was marked Police Exhibit B1 for identification purposes.
- [54] That same day (May 29, 2018), a search warrant was granted authorizing search and seizure of items from [address omitted]. Constables Cropley, Foster and Walaszczyk executed the search warrant between the hours of 9:06 p.m. and 11:16 p.m. that evening. During this search, Constable Foster seized a Cooler Master PC tower desktop computer (the "Computer"). The Computer was marked Police Exhibit 1 for identification purposes.
- [55] Also that same day, B.T. gave a videotaped statement to Constable Rose and Sergeant Rappel at the RCMP detachment in Prince George. B.T. admits this statement was voluntary. The video recording and a true and accurate transcript of the video recording are attached as Appendices C and D to the first set of admissions marked as Exhibit 1 at this trial.
- [56] Continuity, authenticity and integrity of all items produced in evidence in this proceeding is admitted.
- [57] On May 31, 2018, a search warrant was granted authorizing a search of the LG Cellphone.

- [58] From the time of its seizure, the LG Cellphone was kept without material alteration and was delivered without material alteration to Constable Rose on June 5, 2018, for a preliminary examination. Following this examination, the LG Cellphone was kept without material alteration and was delivered, again without material alteration, to Roger de Pass, where it was received and kept thereafter, again without material alteration, until Mr. de Pass performed a digital forensic examination on it.
- [59] Roger de Pass is an expert in the forensic examination of electronic devices, qualified to provide opinion evidence on the identification, preservation, extraction, interpretation and presentation of data from electronic devices.
- [60] During his digital forensic examination of the LG Cellphone, Mr. de Pass extracted data from it. He then properly gave this data from the LG Cellphone without alteration to the Prince George RCMP.
- [61] Exhibit 4 in this proceeding is a report containing images and information from the LG Cellphone data produced by a proprietary computer program under the direction of members of the RCMP. Exhibit 4 does not contain all of the images and information from the LG Cellphone data.
- [62] The images contained in Exhibit 4 are admitted to be child pornography within the meaning of s. 163.1(1) of the Code.
- [63] Exhibit 6 is a true and accurate copy of Exhibit 4, but does not include the images contained in Exhibit 4.
- [64] From the time of its seizure, the Computer, like the LG Cellphone, was kept without material alteration and was delivered without material alteration to Constable Reddekopp, a member trained in digital analysis triage, on June 6, 2018, for a preliminary examination. Constable Reddekopp's examination did not alter the Computer and had no effect on the integrity of the data on the Computer.
- [65] Following the examination by Constable Reddekopp on June 6, 2018, the Computer was kept, again without material alteration, and was delivered without material alteration to Roger de Pass, where it was received and kept thereafter without material alteration until Mr. de Pass performed a digital forensic examination on it.
- [66] During his digital forensic examination of the Computer, Mr. de Pass extracted data from the Computer (the "Computer Data"). Mr. de Pass then conveyed the Computer Data, without alteration, to the Prince George RCMP.
- [67] Exhibit 3 is a report containing images and information from the Computer Data produced by a proprietary computer program under the direction of members of the RCMP. Exhibit 3 does not contain all the images and information from the Computer Data.

- [68] The images contained in Exhibit 3 it is admitted are child pornography within the meaning of s. 163.1(1) of the Code.
- [69] Exhibit 5 is a true and accurate copy of Exhibit 3, but does not include the images contained in Exhibit 3.
- [70] In addition to the documentary evidence and the admissions of fact, the Crown called seven witnesses in its case:
1. Constable Anita Foster;
 2. Corporal Joshua Cropley;
 3. Constable Katarzyna Walaszczyk;
 4. Constable Victoria Rose;
 5. Roger de Pass;
 6. G.D.;
 7. A.D.;
 8. C.D.; and
 9. S.D.
- [71] Other than S.D. and A.D., the credibility of these witnesses and the reliability of their evidence was not challenged.
- [72] Leaving aside my assessment of the evidence of S.D. and A.D. for the moment, I will say here that I found the other Crown witnesses were all credible and their evidence reliable. The reliability of some of G.D. and C.D.'s evidence was undermined only very slightly in certain areas as their abilities to recall specific dates and events was sometimes less than perfect, but this was clearly due to the passage of time and nothing else. Overall, however, I find they were entirely credible and were doing their best to tell the truth of what they remembered. Given the circumstances of the allegations, I think their evidence was remarkably even-handed, fair, and balanced.

Constable Anita Foster

- [73] Constable Foster was involved with B.T. for a few hours on May 29, 2018. She was present for his arrest and assisted in his transport, lodging in cells, and access to counsel. She also observed about an hour of B.T.'s interview from a monitor.
- [74] Constable Foster also assisted with the execution of the search warrant and took photographs at the D. residence that same day. Exhibit 7 contains a number of photographs depicting the exterior and interior of the residence as she found it that day. She also drew rudimentary sketches of each of its three floors.

- [75] There is no issue that photographs 4-6 and 14-18 show A.D.'s bedroom on the upper floor of their home and photographs 11-13 and 19-24 show B.T.'s bedroom quarters (and items found in it) in the basement of their home. It is uncontroversial that the Computer was seized from the entertainment unit or hutch in B.T.'s bedroom quarters, as shown in the photographs. It is uncontroversial that a number of items bearing B.T.'s name and other personal identifying characteristics, such as a veterinary hospital bill, a prescription pill bottle, a bus pass application, a CRA tax document, and a membership card to [name omitted] Taekwon-Do school were located in that same bedroom area of the basement as shown in the photographs.
- [76] Constable Foster was shown several images admitted to be child pornography that were extracted from the LG Cellphone found at pages 3, 22, 102, 178, 194, and 230. She recognized the location of those images as A.D.'s bedroom from the time that she spent there.
- [77] Constable Foster was not challenged on any of her evidence in cross-examination.

Constable Joshua Cropley

- [78] Constable Cropley met with C.D. and S.D. on May 28, 2018, when they attended the Prince George RCMP detachment. On the basis of what they told him, he arranged for A.D. to be interviewed by Constable Rose of the Sex Crimes Unit of the RCMP the following day.
- [79] Constable Cropley met A.D. and her parents at the SCAN clinic on May 29, 2018 at 8:30 a.m. After A.D.'s interview, Constable Cropley planned the arrest of B.T., prepared the necessary materials to obtain a search warrant for C.D. and S.D.'s residence, and participated in the execution of the warrant that was granted. He was taken through the photographs found in Exhibit 7. He identified what he saw and what he found. He was later involved in drafting materials to obtain the search warrant of the LG Cellphone.
- [80] Constable Cropley was not cross-examined.

Constable Katarzyna Walaszczyk

- [81] Constable Walaszczyk was involved in scene security and execution of the search warrant on C.D. and S.D.'s residence as well. There is no issue that the integrity of the scene was maintained at all times. She also participated in the execution of the search warrant and identified many of the photographs or what was depicted in the photographs found in Exhibit 7. This officer was not cross-examined.

Constable Victoria Rose

- [82] Constable Rose interviewed A.D. on May 29, 2018. She had never met A.D. before and, other than during their brief introduction, her interactions with A.D. were all video recorded. Constable Rose was also the officer that took B.T.'s statement later that same day following his arrest.

- [83] Constable Rose also had dealings with the LG Cellphone. On June 5, 2018, using a particular extraction device commonly used by law enforcement across Canada for which she was trained, Constable Rose extracted the contents of the LG Cellphone and a report was prepared. She viewed the report and observed many images that had been downloaded from the phone. Those thumbnail images, along with the data obtained in them, were found in Exhibit 10.
- [84] Constable Rose was taken through Exhibit 10 and identified B.T. as a person in the thumbnail images behind tabs 3 and 4. She identified A.D. as the person in the thumbnail images behind tab 5.
- [85] After reviewing the report from the LG Cellphone download, Constable Rose sent the LG Cellphone and the Computer to Roger de Pass. She later received the analysis reports for both the Computer and the LG Cellphone, again marked Exhibits 3 and 4 respectively.
- [86] Exhibit 3 contains 107 images of child pornography. Over 40 of them are clearly of A.D., posed in such a way so that the focus of the image is on her exposed vagina. Exhibit 4 contains approximately 145 images of child pornography. The vast majority of these are clearly of A.D. posed in such a way so that the focus of the image is on her exposed vagina.
- [87] Constable Rose compared the images in Exhibits 3 and 4 and found a number of images in common between them. Although not a complete list of every common image, she identified nine examples and prepared a list of those examples, marked Exhibit 11. The images referred to in Exhibit 11 depict A.D. with no clothes and her legs spread open to expose her vagina.
- [88] I have also reviewed the images in Exhibits 3 and 4. I agree with Constable Rose and accept her evidence that the examples she has listed appear to be the same images. I also agree that there are many more common images than the nine examples listed in Exhibit 11.
- [89] Constable Rose's evidence was not challenged on cross-examination.

