

CANADA / JUDGMENT

R. v. Kelleher

2025 BCSC 1522

COURT

Supreme Court of British Columbia

DECIDED

19 June 2025

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2025 BCSC R. v. Kelleher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kelleher,

2025 BCSC 1522

Date: 20250619

Docket: 42510-2

Registry: Port Alberni

Rex

v.

Conor Joseph Kelleher

Before: The Honourable Justice Fowler

Oral Reasons for Judgment

Counsel for the Crown:

A.J. Taylor

Counsel for the Accused:

C.L. Hodson

Place and Dates of Trial:

Port Alberni, B.C.

June 16-18, 2025

Place and Date of Judgment:

Port Alberni, B.C.

June 19, 2025

- [1] THE COURT: Mr. Kelleher stands charged that, from the 6th day of November, 2022 to the 21st day of February, 2023, inclusive, at or near Ucluelet, Province of British Columbia, he did possess child pornography for the purpose of transmission, making available, distribution, sale, advertising, or exportation, contrary to s. 163.1(3) of the Criminal Code, R.S.C. 1985, c. C-46; and Count 2, that between the same dates and in the same location, he had in his possession child pornography, contrary to s. 163.1(4) of the Criminal Code.
- [2] The Crown's case in its entirety was admitted into evidence through written admissions, signed by the accused, Mr. Kelleher, and his counsel. These admissions were made pursuant to s. 655 of the Criminal Code. They were read into the record by Crown counsel. Apart from some minor edits made to the entered exhibit, neither counsel for Mr. Kelleher nor Mr. Kelleher himself challenged the accuracy of what was being admitted.
- [3] After the admissions were filed, Mr. Kelleher elected to testify and was cross-examined. That was the end of the evidence. I start these reasons by setting out some of the fundamental principles of criminal law that apply to all criminal trials and then set out the elements of the two offences, highlighting those elements that are in issue. I summarize the admitted evidence, after which I review Mr. Kelleher's evidence. I then briefly discuss issues arising from Mr. Kelleher's evidence; that is, I review my findings about the credibility and reliability of his evidence. Finally, I set out my overall findings of fact and apply them to the elements of the offenses that are in issue. Finally, I provide my verdict.

The Law

- [4] Mr. Kelleher is presumed innocent of these offences. His plea of not guilty at the beginning of the trial means that the Crown has the burden of proving his guilt beyond a reasonable doubt. Beyond a reasonable doubt, albeit not the same as absolute certainty, is much closer to a certainty than it is to a balance of probabilities. At the end of the day, after reviewing all the evidence, with particular attention being paid to Mr. Kelleher's evidence, I can only convict if I am sure Mr. Kelleher is guilty. Because Mr. Kelleher has testified, the burden of proof is particularly important when considering his evidence. The well-known model direction set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93 (S.C.C.) ensures that the burden of proof is not unwittingly reversed when an accused testifies. It forces trial judges and juries to remain alive to the fact that all an accused need do when testifying is to raise a doubt about their guilt. They do not need to convince the trier of fact of their innocence.

- [5] Therefore, when considering the impact of Mr. Kelleher's evidence, I will apply the analytical framework in W.(D.). If I believe the accused, or, more specifically, if I believe the accused's evidence as it relates to a denial of the essential elements of the offences, I must acquit. If I do not believe the accused, but I am left in a reasonable doubt by it, again, specifically as it relates to the elements of the offences, I must acquit. Even if I reject the accused's evidence completely, I must still determine whether the evidence I do accept proves the charges beyond a reasonable doubt. When assessing the credibility of Mr. Kelleher and the application of my findings of fact arising from his evidence, I must remain mindful of the fundamental principles of criminal law: Mr. Kelleher is presumed innocent, and the burden rests with the Crown to prove, to a very high standard, that Mr. Kelleher is guilty. He is not required to prove his innocence.
- [6] That all being said, Mr. Kelleher, having decided to testify, I assess his evidence in the same way I would any witness. I can accept some, all, or none of his evidence. I must assess the credibility or believability of his evidence without being overly influenced by the manner in which he testified, in other words, his demeanor. The way he looked or sounded while testifying must not unduly impact my analysis.
- [7] This is a circumstantial case, certainly in respect of the elements of the offences that are in issue, being knowledge of the presence of child pornography, and the purpose for any proven possession. I must apply the law as it relates to circumstantial evidence, specifically paras. 37- 38 of R. v. Villaroman, 2016 SCC 33:
- [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: R. v. Comba, 1938 CanLII 14 (ON CA), [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd 1938 CanLII 7 (SCC), [1938] S.C.R. 396; R. v. Baigent, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; R. v. Mitchell, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": R. v. Bagshaw, 1971 CanLII 13 (SCC), [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
- [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.
- [8] I can only convict the accused if having reviewed all of the evidence, including evidence I have rejected and considering the absence of evidence, his guilt is the only reasonable inference.

