

- *BILL C-2*
AN ACT TO AMEND THE CRIMINAL CODE and THE
CANADA EVIDENCE ACT
(PROTECTION OF CHILDREN AND OTHER
VULNERABLE PERSONS)

Royal Assent – July 20, 2005

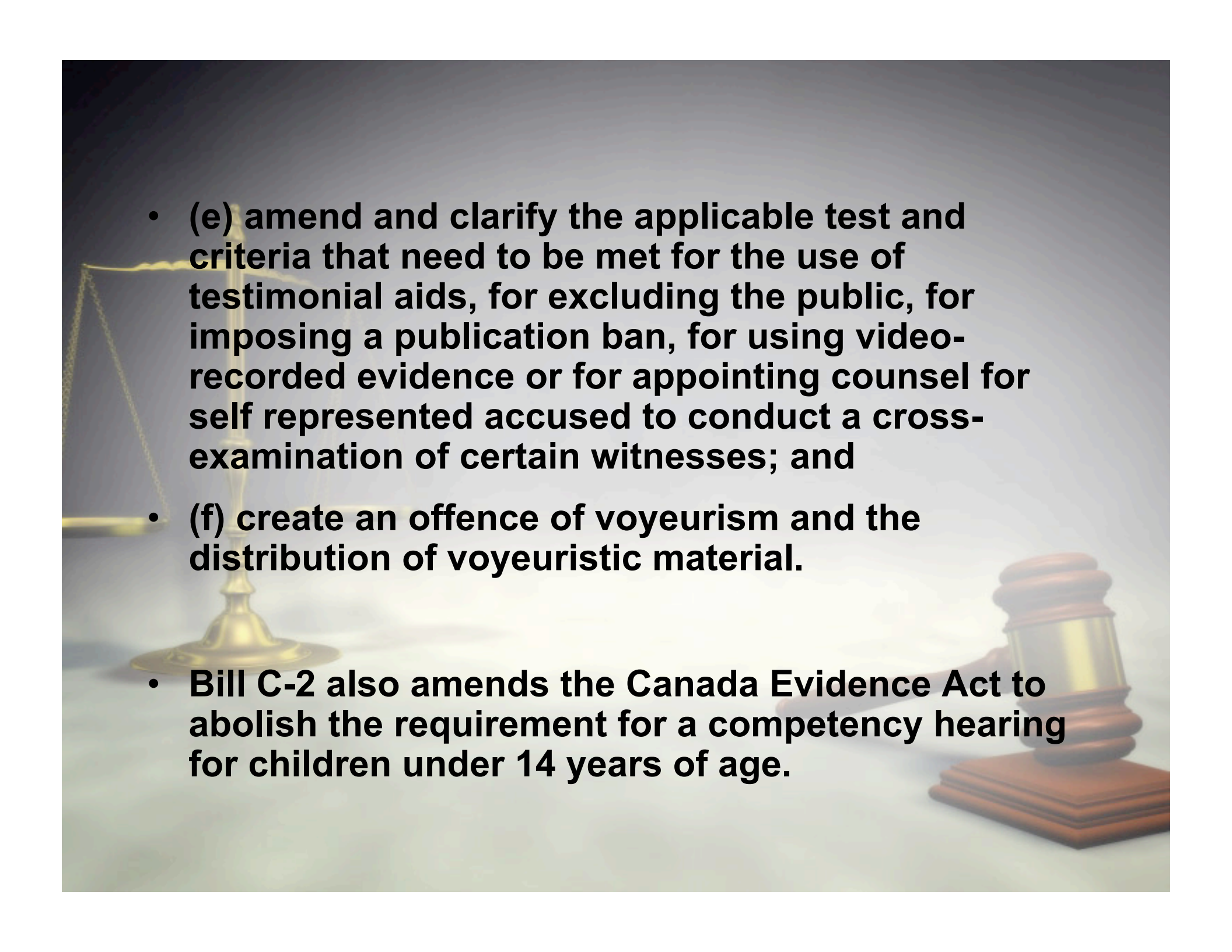
Proclamation dates - November 1, 2005

& January 2 2006

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Bill C-2 Summary

- Bill C-2 amends the Criminal Code to:
 - (a) amend the child pornography provisions with respect to the type of written and audio material that constitutes child pornography and with respect to the child pornography offences, defences and penalties;
 - (b) add a new category to the offence of sexual exploitation of young persons and make additional amendments to further protect children from sexual exploitation;
 - (c) increase the maximum penalty for child sexual offences, for failing to provide the necessities of life and for abandoning a child;
 - (d) make child abuse an aggravating factor for the purpose of sentencing and direct the courts to give primary consideration to the objectives of denunciation and deterrence in sentencing for offences involving the abuse of children;