Roger de Pass

- [90] Roger de Pass is an expert in forensic examination of electronic devices, qualified to provide opinion evidence on the identification, preservation, extraction, interpretation, and presentation of data from electronic devices.
- [91] Mr. de Pass received the Computer and LG Cellphone on July 20, 2018 for examination. In addition to his written extraction reports pertaining to the LG Cellphone (Exhibit 14, tab 2 and Exhibit 16) and his final report pertaining to both the Computer and the LG Cellphone (Exhibit 14, tab 1), Mr. de Pass gave very detailed evidence about the procedures he employed and the tools he utilized to examine these items and thoroughly explained the results of his examination. His qualifications, the tools, the procedures, and the methodologies he used were not challenged. His findings and opinions were not challenged.

- [92] Mr. de Pass' examination of the Computer revealed only one user account in use named "Sadek". He explained that this account, in his opinion, was created by the user and that, in general, a user account includes an area on the computer specific to that user for the user to save videos, documents and photographs, as well as a specific recycle bin for deleted files.
- [93] Mr. de Pass conducted a virtual machine examination of the Computer. Using forensic software, he powered the Computer up and took a screenshot of the desktop screen at start-up. He hit a key to advance to the log-in screen for the Sadek user account, again the only user account on the Computer. That screen required him to enter a password to access the account.
- [94] Mr. de Pass found the Computer was set to Pacific Standard Time and that the time on the Computer was the same as the actual time (with the exception of a two-minute difference).
- [95] Within the only user account, the Sadek account, Mr. de Pass located several folders, including a folder entitled "Storage". Within this folder, his examination revealed three documents entitled "[B.T.'s] Résumés". These documents were printed and are now marked Exhibit 13. They are indeed B.T.'s résumés from three different years and contain information personal to him.
- [96] Mr. de Pass' examination of the Computer also revealed 16 child pornography images, most of which are of A.D., within the same "storage" folder on the desktop of the Computer. Within the "storage" folder are a number of subfolders. One of the subfolders is entitled "New Folder". Within the new folder subfolder are other subfolders, one of which is a subfolder entitled "Pics". It was within this subfolder entitled "Pics" where the 16 images were found. Mr. de Pass opined, and I accept, that this folder system was not a result of the Windows Operating System. Rather, it was the result of the user's actions. I also accept his opinion that the location of these images is easily accessible by a person using the Computer.
- [97] Mr. de Pass used forensic software to capture the metadata of these 16 images. The metadata includes the date and time the image was taken, along with the make and model of the device that took the image. The metadata of these images reveals that they were taken on three different dates in May 2018. One image was taken on May 5, six were taken on May 23, and nine were taken May 25. The make of the device that took the images was LG and the model was H831.
- [98] Mr. de Pass also located child pornography images on the LG Cellphone that are consistent with the images located on the Computer. The images were "thumbnails", not original images. He opined, and I accept, that the presence of the "thumbnails" meant that at some point the original images were located on the LG Cellphone but then deleted. Once the original images were deleted, the remaining "thumbnails" were not accessible to the user of the phone. Exhibit 4 contains those deleted images.

- [99] Mr. de Pass also opined that an LG cellular telephone had been connected to the Computer on May 26 2018, at 15:30 hours. By reference to its unique serial number, Mr. de Pass opined that it was the LG Cellphone, the one seized from B.T., that had been connected to the Computer via a USB port. He also opined that no other LG cellphone had been connected to the Computer.
- [100] Mr. de Pass created a spreadsheet of LNK files (or shortcuts created by the Computer's operating system). He also created a spreadsheet of Local File Access files (which tracks files accessed by the user), as well as a spreadsheet of files in a recycle bin (user deleted files). He testified about particular lines on each spreadsheet containing files associated to the same computer folder, subfolder and file path as the 16 child pornography images.
- [101] Mr. de Pass also located Peer-to-Peer ("P2P") sharing software on the Computer (Shareaza and FrostWire), with the same username of "Sadek". He explained that P2P file sharing is a method of communication available to internet users using special software applications, to allow users of computers using the same file-sharing network and protocols to transfer digital files from one computer to another while connected to a network, usually on the internet.
- [102] Mr. de Pass located evidence on the Computer that files indicative of child pornography had been on the Computer and deleted. He located evidence that files indicative of child pornography had been on the Computer in the LNK files and the Local File Access. He provided examples of these in his report found in Exhibit 14. From his examination, Mr. de Pass opined that the person logged onto the Sadek user profile of the Computer was accessing and downloading child pornography using P2P software.
- [103] Exhibit 3 (images found on the Computer) contains over 100 images identified as child pornography and admitted to be so. Mr. de Pass explained that many of these images are cached images. Many do not appear to be images of A.D., but of course some do. Mr. de Pass explained that thumbcache files are system files created when a user elects to view the contents of a folder's icon in a Windows system. The files contained thumbnail views of the contents of the folders that the user elected to employ the view - icon view. Thumbnail versions of files, he opined, may remain with thumbcache files even after the source file has been removed or deleted from the system. This is a product of the operating system and the thumbcache database working behind the scenes and the average user is not aware of its existence. Mr. de Pass further opined that this database provides evidence of images that were on the Computer even though the original image has been deleted. His examination revealed no original images of persons other than 16 images found in the subfolder on the storage folder on the desktop.
- [104] Mr. de Pass succinctly summarized his opinions at page 22 of his final report for the Computer found behind tab 1 of Exhibit 14:

I believe a person using the computer would have to input a password in order to access the only User account on the computer. The User account was called "Sadek".

Several documents associated to [B.T.] were located on the computer and in the User Profile called "Sadek".

Images of the victim were located on the computer in the User Profile associated to "Sadek" and placed in a folder structure on the desktop.

The creation of a folder(s) structure on the desktop is indicative of knowledge and intent by the person logged on to the system as this is a folder structure not normally created by the Windows OS.

The images of the victim meet the definition of Child Pornography. The metadata from the images indicate an LGH831 was used to obtain the photographs. This model of phone is the same model as Exhibit B-1 (the LG Cell Phone).

Cached images of the victim were located on Exhibit B-1. These images were consistent with the original images located on the computer.

An examination of the USB devices revealed an LGH831 phone had been connected to the computer. the forensic examination confirmed, by serial number, that device known as exhibit B-1 was the device which had been connected to the computer. There were no other LGH831 devices connected to the computer.

I believe a person logged onto the "Sadek" User Profile was accessing and downloading Child Pornography files using P2P file sharing software.

I did not find any evidence which would indicate distribution of child pornography.

[105] Mr. de Pass' findings and opinions were not challenged in cross-examination. Mr. de Pass was a properly-qualified expert in his field. He was aware of his duty to provide fair, objective and non-partisan assistance to the court within the scope of his area of expertise. I am satisfied that Mr. de Pass provided that type of evidence. He was careful, thorough and very balanced in his evidence. I accept the findings from his examinations and opinions without reservation.

G.D.

[106] G.D. is A.D.'s grandfather. He resides at [address omitted] and lived there during the timeframe in question. He explained that before C.D., S.D., A.D., and B.T. moved next door to [house number omitted], they all lived with him for a time in [house number omitted]. G.D. spent time with all of them and was able to identify all areas within their home at [house number omitted], including B.T.'s bedroom in the basement. G.D. spent time in the basement, mostly to say hi to B.T. and see how he was doing. He saw B.T. was mostly playing videogames in his room when he saw him there.

