

<p><b>TYPE OF DOCUMENT – TYPE DE DOCUMENT :</b> <b>Policy – Politique</b></p>	<p><b>EFFECTIVE DATE – ENTRÉE EN VIGEUR :</b> <b>September 1, 2015</b> <b>Le 1<sup>er</sup> septembre 2015</b></p>	<p><b>DOCUMENT ORDER – No. DU DOCUMENT:</b> <b>Policy – Politique 46</b></p>
<p><b>CHAPTER VI – CHAPITRE VI :</b> <b>Particular Proceedings: Specific Offences</b> <b>Procédures particulières : Infractions spécifiques</b></p>	<p>Readers are referred to the list of Related Documents at the end of this Policy for additional information. Les lecteurs peuvent se référer à la liste des documents connexes notés à la fin de cette politique pour information supplémentaire.</p>	

## INTERNET CHILD EXPLOITATION /SEXTING OFFENCES / PEER SELF-EXPLOITATION

Specialized Prosecutions has one or more prosecutors designated as Internet Child Exploitation (ICE) counsel. Matters involving Internet Child Exploitation or the non-consensual distribution of intimate images, including Sections 162.1, 163.1, 172.1 and 171.1 of the Criminal Code should be referred to Specialized Prosecutions, and more specifically Lead ICE counsel. No such file shall remain with a region unless it is prosecuted in consultation with the ICE counsel.

### 1. Introduction

The practice of sending sexually explicit images (pictures or video) between intimate partners along with sexualized chat is becoming more prevalent among teens and young adults. The images often involve persons under the age of 18 in various degrees of nudity and/ or involved in sexual activity with themselves and/or others. When the images depict a person under the age of 18, they may fall within the definition of child pornography as defined at s. 163.1 of the Criminal Code of Canada. Regardless of the age of the parties, if the images were distributed, transmitted, sold, made available or advertised without the consent of the persons depicted in the images, an offence is committed. These cases should be referred to Specialized Prosecutions, and more specifically, to the Lead ICE counsel.

This policy is meant to provide guidance on making decisions in this area.

### 2. Involved offences

This policy will most often apply to the making, distribution (transmission, making available) and/or possession of Child Pornography (or the non-consensual distribution of intimate images). In other instances there may be aspects of making sexually explicit material available to a child (S. 171.1) or luring a child (S. 172.1). Voyeurism (S. 162) is not generally involved because it does not engage the questions of participatory behaviour by the complainant/person featured in or the recipient of the images.

### 3. Pre-Charge Screening

The Pre-charge Screening policy contained in this Manual applies to offences reviewed under this policy.

Where the proposed charge does not pass the evidential test or the public interest test, the Crown Prosecutor cannot proceed with a prosecution, regardless of the importance or seriousness of the proposed charge. Both the evidential test and the public interest test are essential considerations that the Crown Prosecutor must apply in deciding whether to prosecute. With respect to the Public Interest test, the Crown Prosecutor should be cognizant of the following matters:

## Defences

As in all matters, defences available to the accused should be considered. There is a judicially recognized exception for possession of child pornography which applies when the image(s) depict consensual activity and is (are) held exclusively by the accused for private use.

This exception does not apply to the transmission or distribution of child pornography; however, the public interest portion of the test applies particularly to this situation as many cases of sexting involve a teen, who is of age to consent to sexual activity with the recipient of the image. In considering the public interest test, the following applies:

- i. When the accused is a young person particular attention should be paid to the provisions of the *Youth Criminal Justice Act*, and particularly sections 3 and 4.
- ii. In general, the possession or transmission of a large number of explicit sexual images to more than one person or to a publically accessible website would tend to attract prosecution, while the possession or transmission of one or two images of nudity to only one person and where the images depict only the sender would not tend to attract prosecution. In particular, persons involved in a consensual, lawful sexual relationship (for instance two 15 year old individuals or a 17 year old and a 19 year old individual) who exchange images by text or some other form of electronic distribution, would not tend to attract prosecution. Many situations fall within these two extremes and, whether the accused is a young person or not, the following should be considered:
  - a. In any situation where the image is a product of coercion or unlawful sexual activity the public interest would usually require prosecution;
  - b. It is appropriate to consider the gravity or triviality of the facts presented, including the number of images, the nature of the images (how explicit they are) and the number of persons to whom the images were sent;
  - c. It is appropriate to consider how the images were generated including whether the images were sought out or offered voluntarily or were unsolicited by the recipient or whether there is an element of manipulation involved short of coercion;
  - d. A key consideration is the motivation for transmitting the image(s). Where there is evidence indicating an intention to embarrass, harass, intimidate, blackmail or humiliate another person or if there are aspects of revenge, manipulation or extortion, the public interest would usually require prosecution;
  - e. An absence of malicious motive weighs against prosecution;
  - f. In evaluating a young person's motivation and culpability, consideration of the maturity level of that person is appropriate. In particular it should be noted that young persons may not realize or appreciate that electronic images may last forever or be used inappropriately by other recipients; and
  - g. It is appropriate to consider the wishes of the person depicted or who is the recipient of the images. This is particularly true when the complaint originates from the discovery of images by a parent or guardian rather than a direct complaint from the person depicted or who is the recipient of the image.

#### 4. Extra-judicial measures

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Sections 163.1, 171.1 and 172.1 all carry minimum penalties as they target the sexual abuse and exploitation of children. They also carry mandatory Sex Offender Information Registry consequences. As a result, alternative measures, or adult diversion is not recommended, nor available to the Crown Prosecutor as a Post Charge referral pursuant to paragraph 3.2(b) and (h) of the Public Prosecutions Operations Manual. For adult offenders the only option for the Crown Prosecutor is to either recommend or not recommend prosecution.

Where the accused, however, is a young person, particular attention to ss. 3 and 4 of the *Youth Criminal Justice Act* is in order. Where the accused is a first time offender and where there are no co—morbid sexual offences, police warnings or pre or post charge alternatives measures may be sufficient to meet the objectives of the *Youth Criminal Justice Act*.

With respect to young persons, if charges are deemed appropriate, the Crown Prosecutor should provide a written opinion in the file for not recommending extrajudicial sanctions.

#### 5. Related Documents

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Policy 9	Alternative Measures
Policy 11	Pre-Charge Screening
Policy 42	Youth Criminal Justice