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- **(e) amend and clarify the applicable test and criteria that need to be met for the use of testimonial aids, for excluding the public, for imposing a publication ban, for using video-recorded evidence or for appointing counsel for self represented accused to conduct a cross-examination of certain witnesses; and**
 - **(f) create an offence of voyeurism and the distribution of voyeuristic material.**
 - **Bill C-2 also amends the Canada Evidence Act to abolish the requirement for a competency hearing for children under 14 years of age.**

Child Pornography Provisions - OFFENCES

- The definition of what constitutes child pornography has been broadened to include the following:

**The addition of a second category
of written material to section 163.1**

- (c) written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under the Criminal Code;
- This means that the written material will no longer only have to “advocate or counsel illegal sexual activity with a person under the age of 18” to fall within the definition of child pornography.

Audio recordings – s.163.1(1)



- (b) any written material, visual representation **or audio recording** that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under the Criminal Code;
- (d) **[new]** any audio recording whose dominant characteristic is the description, presentation or representation for a sexual purpose of illegal sex with children under 18 years.

Advertising as a New Offence

- s.163.1(3) – DISTRIBUTION OF CHILD PORNOGRAPHY
- any one who transmits, makes available, distributes, sells, **advertises**, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, **advertising** or exportation

Child Pornography Sentencing Issues

- Builds into the section that the Court **shall** consider as an aggravating factor the fact that the offence was committed with the intention to make a “profit.”

DEFENCES REMOVED

s.163.1(6)

- “artistic merit”
- “educational, scientific or medical purpose”

s.163.1(7)

- “public good” (defences borrowed from obscenity section)

SEXUAL EXPLOITATION

- Offence expanded to include:
- Section 153. (1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency **or who is in a relationship with a young person that is exploitative of the young person**

“Inference of sexual exploitation”

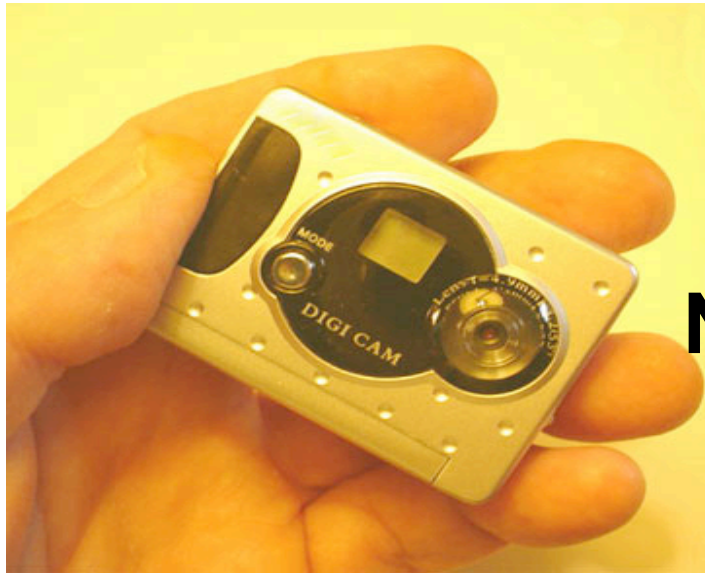
s. 153 (1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship including:

- the age of the young person;
- the age difference between the person and the young person;
- the evolution of the relationship; and
- the degree of control or influence by the person over the young person.