- [107] G.D. testified about the May 2018 long weekend. He recalled that C.D. was involved in a taekwon-do tournament at a local school that weekend and that he went to watch. It was either the Saturday or the Sunday, he could not recall which. S.D., A.D., and B.T. were also there. At some point during the day, G.D. testified that S.D. said she wanted to stay and watch the tournament, so G.D. offered to take A.D. to do an activity. B.T. was watching A.D. outside at a treehouse park area close by, so G.D. walked over there and told A.D. that he would be back in a minute to pick her up. He then walked over to B.T. and B.T. said that he wanted to go back to the house too.
- [108] G.D. drove the three of them home; that is himself, A.D., and B.T. En route, G.D. told A.D. to get her bathing suit on when they got home so he would take her to the water park. When they arrived home, A.D. could not get into the house fast enough, according to G.D., to get changed. G.D. said that he did not pay much attention to what B.T. did, but assumes that he must have let A.D. into their house, because A.D. did not have a key. G.D. went to his home and started playing on his computer while he waited for A.D. to change into her bathing suit and to come to his house. When A.D. did not come over to his house after about ten minutes, he went next door to see what was going on.
- [109] G.D. found the door to [house number omitted] was locked, but he testified this was not unusual. He rang the doorbell and knocked on the door, but no one immediately answered. He then saw B.T. stick his head out of the upstairs bathroom window, which is located above the front door. B.T. told G.D. that A.D. was on her way down. A couple of seconds later, A.D. came out the door wearing her bathing suit and carrying a small bag with a towel. At the time, G.D. found B.T.'s location upstairs unusual, because he was aware that B.T.'s bedroom was two floors down, in the basement. When A.D. came outside, G.D. thought she seemed happy and normal. A.D. told him that B.T. had been in her room, so G.D. assumed that he was perhaps helping A.D. find her things.
- [110] B.T. came downstairs right after A.D. came out of the house. G.D. asked A.D., in B.T.'s presence, where B.T. had been when she was getting changed. A.D. told him that he had been in her bedroom. B.T. then said that he saw A.D. come out of her bedroom with nothing on, and he turned his back and walked away. B.T. did not tell G.D. why he was upstairs. G.D. has known B.T. his entire life. He testified that when B.T. told him this, B.T.'s tone of voice was the same as always, but that he "looked edgy about it", "didn't look right", and was "not calm".
- [111] G.D. was asked about his observations of B.T. in the years that B.T. lived next door to him with C.D., S.D., and A.D. He testified that he saw B.T. two or three times a week. He was aware that B.T. was in receipt of disability benefits, did not work and did not go to school. From his observations, he saw that B.T. was interested in videogames and taekwon-do. He saw that B.T. was always on his cellphone. He was shown several of the thumbnail images extracted from the LG Cellphone and identified them as images of B.T., B.T.'s cat, [name omitted], his own cats, C.D., and B.T.'s mother (G.D.'s sister).

- [112] G.D. testified that he did not use B.T.'s cellphone or computer. He also testified that he never saw C.D. or S.D. use those items either.
- [113] G.D. was not cross-examined.
- A.D.
- [114] A.D. is nine years old. She adopted the contents of her May 29, 2018 video-recorded statement and I ruled it admissible pursuant to s. 715.1 of the Code, without objection. She was seven years old at the time of her statement, nearly eight. During the playing of the recording, A.D. confirmed several times that she was telling the police officer the truth and that the events she was talking about were clear in her mind at the time. In cross-examination, she testified that no one told her what to say to Constable Rose and that she "just figured I'd tell the truth."
- [115] In her statement, A.D. said that she lived with her mom, dad and cousin, B., at the relevant time. She later said B.'s last name was T. She also said that B.T. pretends to be a "troll" and hides down in the basement, that he lived in the basement, and that he had a cat named [name omitted]. She told Constable Rose that she was aware that B.T. was "coming back today" (referring to May 29, 2018). There simply is no question, on the whole of the evidence, that the B. that A.D. refers to throughout her statement is B.T., the accused before the court.
- [116] A.D. was asked if she ever hung out with B.T. She replied, "Sometimes, cause he mostly wants to take pictures of this inside of my vagina." She provided further details about this, including that B.T. wants to take pictures "without permission of my parents" and that she "told him no. But he's like yes, we are doing this." A.D. explained that B.T. had been taking pictures of her since he had been in the house. She expressed negative feelings about his return that day, saying his return is "going to be a long nightmare cause like, he always wants to take pictures."
- [117] A.D. explained that B.T. took the pictures of her with his phone. She said that she did not like that he takes pictures, that he takes pictures of the inside of her vagina and that he takes them in her bedroom. The officer asked A.D. if she had clothes on when he took the pictures, and A.D. replied that he "just like tells me to pull up my skirt without my underwear on. And he takes off half of my pants." On the recording, A.D. can be seen to provide a physical demonstration of this. She also told the officer that the last time B.T. had taken pictures was the last time he was in our house before he left for his mother's. She estimated that B.T. had taken photographs of her 10, 20 or 30 times. She said that she never told anyone about this because B.T. told her "don't tell anyone that I'm taking pictures of your vagina."
- [118] The officer asked A.D. if she was scared of B.T. She said she was not and that "it's just an ordinary thing that happens." She thought what he was doing was wrong because he was "always taking pictures of my insides."

- [119] A.D. said that B.T. also "smacked" her in her "buttocks" with his hand, but that he did not touch her vagina.
- [120] Using a diagram that had been provided by the police officer, A.D. also said that she had seen B.T.'s "mystery??" one to three times. She indicated on the diagram that his "mystery??" was a penis. She said that when she saw it, they were in the bedroom and B.T. was "shaking" it.
- [121] A.D. also told the officer that B.T. had touched her once with his penis. When asked what he did when he touched her with it, A.D. said that "he's just like literally, literally was trying to stick it in here, but it didn't work." Constable Rose asked her, "How come it didn't work?" and A.D. replied, "So 'cause my body's not old enough. My body's only seven just like me." When she said this, A.D. made physical gestures that made it clear she was referring to vaginal penetration.
- [122] A.D. went on to explain that B.T. told her they would have to continue this activity, him attempting to insert his penis in her vagina, in the future. She said that he told her, "now every day, not every day, like, every Saturday. We have to try and stick the -- his mystery into this." When she said this, A.D. pointed to the vagina on the female diagram in front of her on the table. She said that B.T. had "been trying to put it in" and that "it hurts". She further said that she told B.T. "no", and that he replied, "We're going to do this, even if you say no."
- [123] When asked how many times B.T. had tried to penetrate her, A.D. told the officer, "Last Saturday. No, the Saturday before that." She explained that her parents were at a tournament at the taekwon-do school and that she was at home with B.T. getting into her bathing suit because "grandpa was taking me to the water park" and that her grandpa was waiting outside when this occurred.
- [124] In cross-examination, it was suggested to A.D. that B.T. did not take the pornographic photographs of her. A.D. denied this suggestion and testified that B.T. would "do anything to lie and cover up" and that he "tells lies to try and not get in trouble." It was also suggested to A.D. that someone else took those pornographic pictures of her. A.D. replied, "No, I saw him take those pictures with my own two eyes." When it was suggested to her that it was her mom or dad that took those pictures, A.D. incredulously replied "no" and offered that her cat [name omitted] did not take the photographs either.
- [125] A.D. testified in cross-examination that she had never seen her mom with B.T.'s cellphone and that she had never seen anyone but B.T. using B.T.'s computer.

C.D.

- [126] C.D. testified that B.T. is his younger cousin, younger by about a year and a half. He explained that he, S.D. and A.D. lived with his father G.D. in [house number omitted] for a time. While they lived there, B.T. moved in with them during August 2015. Although he was uncertain about specific dates, he explained that they all (C.D., S.D. A.D. and B.T.) lived with G.D. for about a year until they all moved next door to [house number omitted] B.T. set up

his bedroom in [house number omitted] in the basement and continued to live with them until the time of his arrest.