The Offences

- [9] Given what has been admitted by Mr. Kelleher, I need not set out the elements of the offences in detail. For example, it is admitted that certain devices owned, possessed, and used by Mr. Kelleher contained photographs and videos that meet the definition of child pornography. What is in issue is whether Mr. Kelleher possessed those videos and photographs within the meaning of the criminal law. That is, did he know that child pornography videos and child pornography photographs were on his devices, knowledge being an essential element of possession.
- [10] Finally, in respect of Count 1, section 163.1(3) of the Criminal Code requires the Crown to prove beyond a reasonable doubt that possession, if proven beyond a reasonable doubt, was for one or more of the stated purposes in that section, for example transmission, distribution, making available or sale. Knowledge and the purpose for any possession are the only two elements of the offences charged in issue.

The Crown's Case

- [11] On November 6, 2022, an individual with the Snapchat username K0nur, spelled with a capital "K," and a "zero, n-u-r," uploaded two video files believed to be child pornography between the hours of 2:05 p.m. and 2:12 p.m. using an IP address of 50.98.160.123. The username "K0nur," was associated to the email address [email address redacted], and the date of birth of the account user was February 13, 1989. The accused admits that this is his date of birth and his email address. He also admits that a Snapchat account was installed on a Samsung cellular phone, referred to as device number 3, on January 23, 2022, with the username "K0nur."
- [12] Snapchat is a multimedia instant messaging application whose principal feature is that pictures and messages sent over that platform are only available for a short period of time. Further investigation by a civilian member of the RCMP, Nicole Mize, confirmed that the two videos uploaded to Snapchat fell within the definition of child pornography. A description of these video files was also undertaken by Constable MacDonnell, and he too concluded that the videos contained child pornography. Nicole Mize confirmed that the IP address used to upload the video files was associated to a Telus account in the name of Debra Kelleher, with an address of [Address redacted] Tofino Ucluelet Highway, Ucluelet, B.C. The accused admits that he resides at this address, in the upper floor of a two-suite residence. He resides by himself. Debra Kelleher, his mother, resides in the downstairs unit. The accused's father, Peter Kelleher, lives in a single-story, detached residence on the same property. I understand there is also another individual who lives in a trailer on the same property.
- [13] On February 21, 2023, the RCMP executed a search warrant on the residence. Four items of interest were seized: Device number 1, a Samsung cellular phone located on the desk in front of the television; Device number 2, an Xbox on the desk in front of the television in the

main room; Device number 3, a Samsung cellular phone located on a small table next to a bed in the bedroom; and Device number 4, an Acer laptop located on a dresser under a roll of paper towel next to the television in the main room. It is important to note that none of these devices were stored in a cupboard or a drawer. All of them were located, I infer, where you might expect them to be in a cluttered home if they had been recently used. Moreover, Mr. Kelleher admits he owned all these devices. I have reviewed the photographs taken during the search, and conclude that the two phones, devices number 1 and device number 3 were in plain sight, readily available to use, and the laptop was also in a location where it could readily be available to be used.

- [14] Mr. Kelleher provided the RCMP with the passcode to unlock device number 1. The passcode is a pattern pin, [passcode redacted]. This pattern pin also unlocked device number 3. During forensic analysis of the devices by a Digital Evidence Support Technician employed by the RCMP Digital Forensics Service, it was determined that the device number 3 contained a 16 gigabyte micro-SD card, a small memory card that is removable from the device. This micro-SD card was given the exhibit identifier 3(A).
- [15] During analysis, it was determined that device number 1 contained the following applications: Brendr; Discord; something described as "FB Messenger," which I take to mean Facebook Messenger; Gmail; Google Duo; Skype; Snapchat; TikTok; Tinder; and WhatsApp. Device number 3 contained the following apps: Discord; Grindr; Gmail; Google Meet; Instagram; WhatsApp; and Tinder.
- [16] Although many of these applications are ubiquitous, I am not prepared in the absence of evidence to rely on judicial notice to explain the functionality of each of these applications. No evidence about these apps was tendered by the Crown. Mr. Kelleher testified about his use of Grindr only.
- [17] Device number 3 had a secure folder within its own device memory with the same pattern pin, [passcode redacted]. There is no evidence of any child pornography videos or images being found in this folder. To be clear, there is simply no evidence of what was in that folder, if anything.
- [18] Analysis of all four devices located a total of 533,718 image files. Utilizing automated image analysis software called Law Enforcement Against Child Exploitation (LACE), it was determined that of these 533,718 images, 146 met the definition of child pornography, which is 0.027 percent. Mr. Kelleher has admitted these images meet the definition of child pornography. Notably, it is admitted that:

While there is some variation, they are significantly focused on female children between the ages of five to 10 years old engaged in overt sexual acts or where the dominant characteristic is the depiction of a sexual organ or anal region of the child.

- [19] Of the 146 images, 66 were different, and 80 were duplicates. The 146 images were distributed across the devices as follows: There were no images on device number 1; there were 66 images on device number 3; four images on device number 3A, the SD card; and 76 images on device number 4.
- [20] The 146 images were located in what is described as, "acquired data/media." There is no expert evidence explaining whether this phrase has any special meaning.
- [21] A total of 3,415 videos were located, of which 100 met the definition of child pornography, about three percent. All 100 child pornography videos were located on device number 3, again, in the "acquired data/media". Of the 100 videos, 84 were different, and 16 were duplicates. The description of the videos mirrors that of the images, "significantly focused on the sexual organs or anal regions of female children between the ages of five to ten years."
- [22] The Crown has attached to the admissions what is described as "Type A thumbnail reports" generated by the LACE software. It is admitted that these reports, "detail the file names, file path of where the image was found, deletion status, creation date (according to the metadata of the image), last modified date (again according to the metadata of the image), file size, and the associated device."
- [23] Of the 69 images that meet the definition of child pornography located on device number 3, six have a "full path" that includes the word "hot kid", in quotation marks, and teen. No other full path includes any words or phrases that could be suggestive of the presence of child pornography. The admissions indicate that the file names for some of the category 1 images contain the following terms: hot kid; PTHC, which I understand is an abbreviation, according to the admissions, for "pre-teen hardcore"; and pedo, which is an abbreviation for "pedophilia."
- [24] I have reviewed the file names and the full paths for the 66 images located on device number 3, as set out in the "Type A thumbnail report", and can only locate the phrase, "hot kid."
- [25] I have also reviewed the thumbnail report for the videos on device number 3. Only one video contains a file name, "pedo - PTHC - selected" and multiple video files include a full path that contains the words/phrases, "hot kid" and "teen", all strongly suggestive of child pornography.
- [26] The thumbnail report for device 3A, which was found to contain 4 images meeting the definition of child pornography, does not contain any words or phrases indicative of the presence of child pornography.
- [27] Finally, the thumbnail report for device number 4, the laptop computer, does not contain any words or phrases indicative of the presence of child pornography.

[28] Each thumbnail report also contains columns titled, "Last Access", "File Created" and "Last Modified." Although no expert evidence was called to explain what these phrases mean in the context of images or videos stored on these devices, the accused has admitted that:

The last modified date shows category 1 images were modified between October the 27th, 2022, to November the 16th, 2022, including but limited to line 19 in Exhibit 1, attachment 7.1, being last modified on November the 6th, 2022, at 2:02 p.m., shortly prior to two video files being uploaded to Snapchat from device number 3.

[29] I have reviewed the thumbnail report, and the range of dates for "last modified" is September 20, 2017, to November 12, 2022. The vast majority of the last modified dates for these image files are as follows: September 14, 2022, four image files; September 16, 2022, 30 image files; Sunday, November 6, 2022, has two image files; November 7, 2022, has eight image files; and November 12, 2022, has 15 image files.

[30] It is also admitted that the same video that was uploaded to Snapchat on November 6, 2022, was located stored on device number 3. It is noteworthy that device number 3 did not have the Snapchat app installed when the phone was seized on February 21, 2023.

[31] Of the 100 videos containing material meeting the classification of child pornography located on device number 3, the vast majority indicate a last modified date of between November 6, 2022, and November 15, 2022. One or two video files were last modified on dates in 2015, 2016, 2017, or 2019.

[32] Of the images found located on the SD card, device 3A, none were last modified during the period covered by the indictment. All were between February and April 2021.