CONSENT

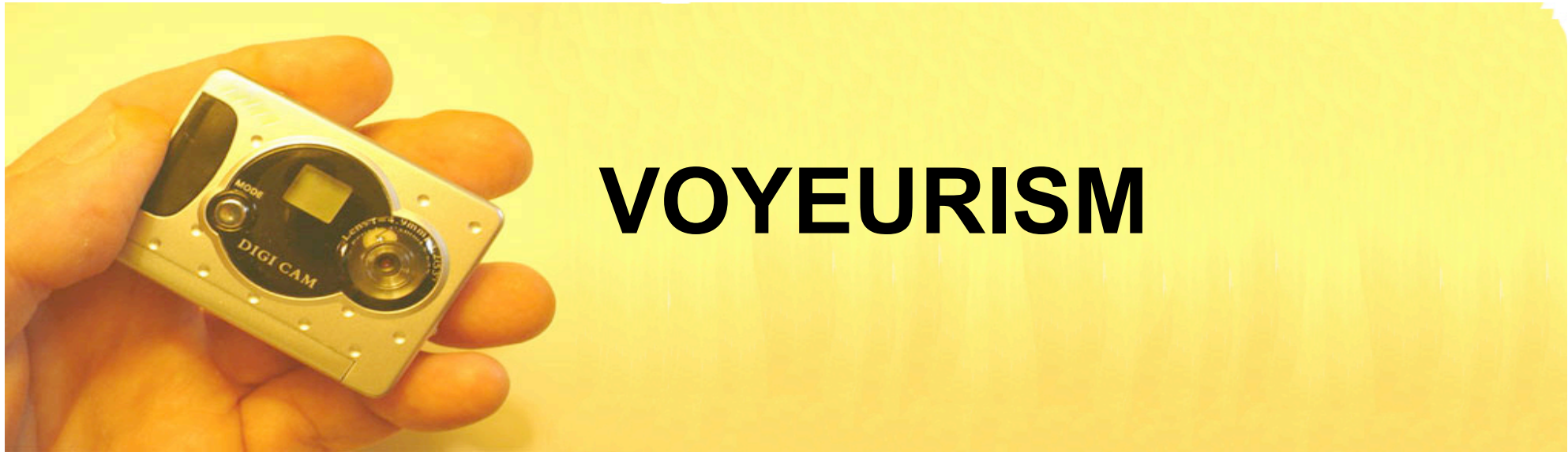
- Consent can be vitiated by an exploitive relationship.
- 150.1 (2) (c) for consent to be valid the accused must not be “in relationship with the complainant that is exploitive of the complaint”.



VOYEURISM

New Offence Created

- **162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if**
 - a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;**
 - b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or such an activity; or**
 - c) the observation or recording is done for a sexual purpose.**



VOYEURISM

- **“visual recording” includes a photographic, film or video recording made by any means.**
- **does not apply to a peace officer acting under a s.487.01 general warrant**
- **It is also an offence to**
 - **print, copy, publish, distribute, circulate, sell, advertise or make available the recording or**
 - **to possess it for the purpose of printing, copying, publishing, distributing, circulating, selling, advertising it or making it available.**
- Hybrid offence
- 5 year maximum by indictment
- 6 months by summary conviction



TESTIMONIAL AIDS

- Exclusion of the public from the court
- Support Person
- Testimony outside courtroom/behind screen
- Cross-examination by accused

Exclusion of the public from the court



- s.486 – now JUST deals with excluding the public
- Test is the same, interest of public morals, maintenance of public order or proper administration of justice
- Defines the “proper administration of justice” The judge must give reasons where the order is not made, for certain offences
- **many offences are the same but adds**
 - child pornography and
 - luring (yet NOT voyeurism)
- **some interesting changes:**
 - s.170 (parent/guardian procuring sexual activity) no longer included
 - bestiality simpliciter no longer included but compelling it or committing it in the presence of a child is included



Support person

486.1 (the old 486(1.2))

- **Where witness is under 18 or has physical or mental disability**
 - raises age of witness from 14-18
 - changes the test from discretionary [“may” make the order without specifying upon what conditions] to mandatory “shall” make the order “unless ... the order would interfere with the proper administration of justice”



Testimony out of court/behind screen 486.2 (the old 486(2.1))