- [127] C.D. was taken to the photographs of [house number omitted] taken by police and identified various rooms, including B.T.'s bedroom in the basement and B.T.'s belongings, including the Computer.
- [128] C.D. recalled that B.T. had the Computer when he first moved in with them at [house number omitted]. B.T. told him that he had ordered all of the parts and built the Computer himself. C.D. testified that the only person he ever saw using the Computer was B.T. He had no recollection of ever using the Computer himself. He recalled B.T. playing videogames, watching YouTube videos, accessing the internet, and listening to music on the Computer. He recalled playing a multiplayer game with B.T., where B.T. would play using the Computer and C.D. would play next to him using his own laptop computer. C.D. testified that B.T. used a television as his computer monitor and that he had seen B.T. using the Computer "a lot" and "pretty much all the time."
- [129] C.D. testified that he was aware that one needed a password to log onto B.T.'s computer, because he had seen B.T. "booting up" the Computer and had seen a lock screen come up where a password was required. C.D. testified he did not know the password.
- [130] C.D. testified that B.T. had an LG G5 cellphone and that he had it on him all the time. He observed that the cellphone was usually in B.T.'s pocket. He had never used B.T.'s cellphone and never seen anyone other than B.T. using it. He agreed that B.T. would sometimes leave his cellphone on B.T.'s bed downstairs when he came upstairs to use the washroom. He was not aware of B.T. bringing his cellphone upstairs, but agreed that this was possible.
- [131] C.D. was shown the images extracted from the LG Cellphone and identified images of G.D., of B.T.'s cat [name omitted], B.T., A.D., and B.T.'s mother, and of A.D.'s bedroom.
- [132] C.D. testified about the circumstances of A.D.'s disclosure to him on Sunday, May 27, 2018, and how that led him to report the matter to police the next day. He testified that the only thing he told A.D. to do when speaking with the police was to be honest.
- [133] C.D. also testified about his observations of B.T. and A.D. during the time they all lived together. He described how A.D. watched cartoons in B.T.'s downstairs bedroom, for about 30 to 60-minute time periods and how B.T. spent time in A.D.'s upstairs bedroom a couple times a week for five to ten minutes at a time. He saw B.T. take A.D. on a walk a couple of times. In cross-examination, he testified that B.T. was in A.D.'s room when he should not be more often than he should be, and that there was no reason for B.T. to be in A.D.'s room at all. He agreed that A.D. never seemed to be reluctant to be around B.T., nor did she ever complain about him.

- [134] C.D. also testified about B.T.'s habits. He saw that B.T. usually stayed at home, other than when he attended a regularly scheduled gaming night on Friday nights, went to taekwondo, or went out with G.D. for some reason. He noted that B.T. made trips to his mother's home in [location omitted], about once a year.
- [135] C.D. was also asked about his relationship with B.T. C.D. testified that he is aware that B.T. is autistic and, to his knowledge, was diagnosed with Asperger's Syndrome. C.D. described his relationship with B.T. as "relatively good". He explained, like most families, they had their disagreements, but that they got along. He could not think of any particular disagreement or source of conflict during the nearly three years B.T. lived with them.
- [136] In cross-examination, C.D. was asked about his observations of the relationship between S.D. and B.T. He testified they never really got along because their personalities clashed. B.T.'s residency was an item of discussion between the three of them. C.D. explained that it was always the plan that B.T.'s time with his family would be temporary and that B.T. would find another place to live. C.D. recalled one time when this topic became an argument. He said that B.T. threatened to move out, but warned C.D. and S.D. that they would not like it because he was helping them with their rent.
- S.D.
- [137] S.D. met B.T. sometime around the time that she and C.D. were married in 2003. She testified that she, C.D., A.D., and B.T. moved from [house number omitted] to [house number omitted] in July 2016. The four of them lived there together until B.T. moved out at the end of May 2018. She testified that B.T. lived in the basement, and identified the area from the police photographs that are before me.
- [138] S.D. testified about the events that caused her and C.D. to go to police. She described that on Saturday, May 26, 2018, C.D. was upstairs asleep and that she and A.D. were on the main floor of their house. She was in the kitchen when she heard A.D. and B.T.'s voices coming from the living room area. They were talking in low voices. She heard B.T. say, in part, something about what would happen if she said anything or told anyone. His tone of voice was low and to S.D. sounded "somewhat threatening". S.D. was clear in her evidence that what she was relating was not verbatim. These were not B.T.'s exact words, but rather the gist of what she overheard him say. She could not see B.T. and A.D., and could not hear if A.D. responded to what B.T. had said. S.D. told C.D. about what she overheard when he woke up.
- [139] S.D. testified that she took B.T. to the airport later that afternoon for his trip to visit his mother. C.D. later related to her what A.D. had told him and they ultimately went to police. She testified that the only thing she told A.D. about talking to the police was to tell the truth.

- [140] S.D. was asked about B.T.'s interactions with A.D. She testified that B.T., to her observation, would "find reasons" to be upstairs when A.D. was changing. He would roughhouse with her. She saw that A.D. spent time with B.T. in his bedroom to watch movies and TV once or twice a month, for up to two hours at a time. She saw B.T. take A.D. for walks around the neighbourhood and he occasionally babysat her, maybe once or twice a month, maybe for an hour or two.
- [141] S.D. testified about her observations of B.T. She explained that she went into the basement area to do laundry and access the seasonal storage, but would not go into B.T.'s bedroom area and his personal living space if he was not there. Occasionally, when he was there, she would have a word with him. When she saw him there, she observed him to be listening to music, playing on his computer, watching shows, or playing videogames. To her observation, B.T.'s computer was the "most common thing" that B.T. used. S.D. denied ever using B.T.'s computer. She believed it was password protected and did not know the password. She testified that she had never seen anyone other than B.T. using the Computer.
- [142] S.D. also testified about B.T.'s cellphone. She believed that he had an LG cellphone, either a G4 or G5. She saw him using it "all the time" to read novels, use app games and call his mother. To her observation, he carried it in his pockets. S.D. denied ever using B.T.'s cellphone and testified that she never saw anyone other than B.T. using it. In cross-examination, S.D. denied that B.T. frequently left his cellphone around the house. To her observation, it was never far from him.
- [143] S.D. was also asked questions about her relationship with B.T. She said they got along most of the time, but that they did not always agree on things and that sometimes led to arguments, such as when they both were using the kitchen to make separate meals. She, like C.D., understood that B.T.'s residency with them was to be temporary. She explained that B.T. paid \$360 per month for rent and his share of utilities. This extra income enabled them to afford to live in that home. In cross-examination, S.D. agreed that she and C.D. had discussed asking B.T. to move out and both agreed that their finances were now such that they could survive without his financial contribution. She understood from B.T. that B.T. was on a wait list with B.C. Housing.
- [144] In cross-examination, it was suggested to S.D. that B.T.'s presence in the house was a serious issue between her and C.D., and that she had "hit upon a plan" to get B.T. out of the house. It was suggested to S.D. that she was the one who took the pornographic photographs of A.D., installed them on B.T.'s computer, and then convinced A.D. to tell police that it was B.T. who took the pictures. S.D. denied these suggestions.