[33] Finally, in respect of the images located on the laptop computer, device number 4, 12 were last modified on November 10, 2022. Multiple images are described as being last modified on April 15, 2022, and August 22, 2013.

[34] The challenge is that in the absence of expert evidence, I cannot speculate about what is required to modify a file. For example, does it mean the image was opened and viewed, or simply that the image file was moved within the file storage structure of the device. I simply have no evidence of what human action, if any, is required to modify a file.

[35] The accused also makes the following additional admissions:

A. He had the Instagram app installed on device number 3 using the username, "C0nur". On November 7, 2022, at 5:56 p.m., he used the app.

B. Between October 27, 2022, until November 16, 2022, he was using apps and other features regularly on device number 3.

C. Between 10:45 p.m. and 11:26 p.m., November 6, 2022, (the same date two videos containing child pornography were uploaded to Snapchat), he was using social media on device number 3.

D. Between October 27, 2022, and November 16, 2022, the chat/text feature of Snapchat was used on device number 1 to contact five other Snapchat users.

E. The accused admits that the Snapchat app was installed on device number 3 on January 23, 2022, using his date of birth and the username, "K0ner".

[36] Given that the Snapchat app was not on device number 3 at the time the devices were seized, I infer that Mr. Kelleher deleted the Snapchat app from device number 3 at some point in time. Given that no child pornography was found on device number 2, the only compelling inference is that it was the Snapchat app on device number 3 that was used to upload child pornography videos on November 6, 2022, to Snapchat. The app was therefore deleted at some point after November 6, 2022, prior to the phones being seized.

Evidence of the Accused

[37] Mr. Kelleher testified that he did not put child pornography on any of the devices and did not know there was child pornography on them.

[38] Mr. Kelleher testified extensively about where he had lived prior to moving in 2020 to his current residence on the top floor of the two-storey building on a one-acre property.

[39] He is currently unemployed, having worked at the landfill near Ucluelet up until a couple of weeks ago. Prior to that, he worked at Pioneer Boat Works for three to four years, leaving, as I understand it, in November 2022.

[40] Mr. Kelleher was asked about the devices that were seized. He said that the laptop used to belong to his mother. He testified he could not get it to work; because the drivers were out of date; it would not connect to the internet. Because he wanted to use it to do online courses, he tried to download drivers from the internet onto his cell phone and then transfer the drivers using a USB-cable connection between his phone and the laptop. He tried three to four times over a few weeks unsuccessfully. He said he forgot about the laptop, and it was left under a pile of books.

[41] He was asked about the two phones. He said one was old, not new. It would not hold a charge. To use it, he had to keep the power cord in it. Mr. Kelleher reviewed the photographs attached to the admissions and confirmed that the phone he described as "wearing out and not able to hold a charge" was device number 3. Mr. Kelleher said that he replaced device number 3 with a new phone about two to three years before they were seized in February 2023.

[42] When it became apparent during his evidence in chief that his testimony about phone number 3 being old and unable to hold a charge conflicted with the admissions, I provided Mr. Kelleher an opportunity to review the admissions he had signed with his counsel.

- [43] After a lengthy break, Mr. Kelleher testified further about phone number 3, confirming that in February 2023 when the police attended, he was using it as an alarm clock, and that it had to remain plugged in because it would not hold a charge.
- [44] He was asked how the child pornography ended up on the older phone. Mr. Kelleher described having two phones stolen when he lived with friends in the upstairs of a duplex during a party. Only one of the two phones was a smartphone. Mr. Kelleher testified that he believed whoever ended up with the older smartphone downloaded child pornography, and this synced with his new phone over the cloud. Mr. Kelleher was not able to explain in any meaningful way why this theory did not lead to child pornography being on his other smart phone, device number 1, which was connected to the same account.
- [45] This theory was expanded upon by Mr. Kelleher when he testified about an old phone syncing with a new phone when the SIM card from the old phone is placed in the new phone. The obvious difficulty with this part of the theory is that Mr. Kelleher never had the SIM card from the stolen phone.
- [46] Mr. Kelleher was asked about how child pornography got on the SD card, and he provided an explanation describing how he understands data is dumped from the phone onto the SD card when the phone's memory is filled up: "I think it just automatically starts filling up with the memory once the phone is full."
- [47] In respect of the laptop, Mr. Kelleher testified about using a cell phone to search for drivers for the laptop and then downloading or attempting to download those drivers onto the laptop using a cable connection between the two. In his evidence in chief, Mr. Kelleher did not say which cell phone he was using for this process. However, in cross-examination, he confirmed that he used device number 1 to search Google for drivers because number 3 could not be used. Mr. Kelleher confirmed that the transfer was from device number 1 to the laptop. During the transfer, child pornography must have got onto the laptop.
- [48] When it was suggested to Mr. Kelleher by Crown counsel during cross-examination that there was no child pornography on device number 1, Mr. Kelleher testified for the first time that he had used multiple devices and that he was now testifying, for the first time, that in fact device number 3 was also plugged into the laptop.
- [49] Mr. Kelleher was cross-examined extensively about his evidence in respect of device number 3. He reiterated numerous times that device number 3 was wearing out; only worked when plugged into a power supply; it needed to stay flat; he could not hold it in his hand without it losing power; it had to sit on a flat surface while he would tap it with one hand.