- **Where witness is under 18 or has physical or mental disability**
 - applies in “any proceedings” (not just enumerated/lengthy list)
 - removes word complainant and leaves witness (which includes complainant/victim)
 - changes the test from discretionary [“may” make the order without specifying upon what conditions] to mandatory “shall” make the order “unless ... the order would interfere with the proper administration of justice”
- **[new] Allows the section to apply to ANY WITNESS in ANY PROCEEDING**
 - discretionary test
 - the court may make the order “where necessary to obtain a full and candid account”
 - court to take into account same factors as for support person

s.486.3 – cross-examination by accused

- **Where witness under 18**
 - now applies to any proceedings (instead of just sexual offences, offences under 271,272,273 or “where violence against the person is alleged to have been used, threatened or attempted.”)
 - same mandatory test – shall order it unless proper administration of justice requires otherwise
- **ANY WITNESS – new**
 - in any proceeding
 - on application of any witness
 - D shall not cross-examine witness IF necessary to obtain full and candid account (onus on person bringing application vs. onus on accused for witness under 18)
 - TJ shall appoint counsel for the cross-examination
 - in any proceeding
 - on application of any witness
 - D shall not cross-examine witness IF necessary to obtain full and candid account (onus on person bringing application vs. onus on accused for witness under 18)
 - TJ shall appoint counsel for the cross-examination

VIDEO-RECORDED EVIDENCE (Section 715.1)



Where witness is under 18

- This section has been revised to apply to new technologies and to any proceeding.
- **Where victim or witness has a mental or physical disability that may influence their ability to communicate evidence.**
 - the tape is admissible if the criteria are met unless the admission of the video recording would interfere with the proper administration of justice
 - applies to “any proceeding”
- The Judge or Justice may prohibit any other use of the video recordings in 715.1 or 715.2.



PUBLICATION BANS

s. 486.4 – publication bans Mandatory order for sexual offences and child pornography

- adds “transmitted in any way” – publishing to cover emerging technologies
- “sexual offences” - (1)(a) is a list of offences covered
 - (i) adds voyeurism, child pornography and luring
 - (ii) historical offences - same offences (but helpfully spells out what the name of the old charge was)
 - (iii) other historical offences – same offences
- still covers all offences on information or indictment if one is listed above.
- (2) THE ORDER IS MANDATORY for complainants or witnesses under 18 – and the judge must tell them so

Section 16

Canada Evidence Act

- The old section STILL applies to witnesses over 14 years whose mental capacity is challenged.

NEW SECTION 16.1

FOR WITNESSES UNDER 14 YEARS OLD

- 1) **There is a presumption that a person under 14 has the capacity to testify.**
- (2) **The person under 14 shall not take an oath or make a solemn affirmation.**
- (3) **The evidence of the witness shall be received if they are able to understand and respond to questions.**
- (4) **The party who challenges the capacity of the witness has the burden of satisfying the court.**
- (5) **The court shall conduct an inquiry**
- (6) **The court shall require the witness to promise to tell the truth before permitting the witness to give evidence.**

NEW SECTION 16.1

FOR WITNESSES UNDER 14 YEARS OLD

- (7) No witness shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
- (8) If the evidence of the witness is received by the court it shall have the same effect as if it were taken under oath.



A photograph of a prison hallway with barred doors and cell numbers. The hallway is long and narrow, with a polished floor that reflects the overhead lights. The walls are a muted green color, and the doors are made of metal bars. Cell numbers are visible on the walls, including the number '12' on the right side. The overall atmosphere is institutional and somewhat somber.

SENTENCING - PRINCIPLES

- s.718.01 NEW – when court sentences for an offence involving the abuse of a person under 18 it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.
- s.718.2(a)(ii) – aggravating factors - broken in two parts
 - (ii) abuse of spouse or common-law partner
 - (ii.1) abuse of person under 18 (not restricted to offender's child)



“SUPER” SUMMARY CONVICTION 18 month maximum

- Sexual interference
- Invitation to Sexual Touching
- Sexual Exploitation
- Making Child Pornography
- Distributing Child Pornography
- Possession of Child Pornography
- Accessing Child Pornography
- Failure to provide necessities
- Child Abandonment