B.T.'s Statement to Police

- [145] The Crown also introduced B.T.'s statement to the police. B.T. exercised his right to silence regarding the allegations against him, but he did speak freely to the officer on other matters. He discussed many aspects of his life, including his living arrangements, his interactions with A.D., the LG Cellphone, the Computer, his taekwon-do, and other activities.
- [146] With respect to his living arrangements, B.T. told police that he had lived in Prince George with C.D. and S.D. and their seven-year-old daughter in [location omitted] for the last two to three years. He said that he sleeps in the basement beside the laundry room. He told the officer that he knew where A.D.'s bedroom was located in the house, offering that her room was usually a "pigsty". He said that he was occasionally upstairs in the residence for various purposes and had not been told not to go into A.D.'s room.
- [147] With respect to contact with A.D., B.T. told the officer that he had been in A.D.'s room with her. He also said that he had only been alone with A.D. once in the past year. He agreed that he hid in A.D.'s closet, but said his purpose in doing so was to scare C.D. He said that he gave A.D. hugs, but they were by the edge of her bed by the entrance to her room, that he would stand in the doorway or sit by her bedroom door.
- [148] With respect to the Computer, B.T. explained that it was custom built by him and password protected. He described his bedroom layout in the basement and explained how he would lay on his bed to play the Computer. He said he liked to play on it in his spare time, that he had a computer, his TV, and videogames. B.T. also told the officer that he generally kept to himself, that A.D. came downstairs rarely, that his cousin came down to say hi to him, and that his cousin's wife came down two days a week to do laundry.
- [149] B.T. said that C.D. would not know the password to the Computer. He agreed that C.D., S.D., and A.D. would not use the Computer. He said that he keeps to himself in the basement, playing on his computer with videogames, watching anime, and reading books. He explained that he did not care for social interactions, and that he spent time with acquaintances once a week to play Magic, had never had a girlfriend or a boyfriend, plays his games and does nothing else.
- [150] B.T. also discussed the LG Cellphone. He told the officer that he did not have any other phones and that he had obtained the LG Cellphone in the past month or two because his other phone died. His previous phone, he said, was an LG G4, and he now had an LG G5. He told the officer that he had no pictures of A.D. on his cellphone. He said that he had "googled" child pornography law.
- [151] B.T. also said that he views regular and animated adult pornography, whatever is available. He explained that he goes to whatever site his Google search comes up with and normally streams rather than downloads. He said that he downloaded pornography once using a P2P service, that it looked like child pornography so he immediately purged it. He later

indicated downloading adult pornography more than once, saying "at times". He also stated that the title of the file somehow changed mid-download and that he tries to avoid child pornography. He indicated that he had deleted material from his computer.

[152] B.T. also explained to the officer that he had just returned from [location omitted] where he was visiting his mother, as his mother had fallen two weeks ago. He had flown there to see her.

[153] B.T. discussed various aspects of his life with the officer, including that he attended a taekwon-do club in Prince George and that he had a yellow belt. He also discussed that he liked videogames and anime.

[154] I will discuss other aspects of B.T.'s statement when I assess his evidence.

The Defence Case

B.T.

[155] B.T. testified that he has a grade 8 or 9 education and is currently 36 years old. He explained that he was diagnosed with Asperger's Syndrome when he was 14 years old. He explained that he was on medication for this condition for a while, but explained that he has not used the medication for several years. He has not been under a doctor's care since he was about 18.

[156] B.T. described the effect of his condition. He said that it causes him to think, act, and respond differently from others. He explained that it takes him longer to learn things and causes him difficulty in social situations. He feels that he does not interact well with others. He explained that he has been receiving disability benefits as a result of this condition since he turned 19.

[157] B.T. testified that he moved to Prince George from the [location omitted] in August 2015. His cousin, C.D., and uncle, G.D., helped him move. He confirmed that he initially moved in with them in [house number omitted] and then moved to [house number omitted], where he moved into the basement. He confirmed that the items shown in the police photographs of that space belonged to him.

[158] B.T. testified about his cellphone. He confirmed the LG Cellphone was his and that he had it for about two to three months before his arrest. He testified that he took photographs with the LG Cellphone that included photographs of his cat, his uncle's cat, and of his mother, depicting the injuries she suffered from a fall. He said that he never locked his phone and that it did not require a password. He testified that it was not always on his person and recalled leaving it charging in the main living room on a rocker when he was doing something in the kitchen or going to have a shower. He testified that he forgot it at home once or twice for two or three hours when he went out.

- [159] B.T. testified that he and C.D. got along pretty well, but he and S.D. never really did get along. He said that he and S.D. were civil, and kind of ignored each other. He recalled two confrontations with S.D., one where she complained about the cleaning product he used on the downstairs bathroom toilet, and the other pertaining to sparring that he and C.D. had done in taekwondo. He testified that they had no disputes about her wanting him to leave, nor did C.D. ever say anything to him about that either.
- [160] B.T. testified about the Computer. He confirmed that it was password protected, but said that the way he had set it up was that unless he shut it down, it would go to a screen saver and all that was needed to access it was to "wiggle the mouse". When he left Prince George to go to his mother's on Saturday, May 26, 2018, he said that he shut it down.
- [161] B.T. testified that he did not know child pornography images had been taken with his cellphone and did not know child pornography images were on his computer. He said that if he took any photographs of A.D. at all, they were of her holding his cat or with her parents in the living room. He said that he had never seen the child pornography found at Exhibits 3 and 4 before this trial, and denied taking any pictures of A.D. displaying her vagina. He said it was "news to me" when he heard Mr. de Pass testify about the photographs that were found to have been deleted from his cellphone.
- [162] B.T. denied ever being alone with A.D. in her room. He testified that if he ever went into her room, he made sure S.D. and C.D. (or both) were in the room. He only stood at the door to "say good night to the kid". He recalled one occasion where he hid in A.D.'s closet in order to scare C.D.
- [163] B.T. was not asked in examination-in-chief about the events of the May long weekend or whether he tried to penetrate A.D.'s vagina with his penis. I will discuss aspects of his cross-examination, where he did provide evidence on these topics, when I assess B.T.'s evidence.

Analysis

- [164] I commence my analysis by first finding that I do not believe the accused, nor does his evidence give rise to a reasonable doubt.
- [165] B.T.'s evidence was no more than a blanket denial of most of the allegations which, when considered in light of the totality of the evidence, is simply incapable of belief. While B.T. certainly does not have to prove anything, his "theory" that S.D. somehow framed him by taking these pornographic pictures of A.D. and convincing her to lie to police about him taking them and trying to have intercourse with her, all in order to get him out of their house, is simply preposterous and without any foundation in the evidence or in the absence of evidence.
- [166] B.T.'s credibility was significantly undermined in cross-examination. In general I find his evidence lacked balance, some aspects were internally inconsistent and others were simply implausible.

- [167] Balance exists when a witness shies away from exaggeration or minimization, admits memory frailties, admits personally difficult facts, or credibly acknowledges weaknesses in their evidence. A balanced witness does not answer questions strategically, in the sense that they answer the questions asked and do not attempt to unreasonably control the narrative. They do not appear to have an agenda given the way they testify. They are not evasive.
- [168] B.T. was not balanced, in all of these ways.
- [169] B.T. tried to minimize aspects of his evidence in an obvious attempt to distance himself from A.D. and any opportunity he would have had to make child pornography of her. When questioned in cross-examination, he was very defensive and gave inconsistent or implausible answers to try and retain that minimization.
- [170] For example, in examination-in-chief, B.T. testified that he was never alone with A.D. in her bedroom. He said that if he ever went in there, he made sure that S.D. and C.D. (or both) were in the room, that he only stood at the door to "say good night to the kid". When his counsel reminded him about perhaps hiding in her closet once, B.T. admitted he had done that, but offered that it was done on the spur of the moment in order to scare C.D. He also added that on that occasion he recalled walking past S.D. into A.D.'s room so that S.D. was aware that he was in there. B.T. left the distinct impression after examination in chief that he had only been in A.D.'s bedroom alone on that one, very brief occasion.
- [171] In cross-examination, B.T.'s evidence changed and he admitted to two other occasions when he was alone in A.D.'s bedroom with her. At first, he confirmed that he had never been in her bedroom alone, except for the one time he hid in her closet to scare C.D. He said he did this out of concern for A.D.'s privacy. When pressed, he admitted that he did help A.D. once get something off a shelf. A short time later, he reasserted that he definitely never went into her room "unattended", adding that he "made sure of that". Later still, he testified that during the weekend of the taekwondo tournament in May 2018, he got something off the shelf from her closet for her. He could not recall what the item was. Later yet, when an inconsistency with his police statement was pointed out, he testified that A.D. never asked him to get stuff from her room.
- [172] B.T.'s insincere efforts to distance himself from being in A.D.'s room at all continued when he was shown photographs of her room in cross-examination. When asked if particular photographs were of A.D.'s bedroom, he responded with answers like, "looks like it from the very little time I spent in there" and "from what I remember of A.D.'s bedroom" and, when shown a photograph of A.D.'s bed, he said it looked like it from the odd times that he "stuck my head around the corner". When asked about A.D.'s belongings in her room, B.T. agreed to things using very reluctant language, such as "from what I understand", "from what I saw the couple of times that I went in to say good night when S.D. or C.D. were in there", often adding that he never went in by himself without being asked. Much later in cross-examination, B.T. testified that he never paid attention to the contents of A.D.'s room.