[50] When Mr. Kelleher was confronted with the admissions that he had made that established the extent to which device number 3 was being used, his initial response was to say he was confused about which device was which. After reviewing the photographs, he confirmed that device number 3 was the old phone that he was about to throw out. He confirmed again that he was using it minimally back then and that he could not walk around with it.

Analysis of Mr. Kelleher's Evidence

[51] I find that Mr. Kelleher's evidence is to a very large extent not credible. I do not believe his exculpatory evidence. I do not believe his denials about his knowledge of the presence of child pornography on his devices for the following reasons.

[52] It was abundantly clear throughout his testimony, both in direct examination and cross-examination, that he was hopelessly attempting to minimize as much as possible his use of device number 3 where child pornography was located. His evidence that he used it as an alarm clock, that it had to remain flat, and that he would tap it with one finger, is completely contradicted by his own admissions and the Cellebrite report that documents the extent of when and how the phone was used.

[53] For example, on November 7, 2022, multiple messages were sent and received on the app Grindr, an app the accused described as being used for sexual hook ups, on device 3. I note, too, that intimate photographs were sent from device number 3. While most of these photographs are vetted to remove explicit content, what can be seen clearly shows that the phone was not simply being used lying flat.

[54] In addition, when it was suggested to him that he used apps on phone number 3, he denied it, and yet the exhibits clearly show that he did use apps on device number 3. The admissions confirm this too.

[55] Secondly, he testified he only had two usernames. The evidence, however, clearly establishes in addition to the two he said he used, he also used Chillfun on Grindr, and he also used C0nur on Instagram.

[56] Thirdly, Mr. Kelleher testified that device number 1 was his new phone. He testified that he obtained this phone no more than two to three years prior to February 2023. However, Grindr messages show that he got a new phone approximately one week before November 12, 2022. Despite this, he told the police that his current phone was almost dead and that he has had it for a long time. He also told the police officer that he used his phones until they are dead and not even working, and that he then chucks the old one out.

[57] It is clear from these portions of the statement put to Mr. Kelleher by Crown counsel during cross-examination that he was not being forthcoming with the police about his phones.

[58] Finally, Mr. Kelleher's evidence evolved about which phone or phones he used to search for drivers to download onto the laptop. That evidence is not at all believable.

Analysis

- [59] I have rejected the evidence of the accused. It is not credible. I do not believe his denials, and they do not leave me with a reasonable doubt.
- [60] It is admitted that between 2:05 p.m. and 2:12 p.m. on November 6, 2022, two video files containing child pornography were uploaded from Mr. Kelleher's phone number 3 to Snapchat. It is also admitted that on November 6, 2022, Mr. Kelleher was using social media apps on phone number 3 from 10:45 p.m. to 11:26 p.m. Finally, it is admitted that at 12:48 p.m., about 90 minutes before the videos were uploaded, Mr. Kelleher used phone number 3 to phone his father, and then used this phone again to call a restaurant at 4:27 p.m.
- [61] When phone number 3 was seized by the police, the Snapchat app was no longer installed. It is not known precisely when or how it was removed. However, as I stated earlier, I have concluded it was removed by Mr. Kelleher.
- [62] The evidence does not disclose any use of Snapchat by Mr. Kelleher on any device where child pornography was located. In fact, there is very little evidence that Mr. Kelleher ever used Snapchat. As set out in the admissions, Snapchat was used between October 27, 2022, to November 16, 2022, to contact five other Snapchat users. We do not know how frequently. In addition, there was a message sent from Snapchat on November 6, 2022, at 5:18 p.m. to device number 3 that reads, "Your friends have added you back." The message indicates it was unread. I know nothing more about what this might mean in respect of past Snapchat use.
- [63] The only evidence about Snapchat is that it is a multimedia instant messaging application with a principal feature being that pictures and messages are usually only available for a short period of time. Other than this, I know nothing about how it functions. However, I infer from the fact that pictures and messages are usually only available for a short time, that Snapchat has some automated functionality that allows the app to delete files from your phone. Other than this, I have been told nothing about how Snapchat works.
- [64] In respect of the child pornography that was located on device number 3 and its SD card and the laptop, the evidence does not show that the image and video files have been cataloged, saved in specified subfolders, or otherwise password protected. In other words, there is no evidence the files were organized by some user of the device.
- [65] The quantity of child pornography images was 146 out of a total of 533,718 image files, and as stated earlier, the total number of child pornography videos was 100 out of a total of 3,415 videos. There is no evidence of where the child pornography came from. For example, there is no download or search history indicative of someone searching for child pornography on any of the devices. There is no social media activity consistent with looking for, sharing, or otherwise having an interest in child pornography.