NEW MANDATORY MINIMUMS – no more conditional sentences

STRAIGHT INDICTABLE

- | | | | |
|--|---------|-------------------|----------------|
| • Live on the avails of prostitution under 18 | 2 years | | |
| • Obtain/communicate FTP prostitution under 18 | 6 mos | | |
| | | V under 14 | V 14-18 |
| • Parent or Guardian procuring sexual activity | 6 mos | | 45 days |
| • Householder permitting sexual activity | 6 mos | | 45 days |

HYBRID

SUMMARY

INDICTMENT

Making Child Pornography	90 days	1 year
Distributing Child Pornography	90 days	1 year
Sexual Interference	14 days	45 days
Invitation to Sexual Touching	14 days	45 days
Sexual Exploitation	14 days	45 days
Possession of Child Pornography	14 days	45 days
Accessing Child Pornography	14 days	45 days

Case Law Update

- **Internet Luring Cases**

- ***R. v. Jarvis [2006] O.J. No. 3241 Ontario Court of Appeal***

- *-Sentence of 6 mths & 3 yrs probation*
- *-Appeal by both defence and Crown*
- *-22 yr old accused communicating with who he believed was a 13 yr old girl*
- *-communications involved graphic sexual discussions and accused sent pornographic photos of himself*
- *-Crown fresh evidence application dismissed*
- *-OCA held while sentence was lenient, was not manifestly unfit*
- *-specifically held that objectives of general deterrence and denunciation would not have been satisfied by a conditional sentence*

R. v. Legare, [2006] A.J. No. 371 (Alta. Q.B)

- Accused acquitted and Crown appeal launched
- Court held that “dirty talk”, although reprehensible, was not captured by this section
- agreed statement of fact stated that accused never intended to actually meet the victim
- Court held that Crown did not prove that the communication was for the purpose of facilitating the commission of the an offence

R. v. Randall [2006] N.S.J. No. 180 (P.C.)

- 33 yr old Accused spoke to who he believed was a 13 yr old girl on a chat room and arranged a meeting
- arrested at meeting site but claimed only showed up to warn her about dangers of meeting strangers encountered on the internet
- court held there was no air of reality to the defense that offender only wanted to scare the girl
- the Crown need not prove the accused actually intended to carry out the enumerated offence – the Crown does not need to prove the accused intended to lure the child for that purpose (the listed secondary offence need not be realized)
- a conviction can stand if a person intentionally communicates with someone in the prohibited class: “to urge that person to participate in one of the listed prohibited acts, in language that indicates objectively that he wishes that person to take his intentions seriously.”

Child Pornography Cases

R. v. Horvat, [2006] O.J. No. 1673 (OSCJ)

- Court found that copying of child pornography onto DVDs, CD and memory cards constitutes “making” child pornography under s. 163.1(2) -personal use not a defence

R. v. Panko, [2006] O.J. No. 2208 (O.C.J.)

- Accused acquitted of child pornography charges
- Crown appeal filed on June 6, 2006
- Accused brought computer in for repairs
- child porn was found on computer
- trial judge found Crown did not prove possession and that child porn could have been downloaded to the computer without the accused’s knowledge
- Crown failed to establish the essential elements of knowledge and control by the accused of the contents of the computer

R. v. Shelton, [2006] A.B.C.A. 190 (Alta. C.A.)

- Crown sentence appeal from a 2 Years Less a Day conditional sentence
- Appeal Granted -- 15 mths imprisonment substituted
- the accused plead guilty to possession and distribution of child pornography
- accused collection was labeled as sophisticated and extensive
- held that trading to increase collection equally as reprehensive as trading for profit

Testimonial Aids Cases

R. v. Elmer, [2006] B.C.J. No. 585

- Robbery trial
- a s. 486.2(1) application was brought with respect to 2 female complainants
- hearing was held in which both complainants testified but were permitted to testify on the hearing itself behind a screen
- good discussion of different tests between new and old legislation
- Ruling – both complainants could testify behind a screen

R. v. C.N.H. [2006] B.C.J. No. 782

- Youth Trial of charges of Assault CBH
- Crown application to permit two witnesses under the age of 18 to testify via closed circuit television
- defence brought a constitutional challenge based on s. 7 & s. 11(d) to the new s. 486(2) provisions
- constitutional challenge dismissed