- [173] On this topic (his time alone with A.D. in her room and his familiarity with her bedroom and its contents), B.T.'s evidence in examination-in-chief not only differed from his evidence in cross-examination. Both versions differ from what he told Constable Rose.
- [174] Constable Rose asked B.T. what A.D.'s room looked like. He described it in detail, saying that it is "usually a pigsty" with "stuffies" and "everything all over the place". He recalled that she had a radio, a lamp and an alarm clock. He described the layout of her room, the location of items in it relative to other items, including her bed, her "toy cat chest thing" with all the stuffies, a closet, a dresser, and a desk. When this obvious inconsistency with his in-court testimony was put to him in cross-examination, B.T. offered a most implausible explanation, saying that the details he told Constable Rose were what he saw out the corner of his eye and was based on what he heard the room had in it.
- [175] Constable Rose also asked B.T. about whether he had been in A.D.'s room with A.D. He replied "yes". When asked what he usually did there, he provided a few examples again, revealing inconsistencies with his in-court testimony. He talked about the occasional time he would give her a:
- bad time the fact that her room is clean
- Like, oh yeah, it's clean, it's clean. Ah just give her a hug, good hug and kiss goodnight or that's it. Or if she needs help pulling something down, pull it down. Leave.
- [176] Without prompting, B.T. then said, "if she needs help getting something and I'm the only one there she comes for help. Asks to get like something on top of her closet or help looking for something." He offered that he would "help find that, pass it to her and leave and go downstairs."
- [177] As another example, B.T. attempted to minimize the nature and extent of his general relationship with A.D. as well. He testified about living with A.D. and her parents for nearly three years. He was at home a lot. He did family activities with them, such as taekwondo and swimming. He played games with A.D., watched TV and movies with her in his bedroom, took her for walks, and watched her at playgrounds. He rough-housed with her and they "bugged" each other. He told Constable Rose she was a "good kid" and had an "enjoyable personality". Despite all of this, when asked in cross-examination about his relationship with A.D., B.T. testified that he spent only a little bit of time with her, had no issues with her, that from the little he knew of her, she seemed to be a good kid and that he "didn't mind her." He testified that he was not affectionate with her, that they "got along", but that he did not go out of the way to care for her. He admitted to showing affection in the form of a hug or kiss goodnight, but qualified his answer with "if I did" or "but it would always be in the presence of one or both of her parents".

- [178] Later in cross-examination, when asked about the whispering S.D. overheard on May 26, 2018, between him and A.D., B.T. denied it, responding, in part, that he "barely associated" with A.D. Later yet, when asked again about whether he had secrets with A.D., he testified that he did not, adding that he "did not associate with [A.D.]", if I did it wasn't no more than five minutes a day other than games in the kitchen or when she came downstairs to watch an episode or a movie".
- [179] When asked in cross-examination about whether he took A.D. for walks, B.T. testified he had done that once and it was "just around the block". When asked if he was sure about his answer, he changed his answer and said that he had done that "maybe twice", "once around the block and once to a park and back". He then admitted to watching her at the park once. When asked if it could have been more times, he replied, "Not to my knowledge, given that I didn't interact with A.D. very much." He then testified that he remembered another time that A.D. was grounded when he took her for a walk. He said that since he needed a walk anyway, he took her, but added, for reasons that seemed quite unclear, that he texted S.D. along their route.
- [180] B.T.'s evidence about the time he spent with A.D. was inconsistent with the evidence of C.D., who testified that A.D. would go down to B.T.'s room and watch cartoons for 30-60 minutes at a time and B.T. would go upstairs to A.D.'s room and spent five to ten minutes with her a couple of times a week. It was also inconsistent with S.D.'s evidence, whose evidence I accept, that B.T. would find reasons to be upstairs with A.D. when she was changing, that he would roughhouse with her, and that she would go down in his bedroom to watch movies or TV once or twice a month up to two hours at a time.
- [181] All of this inconsistent evidence was a clear attempt by B.T. to minimize his relationship with A.D. and to untruthfully distance himself from the suggestion that he would have opportunity to be alone to do the things that A.D. has accused him of doing. It significantly undermined his credibility.
- [182] Another area of cross-examination that undermined B.T.'s credibility was his evidence about why he was upstairs with A.D. on the May 2018 long weekend. This was the event described by A.D. as the time that B.T. tried to vaginally penetrate her with his penis. This was the event described by G.D.
- [183] B.T. did not testify about this event in examination-in-chief, but was asked extensively about it in cross-examination. In cross-examination, he confirmed that he returned home from the taekwondo tournament with G.D. and A.D. that day. He testified that when he went inside the house, he went downstairs. He did not know what A.D. was up to. He said that A.D. called him to come upstairs to get an item down in A.D.'s bedroom. He testified that he went upstairs to the top floor and into her bedroom, retrieved the item for her, and left the room quickly. He testified that he then sat halfway up the stairs, between the top and main floors, waiting for A.D. to leave so that he could have a bath.

- [184] While he sat there, B.T. said that A.D. ran into the bathroom past him. He could only see her out of the corner of his eye, but said that she was "butt naked". He said he turned his head away and closed his eyes, and said "Geez kid, put clothes on". He testified that A.D. then left the bathroom and a few minutes later he heard knocking at the front door. In response to the knocking, he decided to go up the stairs, into the bathroom, rather than going down to answer the door. He looked out the bathroom window and saw it was G.D. G.D. asked what A.D. was doing. B.T. says he replied that he did not know, so he hollered at A.D. and asked her if she was ready yet. A.D. then went downstairs. He then locked the door and "that was that". B.T. testified that he then "gave up on having a bath and went downstairs to lay down to try to get some sleep". B.T. did not testify about any conversation with G.D. regarding G.D.'s concerns that he was upstairs with A.D.
- [185] When pressed in cross-examination about whether he had such a conversation with G.D. that day, B.T. testified that he could not really remember. He said that G.D. "might have mentioned something" and that he told G.D. that he was getting something upstairs. Later yet, B.T. testified that he did not remember the conversation where G.D. expressed his concerns about him being upstairs. When asked if he remembered telling G.D. that A.D. was changing, he then testified, "If anything, I would have said I saw her running to the bathroom. I would have explained she asked me to go upstairs to get something."
- [186] During this area of his testimony, I was left with the firm impression that B.T. was making it up as he went along. His explanation for being upstairs with A.D. was also, as the Crown submits, self-serving and does not accord with common sense in all of the ways outlined by the Crown in her written submissions at pages 13 and 14.
- [187] Another area where B.T.'s credibility was undermined was his evidence about his adult pornography habits. Of course, B.T.'s adult pornography habits are entirely irrelevant to the charges he faces. The relevance lies in his familiarity with internet streaming and downloading.
- [188] In B.T.'s statement to police, he was quite open about his familiarity with internet streaming and downloading in this context. However, in cross-examination, he distanced himself from what he told Constable Rose and tried to make it seem that he was not. To Constable Rose, he said that he "snoops sites, regular and animated". He confirmed that it was Japanese anime or hentai. She asked him if he accessed free streaming sites like Pornhub and YouPorn and B.T. replied, "Whatever is available. Just look, look, look, bored, look, bored, look, bored, not interested, just -- just watch, check, bored, done."
- [189] Constable Rose asked B.T. if he had any preferences in his adult pornography, to which he replied he did not watch certain types but anything else. When asked if he had a site he frequented, B.T. replied that he goes to "whatever is available. Whatever Google search comes up with", "whatever fits the mood at the time". He told the officer that he would just "start with that and just go through the site, and just go to the home page and just pick a link on one of their sites and just go through".