- [66] Most importantly, there is also no direct evidence that Mr. Kelleher viewed any of the child pornography material. I have reviewed the LACE thumbnail reports, but in the absence of expert or technical evidence explaining what "last accessed", "last modified," or "file created" means, I am not prepared to speculate about whether they mean the image or video files must have been opened by a person and viewed.
- [67] I should add there is no evidence that anyone else had access to phone number 3 or, during the relevant time, the laptop.
- [68] There is also no expert evidence to assist me in understanding the functionality of any of the apps present on the phones and whether, for example, material could be sent to the phone without the user's knowledge. While clearly child pornography is present, there is simply no evidence to explain how it got on any of the devices. Again, in the absence of any evidence telling me that it could only have got there through the actions of a user of the phone, I am not prepared to speculate.
- [69] The most problematic evidence against Mr. Kelleher is that we know two files containing child pornography were uploaded to a Snapchat account registered to a username of "K0nur" associated to his email address and his birthdate. While I am satisfied that this is, in fact, the accused's Snapchat account, there is simply no other evidence of this account being used by him. For example, there is no messages requesting the images be sent to somebody else's Snapchat account. There is simply no evidence of how the uploading of these video files was initiated.
- [70] There is no evidence of any kind that suggests Mr. Kelleher has ever shown an interest in child pornography. While that is in no way determinative, evidence that Mr. Kelleher had previously shown an interest in finding child pornography, through, for example, a search history, would be one piece of circumstantial evidence that might assist in establishing that he had knowledge of the child pornography that was on his devices.
- [71] It is important to the analysis that the child pornography images located are an extremely small percentage of the total number of images located. Equally, the videos containing child pornography are a small percentage of the total number of videos located. It is also important that there is no evidence of any organization of the child pornography material. For example, no evidence of any attempt to save the child pornography in a password protected subfile, or, in fact, any specific file at all. In other words, there is no direct or circumstantial evidence that confirms Mr. Kelleher opened, reviewed, viewed, renamed any of the child pornography files such that the inference of knowledge would be irresistible.
- [72] I am left to consider what to make of the uploading of two child pornography video files on the afternoon of November 6, 2022, on a day when we know Mr. Kelleher was using device number 3, the same device where one of these child pornography videos was found stored. Without any evidence from any expert or technician of how Snapchat operates, I am left not knowing whether the uploading of video files from a device always requires human intervention, in other words, actions by a user of the device. I cannot speculate how

Snapchat works. I cannot rely on judicial notice or common sense to bridge this gap in the evidence.

Conclusion

- [73] I reject the evidence of the accused. I do not accept his denials about his lack of knowledge of the child pornography present on his devices as being true, nor does his evidence leave me with a reasonable doubt. However, when I consider the rest of the evidence, that is, the evidence that I do accept, and I consider the absence of evidence explained in these reasons, I find myself unable to conclude that the accused's knowledge of the child pornography on his devices is the only reasonable inference. The evidence leads me to be highly suspicious, and I believe that Mr. Kelleher probably knew there was child pornography on his devices, and he probably uploaded two child pornography videos to Snapchat.
- [74] However, believing something is probable is a long way from being nearly certain. I am unsure of the guilt of the accused, and therefore the Crown has not met its burden of proof to displace the presumption of innocence, and I must acquit.
- [75] Mr. Kelleher, please stand. I find you not guilty of counts 1 and 2 in the indictment. You are free to go.

"The Honourable Justice Fowler"

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