- [190] Constable Rose asked him if he used any downloading sites. B.T. said that he normally does not download, that he normally streams stuff, and that if he does download stuff, it is usually anime. He said the he usually uses UTorrent to download. He said he does not like to download pornography and talked about a time when he downloaded it once and started checking out the video, and "I'm like, yeah. No, go away, I don't like this." He also talked about trying to download a video category from a P2P service once, Shareaza. He told Constable Rose that he was surprised that it looked like child pornography, so he purged it. He also explained that sometimes he had gone to bed and the preview of something he was downloading was not loaded yet, so it downloaded overnight. When he woke up, it was something he did not want. When asked about just looking at the title, B.T. said that he can, but then "once the file downloads all of a sudden mid like it comes up as one thing but mid-download the title somehow changes". He said he tries to avoid child pornography.
- [191] Constable Rose asked B.T. whether he would Google "little girl pornography" or "little boy pornography". B.T. replied that if he did Google something like that, he was looking, "just curious what - try and figure out what the law is and stuff like that." He informed the officer that he had done that once or twice before.
- [192] In cross-examination, B.T.'s evidence on this topic differed. He testified that when he told Constable Rose that he "snooped" adult pornography sites, he did not mean that he watched the pornography. He testified that he had watched it only years ago and found it boring. He testified that he only downloaded Shareaza to fix "magnet links" and used FrostWire to find music, but it did not work. He said that he only used UTorrent to download celebrity pornography. He denied ever accidentally downloading child pornography. He denied deleting child pornography from the Computer. He denied downloading files with PTHC (pre-teen hard core) in the title. He said that over ten years ago, he had downloaded one video, saw the face, and stopped the download. The person, he said, could have been 18 or 19 years old.
- [193] All of this is quite inconsistent with B.T.'s police statement and is inconsistent with all of the data found on the Computer; a computer on which B.T. was, I find and I will explain shortly, the only user. In this area, I was again left with the impression that B.T. was making it up as he went along in an effort to distance himself from familiarity with these topics.
- [194] I also found B.T.'s answers were often non-responsive to the question asked, in the sense that he would add information that was unnecessary to the answer. He did this quite often, demonstrating a not-so-subtle effort to answer questions strategically in order to portray himself in what he thought might be a better light and to somehow the control the narrative.
- [195] B.T. was also evasive and, at times, argumentative. This was particularly so when he was confronted with his prior inconsistent statements. As an example, at the beginning of his cross-examination, he answered questions about his police statement very easily, recalling aspects of what he said to Constable Rose without even having to refer to the statement

itself. However, when B.T. was later confronted with other, inconsistent aspects of his statement, he became argumentative and claimed memory frailties. In an attempt to explain away obvious inconsistencies, he gave answers which, as the Crown submits, were contrary to the ordinary meaning of the words that he had used.

- [196] Taken as a whole, I find B.T.'s evidence on the material issues incapable of belief. His credibility and the reliability of his evidence has been so undermined that I find his evidence on the material issues to be untrue. I do not believe it and it does not raise a reasonable doubt.
- [197] However, the mere rejection of B.T.'s evidence does not prove his guilt. B.T. is not to be convicted unless the evidence that is given credit by me proves him guilty on each and every element of each offence beyond a reasonable doubt.
- [198] As I indicated at the outset, other than the evidence of S.D. and A.D., no issue was taken with the reliability of any of the Crown's evidence, nor the credibility of the Crown's witnesses. As I indicated earlier, I found all of that evidence credible and reliable. I reach the same conclusions about the evidence of S.D. and A.D.
- [199] A.D. was a remarkable witness. She was remarkable not only for her maturity, but her composure and her balance as a witness. I accept every aspect of her evidence as both credible and reliable. She demonstrated a good capability of understanding questions, of remembering events, and of accurately describing those events in a way that was responsive and clear. Her evidence was consistent, both internally and externally. Internally, she showed no signs of coaching and no inconsistencies were revealed. She used her own words. There were no times that she, as the Crown argues, used adult words or words with which she was unfamiliar. She answered questions in both examination-in-chief and cross-examination in a similar manner - straightforward and direct. Her descriptions were clear and unambiguous. Her evidence was consistent with the evidence of G.D., C.D., and S.D. regarding the events during the day of the taekwondo tournament and in other aspects as well. A.D.'s evidence was consistent with, and corroborated by, the images found on the Computer and the LG Cellphone. She testified that B.T. took pictures of her vagina in her bedroom on multiple occasions and that is exactly what those images reveal.
- [200] A.D. did not demonstrate any bias toward B.T. She had no motive to lie. She was there to tell the truth and I am satisfied, without any question, that she did. She was confronted with B.T.'s theory that someone else, her mother perhaps, took the pornographic photographs of her. Her denial struck me as honest, both from her words she used and her body language. I accept that what A.D. says happened did, in fact, happen.
- [201] S.D. was also a credible and reliable witness. Her evidence was consistent, both internally and externally with all of the other evidence. She denied using B.T.'s cellphone and computer, and even knowing the password to his computer. She denied the suggestion that she framed B.T. I accept her evidence unreservedly.

- [202] There is no foundation in the evidence, or the absence of evidence, to support any consideration of a third-party suspect here, S.D. or otherwise. A.D. was very clear in many ways about who did these things to her. There was no one else staying at the residence who could have done this. Quite frankly, I was impressed by S.D.'s restraint when such a suggestion was put to her. To suggest that, given B.T.'s intense connections to his cellphone and computer, that S.D. had somehow gained access to B.T.'s phone on multiple occasions without him knowing, somehow taken multiple pornographic photographs of her own daughter, somehow downloaded some of those photographs to B.T.'s password-protected computer, and somehow saved them in a folder that B.T. clearly used, again on multiple occasions without B.T. knowing, and then for some reason deleted those photographs from his cellphone, and then somehow convinced her young daughter to lie to her husband and tell him that B.T. had done something, in the hopes of prompting a police investigation that might lead to a warrant and a forensic examination of his computer and cellphone, all for the purpose of getting him to move out of their home or some other unknown purpose, is not only implausible on the evidence, it defies all logic and common sense. I reject it as a possibility utterly and completely.
- [203] S.D., or anyone else, had no motive to come up with such an elaborate and diabolical scheme. Even if S.D. did want B.T. out of the house, as the Crown argues, she had many other options, such as asking him.
- [204] In the end, I agree with both counsel that the Crown's case against B.T. on all counts is overwhelming. I am satisfied the Crown has proven each element of each offence with which B.T. is charged beyond a reasonable doubt. Even on the evidence of A.D. alone, I would convict B.T. of the sexual offences with which he has been charged and with making child pornography of her. With the corroborating evidence of the civilian witnesses and the images extracted from his cellphone and computer that match exactly what A.D. said B.T. did to her and where he did it, the conclusion is all the more inescapable.

Counts 1, 2 and 3

- [205] These counts pertain to the same event. I am satisfied the Crown has proven B.T. tried to penetrate A.D.'s vagina with his penis on one occasion. This event occurred in A.D.'s bedroom on the Saturday of the May long weekend in 2018. A.D., her parents, her grandfather, and B.T. had been at a taekwondo tournament that day. A.D.'s grandfather decided to take her to play at the water park and took her home to change into her bathing suit to do that. B.T. came home with them.
- [206] G.D., A.D.'s grandfather, sent A.D. into her home to change and he went into his own home to wait. B.T. went into the home with A.D. B.T. and A.D. were alone in the home when B.T. took the opportunity try to have intercourse with A.D. When he tried to penetrate her vagina with his penis, A.D. told him no, it hurt her. B.T. told her that they were going to do this, even if she said no. He told her that he would continue to try to penetrate her with his penis on a regular basis. A.D. was seven years old at the time and B.T. knew she was that

age.

- [207] With respect to Count 1, I am satisfied the Crown has proven that during the timeframe alleged, B.T., the accused before the court, intentionally touched A.D. for a sexual purpose I find him guilty of Count 1.
- [208] With respect to Count 2, I am satisfied the Crown has proven that during the timeframe alleged, B.T., the accused before the court, intentionally invited, counselled, and incited A.D. to touch B.T.'s body with a part of her body for a sexual purpose. I find B.T. guilty of Count 2.
- [209] With respect to Count 3, I am also satisfied that the Crown has proven that during the timeframe alleged, B.T., the accused before the court, intentionally applied force to A.D. in circumstances of a sexual nature. I find B.T. guilty of Count 3.

Counts 4, 5 and 6

- [210] Counts 4, 5, and 6 involve the images of child pornography found on the Computer and the LG Cellphone.
- [211] I am satisfied the Crown has overwhelmingly proven that B.T. was the sole user of the Computer, the sole user of the Sadek account (the user account on the Computer), and the sole user of the LG Cellphone. B.T. custom built the Computer. It was located in his living space in the basement of the home he shared with C.D., S.D., and A.D. It was password protected. B.T., a person who does not care for social interactions, mostly stuck to himself in the basement, playing on the Computer with videogames, watching anime, reading books. He spent a great deal of time using the Computer. Other than B.T., the evidence reveals that only S.D., C.D., and G.D. could have had access to the Computer during the relevant timeframe. There is no evidence to suggest that any of them or any other person used the Computer even once. I accept the evidence from all of the witnesses that they did not use the Computer.
- [212] The Computer has only one user account, the Sadek account. On the desktop of the Computer is located a folder entitled "Storage", a folder created by the user. In that folder were a number of subfolders, which I am satisfied were created by the user. Within the Storage folder were found three of B.T.'s résumés, one from 2013, one from 2015, and one from 2016. In that folder was also a subfolder entitled "Anime", which B.T. admitted was his folder. I am satisfied B.T. is the only person who used the Sadek user account. He was the person who created the folders on the desktop.
- [213] The LG Cellphone was seized from B.T. when he was arrested. He admitted it was his cellphone and that he had had it for two or three months at the time of his arrest. Mr. de Pass' examination of the phone revealed, and I accept, multiple user accounts associated to B.T. and multiple personal photographs unique to B.T. and his life circumstances, including of his mother, cat, and others. B.T. recognized several of his email accounts found on the phone. He also acknowledged that he used his cellphone a great deal. Other than him, only

S.D., C.D., and G.D. would have had access to the LG Cellphone during the relevant timeframe. There is no evidence to suggest that any of them used the LG Cellphone, even once. I accept their evidence that they did not use the LG Cellphone. B.T. was the only user.

[214] Turning now to the individual counts.

Count 4

[215] I am satisfied the Crown has proven beyond a reasonable doubt that B.T. knowingly made child pornography.

[216] A.D. testified that B.T. took photographs of her vagina with his cellphone on many occasions in her bedroom from the time that he moved into their home. He told her not to tell anyone what he was doing. He consistently had A.D. pose in a certain way in order to expose her vagina. A.D.'s evidence was entirely corroborated by the pornographic images found on the LG Cellphone and the Computer.

[217] The LG Cellphone contained many child pornography images. Exhibit 4 contains 145 such images, most of which are clearly of A.D., posing exactly how she explained she had posed. These images were not original images, but rather "thumbnails", which means that the original images on the LG Cellphone had been deleted.

[218] I am satisfied that B.T. took these photographs with the LG Cellphone, mostly in A.D.'s bedroom, but in other places in the house as well. He then deleted the images from the phone, not realizing that a thumbcache would remain.

[219] The Computer also contained many child pornography images. Exhibit 3, images obtained from the Computer, contains 107 such images. Over 40 of those are clearly of A.D., posing to expose her vagina in the way that she explained she had done. Most of them were taken in A.D.'s bedroom, but in other places in the home as well.

[220] There are 16 original child pornography images on the computer, found in the subfolder I have described on the desktop. The folder system was created by B.T., the Computer's only user. The metadata from the 16 original images shows that they were taken on three occasions, separate occasions, in May of 2018, and the only LG Cellphone to be connected to the computer was B.T.'s LG Cellphone. Cached images from the LG Cellphone are the same as these 16 original images on the Computer.

[221] All of this clearly and overwhelmingly proves that B.T. used the LG Cellphone to take these 16 original images. He connected the LG Cellphone to the Computer via a USB port, downloaded the images to the Computer, saved them in the subfolder he created on the storage folder system he created on the desktop. Many of these 16 images depict A.D. posing in the manner in which she described B.T. had her pose.

[222] The other child pornography images found on the Computer are cached images. Many of them are of A.D., at different ages, showing her posing the way she described. Others do not appear to be A.D. As Mr. de Pass explained, thumbcache files are system files created

when a user elects to view the contents of a folder's icons in a Windows system. The files contain thumbnail views of the contents of the folder that the user elected to employ the view-icon view. Thumbnail versions of files may remain, I accept, with thumbcache files, even after the source file has been removed or deleted from the system. This is a product of the operating system and thumbcache database working behind the scenes. The average user is not aware of its existence.

- [223] Mr. de Pass opined, and I accept, that this database provides evidence of images that were on the Computer, even though the original images have been deleted.
- [224] There are many thumbcache child pornography images of A.D. found on the LG Cellphone that are the same as the thumbcache child pornography images of A.D. found on the Computer. Constable Rose identified nine examples (see Exhibit 11) and, I find, there are many more examples.
- [225] The evidence points to only one conclusion in this case. B.T. took a large number of child pornography photographs of A.D. with the LG Cellphone. He downloaded them to the Computer and then deleted them from his phone. With the exception of the 16 photographs in the subfolder which B.T. had stored only a short time before the Computer was seized, B.T. had previously deleted the other images from the Computer.
- [226] I am satisfied the Crown has proven beyond a reasonable doubt that B.T. knowingly made child pornography of A.D. during the timeframe alleged. I find B.T. guilty of Count 4.

Count 5

- [227] Based on these same findings and conclusions, I am also satisfied the Crown has proven that B.T. had knowledge and control over the child pornography images of A.D. located on the LG cellphone and on the Computer, and he therefore possessed those images. I find B.T. guilty of Count 5.

Count 6

- [228] I am also satisfied the Crown has proven beyond a reasonable doubt that B.T. accessed child pornography. The Crown has proven that he did so in two ways.
- [229] First, B.T. accessed the child pornography of A.D. after he created the images.
- [230] As I have found, after B.T. made the child pornography images of A.D. on the LG Cellphone, he then knowingly caused those images to be transmitted to himself. He did so when he moved the images from the LG Cellphone onto his Computer and stored them. Mr. de Pass created a spreadsheet of LNK files (or shortcuts created by the Computer's operating system), a spreadsheet of Local File Access files (which tracks files accessed by the user), and a spreadsheet of files in the recycle bin (user deleted files). He then interpreted the information on each spreadsheet containing files associated to the same folder in the file path as the 16 original images of child pornography. From this evidence, I infer and find

that B.T. returned to the folder where the 16 child pornography images were stored by him to view, add, and delete images from time to time.

- [231] Second, with respect to the other child pornography, not of A.D., located on the Computer, I am also satisfied the Crown has proven that B.T. accessed these images as well. In addition to all of the child pornography images of A.D., the Computer also contained, as I explained, cached pornographic images of children that appear not to be A.D. I accept the evidence of Mr. de Pass that he also located P2P sharing software on the Computer, with B.T.'s username of Sadek. This software allows a user, in this case B.T., to look for files on the internet and to download files on his computer. Mr. de Pass located, and I accept, evidence on the Computer that files indicative of child pornography had been on the Computer and then deleted. He also located evidence that files indicative of child pornography had been on B.T.'s Computer in the LNK files and in the Local File Access files.
- [232] Finally, Mr. de Pass testified, and I accept, that he located evidence that numerous files indicative of child pornography were in the recycle bin of the Computer.
- [233] Mr. de Pass opined from all of this evidence, and I accept, that the user of the Computer was accessing and downloading child pornography using P2P file-sharing software. B.T. was the only person who used the Computer. The totality of the evidence proves B.T. accessed child pornography using P2P file-sharing software that he downloaded to the Computer.
- [234] For all of these reasons, I find B.T. guilty of Count 6 as well.

"S.A. Donegan J."

DONEGAN J.

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